OPINION OF ADVOCATE GENERAL ALBER

delivered on 12 October 2000 [1]

I — Introduction

1. Two disputes form the basis of this reference for a preliminary ruling. In both cases, workers who used to be resident in the Netherlands — and have since returned to their respective countries of origin, Morocco and Spain, where they receive Netherlands social security benefits for their incapacity for work — have instituted proceedings with a view to obtaining child allowance for their children studying in Morocco and Spain respectively. The Netherlands is refusing to grant that allowance on the ground that the relevant benefits intended to finance studies would now be paid directly to students, not to their parents. In both cases, the student children do not in any event meet the conditions of eligibility for a study grant.

2. The Arrondissementsrechtbank, Amsterdam, is therefore asking the Court of Justice to answer various questions principally concerning whether the abovementioned amendment of the Netherlands provisions applicable to study finance is compatible with various prohibitions of discrimination. These are, in the first case, Article 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco [2] (hereinafter: the Cooperation Agreement) and, in the second, the provisions of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (hereinafter: Regulation No 1408/71), [3] in particular Article 3 thereof, and Article 7(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [4] (hereinafter: Regulation No 1612/68) and Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 and 43 EC).

II — The main proceedings and the facts

3. The questions have been referred in the context of two disputes between Mr H. Fahmi, a Moroccan national, and Mrs M.M. Esmoris Cerdeiro-Pinedo Amado, a

1 — Original language: German.

2 — OJ 1978 L 264, p. 2

3 — OJ L 149, p. 2, most recently amended by Council Regulation (EC) No 1399/1999 of 29 April 1999, amending Regulation No 1408/71 and Regulation (EEC) No 574/92; the provisions relevant to this case are contained in the consolidated version (OJ 1992, C 325, p. 1).

4 — OJ, English Special Edition 1968 (II), p. 475.

Spanish national, on the one hand, and the Netherlands Sociale Verzekeringsbank (Social Insurance Bank, hereinafter: SVB) on the other, which was responsible for disbursing to parents the benefit which has now been abolished.

4. Mr Fahmi's son, Rida, who was born on 9 July 1977, has never lived in the Netherlands. During the 1995-1996 academic year, he attended secondary school in Al-Hoceima and, in the 1996-1997 academic year, began a course of study at university in Morocco.

5. Mrs Esmoris Cerdeiro-Pinedo Amado's daughter, Erika, was born on 15 November 1976 in the Netherlands. In the 1995-1996 academic year, Erika studied at the Instituto de Educación Secundaria y Profesional; since the start of the 1996/1997 academic year, she has been studying at the Facultad de Ciencias Economicas y Empresariales of the University of Corunna.

6. Mr Fahmi and Mrs Esmoris Cerdeiro-Pinedo Amado initially received child allowances for those children. However, once the children had embarked on a new course of education in 1996, their parents ceased to be entitled to those benefits.

III — Relevant legislation

A — *Community law*

7. Article 41 of the Cooperation Agreement provides:

'1. Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed.

2. ...

3. The workers in question shall receive family allowances for members of their families who are resident in the Community.

4. The workers in question shall be able to transfer freely to Morocco... any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity [resulting from industrial accident or occupational disease].

5. ...'

It is clear from the other language versions and the context that paragraph 1 of the German version, which is open to misunderstanding, in fact prohibits discrimination against Moroccan nationals in relation to the *nationals* (Staatsangehörigen) of the Member States, not in relation to the *nationalities* (Staatsangehörigkeiten) of the Member States in which the Moroccans are employed.

Regulation No 1408/71

8. Article 3(1) reads:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

9. Article 4(1) defines the material scope of Regulation No 1408/71 as follows:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) — (g)...

(h) family benefits.'

10. According to Article 1(u), '"family benefits" means all benefits in kind or in cash intended to meet family expenses...'.

11. Article 13(2) states *inter alia* that:

'(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State...

(b) — (e)...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

12. Article 73 reads:

'An employed... person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State...'

13. Article 77 provides:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity... and increases or supplements to such pensions in respect of the children of such pensioners... .

2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;

(b) ...'.

Regulation No 1612/68

14. The provisions of Article 7(1) and (2) state:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as

regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

B — *National law*

15. Under Netherlands law, benefits paid in respect of incapacity for work in principle also carry an entitlement to child allowance pursuant to the *Algemene Kinderbijslagwet* (General Law on Dependent Children's Allowances; hereinafter: the AKW). Initially that benefit was also in principle granted for dependent children aged 18 or over when they were pursuing a course of education — particularly, therefore, when they were studying.

16. On 1 October 1986, the Netherlands began granting benefits for students which were paid directly to the students, not to their parents. In accordance with the *Wet op de studiefinanciering* (Law on Study Finance, hereinafter: the WSF), the grant of such a benefit is conditional either on the student possessing Netherlands nationality or being resident in the Netherlands and treated as a Netherlands student in the Netherlands. Furthermore, study finance is in principle awarded only in respect of studies at Netherlands educational establishments. In some very limited circumstances, educational establishments outside the Netherlands may also be recognised for the purposes of study finance. Such arrangements involve a select number of universities in Belgium and Germany and, at Community level, courses of study leading to diplomas harmonised under Community law.[5] The children of Mr Fahmi and of Mrs Esmoris Cerdeiro-Pinedo Amado do not meet any of those conditions.

17. Although there was no entitlement to study finance, child allowance as provided for by the AKW was nevertheless still initially paid where a child was born before 1 October 1986, was aged between 18 and 25, pursued a course of education of at least 213 hours per term and one of his parents, who was entitled to claim child allowance, bore most of the cost of maintaining him. This child allowance, which was an alternative to study finance, was introduced into the AKW, upon adoption of the WSF, in the form of Article 7a(1).

18. That alternative entitlement was also, in principle, abolished on 1 January 1996 — that is to say, almost 10 years after study finance was introduced. Only entitled persons already in receipt of benefits pursuant to the abovementioned rules during the final quarter of 1995 were to continue receiving them for as long as the

5 — These courses of study are mainly medicine, veterinary medicine, dentistry, pharmacology, architecture, nursing and midwifery.

child in question was still pursuing the course of study on which he was enrolled on the first day of the term in question.

IV — Assessment of the referring court and the questions referred

19. The referring court takes the view that the entitlement to study finance under the WSF replaced the entitlement to child allowance paid in accordance with the AKW. That change involves not only the express distinction drawn in the WSF between Dutch students and students of other nationalities, but also a distinction 'with respect to nationality... in relation to persons insured under the AKW, since the overwhelming majority of non-Dutch children of persons insured under the AKW have parents who do not possess Netherlands nationality'. Consequently, 'it is precisely non-Dutch persons insured under the AKW that are excluded on the conversion of their right to receive child allowance into an entitlement on the part of their child(ren) to receive a study grant'.

Furthermore, the place-of-study criterion set out in the WSF likewise results in a distinction being drawn between persons insured under the AKW on the basis of residence. The overwhelming majority of parents insured under the AKW who are resident in the Netherlands have children who study at Netherlands educational establishments, whereas most of the parents insured under the AKW who are resident outside the Netherlands have children who study at educational establishments outside the Netherlands. The referring court consequently wishes to ascertain whether that amendment of Netherlands law results in impermissible discrimination.

