# OPINION OF ADVOCATE GENERAL FENNELLY
## delivered on 23 October 1997 *

Table of Contents



* Original language: English.

## I — Introduction

1. This reference for a preliminary ruling from the Bundessozialgericht (Federal Social Court) in Germany raises the question whether a retired German civil servant who has never worked outside Germany is entitled, as a matter of Community law, to a German family allowance in respect of his French-resident daughter by his deceased French former wife, where the allowance in question is normally provided only in respect of children resident in Germany. The questions referred relate expressly to Articles 2(3) and 73 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as modified and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 [1] and as further modified by Council Regulation (EEC) No 3427/89 of 30 October 1989 [2] (hereinafter 'the Regulation'). [3] The case also raises questions regarding the interpretation of Articles 1(a)(i) and (ii), (g) and (j), 2(1), 4(4), 76 and 77(1) and (2)(a), and Annex I, point I, C to the Regulation.

1 — OJ 1983 L 230, p. 6.

2 — OJ 1989 L 331, p. 1.

3 — Pursuant to Article 3 of Regulation No 3427/89, the amendment by that regulation of Article 73 of the Regulation applied with effect from 15 January 1986. The Bundessozialgericht has indicated in the order for reference that it is, therefore, the version so amended of the Regulation which applies to the facts of the present case. However, the amendment of Article 76 of the Regulation by Regulation No 3427/89 was applicable only from 1 May 1990.

## II —Legal and factual context

### A — *Provisions of Community law*

2. Article 1(a)(i) and (ii) of the Regulation provides as follows:

'For the purpose of this Regulation:

(a) "employed person" and "self-employed person" mean respectively:

(i) any person who 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 for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this

Regulation, under a social security scheme for all residents or for the whole working population, if such a person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I ... .'

3. Article 2(1) and (3) of the Regulation provides as follows:

'(1) This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.

...

(3) This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.'

4. Article 4(1) of the Regulation states:

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

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.'

5. Article 4(4) of the Regulation states the following:

'This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.'

6. The terms of Article 73 of the Regulation are as follows:

'An employed or self-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, subject to the provisions of Annex VI.'

7. Article 77(2)(a) of the Regulation provides as follows:

'(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 ... .'

8. Annex I, point I, C, (a) to the Regulation states the following:

'If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

(a) "employed person" means any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits ... .'

## B — *German law*

9. Paragraphs 1(1)(1) and 2(1) of the Bundeskindergeldgesetz (the Federal Law on Children's Allowance, hereinafter 'the BKGG') of 14 April 1964 [4] provide that any person domiciled or normally resident in Germany is entitled to *Kindergeld* (dependent child allowance) in respect of children who are similarly domiciled or resident. [5] Under Paragraph 2(5), children not so domiciled or resident are not to be taken into account for children's allowance purposes. However, Paragraph 42(2) states that the BKGG does not affect Community-law provisions. Thus, Articles 73 and 77 of the Regulation may apply. *Kindergeld* is granted until the child reaches the age of 18; however, it can be extended to the age of 21 if the child is unemployed, or until the age of 27, if the child is pursuing further education. [6]

## C — *Facts and national proceedings*

10. Mr Kulzer is a retired policeman and a German national. He resides in Germany, where he receives a pension from Freistaat Bayern (the State of Bavaria). He is the father of Stefanie, who was born in 1974 and who moved to France at the end of 1983 with her French mother, who had been divorced from Mr Kulzer. After Stefanie's mother died in July 1987, she lived with her French grandparents in France. She attended

4 — BGBl I, p. 265.

5 — From 1996 onwards, this allowance will normally be received by German residents by way of a reduction in taxes due under the Einkommensteuergesetz ('EStG': Law on Income Tax), as amended by the Jahressteuergesetz 1996 of 11 October 1995 (BGBl I, p. 1250). Paragraphs 1(1)(1) and 2(5) of the BKGG are the residual basis of entitlement of persons who do not come within the terms of the EStG. However, the term *Kindergeld* is used throughout this Opinion.

6 — Paragraph 32, EStG, and Paragraph 2(2) and (3), BKGG.

school there, but regularly visited Mr Kulzer during the holidays. Mr Kulzer made a declaration of second residence in Germany in respect of Stefanie to the German authorities. Mr Kulzer was responsible for Stefanie's subsistence and education costs. No children's benefit was received in her regard from the French authorities.

11. Mr Kulzer applied to Freistaat Bayern in October 1988 for *Kindergeld* in respect of Stefanie under the BKGG. His request was rejected on 27 July 1989, as was his complaint, on 5 December 1989, and his appeal. He appealed against the latter decision to the Landessozialgericht (Higher Social Court).

12. The Landessozialgericht considered that, despite the residence declaration and Stefanie's occasional visits, she did not reside with Mr Kulzer in the sense provided for in Article 2(5), first sentence, of the BKGG, and in Article 30(3) of the First Book of the Sozialgesetzbuch (Code of Social Law). The Landessozialgericht also took the view that Mr Kulzer, as a retired person, could not avail of the provisions of Article 73 of the Regulation, as he was neither a worker within the meaning of Article 1 of the Regulation, nor a civil servant within the meaning of Article 2(3). Furthermore, the Landessozialgericht ruled that Article 77(1) of the Regulation was not applicable, as the provision of *Kindergeld* under the BKGG was in no way dependent on receipt of a pension.

13. Mr Kulzer appealed on a point of law against this decision before the Bundessozialgericht (the Federal Social Court, hereinafter 'the national court'). He argued, essentially, that his daughter was resident in Germany, and that, in any event, there was no reason to exclude retired civil servants from the field of application of the Regulation.

14. The national court found that the decision of the Landessozialgericht was consistent with the BKGG. It doubts whether Mr Kulzer can benefit from the Regulation, as he has never exercised his right, as a worker, to freedom of movement within the Community. The Regulation does not apply in cases where all the facts are confined to the territory of a single Member State and there is no connection with any of the situations envisaged by Community law.[7] Although the title of the Regulation refers to employed persons, self-employed persons and members of their families moving within the Community, the fact that it was adopted on the basis of Article 51 of the Treaty establishing the European Community (hereinafter 'the Treaty'), which only concerns migrant workers and their dependants, requires that the Regulation be interpreted, if it is to be valid, so as not to apply where only a family member, and not the worker himself, has moved within the Community.

7 — The national court cites Case 147/87 *Zaoui* v *CRAMIF* [1987] ECR 5511, p. 5528 of the judgment; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, p. 3736; Case C-206/91 *Koua Poirrez* v *CAF* [1992] ECR I-6685, p. I-6707; and Case C-153/91 *Petit* v *Office National des Pensions* [1992] ECR I-4973, p. I-4995.

15. On the other hand, the national court does not exclude the possibility of the Regulation's applying in the circumstances of the present case if the divorced wife of Mr Kulzer had worked in France before her death. While no evidence of such employment is before the national court, it considers that it would render the facts of the present case, during the life of Stefanie's mother, analogous to those in which the Regulation was found to be applicable in *Kracht*. [8] In response to a written question from the Court, counsel for Mr Kulzer stated that his wife had worked in Munich from 1979 to 1982, and that she was employed as a supply teacher in France from 1983 until her death in 1987. It is not clear whether she also worked before the birth of Stefanie in 1974.

16. The national court did not think that Mr Kulzer came within the definition of an employed or self-employed person in Article 1(a) of the Regulation. Children's allowances under the BKGG are not linked to compulsory or optional insurance pursuant to a social security scheme, referred to in Article 1(a)(i) of the Regulation, and the manner in which the German scheme is administered and financed does not permit beneficiaries to be identified as employed or self-employed persons, as envisaged in Article 1(a)(ii), first indent, of the Regulation. Thus, the national court considered it necessary, pursuant to Article 1(a)(ii), second indent, of the Regulation, to consult Annex I, point I, C, whose conditions were not satisfied by Mr Kulzer either.

17. None the less, the national court raised the possibility that Mr Kulzer could be considered, despite being retired, to be a civil servant or a person treated as such, in accordance with the legislation applicable, so as to come within the scope of Article 2(3) of the Regulation. The BKGG is legislation to which the Regulation applies, and civil servants are subject to it, in that benefits are awarded on the basis of residence in Germany rather than on the basis of a particular employment status. The Regulation, pursuant to its Articles 27 and 77, includes recipients of pensions in its field of application for certain purposes, and such retired persons are deemed to be workers for the purposes of the Regulation. [9] These points seemed, in the national court's view, to favour the inclusion of retired civil servants within the scope of Article 2(3).

18. The national court therefore suspended the proceedings before it and referred the following questions for a preliminary ruling pursuant to Article 177 of the Treaty:

'1. (a) Does Regulation (EEC) No 1408/71, in particular Article 73 thereof, apply if the child in respect of whom family benefits are sought, but not the person entitled to benefits him or herself (in particular an employed or self-employed person), has exercised the right to freedom of movement within the European Community?

8 — Case C-117/89 [1990] ECR I-2781.

9 — Case 182/78 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik* [1979] ECR 1977.

(b) Is it relevant in that respect whether the other parent moved with the child to another Member State and pursued an activity there as an employed or self-employed person until his or her death?

2. If Question 1 is answered in the affirmative, is a retired police officer a civil servant within the meaning of Article 2(3) of Regulation No 1408/71?'

## III — Observations

19. Written observations were received from the Commission and Mr Kulzer. Mr Kulzer's observations are confined to an indication of his financial circumstances, and do not address directly the legal issues in this case. Mr Kulzer requested legal aid pursuant to Articles 76 and 104(5) of the Rules of Procedure of the Court on 14 August 1997 in order to be represented at the oral hearing, but this was rejected by order of the Court on 15 September 1997. The Commission submitted oral observations at the oral hearing held on 16 September 1997. The Commission's observations may be summarised question by question.

### A — *Question 1(a)*

20. The Commission submits that this question should be answered in the affirmative, as the facts of the case are not confined to the territory of a single Member State. The title of the Regulation refers to family members who move within the Community. Article 2 of the Regulation speaks of employed persons who are subject to the legislation of one or more Member States and of the members of their families. The fourth recital in the preamble to the Regulation [10] recites that the Regulation should apply to all Community nationals insured under social security schemes for employed persons. Both the title and Article 2 were cited by the Court in *Laumann*, [11] in which it stated that the Regulation applied where the survivor of a worker, rather than the worker himself, lived in another Member State. The Regulation was also applicable to a person who was employed in his own Member State but lived

10 — The recitals are, unfortunately, not reproduced in the consolidated version of the Regulation of 1983.