20. The Arrondissementsrechtbank, Amsterdam, has therefore asked the Court to answer the following questions:

In the Fahmi case:

'1. (a) Must Article 41(1) of the Cooperation Agreement be interpreted as meaning that a Moroccan worker may rely on the prohibition of discrimination laid down in that provision if he no longer resides on the territory of a Member State of the European Community?

(b) If so, does Article 41(3) of the Cooperation Agreement preclude reliance on Article 41(1) thereof by a Moroccan worker whose

children reside outside the Community?

2. If a worker such as the first plaintiff may rely on the prohibition of discrimination laid down in Article 41(1) of the Cooperation Agreement, does that prohibition have the effect of rendering the abolition of the entitlement to receive child allowance impermissible if the effect of that abolition is such that that right is replaced by an entitlement to receive a contribution to (*inter alia*) the cost of maintaining student children aged 18 or over which far more frequently benefits Netherlands nationals or persons insured under the AKW who reside in the Netherlands than workers such as the plaintiff?'

In the case of Esmoris Cerdeiro-Pinedo Amado:

'1. (a) Does Article 3 of Council Regulation (EEC) No 1408/71, or any other provision of that regulation, preclude the abolition of the right to child allowance for student children over the age of 18 if eligibility for the entitlement which replaces that right is in principle enjoyed only by students who are Netherlands nationals and who are pursuing their studies in the Netherlands?

(b) Must Article 7(1) of Council Regulation (EEC) No 1612/68 be interpreted as precluding the abolition of the right to child allowance for student children over the age of 18 if eligibility for the entitlement which replaces that right is in principle enjoyed only by students who are Netherlands nationals and who are pursuing their studies in the Netherlands?

2. Must Article 48 or Article 52 of the EEC Treaty be interpreted as meaning that the restriction of entitlement to receive from the national authorities a contribution to the cost of maintaining student children aged 18 or over results, for nationals of Member States other than the Netherlands who move to the Netherlands or for the children of such nationals, in an obstacle to freedom of movement for workers, alternatively to freedom of establishment, which is such as to render that restriction incompatible with those Articles or either of them?'

V — Legal analysis

A — *Subject-matter of the questions*

21. It is first necessary to arrive at a more precise definition of the subject-matter of the questions referred. By its questions, the

Arrondissementsrechtbank is seeking to ascertain whether the replacement of child allowance with study finance is compatible with various prohibitions of discrimination under Community law. That raises the question whether — and, if so, in what circumstances — the repeal of a significant part of an existing law in conjunction with the introduction of a new law should be regarded as constituting a single legislative process under Community law.

Submissions of the parties

22. The Netherlands Government points out that the national legislature has indeed both restricted entitlement to receipt of child allowance under the AKW and introduced an independent financing system under which benefits are paid to individual students. However, the fact that those two pieces of legislation are simultaneous does not mean that study finance is simply a new type of child allowance which largely excludes parents who do not possess Netherlands nationality. In fact, the WSF differs in several ways from the arrangements previously applicable, for example, in relation to the taking into account of parents' income. Moreover, when the system of study finance was changed in 1996, other categories of benefit were restricted in addition to those paid to children of non-Dutch parents.

23. The Netherlands Government maintains that if there is any impermissible discrimination, it can exist only within the context of the WSF and must be considered within that context, not in relation to the transitional arrangements laid down in the AKW. Entitlements under the WSF do not, however, form the subject-matter of the two disputes in the main proceedings, since the Arrondissementsrechtbank has no jurisdiction in that respect. The transitional arrangements laid down by the AKW apply uniformly to all persons concerned, irrespective of their nationality.

24. The defendant SVB proceeds from the principle that only the version of the AKW currently applicable should be examined for the purpose of establishing whether any impermissible discrimination exists. No comparison can be drawn with the rules applicable before 1996. At present, the AKW does not contain any distinction on grounds of nationality, residence or place of study. Furthermore, the SVB also cites the freedom of Member States to organise their social security systems.

25. The other parties concerned do not expressly address that issue. However, Mrs Esmoris Cerdeiro-Pinedo Amado, Mr Fahmi, the Spanish and Austrian Governments proceed from the premiss that the benefits at issue paid under the AKW and those paid under the WSF are to be treated as the same, whereas the United Kingdom Government and the Commission make a clear distinction between the two benefits.

The French Government regrets that the information contained in the order for reference does not allow it to determine the legal nature of the WSF.

Assessment

26. The Arrondissementsrechtbank entertains doubts not as regards the rules governing the transition between two different systems for the grant of benefits to students but as regards the more restrictive conditions governing the grant of benefits under the new system, the WSF.

27. The transitional arrangements set out in the AKW do not involve any manifest discrimination. As the Court of Justice has ruled on several occasions, the Member States are free to organise their social security systems. [6] In particular, they are to a large extent entitled to determine themselves how far they employ State resources to grant social security benefits. They must nevertheless comply with Community law [7] when exercising those powers and, in particular, observe the principle of the prohibition of discrimination on grounds of nationality, [8] but the withdrawal or restriction without distinction of entitlements such as child allowance do not disclose any infringement of Community law.

28. This amendment of Netherlands law simply provides an opportunity to review the conditions governing the grant of benefits under the WSF. [9] However, it cannot be concluded from this that the question referred is inadmissible because the Arrondissementsrechtbank has limited jurisdiction over the arrangements laid down by the WSF. It is, in principle, for the national court to assess the relevance of the questions of law raised in a dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment. [10] The Court of Justice does not, however, have jurisdiction to determine how the Arrondissementsrechtbank should react were it to identify the existence of discrimination as a result of the WSF. It is exclusively for the Netherlands courts to make that decision. There are at least two possible courses of action here. On the basis of such a finding, it might, on the one hand, be necessary to amend the application of the WSF. According to information supplied by the Netherlands Government, the Arrondissementsrechtbank would have no jurisdiction to do so. On the other hand, the Arrondissementsrechtbank might, on the basis of such discrimination, be forced to refrain from putting into effect the repeal

6 — Case C-120/95 *Decker* [1998] ECR I-1831 paragraph 21 with further references.

7 — Case C-120/95 (cited above at footnote 6, paragraph 23).

8 — See, for instance, Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12.

9 — Closer examination reveals that the distinctions made in Netherlands law which form the basis of the question have apparently existed since the WSF was introduced in 1986. However, until 1996, the legal consequences of that distinction were less significant for persons in Mr Fahmi's or Mrs Esmoris Cerdeiro-Pinedo Amado's situation.

10 — Case 338/85 *Pardini* [1988] ECR 2041, paragraph 8.

of the relevant provisions of the AKW, and that would fall within its jurisdiction. It is not inconceivable, therefore, that the question referred for a preliminary ruling is actually of practical significance for the Arrondissementsrechtbank as regards the WSF. It is consequently necessary to establish whether the rules laid down in the WSF involve impermissible discrimination.

particular Article 3 thereof, precludes the replacement of child allowance by study finance which, in general, does not benefit persons who are not Netherlands nationals or who do not live in the Netherlands.

Submissions of the parties

B — *The main proceedings in the Esmoris Cerdeiro-Pinedo Amado case*

29. Departing from the order in which the questions have been raised, it is advisable to examine the Fahmi case second because the answer to the questions referred in that case depends on the analysis to be undertaken in the context of the Esmoris Cerdeiro-Pinedo Amado case.