11 — Case 115/77 *Laumann* v *Landesversicherungsanstalt Rheinprovinz* [1978] ECR 805.

elsewhere, [12] as well as to someone who lived and worked in his own Member State, but whose children lived with their mother who exercised an economic activity in another Member State, of which she was a national. [13] The Commission also points out that Article 22 of the Regulation permits an employed person who has not moved within the Community to claim certain entitlements from his own Member State in respect of medical treatment in another Member State. [14] Only where all the elements of a case are confined to one Member State should the Regulation be deemed inapplicable. [15]

21. The Commission argues that the interpretation it contends for would not exceed the legislative competence of the Council, as the Regulation was adopted on the basis of Article 235 as well as of Article 51 of the Treaty.

B — *Question 1(b)*

22. The facts of the present case would be on all fours with those of *Kracht* if Mr Kulzer's divorced wife had engaged in employed or self-employed activity and had not claimed French allowances equivalent to the German allowances sought by Mr Kulzer. The Court did not take into account in that case the text of Article 76 of the Regulation as modified by Regulation No 3427/89, which was not applicable during the material period, but the Commission doubts the relevance in the present proceedings of the provision in either version. Stefanie's mother was not in fact entitled to any equivalent French allowance, and Mr Kulzer did not seek the German allowance until after her death, thus precluding the accumulation of benefits which Article 76 is designed to prevent.

23. The Commission concludes that the fact that Mr Kulzer's divorced wife might have exercised an economic activity in France before her death does not prevent Mr Kulzer from availing of a German children's allowance after her death.

C — *Question 2*

24. In the light of Advocate General La Pergola's statement in his Opinion in *Stöber and Piosa Pereira* [16] that even a national of a Member State who has not availed of his right of freedom of movement is subject to

12 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755.

13 — *Kracht*, cited above.

14 — Case 117/77 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik* [1978] ECR 825.

15 — Case C-153/91 *Petit* v *Office National des Pensions*, cited above.

16 — Joined Cases C-4/95 and C-5/95 [1997] ECR I-511, paragraph 51 of the Opinion.

Article 8a of the Treaty, the Commission argues that the extremely limited definition given in Annex I, point I, C to the Regulation of persons who may benefit from the German regime of family allowances should be revised, in order that it apply to a civil servant who seeks to avail of benefits provided under a scheme other than a special scheme for civil servants.

25. Furthermore, the Commission considers Article 77 of the Regulation to be relevant in this case, rather than Article 73. The German version of Article 77 refers only to 'Rentner', and German law distinguishes between recipients of general retirement pensions ('Rentner') and recipients of retirement pensions for civil servants ('Pensionäre'). However, the French text speaks of persons who are entitled to 'pensions' or to 'rentes'. As Article 77(2) of the Regulation provides for family allowances to be paid by the Member State responsible for the pension, irrespective of the place of residence of the pensioner or of the children, this Article should therefore be viewed as a *lex specialis* in relation to Article 73.

26. The Commission also addresses in some detail the question whether a retired civil servant can benefit from Article 77. For reasons given below, I do not think it necessary to repeat the account of the applicable German legislation given by the Commission with a view to establishing the retention after retirement of the status of civil servant.

27. The Commission concludes that a retired policeman remains a civil servant within the meaning of Article 2(3) of the Regulation, for the purposes of claiming family allowances pursuant to Article 77. In response to a question at the oral hearing, the agent for the Commission stated that Mr Kulzer's entitlement under Article 77 of the Regulation should not be affected by Article 4(4), as the former provision does not directly concern his special civil service pension, but relates, rather, to entitlement to a family allowance generally available to persons resident in Germany.

## IV — Analysis

28. The national proceedings are essentially concerned with establishing whether Mr Kulzer is entitled, as a matter of Community law and, in particular, under the Regulation, to payments of *Kindergeld* under the BKGG in respect of his daughter Stefanie which would otherwise be denied to him because she is deemed to reside outside Germany. It is therefore useful to recast the questions referred by the national court, and to address them together in terms of four stages of analysis:

(i) As a matter of principle, can a person claiming social security benefits come within the personal scope of application of the Regulation if he has never lived or worked in a Member State other than his own?

(ii) If the first question is answered in the affirmative, is a person in Mr Kulzer's position covered by the Regulation, pursuant to Article 2 (and, in particular, paragraph (3)) thereof?

(iii) If the second question is answered in the affirmative, does a person in Mr Kulzer's position comply with the requirements for the award of family benefit or dependent child benefit under the Regulation and, in particular, under Chapters 7 and 8 of Title III thereof? [17]

(iv) If any of the above questions is answered in the negative, can a person in Mr Kulzer's position invoke rights under other provisions of Community law, including the provisions of the Treaty?

A — *The Regulation and the non-migrant worker*

29. As the national court observed in its order for reference, the Court has indicated on numerous occasions that the regulations adopted to implement the Treaty provisions on free movement of workers do not apply in cases where all the facts are confined to the territory of a single Member State or where there is no connection with any of the situations envisaged by Community law. [18] Furthermore, the Court has stated in a number of these cases that this reasoning excludes from the benefit of the Regulation workers who have never exercised their right of free movement and who have always worked and resided in their own Member State, [19] which is also the position of Mr Kulzer. However, the latter, apparently categorical, statements have all been made in circumstances where the family member who sought benefits or social advantages was a third-country national who had no material connection with any other Member State.