(1) Regulation No 1408/71

30. According to the Arrondissementsrechtbank, under Netherlands law, the case of Mrs Esmoris Cerdeiro-Pinedo Amado falls within the personal scope of Regulation No 1408/71. However, it raises the question whether the facts of this case also fall within the material scope of that regulation and whether the regulation, in

31. Mrs Esmoris Cerdeiro-Pinedo Amado takes the view that the restriction of benefits paid under the AKW on the introduction of the WSF is not compatible with Regulation No 1408/71. Mrs Esmoris Cerdeiro-Pinedo Amado relies first on Article 77(2) of the regulation, under which it follows from the application of Netherlands law to her invalidity pension that she must receive benefits in respect of her daughter also, without being subject to discrimination on the basis of her nationality. Independently of that, the amendment of the Netherlands system is contrary to the prohibition of discrimination laid down in Article 3 of the regulation. Netherlands nationals are in practice affected by those restrictions only if their children wish to pursue their studies abroad. However, the very fact that their children are in principle required to study in the Netherlands is far more likely to represent a burden for parents who are not Netherlands nationals than for parents who are Netherlands nationals. In addition, the conditions for treating non-Dutch children as Dutch students are restrictive.

32. The Spanish Government considers that the benefits paid under the AKW are family benefits within the meaning of Regulation No 1408/71. In view of the way in which the legislation has developed, the benefits paid under the WSF should be classified in exactly the same way. In practice, the WSF initially guaranteed the rights 'acquired' under the AKW. Only subsequently did a further provision restrict those rights. The fact that the benefits provided for by the AKW were not simply abolished when the WSF was introduced illustrates that the legislature intends the two systems to serve the same purpose. They are both based on the family's need for financial support when a child is pursuing his studies.

33. Under Article 3 of Regulation No 1408/71, direct and covert discrimination is prohibited. According to the Spanish Government, the requirement of Netherlands nationality under the WSF constitutes direct discrimination and the requirement that studies must be pursued at a Netherlands educational establishment constitutes covert discrimination.

34. It is immaterial whether the benefit in question constitutes a personal right vested in the student or a derived right. Referring to the judgment of the Court in *Cabanis Issarte*, [11] the Spanish Government notes that that distinction is relevant only where unemployment benefits are involved. The Spanish Government also refers to Article 73 of Regulation No 1408/71 and the case-law which has been developed concerning that article, [12] under which payment of family benefits to employed persons and self-employed persons should not be refused where the family members concerned live in another Member State.

35. In the Austrian Government's view, the benefits paid under the WSF have to be classified as family benefits within the meaning of Article 1(u)(i) of Regulation No 1408/71. Accordingly, the prohibition of discrimination contained in Article 3 of Regulation No 1408/71, which also prohibits covert or indirect discrimination, is applicable. The conditions governing the payment of benefits laid down in the WSF will result in such indirect discrimination since children of non-Dutch parents will be far more frequently excluded from the benefits paid under the WSF.

36. On the basis of their views on the subject-matter of the proceedings, as set out above, the Netherlands Government and the SVB consider that only the rules of the AKW, which have no discriminatory effect, should be examined in this case.

11 — Case C-308/93 *Cabanis Issarte* [1996] ECR I-2097.

12 — Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, and judgment in Case C-321/93 *Imbernon Martínez* [1995] ECR I-2821.

37. The French Government considers that even where social security systems are amended, migrant workers may not be placed at a disadvantage in relation to nationals. However, the order for reference does not contain sufficient information on the entitlement to study finance to enable it to assess the compatibility of that entitlement with the provisions cited in the order. In any event, the French Government has misgivings concerning the fact that the most recent case-law of the Court indicates a trend towards family members increasingly being regarded as independent, which creates considerable problems for the individual social security systems of the Member States. [13]

38. The United Kingdom Government proceeds from the premiss that the benefits paid under the WSF do not constitute social security benefits within the meaning of Article 4 of Regulation No 1408/71 nor, in particular, do they constitute family benefits within the meaning of Article 1(u)(i) of that regulation. The United Kingdom Government considers that study finance does not serve to meet family expenses, but only to provide financial support for students.

39. Even if study finance were to represent a social security benefit, in the United Kingdom Government's view, it is apparent from Article 13(2)(f) of Regulation No 1408/71 that, as regards study finance, Mrs Esmoris Cerdeiro-Pinedo Amado is covered by Spanish law alone because she has returned to Spain. She cannot in any event rely on Article 77(2)(a) of the regulation since that provision concerns only family allowances, which cannot in any circumstances cover study finance.

40. The Commission first points out that the Netherlands is, in principle, free to alter the way in which it organises its social security systems — including by removing some branches or replacing them with different arrangements. Article 3 of Regulation No 1408/71 is effective only within the material scope of that regulation. That is clear from Article 4(1)(h) which mentions family benefits. The Commission considers that the child allowance paid under the AKW must accordingly be classified as a family benefit falling within the material scope of Regulation No 1408/71. Benefit payments made directly to students in accordance with the WSF, on the other hand, should no longer be classified as benefits covered by the branches of social security mentioned in Article 4 of Regulation No 1408/71. Consequently, any discrimination which may exist by virtue of the WSF is not to be assessed in the light of Article 3 of Regulation No 1408/71.

13 — The French Government draws attention in particular to Cases C-308/93 (cited above at footnote 11) and C-126/95 *Hallouzi-Choho* [1996] ECR I-4807.

Assessment

41. Mrs Esmoris Cerdeiro-Pinedo Amado falls within the *personal* scope of Regulation No 1408/71. That is clear from Article 2 of the regulation. Although Mrs Esmoris Cerdeiro-Pinedo Amado is no longer an employed person, to be classified as such, in accordance with the definition contained in Article 1(a)(i) of Regulation No 1408/71, it is nonetheless sufficient that the person in question 'is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme...'. Since Mrs Esmoris Cerdeiro-Pinedo Amado receives invalidity benefit, she must be considered to be a worker within the meaning of Regulation No 1408/71.

42. Benefits paid under the AKW must also be regarded as family benefits in accordance with Article 1(u)(i) of Regulation No 1408/71 and, possibly, even as family allowances as provided for by Article 1(u)(ii). They therefore fall within the *material* scope of Regulation No 1408/71. However, it is much more difficult to determine whether that also applies to benefits in the form of the study finance paid in accordance with the WSF which is to be assessed in this case. Study finance as such is not a social security benefit which falls within the material scope defined by Article 4(1) of Regulation No 1408/71. The link between study finance and child allowances on which the questions are based nonetheless raises the question whether the benefits paid under the WSF must be regarded as family benefits within the meaning of Article 4(1)(h) of Regulation No 1408/71.

43. In Joined Cases *Hoever and Zachow*, the Court held as follows with regard to the classification of certain benefits:

'The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation...