30. On the other hand, both the title and provisions of the Regulation, as well as their interpretation by the Court, indicate that the necessary connection with one of the situations envisaged by Community law may arise otherwise than through the physical migration of a worker. As the Commission has pointed out in its observations, the title

17 — Article 73 of the Regulation is to be found in Chapter 7 of Title III, while Article 77 is in Chapter 8 of that Title.

18 — *Morson and Jhanjan* v *State of the Netherlands*, cited above, paragraph 16 of the judgment; *Zaoui* v *CRAMIF*, cited above, paragraph 15; *Koua Poirrez* v *CAF*, cited above, paragraph 11; *Petit* v *Office National des Pensions*, cited above, paragraph 8. These statements related, in some cases, to the provisions of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ, English Special Edition, First Series 1968 (II), p. 475, and of Commission Regulation (EEC) No 1251/70 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, First Series 1970 (II), p. 402, as well as, or instead of, those of the Regulation. However, it does not appear to me to be necessary for present purposes to distinguish between the two formulas used.

19 — *Morson and Jhanjan* v *State of the Netherlands*, paragraph 17 of the judgment; *Zaoui* v *CRAMIF*, paragraphs 15 and 16; *Koua Poirrez* v *CAF*, paragraph 15.

of the Regulation refers to the application of social security schemes to employed persons and to members of their families moving within the Community, so that residence in a different Member State by a member of a worker's family should, in principle, render the provisions of the Regulation applicable, at the very least, to claims for benefits by or in respect of that family member. Furthermore, Article 2(1) of the Regulation states that the Regulation shall apply to employed persons who are or have been subject to the legislation of *one* or more Member States, as well as to members of their families and their survivors. While it has been argued in the past that the application of the Regulation to persons insured in only one Member State was designed simply to provide for migrant workers who spend all their working lives in a Member State other than their own, [20] the Court has favoured a broader interpretation. [21]

31. In *Laumann*, the Court stated that the title and Article 2(1) of the Regulation establish that 'the application of the Regulation is not limited to workers or their survivors who have had employment in several Member States or who are, or have been, employed in one State whilst residing or having resided in another'. [22] The case concerned the right to a German orphan's pension of minors of German nationality, who lived in Belgium with their mother and Belgian stepfather, in respect of their deceased German father. Neither the deceased father nor the stepfather had ever worked other than in their respective Member States, while the mother 'had never been employed and plainly did not intend to pursue a professional or trade activity in Belgium, [having] moved to Belgium, after her remarriage, to the home of her second husband'. [23] The Court concluded that 'the Regulation also applies when the residence in another Member State was not that of the worker himself but of a survivor of his'. [24] The survivors in this case were the minors.

32. The facts of the present case are not materially dissimilar to those of *Laumann*. That case concerned orphans' pensions, which, while received directly by the orphan himself, constitute, like other survivors' benefits, 'the projection in time of a prior occupation, pursuit of which ceased on the death of the worker'. [25] The judgment of the Court indicates that, where he can satisfy the detailed provisions of Article 78 of the Regulation, a minor orphan resident in a Member State other than his own can claim

20 — This was the position of the Commission and of Advocate General Reischl in *Laumann* v *Landesversicherungsanstalt Rheinprovinz*, cited above: see the Facts and Issues, page 811, the Opinion, page 820, and paragraph 4 of the judgment.

21 — See, in addition to the cases discussed below, Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, regarding the right to family benefits under Article 77 of the Regulation of a person who, having worked only in his own Member State and having been awarded a pension under its legislation, moved, upon his retirement, to another Member State; *Kits van Heijningen*, cited and summarised above; and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* v *Land Nordrhein-Westfalen* [1996] ECR I-4895, in which Article 73 of the Regulation was held to apply to two German couples who lived in the Netherlands and who, in so far as they worked, worked exclusively in Germany.

22 — Paragraph 5, third indent, of the judgment.

23 — Opinion of Advocate General Reischl, page 819; see also paragraph 4 of the judgment.

24 — Paragraph 5, fourth indent, of the judgment.

25 — *Laumann*, cited above, paragraph 7, fifth indent, of the judgment.

an orphan's pension thereunder by virtue of a deceased parent's professional or trade activity pursued exclusively in his own Member State. By the same token, a living parent who, like Mr Kulzer, works or has worked exclusively in his own Member State and who satisfies the detailed provisions of the Regulation governing family and dependent child benefits (Articles 73, 74 and 77) should be able to claim such benefits in respect of offspring who reside in another Member State. However, if the worker's sole connection with a situation envisaged by Community law is the residence of his children in another Member State, this fact cannot, in my view, constitute a sufficient basis for the application of the Regulation in respect of benefits other than family, dependent child and orphan benefits.

33. The Court's decision in *Kracht* [26] is also of interest. That case concerned a claim to children's allowance under the BKGG by the German father of children who lived with their Italian mother in Italy, where she worked. It appears that the parents had never worked outside their respective Member States of origin. The Court interpreted the relevant provisions of the Regulation without questioning its applicability to the facts of the case. The facts would resemble those of the present case, as the national court has pointed out, if Stefanie's mother had worked in France before her death. That issue does not appear to me to be relevant. That the mother in *Kracht* worked exclusively in Italy, of which she was a national, can add nothing to the claim of the father, who also worked exclusively in his own Member State, to be eligible under the Regulation for benefits in respect of his children. As in *Laumann*, the connecting factor must be the residence of the children in a Member State other than that of the non-migrant working parent who was claiming family benefits from his own Member State. Furthermore, that constitutes a connecting factor with a situation envisaged by Community law which is directly relevant to the benefits claimed.