In that regard, it has, on a number of occasions, stressed that a benefit is to be regarded as a social security benefit if it is granted to recipients without any individual or discretionary assessment of perso-

nal needs on the basis of a legally defined position and if it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71...'. [14]

44. According to the documents in the case, benefits paid under the WSF are granted in accordance with conditions strictly laid down by law, not on a discretionary basis. The fact that part of the study finance depends on parental income is not inconsistent with this. As far as can be ascertained, the grant of that benefit does not involve a full individual assessment of the claimant's personal needs; criteria are applied which are objectively and legally defined and which, if met, confer entitlement to the study finance, the competent authority having no power to take account of other personal circumstances. [15]

45. The fact that parental income is taken into account does seem capable of arguing in favour of such benefits being regarded as a family benefit. In that respect, study finance depends on parents' ability to provide financial assistance and consequently also seek to reduce the financial burden imposed, as a result of children's studies, on families with lower incomes, whereas children of families with higher incomes receive only very limited study finance or none at all. In the case at issue, there is an even closer relationship between the family benefit of child allowance and the study finance since the child allowance was paid as an alternative to the study finance and, in limited circumstances, still is. It could be inferred from this that the purpose of the study finance, as provided for by the WSF, is in principle also to meet family expenses. Since Article 1(u)(i) expressly defines family benefits as meaning 'all' benefits intended to meet family expenses, such a definition could include benefits which at least serve to offset such expenses. Thus, benefits paid under the WSF would fall within the material scope of Regulation No 1408/71 at least inasmuch as their amount is calculated by reference to parental income.

46. Contrary to those arguments, the overriding consideration is, however, that study finance must cover the needs of children who are usually aged 18 or over and personally responsible for organising their own lives. As a rule, when children begin their studies, they leave the family unit within the narrow meaning attached to that term by custody law and on which the concept of meeting family expenses is based. Account must also be taken of the fact that study finance is a cost-intensive benefit which is not offset through the payment of contributions by students. Consequently, it seems improper to broaden the concept of family benefits to cover benefits which serve only indirectly to meet family expenses.

14 — Cited above at footnote 12 (paragraph 17 et seq.).

15 — See Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 17.

47. Even if the Court were to support the arguments in favour of broadening the concept of family benefits, Regulation No 1408/71 does not in this case require that the daughter of Mrs Esmoris Cerdeiro-Pinedo Amado be accorded Netherlands study finance.

48. If the Court were to adopt that approach, it would first be necessary to apply the special rules contained in Regulation No 1408/71 concerning the grant of family benefits which take precedence over the application of the general prohibition of discrimination laid down in Article 3.

49. In so far as Mrs Esmoris Cerdeiro-Pinedo Amado relies on Article 77(2) of Regulation No 1408/71, it should first of all in any event be established that that provision applies only to family allowances. [16] In accordance with the legal definition set out in Article 1(u)(ii) of Regulation No 1408/71, those family allowances are 'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'. Whilst benefits paid in the past under the AKW might, in some circumstances, have been regarded as family allowances, the benefits provided for in the WSF are at most, if at all, covered by Regulation No 1408/71 where their award is based on parental income. Consequently, they are not exclusively granted in accordance with the above criteria and cannot be regarded as family allowances.

50. Furthermore, Chapter 7 of Regulation No 1408/71 is to be applied to family benefits. In accordance with Article 73 of Regulation No 1408/71, Mrs Esmoris Cerdeiro-Pinedo Amado may assert a right to family benefits under the provisions in force in the State to whose legislation she is subject. The identity of that State can be ascertained from the rules on conflict of laws set out in Articles 13 to 17a of Regulation No 1408/71. Under Article 13(2)(a), employment in a Member State is in principle subject to the application of the legislation of that Member State. Although Mrs Esmoris Cerdeiro-Pinedo Amado is a worker within the meaning of Regulation No 1408/71 because she receives a Netherlands pension for incapacity for work, she cannot be regarded as continuing to be employed in the Netherlands. In accordance with its meaning and use in Regulation No 1408/71, the term employment is usually used to denote periods during which a worker actually carries out an activity as an employed person. [17] Consequently, the abovementioned provisions do not make clear which law is applicable.

51. Nor is there any other obvious reference to Netherlands law. It is therefore necessary to apply the catch-all provision of

16 — Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 9 et seq.

17 — See in particular Article 1(a)(iv), first indent, in addition to Article 1(c), (r) and (s) and Article 10a(2).

Article 13(2)(f) of Regulation No 1408/71. Under that provision, the law of Mrs Esmoris Cerdeiro-Pinedo Amado's place of residence, that is to say Spanish law, must in principle apply to her, in accordance with Regulation No 1408/71.

52. That conclusion is not contradicted by the fact that Mrs Esmoris Cerdeiro-Pinedo Amado receives a Dutch invalidity pension. Article 10 of Regulation No 1408/71 expressly requires that invalidity pensions be exported. Article 17a of Regulation No 1408/71 [18] shows that, by way of derogation, the exporting Member State has competence and its provisions are applicable. The possibility laid down in that article of exempting employed persons from the provisions of the Member State in which they are resident is justified only by the fact that, on account of the structure of its social security system, the State which exports its benefits links the benefit to be exported to other benefits, [19] though Community law does not require those additional benefits to be exported. This linkage of benefits may result in the persons concerned having to pay amounts, in respect of the same risk, to two different insurance systems if they cannot be exempted from one of those systems.

53. Consequently, the study finance for Mrs Esmoris Cerdeiro-Pinedo Amado's daughter must be subject exclusively to the provisions of Spanish law, not to those of Netherlands law. This is so, irrespective of whether, in practice, Spanish law confers entitlement to study finance. On the basis of Netherlands law, the facts of this case are not in any event caught by Article 73 of Regulation No 1408/71.

54. The above considerations concerning the applicable law apply *mutatis mutandis* to Article 3 of Regulation No 1408/71 cited by the Arrondissementsrechtbank. That provision does not require that the person relying on the prohibition of discrimination contained in Article 1 be resident in the Member State in respect of which he is asserting his right to equal treatment. However, it is applicable only in cases where not only are the conditions for the application of Regulation No 1408/71 *ratione personae* and *ratione materiae* fulfilled, but also where that regulation further requires that the national law concerned be applied to the circumstances at issue. Otherwise, a migrant worker could — subject to the special provisions of Regulation No 1408/71 — make simultaneous claims for social security benefits paid under the national law of each of the Member States. Since in this case only Spanish law would apply to the student finance, Mrs Esmoris Cerdeiro-Pinedo Amado cannot rely on Regulation No 1408/71 as regards any discrimination

18 — 'The recipient of a pension due under the legislation of a Member State or of pensions due under the legislation of several Member States who resides in the territory of another Member State may at his request be exempted from the legislation of the latter State provided that he is not subject to that legislation because of the pursuit of an occupation.'

19 — German pension insurance is, for example, associated with sickness insurance.

she might have suffered as a result of Netherlands law.

(2) Regulation No 1612/68 and Article 48 of the EC Treaty

55. The Arrondissementsrechtbank also considers it possible that the rules of the WSF as they apply to Mrs Esmoris Cerdeiro-Pinedo Amado are incompatible with Article 7 of Regulation No 1612/68. Furthermore, that court considers that there may be an infringement of Article 48 of the EC Treaty. Those two issues should be considered together as Article 48 of the EC Treaty cannot in any event produce broader effects within the scope of Regulation No 1612/68 than Article 7 thereof.

Submissions of the parties

56. Mrs Esmoris Cerdeiro-Pinedo Amado first draws attention to the fact that, according to the Court's case-law, benefits paid on the basis of the WSF constitute a social advantage within the meaning of Article 7(2) of Regulation No 1612/68. At the same time, again according to case-law, that regulation prohibits making the place of residence a condition for the grant of a social advantage. Therefore persons insured under the AKW who are not Netherlands nationals and are resident outside the Netherlands are unlawfully disadvantaged in relation to insured persons who possess Netherlands nationality or reside in the Netherlands.

57. The Spanish Government refers in particular to the judgment in *Meints*,[20] where the Court held that a residence requirement is incompatible with Article 7(2) of Regulation No 1612/68. It is therefore incompatible with the principles of equal treatment and freedom of movement to require residence in the Netherlands and Netherlands nationality.

58. The Netherlands Government accepts that the status of worker within the meaning of Regulation No 1612/68 can be retained even after a period of employment has ended but nonetheless disputes whether, in this case, being in receipt of invalidity benefits is sufficient to maintain that status. In the alternative, it notes — as does the SVB — on the basis of the view it put forward when defining the subject-matter of the action, that the rules of the AKW did not comprise any overt or covert discrimination on grounds of nationality and that the WSF is not the subject-matter of the question referred.

59. The Austrian Government and the United Kingdom Government take the view that Regulation No 1612/68 ceases in

20 — Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 43 et seq.

principle to be effective when a worker returns with his family to his country of origin. Any exceptions to that principle do not apply in this case.

60. The representative of the United Kingdom Government pointed out at the hearing that, in accordance with existing case-law, derogations apply only to frontier workers, not to migrant workers who return to their home country.

61. Irrespective of this, the United Kingdom Government contends that the requirement of Netherlands nationality could represent impermissible discrimination under Article 48 of the EC Treaty. Referring to the judgments of the Court, [21] it submits, however, that restricting study finance to students enrolled at Netherlands universities is compatible with Article 48 of the EC Treaty. The exportability of benefits can be restricted if they are associated with a certain social or economic situation.

62. Citing case-law, [22] the Commission first argues that Mrs Esmoris Cerdeiro-Pinedo Amado is a worker within the meaning of Regulation No 1612/68 since that status is also in principle attributed to former workers. She may therefore, in the Commission's view, claim benefits under the WSF in respect of her daughter under the same conditions as those which apply to the children of Dutch workers, that is to say in particular without being subject to a residence requirement.

63. At the hearing, the Commission also drew attention to the fact that the condition that students must study in the Netherlands, which applies without distinction, constitutes indirect discrimination. Because of linguistic and cultural kinship, children of migrant workers have a far greater interest in studying in the country of origin of their parents than children of Netherlands nationals. Whether such discrimination can be supported by statistics is irrelevant since potential indirect discrimination is impermissible also. Nor can such discrimination be justified on the basis of social and economic differences between the various locations of universities either, because those differences could be taken into consideration when the appropriate flat-rate amounts are determined.

64. The Commission further submits that in relation to Article 48 of the EC Treaty, Article 7 of Regulation No 1612/68 constitutes a *lex specialis*.

21 — Case 313/86 *Lenoir* (cited above at footnote 16, paragraph 16 et seq.) and Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 38 to 49.

22 — *Meints* (cited above at footnote 20), Case C-349/87 *Paraschi* [1991] ECR I-4501 and Case C-35/97 *Commission v France* [1998] ECR I-5325.

Assessment

65. A distinction must first be made between the conditions for the application of Article 7(2) of Regulation No 1612/68, or indeed Article 48 of the EC Treaty, and their legal consequences. The condition for the application of that provision is that a worker who is a national of a Member State must be seeking to benefit from a social advantage in the territory of another Member State.

(a) Conditions of application

66. According to the Court's case-law, benefits intended to finance the studies of children of migrant workers are to be regarded as social advantages granted to migrant workers within the meaning of Article 7(2) of Regulation No 1612/68. [23] However, doubts remain as to whether Mrs Esmoris Cerdeiro-Pinedo Amado should continue to be regarded as a worker within the meaning of that provision. In that regard, the Court found in its judgment in *Martínez Sala*:

'In the context of Article 48 of the Treaty and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended...'. [24]

67. Mrs Esmoris Cerdeiro-Pinedo Amado was a worker as defined above, but has in the meantime lost that status. The question therefore arises as to whether the facts of the present case are covered by the effects referred to in that definition.

68. The judgment in *Martínez Sala* is helpful in that regard. In it, the Court expressly refrained from delivering a ruling on whether Spanish national Mrs Martínez Sala enjoyed worker status since it did not have sufficient information to answer that question. However, it was established that Mrs Martínez Sala had initially been employed in Germany but that, from 1989, she was no longer employed there and, from January 1993, she claimed a child-raising allowance for a child born during that month. In that case at least, the Court tacitly proceeded from the assumption that periods of employment dating back a relatively long time in any event ceased to

23 — Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 24 et seq. and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 9.

24 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32.

have any effect on benefits such as child-raising allowance.

69. The benefits which were the subject of the judgments, cited by the parties, in *Meints* and *Paraschi*[25] are different from the child-raising allowance, primarily because they are directly linked to previous employment. The *Meints* case involved a special benefit paid when the worker in question became unemployed, whilst the *Paraschi* case was concerned with invalidity benefits. Those two benefits are associated with the termination of employment relationships. The similarly cited judgment in Case C-35/97,[26] refers not only similarly to unemployment benefits — the award of supplementary pension points — but also to Article 7(1) of Regulation No 1612/68, which in turn refers *inter alia* to equal treatment in the event of dismissal and not, therefore, to Article 7(2) which is relevant to this case.

70. The study finance for Mrs Esmoris Cerdeiro-Pinedo Amado's daughter in Spain is not, however, directly linked to the employment of the former in the Netherlands. Since the allowance is attached to a family member, it is far more closely related to the child-raising allowance than to unemployment or invalidity benefits, to which, according to case-law, Regulation No 1612/68 is applicable, even though the employment relationship has already ended. On the basis of the above-mentioned case-law, the present case cannot consequently be said to be caught by Article 7(2) of Regulation No 1612/68.

71. Since Mrs Esmoris Cerdeiro-Pinedo Amado did not remain in the Netherlands, consequences of the employment relationship cannot be drawn from Article 2(1)(b) or Article 7 of Regulation No 1251/70 either,[27] under which the prohibition of discrimination contained in Article 7(2) of Regulation No 1612/68 also applies to recipients of an invalidity pension who remain in the host State.

72. Consequently, on the basis of the Court's case-law and of secondary legislation, while application of the prohibitions of discrimination under Article 7 of Regulation No 1612/68 and Article 48 of the EC Treaty to the facts of this case is not precluded, nor is it expressly required.

73. However, the question arises whether the state of Community law as reflected in the above considerations ought not to be reconsidered in the light of citizenship of

25 — Case C-57/96 (cited above at footnote 20) and Case C-349/8 (cited above at footnote 22).

26 — Cited above at footnote 22.

27 — Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ English Special Edition 1970 (II), p. 402).

the Union and, in particular, the right of residence under Article 8a of the EC Treaty (now, after amendment, Article 18 EC). Under that article citizens of the Union are guaranteed the fundamental right to choose freely their place of residence in a Member State. Under Article 48 of the EC Treaty, on the other hand, individuals are entitled only to choose their place of residence for the purpose of an employment contract, or to remain in the host State after the employment contract has ended.

74. With regard to equal treatment in the enjoyment of social advantages, there may be justification for limiting the effects of employment relationships to advantages directly linked to the employment relationship, where the working life of the migrant worker has not yet come to an end. As long as migrant workers are gainfully employed, they are integrated into the social security system of the host State as a result of that employment activity, as guaranteed in particular by Regulation No 1408/71. When deciding to take up employment, citizens of the Union may themselves influence their status in terms of social law and, in that context, weigh up the advantages and disadvantages of changing their place of residence.