34. The validity of the Regulation is not placed in doubt, in my view, by the fact that it also applies to certain persons who are not themselves migrant workers within the meaning of Article 51 of the Treaty. In *Laumann*, as we have seen, the Court adopted a broad view of the personal scope of the Regulation. [27] This was consistent with its approach to the predecessor of the Regulation, Council Regulation (EEC) No 3 of 25 September 1958 on social security for migrant workers. [28] In *Hessische Knappschaft* v *Singer*, [29] the Court was asked whether a provision of that regulation could validly be construed to give rise to benefits for the survivors of a worker killed in an accident in another Member State, where he was not a migrant worker and where the accident suffered took place neither during nor arising

26 — Cited above.

27 — Cf. the view of Advocate General Reischl, page 820 of his Opinion.

28 — Journal Officiel 1958 No 30, p. 561 (not published in English).

29 — Case 44/65 [1965] ECR 965.

out of his employment. It is instructive to quote at length from the Court's judgment:

'Article 51 is included in the Chapter entitled "Workers" and situated in Title III ("Free movement of persons, services and capital") in Part Two of the Treaty ("Foundations of the Community"). The establishment of as complete freedom of movement for workers as possible, which thus forms part of the "foundations" of the Community, therefore constitutes the ultimate objective of Article 51 and thereby conditions the exercise of the power which it confers upon the Council. It would not be in conformity with that spirit to limit the concept of "worker" solely to migrant workers *stricto sensu* or solely to workers required to move for the purposes of their employment. Nothing in Article 51 imposes such distinctions, which would in any case tend to make the application of the rules in question impracticable.' [30]

35. In *Entr'aide Médicale* v *Assurances Générales*, the Court articulated a test in respect of Regulation No 3 which, with minor amendments, still determines the personal scope of the Regulation: it was 'applicable to any wage-earner or assimilated worker who finds himself in one of the situations involving international elements as provided for in the said regulation, as well as to his survivors'. [31]

30 — Page 971 of the judgment.

31 — Case 27/69 [1969] ECR 405, paragraph 4 of the judgment.

36. In the circumstances, there is no need to address the argument submitted by the Commission that, irrespective of the interpretation of Article 51, the application of the Regulation to a person in Mr Kulzer's position would be saved by reliance upon Article 235. It is unclear, in any event, whether that argument could apply in the present case, as Article 235 was added as a legal basis to the Regulation only when its personal scope was extended to self-employed persons by Council Regulation No 1390/81 of 12 May 1981, [32] and was presumably not intended to affect pre-existing aspects of the Regulation. [33]

37. To conclude this section, it is my view that a person claiming social security benefits can, in principle, come within the personal scope of application of the Regulation, even if he has never lived nor worked in a Member State other than his own, where all the material facts are not confined to the territory of that Member State, as, for example, when a family member in respect of whom benefits are claimed resides in another Member State.

32 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and to members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1981 L 143, p. 1.

33 — See the Opinion of Advocate General Léger of 6 May 1997 in Case C-20/96 *Snares* v *Adjudication Officer*, [1997] ECR I-6059, paragraph 71.

B — *Is a person in Mr Kulzer's position covered by the Regulation, pursuant to Article 2 thereof?*

38. Thus, Mr Kulzer is not barred *in limine* from claiming family benefit in Germany in respect of a child who resides in another Member State. This does not, however, relieve him of the need to demonstrate that he comes within the specific personal scope of the Regulation, as defined in its Article 2. Mr Kulzer is a retired civil servant, and the national court has expressly asked whether he is a civil servant within the meaning of Article 2(3) of the Regulation. To this end, the Commission has taken pains in its observations to establish that Mr Kulzer is a civil servant or a person who, in accordance with the legislation applicable, is treated as such, by reference to the provisions of a number of German laws on the civil service. I do not think that it is either appropriate or necessary to deal with these issues in a reference for a preliminary ruling. The national court has indicated that Mr Kulzer had the status of a civil servant when he served as a policeman. If the reference to civil servants in Article 2(3) of the Regulation can be understood — as I think it can — as referring, implicitly, to retired civil servants, it is immaterial whether Mr Kulzer also retains that status, as a matter of German law.

39. Firstly, specific reference is made in three of the recitals in the preamble to the Regulation to the position of pensioners and pension claimants, to the award of old-age benefits, and to the calculation of pensions. Secondly, Chapter 3 of Title III of the Regulation governs the award of pensions for old age and death, in the case of persons who have been subject to the legislation of two or more Member States. Articles 27 to 33 and 77 of the Regulation set out various rights of pensioners in respect of sickness and family benefits. Moreover, in *Pierik*, the Court interpreted the term 'worker' then used in Articles 1(a) and 22 (regarding sickness benefits for workers) of the Regulation as covering any person who is insured under the social security legislation of a Member State, whether or not he pursues a trade activity. Thus, 'even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the Regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them'. [34]

40. As a matter of principle, I think it is clear that the Regulation must include retired persons within its personal scope, provided that they comply with the specific requirements of Article 2. Just as the term 'employed persons ... who are or have been subject to the legislation of one or more Member States', in Article 2(1), clearly extends to retired persons, the same must be true of the reference in Article 2(3) to 'civil servants ... where they are or have been subject to the legislation of a Member State to which this Regulation is applicable'. The Court made clear in *Van Poucke* that Article 2(3) of the Regulation is not to be

34 — Case 182/78 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik*, cited above, paragraph 4 of the judgment.

interpreted restrictively: it is a 'general provision', so that civil servants come within the scope of the Regulation for all purposes where they are or have been subject to national legislation concerning even one of the branches of social security to which the Regulation applies, as defined in Article 4(1). [35] In that case, the medical care provisions of the general Belgian compulsory sickness and invalidity insurance scheme for employed persons [36] had been extended to *inter alia* the armed forces. Although he was simultaneously covered by a special insurance scheme for civil servants, to which Article 4(4) would have applied, the applicant, a doctor in the army, was covered by the Regulation. [37]

41. The fact that civil servants and persons treated as such may be subject, in differing degrees in different Member States, to special schemes for civil servants, which are excluded from the material scope of the Regulation by Article 4(4), does not alter the conclusion that Article 2(3) is a general provision on the personal scope of the Regulation. It should be interpreted no more restrictively than Article 2(1). The exclusion of special civil service schemes under Article 4(4) is not related to the particular functions and responsibilities of civil servants (as is, for example, Article 48(4) of the Treaty), but rather, simply takes into account the special features of such schemes. [38] This reasoning applies equally to a retired civil servant in receipt of a special civil service pension who is, none the less, subject to general legislation regarding one or more other social security risks. [39]

42. I wish, before concluding this section, to raise briefly the possibility that Mr Kulzer could also be a person covered by the Regulation if he were considered to be a survivor of his late divorced wife. Article 2(1) of the Regulation includes among the persons covered thereby the survivors of employed or self-employed persons who were subject to the legislation of one or more Member States and who were nationals of one of the Member States. It appears from the answer by Mr Kulzer's counsel to a written question from the Court that Mrs Kulzer worked in Germany and France between 1979 and her death in 1987. If this is confirmed by the national court, and if she was insured in such a fashion as to come within the terms of Article 1(a) of the Regulation, Mr Kulzer would be deemed to be her survivor for the

35 — Case C-71/93 [1994] ECR I-1101, paragraphs 9, 13 and 14 of the judgment. The Court thereby rejected implicitly the statement by Advocate General Capotorti in Case 129/78 *Sociale Verzekeringsbank Amsterdam* v *Lohmann* [1979] ECR 853, page 865 of the Opinion, that Article 2(3) of the Regulation 'is in the nature of an exceptional provision'.

36 — Schemes or legislation are described as 'general' in the discussion which follows where they are applicable to a class of persons wider than that of current and retired civil servants, and where they comply with Article 4(1) and (2) of the Regulation. The term does not imply either that the scheme is applicable to the population as a whole, or that the scheme in question provides against all social security risks to which the Regulation applies. 'Special schemes' refers only to special schemes for civil servants and persons treated as such within the meaning of Article 4(4) of the Regulation (and not, for example, to special schemes referred to in Article 4(2)).

37 — Paragraph 25 of the judgment.

38 — Case C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033, paragraph 20 of the judgment.

39 — Advocate General Capotorti's statement to the contrary in *Sociale Verzekeringsbank Amsterdam* v *Lohmann*, cited above, page 866 of the Opinion, can also be taken to have been implicitly rejected by the Court's decision in *Van Poucke*, cited above.

purposes of the Regulation if, in accordance with Article 1(g), he were 'a person defined or recognised as such by the legislation under which the benefits are granted'. In the absence of concrete information on the definition in German social security law of survivors, and on whether it can extend, in particular, to surviving divorced spouses, I must leave the question open, although I will discuss its possible significance at the end of the next section.

43. I conclude that, where a retired civil servant is or has been subject to legislation of a Member State to which this Regulation applies, in respect of any of the branches of social security mentioned in Article 4(1), he is a person covered by the Regulation even if he is in receipt of a pension under a special civil service scheme.

C — *Does a person in Mr Kulzer's position comply with the requirements for the award of family benefit or dependent child benefit under the Regulation and, in particular, under Chapters 7 and 8 of Title III thereof?*

44. The next matter to be considered is Mr Kulzer's eligibility under the provisions of the Regulation relating to particular benefits — in this case, family benefit or dependent child benefit.

45. The Commission argues that Mr Kulzer is eligible for a BKGG children's allowance under Article 77 of the Regulation. The agent for the Commission took the view at the oral hearing, in response to a question from the Court, that Mr Kulzer's eligibility was unaffected by Article 4(4) of the Regulation, as the BKGG scheme was applicable to all residents in Germany and the fact that he received a special civil service pension was not material.

46. However, the Commission has omitted to take into account the condition in Article 77(2)(a) that a pensioner who relies on that provision to secure benefits irrespective of the Member State in whose territory his child resides must be in receipt of a pension under the *legislation* of a Member State. The term 'legislation' is defined in Article 1(j) of the Regulation as meaning 'in respect of each Member State statutes,

regulations and other provisions ... relating to the branches and schemes of social security covered by Article 4(1) and (2)'.