75. However, by retiring permanently from working life, migrant workers to a large extent lose the opportunity to influence their situation as regards social advantages. Regulation No 1251/70 therefore makes express provision for an effect deriving from previous employment relationships, namely, *inter alia*, that Article 7 of Regulation No 1612/68 continues to apply to retired persons who remain in the host State.

76. If, however, retired persons become established in another Member State, they usually depend on the social security benefits which they have been able to bring with them from the previous host State. That assumption derives in particular from Council Directive 90/365/EEC,[28] of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.[29] In that respect, Regulation No 1408/71 guarantees only a minimum of exportable benefits. Consequently, where retired persons avail themselves of the right of residence, there is still a gap in the protection they are afforded with regard to social advantages.

77. This is demonstrated, at least as regards the problems raised in this case, by a comparison with migrant workers who remain in the host State. With regard to

28 — OJ 1990 L 180, p. 28.

29 — Article 1(1) of the Directive states: 'Member States shall grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families as defined in paragraph 2, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State...'.

financing their children's studies, such workers — or their children — may, in accordance with case-law, rely on Regulation No 1612/68 in conjunction with Article 7 of Regulation No 1251/70 after their working life has ended. [30] Migrant workers who return to their State of origin, on the other hand, would be exclusively dependent on the benefits granted by that State, even if they themselves or their children cannot meet the conditions required because of the time spent in employment abroad. That gap is at the very least incompatible with the spirit of the right of residence.

78. Lastly, it is also necessary to take account of the fact that Mrs Esmoris Cerdeiro-Pinedo Amado pays the tax on her retirement pension in the Netherlands and the WSF is financed from taxation, not from contributions. [31]

79. By analogy with Regulation No 1251/70, which applies only to retired persons who have remained in the host State, the consequences of previous employment should therefore in principle be extended to social advantages financed from taxation where, at the end of their employment activity, migrant workers

— draw a pension from the host State;

— pay tax on that pension in the host State; and

— leave the host State to become established in another Member State, in particular the State of origin.

In such cases also, therefore, the prohibition of discrimination laid down in Article 7 of Regulation No 1612/68 should — by extension — be applied *mutatis mutandis* in the relationship between the migrant worker and the original host State. This principle is restricted only in so far as social advantages from various Member States may not be enjoyed on a cumulative basis,

30 — Case C-3/90 (paragraph 22 et seq.) and Case C-337/97 (paragraph 18 et seq.), cited above at footnote 23, and also Case C-308/89 *Di Leo* [1990] ECR I-4185.

31 — See the Opinion of Advocate General La Pergola of 28 January 1999 in Case C-337/97, cited above at footnote 23, point 20.

in particular on top of benefits from the State of origin. [32]

(b) Legal consequences

80. If the foregoing is applied to this case, it follows, first, that the condition of residence in the Netherlands cannot be applied to the daughter of Mrs Esmoris Cerdeiro-Pinedo Amado because Netherlands nationals do not have to meet that condition. In its judgment in *Deak*, [33] the Court ruled that Article 7(2) of Regulation No 1612/68 prohibits (unjustified) discrimination arising from the fact that, because of their nationality, offspring of employed persons who receive maintenance from those employed persons do not receive benefits which the Member State concerned grants to the children of its own citizens on the basis of their nationality. Such discrimination, affecting the treatment of offspring, could prevent the latter from exercising their right to freedom of movement.

81. It is also necessary to establish whether the condition that studies must be pursued in a Netherlands educational establishment or a recognised establishment is compatible with the prohibition of discrimination. That condition could involve indirect discrimination. The judgment in *O'Flynn* contains an extensive discussion of indirect discrimination: [34]

'Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers... or the great majority of those affected are migrant workers... where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers... or where there is a risk that they may operate to the particular detriment of migrant workers... .

It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law...'.

82. The Commission rightly contends in this case that, for cultural and linguistic reasons, migrant workers are far more likely to want their children to study outside the host State, that is to say in the State of origin. Therefore, excluding such chil-

32 — Thus, if a study finance system were to exist in Spain which was comparable with the system provided for by the WSF, and from which Mrs Cerdeiro-Pinedo Amado's daughter could benefit, Dutch benefit would have to be granted only in respect of a sum equal to any difference which might exist between that benefit and the Spanish benefit.

33 — Case 94/84 *Deak* [1985] ECR 1873, paragraph 23 et seq.

34 — Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 18 et seq. with further references.

dren from study finance to study at educational establishments situated in the State of origin is particularly likely to be prejudicial to their interests. There is, consequently, indirect discrimination against migrant workers.

83. However, indirect discrimination is permissible provided that it is justified. The arguments put forward by the United Kingdom Government to the effect that study finance is based on the social and economic conditions existing at places of study in the Netherlands, cannot, however, provide justification. On the one hand, the relevant differences can be taken into account in the amount of the study finance, and, on the other, according to the Commission's uncontested submissions, benefits under the WSF are already paid throughout the European Union if students pursue a course of study which has been the subject of harmonisation.

84. Justification could, however, lie in the fact that the diplomas awarded upon completion of studies have not yet been fully harmonised in the European Union. Study finance is not intended to finance students' freedom to pursue a course of higher education, but is primarily intended to enable them to gain the qualification required to pursue certain occupations. Financing only those studies which meet certain quality criteria is therefore justified.

85. However, within the scope of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, [35] it is in principle to be assumed that the courses of study in all Member States achieve the required quality standard. Additional requirements may be imposed only within the scope of Article 4 of the directive where the combination of subjects studied or the duration of the period of studies in another Member State differs considerably from national requirements. Article 4 of that directive also allows additional requirements to be imposed in respect of advisory occupations in the field of law, although these have become largely insignificant as a result of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. [36]

86. Consequently, if a national diploma leading to the same occupation made it possible, in principle, to claim study finance, restrictions on that finance in respect of studies pursued abroad can be justified only where the Member State concerned subjects the holders of diplomas to measures for the recognition of such

35 — OJ 1989 L 19, p. 16.
36 — OJ 1998 L 77, p. 36.

diplomas within the meaning of Article 4 of Directive 89/48.

87. However, impermissible indirect discrimination against the children of migrant workers exists where the host State awards study finance only in respect of courses of study at educational establishments situated in its territory and at a limited number of establishments in neighbouring States.

(3) Article 52 of the EC Treaty

88. There is nothing in this dispute to support the application of this provision.

C — *The main proceedings in the Fahmi case*

89. By its questions, the Arrondissementsrechtbank is seeking to ascertain, first, whether Mr Fahmi may, both personally and in relation to his son, rely on the prohibition of discrimination in the area of social security pursuant to Article 41 of the Cooperation Agreement,[37] even though he is no longer resident in the Community and his son has never even lived there. Should the Court answer both questions in the affirmative, the Arrondissementsrechtbank also asks the Court to examine whether the prohibition of discrimination precludes the replacement of child allowance by study finance.

Submissions of the parties

90. Citing the judgment in *Kziber*,[38] Mr Fahmi first points out that recipients of a retirement pension are also workers within the meaning of Article 41 of the Cooperation Agreement. It follows from Article 41(4) of the Cooperation Agreement that recipients of a pension may also return to Morocco whilst continuing to draw that pension.

91. He maintains that the term 'family allowances' under Article 41(3) of the Cooperation Agreement is to be construed in accordance with the broad definition of

37 — For the contents of that article, see paragraph 7 above.
38 — Case C-18/90 *Kziber* [1991] ECR I-199, paragraph 27.

family benefits within the meaning of Regulation No 1408/71. Netherlands child allowance must, however, be understood as meaning family allowance within the meaning of Article 1(u)(ii) of Regulation No 1408/71. The distinction drawn by Regulation No 1408/71 between the broad concept of family benefits and the narrow concept of family allowances must be transposed to Article 41 of the Cooperation Agreement, so that paragraph 3 thereof, which limits the export of benefits from the Community, applies only to family benefits, whilst family allowances, on the other hand, are caught by Article 41(1). This is consistent with Regulation No 1408/71 which limits the export of family benefits whilst laying down more generous rules governing the export of family allowances. Consequently, the prohibition of discrimination also extends to the latter. Since the previous child allowance system under the AKW did not contain any discrimination, its abolition in favour of the discriminatory study finance system is incompatible with Article 41(1) of the Cooperation Agreement.

92. The Netherlands Government takes the view that, as a former worker, Mr Fahmi falls within the personal scope of the directly applicable prohibition of discrimination laid down in Article 41(1) of the Cooperation Agreement. The benefits paid under the AKW also fall within that provision's material scope which must be determined by analogy with Regulation No 1408/71.

93. However, it is impossible for workers to rely on Article 41(1) of the Cooperation Agreement once they have left the Community, at least in so far as they are objecting to unequal treatment which cannot be disassociated from their departure. This follows from the wording of that article, from its context, in particular Article 41(2), and from a comparison with Article 3(1) of Decision 3/80 of the EEC-Turkey Association Council. [39] There is nothing in the Court's case-law to indicate that the protection afforded by that provision extends to a worker who has left the Community.

94. If, in the absence of implementing measures, Article 41(3) of the Cooperation Agreement can in fact be directly applied, it necessarily follows from its clear wording that family allowances are to be paid only to members of the worker's family who are resident in the Community.

95. As regards any application of the prohibition of discrimination to this case,

39 — This article states: 'Subject to the special provisions of this Decision, persons resident in the territory of one of the Member States to whom this Decision applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as nationals of that State.'

the Netherlands Government refers to the submissions it made regarding the subject-matter of the questions and again submits that the arrangements under the AKW are not in any event discriminatory.

96. The United Kingdom Government takes the view that Article 41(1) of the Cooperation Agreement is applicable to Moroccan workers only for as long as they are resident in the Community. That provision comes under the heading of cooperation in the field of labour and expressly requires employment in a Member State, as does Article 40(1) of the Cooperation Agreement, which regulates the prohibition of discrimination in employment law. The possibility of transferring certain benefits to Morocco, provided by Article 41(4) of the Cooperation Agreement, confirms that interpretation since such a possibility would be superfluous if the prohibition of discrimination extended to workers returning to their country of origin. None of the judgments delivered in relation to the Cooperation Agreement contradict that interpretation, since they all relate to Moroccan nationals who are resident in a Member State.

97. Irrespective of this, Article 41(3) of the Cooperation Agreement in any event prevents individuals from relying on the prohibition of discrimination in respect of children living outside the Community.

98. The United Kingdom Government finally submits, in the alternative, that the disputed student benefit is not a social security benefit within the meaning of Regulation No 1408/71 — that is to say that it is neither a family benefit nor a family allowance — since it is paid directly to students to provide them with financial independence from their parents. Since the material scope of Article 41(1) of the Cooperation Agreement is the same as that of Regulation No 1408/71, application of the prohibition of discrimination is out of the question.

99. The Austrian Government draws attention to the fact that, unlike the Association Agreement with Turkey, the Cooperation Agreement with Morocco does not hold out to the latter the possibility of accession. It concludes from this that the principles of interpretation applicable to fundamental freedoms cannot be transposed to the prohibitions of discrimination contained in the Cooperation Agreement. Those principles are intended to protect Moroccan workers and members of their family only during the period that they remain in the Community. A transfer of benefits is likewise precluded in this case because Article 41(3) of the Cooperation Agreement provides for payment of family allowances only in respect of family members who are resident in the Community, and the specific rules on the transfer of benefits, contained

in Article 41(4) of the Cooperation Agreement, do not include the disputed benefit.

100. The French Government considers that the prohibition of discrimination laid down in Article 41 of the Cooperation Agreement applies only where the members of Moroccan workers' families are at least resident in the Community (Article 41(3)). In addition, Article 41(4) also provides for the possibility of transferring certain benefits to Morocco. However, this case does not involve either of those two situations.

101. The Commission first points out, citing case-law, that Article 41(1) of the Cooperation Agreement is directly applicable and that Mr Fahmi falls within its scope in his capacity as a former worker. However, the Commission raises the issue of whether the question referred is covered by social security within the meaning of Article 41(1) of the Cooperation Agreement. Only at first sight is the answer to the question apparent from case-law, which provides that the rules governing the material scope of Regulation No 1408/71 must be applied *mutatis mutandis*. There is no doubt that child allowance paid on the basis of the AKW comes under the heading of social security.

102. However, Mr Fahmi loses his entitlement to those benefits because they have been completely abolished for student children aged 18 or over, and replaced by a study finance system that is not related to contributions paid and no longer comes under the heading of social security. As the Court has consistently held, Community law contains only rules relating to coordination in the field of social law, but it does not affect Member States' competence to organise their social security systems provided that they take into account the freedom of movement of workers and observe the principles of equal treatment associated with that freedom. However, freedom of movement of workers protects only nationals of the Member States, not Moroccan nationals such as Mr Fahmi. Since study finance no longer comes under the heading of 'social security', Article 41(1) of the Cooperation Agreement is not in any event applicable in this case.

103. The Commission also considers that Article 41(1) of the Cooperation Agreement applies to Moroccan workers only for as long as they are resident in the Community. The very wording of that provision refers to the Member State in which they are employed. Even in the organisation of social security, for which the individual Member States are responsible in the Community, equal treatment may be applied only at Member State level. Article 41 of the Cooperation Agreement provides for only a slight degree of coordination for those areas in which it appears to be possible. This involves the aggregation of periods of insurance under Article 41(2), and entitlement to family allowances under Article 41(3). However, such entitlement is specifically restricted to family members who are resident in the Community. Fur-

thermore, the Commission argues that family allowances in particular are not among the transferable benefits provided for in Article 41(4). Lastly, Morocco's obligation to grant the same rights only to Community nationals who are resident in Morocco supports the argument that the effect of Article 41(1) of the Cooperation Agreement is restricted to Moroccan nationals who are resident in the Community.

104. The Commission also mentions the prohibition of discrimination in the field of employment law, as referred to in Article 40 of the Cooperation Agreement, which likewise applies only to Moroccan nationals employed in a Member State. A comparative reading of the main human rights covenants shows that the signatory States' duty of protection under those covenants is limited to persons who are within their territory and subject to their jurisdiction, [40] or to persons who are within their jurisdiction. [41] The protective effect of the Cooperation Agreement cannot extend further.

Assessment

105. It should first be pointed out that the Cooperation Agreement has been replaced, with effect from 1 March 2000, by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (hereinafter: the Euro-Mediterranean Agreement). [42] For the purposes of this case, however, this raises no fundamentally new issues, since the provisions relevant to the following considerations have remained largely unchanged.

106. To some extent, the Court's case-law itself provides an answer to the questions

40 — Article 2(1) of the International Covenant on Civil and Political Rights, New York, 1966.