47. The term was interpreted in *Lohmann* [40] in the context of the application of Article 77 of the Regulation. There, the Court stated that the fact that Article 1(j) referred only to Article 4(1) and (2) did not preclude the application of Article 4(4), as there had been no need to define negatively the material scope of the Regulation by repeating the express exclusion of special schemes for civil servants and persons treated as such in that provision. [41] The Court stated, therefore, that 'a pension under the legislation of one Member State only within the meaning of Article 77(2)(a) of Regulation 1408/71 does not include a pension granted under a special scheme for civil servants or persons treated as such'. [42]

48. This interpretation, which is, in my view, correct, effectively excludes reliance by Mr Kulzer on Article 77 of the Regulation. Furthermore, it indicates that the use in the German version of Article 77 of the terms 'Rentner' and 'Rente', which exclude persons in receipt of civil service pensions ('Pensionär(e)'), is not inappropriate. [43] While this linguistic distinction does not exist in all languages, [44] its use in the German amplifies the condition imposed by Article 77(2)(a), in all language versions, that the pension be drawn under the 'legislation' of a Member State, as that term is defined for the purposes of the Regulation.

49. I turn, therefore, to Article 73 of the Regulation, which would permit Mr Kulzer to receive a BKGG children's allowance in respect of his French-resident daughter if he could be deemed to be an employed or self-employed person for the purposes of its application.

50. However, subparagraph (a) of Annex I, point I, C to the Regulation (hereinafter, including point I, C, (b), 'the Annex') sets out a restrictive definition of 'employed

40 — *Sociale Verzekeringsbank Amsterdam* v *Lohmann*, cited above.

41 — Paragraph 3 of the judgment.

42 — Paragraph 6 and operative part of the judgment. This interpretation was described by Advocate General Lenz as being obvious in Case C-227/94 *Olivieri-Coenen* v *Bestuur van de Nieuwe Bedrijfsvereniging* [1995] ECR I-3301, paragraph 14 of his Opinion.

43 — Article 77(2)(a) of the Regulation provides, in the German version: 'Der Rentner, der nach den Rechtsvorschriften nur eines Mitgliedstaats Rente bezieht, erhält die Leistungen nach den Rechtsvorschriften des für die Rente zuständigen Staates'. The French version provides: '[Les prestations sont accordées ...: ] au titulaire d'une pension ou d'une rente due au titre de la législation d'un seul État membre, conformément à la législation de l'État membre compétent pour la pension ou la rente'.

44 — For example, the term 'pension' is equally applicable in English to both types of old-age provision. In French, while the term 'rente(s)' cannot be applied to a civil service pension, the term 'pension(s)' can apply to either a civil service pension or to a pension under a more general scheme. Thus, the reference in the French version of Article 77(2)(a) to a 'titulaire d'une pension ou d'une rente' neither prejudges nor contradicts the condition that the benefit in question be due 'au titre de la législation d'un seul État membre'.

person' for the purposes of Article 1(a)(ii), applicable in cases where the competent institution for granting family benefits in accordance with Chapter 7 of Title III is German. The Court has recently decided, in *Merino García* v *Bundesanstalt für Arbeit*, that only workers compulsorily insured in accordance with the terms of the Annex are entitled to German family benefits in accordance with that Chapter. [45] If a worker were allowed to rely on one of the other definitions of employed persons set out in Article 1(a) in order to qualify for German family benefits, that would be tantamount to depriving the provision in the Annex of all effectiveness. [46] The national court has indicated in its order for reference that Mr Kulzer does not comply with the conditions set out in the Annex. [47]

51. The national court has raised the question whether Mr Kulzer can bypass the restrictive terms of the Annex by relying on his status as a civil servant under Article 2(3) of the Regulation. It is true that Article 2(3) brings civil servants within the general personal scope of the Regulation separately from employed and self-employed persons, who are governed by Article 2(1), which, in turn, refers implicitly back to the definition in Article 1(a) and thus, it can be said, where Chapter 7 of Title III is at issue, to the Annex. It might, therefore, be argued that civil servants escape the strictures of the Annex, and can benefit normally under, *inter alia*, Article 73 of the Regulation.

52. However, a number of points can be made which, in my view, fatally undermine this argument. First, I would observe that the substantive provisions of the Regulation, such as Article 73, do not mention civil servants as such. It appears from the judgment of the Court in *Van Poucke* that employment as a civil servant of a person falling within the scope of the Regulation is to be treated as activity of a person 'employed' within the meaning of the Regulation. [48] This follows from the scheme of the Treaty, in which civil servants are treated as workers for the purposes of the exception in Article 48(4), and from the fact that civil servants fulfil the objective criteria which distinguish the employment relationship, the essential feature of which is that a person performs services for and under the direction of another person in return for which he receives remuneration. [49] Thus, a civil servant's rights under Article 73 arise from his being treated as an employed person. Such assimilation is, however, contingent on

45 — Case C-266/95 [1997] ECR I-3279, paragraph 24 of the judgment.

46 — Paragraph 25 of the judgment. The Court recalled its decision in *Stöber and Piosa Pereira*, cited above, paragraphs 29 and 32, in which it reached the same conclusion regarding the application of the similarly structured Annex I, point I, C, (b) regarding self-employed persons.