41 — Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

42 — OJ 2000 L 70, p. 1. Article 65 of the Euro-Mediterranean Agreement, which is comparable with Article 41 of the Cooperation Agreement, is worded as follows:
'1. Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed.
The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.
These provisions shall not, however, cause the other coordination rules provided for in Community legislation based on Article 51 of the EC Treaty to apply, except under the conditions set out in Article 67 of this Agreement.
2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old-age, invalidity and survivors' benefits and family, sickness and maternity benefits and also for that of medical care for the workers and for members of their families resident in the Community.
3. The workers in question shall receive family allowances for members of their families who are resident in the Community.
4. The workers in question shall be able to transfer freely to Morocco, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits.
5. ...'.

referred. In its judgment in *Kziber*, the Court found as follows:

'The concept of social security in Article 41(1) of the Agreement must be understood by means of an analogy with the identical concept in Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community ...'.[43]

107. The prohibition of discrimination therefore relates only to benefits which fall within the material scope of Regulation No 1408/71. As has already been shown, benefits paid under the AKW are family benefits, or even family allowances within the meaning of that regulation, whereas study finance does not, in principle, fall within the scope of that regulation.[44] There is therefore no question of applying Article 41 of the Cooperation Agreement to this case.

108. Even if — as discussed in the Esmoris Cerdeiro-Pinedo Amado case[45] — the study finance were regarded as a family benefit in so far as it takes account of parental income, Mr Fahmi would not be entitled to it.

109. This follows at least indirectly from the following further findings in the judgment in *Kziber*:

'The fact that Article 41(1) states that that prohibition of discrimination applies only subject to the provisions of the following paragraph means that, as regards... the grant of family benefits..., that prohibition of discrimination is guaranteed only within the limits of the conditions laid down in paragraphs 2, 3 and 4 of Article 41.'[46]

110. Consequently, regardless of the answer to all other questions and in accordance with Article 41 of the Cooperation Agreement, Mr Fahmi could claim family allowances only in respect of members of his family who were resident in the Community. Therefore, any entitlement to a study grant for his son who is resident in Morocco is in any event precluded if family benefits has the same meaning in the Cooperation Agreement as it does in the regulation. Given the translation problems

43 — Case C-18/90 (cited above at footnote 38, paragraph 25). Article 65(1) of the Euro-Mediterranean Agreement contains an exhaustive definition of social security, based on this judgment.

44 — See above, paragraph 43 et seq.

45 — See above, paragraph 47 et seq.

46 — Case C-18/90 (cited above at footnote 38, paragraph 18).

which arise, it should be noted that the German version of the EEC-Morocco Agreement uses the term 'Familienzulage' whereas the German version of Regulation No 1408/71 uses the terms 'Familienleistung' for family benefits and 'Familienbeihilfe' for family allowances. The Euro-Mediterranean Agreement, on the other hand, uses the term 'Familienbeihilfen' which was translated into French as 'prestations familiales' [family benefits].

111. The Court has not yet stated its position on the meaning of 'Familienzulage'. A comparison of the various language versions of the Cooperation Agreement, however, argues in favour of taking 'Familienzulagen' to mean family benefits in accordance with Article 1(u)(i) of Regulation No 1408/71. The Italian, Danish, Dutch and, in particular, French versions of the Cooperation Agreement in fact use, whenever that word occurs, the term corresponding with 'Familienleistungen' [family benefits] in the German version of Regulation No 1408/71. It is to be assumed from this that the French version is particularly authoritative because French was probably the most common language of negotiation during the preparatory work for the Cooperation Agreement. That choice of words is confirmed in the different versions of Article 65(4) of the Euro-Mediterranean Agreement.[47] Only the English version of the two agreements mentions 'family allowances', which corresponds to the term 'Familienbeihilfen' in the German version of Regulation No 1408/71. The German version of the Euro-Mediterranean Agreement also refers to 'Familienbeihilfen'.[48]

112. Consequently, the term 'Familienzulage' used in the German version of the Cooperation Agreement in any event appears to be an inaccuracy in translation which is of no importance as far as its meaning is concerned. The concept of family allowances which is used in the English version of the Cooperation Agreement and is also found in at least two other versions of the Euro-Mediterranean Agreement, cannot result in the assumption, for the purposes of Article 41(3) of the Cooperation Agreement, that the term means anything other than 'family benefits'. It would be incorrect, in view of the fact that the term 'family benefits' is used predominantly, to base Article 41(3) of the Cooperation Agreement on the narrower concept of family allowances.

113. The parallel nature of the individual branches of social security in Regulation No 1408/71 and in Article 41 of the Cooperation Agreement is confirmed by Article 65(1) of the Euro-Mediterranean Agreement. The list of the individual branches to which the agreement applies, set out in the second subparagraph of Article 65(1) of the abovementioned agreement, is identical in the French version to the list set out in

47 — Furthermore, the Finnish, Greek, Spanish and Swedish versions of that agreement also use a term which corresponds to the term 'Familienleistung' [family allowances] used in Regulation No 1408/71.

48 — The Portuguese version of the Euro-Mediterranean Agreement also uses a term which corresponds to the concept of 'Familienbeihilfen' [family allowances] used in Regulation No 1408/71.

Article 7(1) of Regulation No 1408/71. Furthermore, the third subparagraph of Article 65(1) of the Euro-Mediterranean Agreement prohibits the application of other rules for coordinating social security systems on the basis of Article 51 of the EC Treaty (now, after amendment, Article 42 EC), if such application is not expressly provided for by the Association Council of the Euro-Mediterranean Agreement. It is to be inferred from this that the second subparagraph of Article 65(1) of the Euro-Mediterranean Agreement incorporates at least that part of Regulation No 1408/71 which defines the material scope.

114. It should therefore be assumed that Article 41(3) of the Cooperation Agreement provides exhaustively for the grant of family benefits and precludes the grant of those benefits in this case. Consequently, Article 41(1) of the Cooperation Agreement does not confer on members of the families of Moroccan workers who are resident outside the Community any entitlement to benefits intended to finance their studies. In view of those findings, the other questions raised by the Arrondissementsrechtbank in relation to the Fahmi case need not be answered.

VI — Conclusion

115. I therefore suggest that the questions referred be answered as follows:

(1) In the Fahmi case:

Article 41(1) of the EEC-Morocco Cooperation Agreement does not confer any entitlement to benefits intended to finance studies on members of the families of Moroccan workers where those family members are resident outside the Community.

(2) In the Esmoris Cerdeiro-Pinedo Amado case:

Council Regulation (EEC) No 1408/71 of 14 June 1971 does not confer on a migrant worker who has returned to his State of origin and is in receipt of an invalidity pension from his previous host State any entitlement as against the host State to benefits intended to provide study finance for his children.

As regards the social advantages granted by the host State and financed from taxation, the prohibition of discrimination under Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 is to be applied *mutatis mutandis* to a migrant worker,

— if he receives an invalidity pension from the host State,

— if he pays tax on that pension in the host State, and

— if he has returned to his State of origin.

It is incompatible with that prohibition of discrimination for the children of a migrant worker, in contrast to the nationals of the host State, to receive benefits for study finance only if they are resident in the territory of that host State.

Furthermore, the host State discriminates against migrant workers if it grants benefits for study finance only in respect of courses of study provided by educational establishments in its own territory and by certain establishments in neighbouring States.