47 — The national court has also stated that Mr Kulzer did not comply, in any event, with the conditions mentioned in Article 1(a)(i) and (ii). I should say, however, that I do not share the apparent point of view of the national court that the BKGG is the only relevant national social security measure simply because it is the one Mr Kulzer seeks to rely upon. There is no need to pursue the point here, given the overriding character of Annex I, point I, C, (a) for the purposes of Chapter 7 of Title III.

48 — Cited above, paragraph 19 and operative part of the judgment.

49 — Paragraph 17 of the judgment. The Court was adverting to the criteria established in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17.

compliance with the definition of an employed person in the Annex for the purposes of, *inter alia*, Article 73.

53. Secondly, the Annex does not operate through Article 2(1) in a manner which would permit that provision to be contrasted with Article 2(3). It relates directly with the provisions of Chapter 7 of Title III of the Regulation, such as Article 73, and bypasses the normal definition of two terms, employed person and self-employed person, used in Article 2. Thus, a worker who does not comply with its terms may still be an employed or self-employed person, pursuant to Article 1(a)(i) or (ii), first indent, for the purposes of Article 2(1), and thus, in a general sense, a person covered by the Regulation. It is only when he seeks to avail of family benefits under Article 73 or its companion provisions that he will find that he does not satisfy the specific requirements of that Chapter, as set out in the Annex.

54. Thirdly, the Court's decisions in *Stöber and Piosa Pereira* and *Merino García* were not reached on the basis of the Annex and Article 1(a), taken in isolation from Article 73. In *Stöber and Piosa Pereira*, the Court stated that 'where the competent institution for the payment of family benefits is German, the notion of self-employed person *within the meaning of Article 73* of Regulation 1408/71 must be interpreted as referring *only* to persons satisfying the specific conditions set forth in the second indent of Article 1(a)(ii) and point I, C, (b) of Annex I'. [50]

55. It follows that Mr Kulzer cannot claim family benefit in respect of his daughter under Article 73 of the Regulation, by relying on his possible status as a civil servant covered by the Regulation. [51] However, I would also like to return to the possibility that Mr Kulzer can rely upon his, at this stage admittedly conjectural, status as a survivor of his late divorced wife in order to found a claim under Chapter 7 of Title III of the Regulation.

56. The Court stated in *Hoever and Zachow v Land Nordrhein-Westfalen* that '[s]ince the grant of a benefit such as German child-raising allowance [which is distinct from *Kindergeld*] is intended to meet family expenses, the choice of the parent who is to receive the allowance is not of importance'. [52] The Court concluded that 'where an employed person is subject to the legislation of a Member State [and complies with the Annex, in the case of Germany] and lives with his or her family in another Member

50 — Paragraph 34 of the judgment, emphasis added. See also, to similar effect, paragraph 26 and the operative part of the judgment in *Merino García*.

51 — In the circumstances, I need not address the Commission's arguments regarding the possible application of either the former or the modified version of Article 76 of the Regulation, although they appear to me to be well founded.

52 — Cited above, paragraph 37 of the judgment. The Court had already found, at paragraph 33, consistently with its decision in Case C-308/93 *Bestuur van de Sociale Verzekeringsbank* v *Cabanis-Issarte* [1996] ECR I-2097, that the distinction between personal rights and derived rights first identified in Case 40/76 *Kermaschek* [1976] ECR 1669 does not in principle apply to family benefits.

State, that person's spouse is entitled, under Article 73 of Regulation 1408/71, to receive a benefit such as a child-raising allowance in the State of employment'. [53]

57. As family members and survivors are brought within the scope of the Regulation in the same way by Article 2(1), the same reasoning should apply to a claim to *Kindergeld* by the surviving spouse of a person who complied with the requirements of Article 73 or of one of the other provisions of Chapter 7 of Title III of the Regulation. In that case, Mr Kulzer could benefit from it being established that his late former wife was such an employed person and was subject to German social security legislation at the time of her death. Her employment history is still uncertain and is subject to verification by the national court. If she cannot be considered to have been employed in France within the meaning of Article 1(a) of the Regulation, but was previously so employed in Germany, Article 13(2)(a) of the Regulation, as interpreted by the Court in *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging*, [54] would indicate that she remained subject to German law until her death. [55] If she were deemed to comply with the Annex at the time of her death, Mr Kulzer, if he has the status of her survivor, could claim *Kindergeld* in respect of Stefanie under Article 73. While I am not in a position to reach a conclusion on this possible ground of entitlement, I hope that these speculations can serve as a highly contingent response to the national court's question about the significance of the employment history of Stefanie's late mother.

D — *Can a person in Mr Kulzer's position invoke rights under other provisions of Community law, including the provisions of the Treaty?*

58. The Commission has argued that the Annex should be held to be invalid in the light of the provisions of the Treaty in so far as it excludes a person in Mr Kulzer's position from the benefit of Article 73 of the Regulation. However, the Court pointed out in *Merino García* that Article 73 of the Regulation does not in itself confer any entitlement to family benefits, which are

53 — Paragraph 38 and operative part of the judgment.

54 — Case 302/84 [1986] ECR 1821.

55 — Article 13(2)(f) was inserted in the Regulation in order to reverse the decision in *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* by Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72, OJ 1991 L 206, p. 2, with effect from 29 July 1991. Thus, it does not affect the material law in 1987 when Stefanie's mother died. The position would be different, however, if she were deemed to have definitively ceased all professional activity upon moving to France: see Case C-140/88 *Noij* [1991] ECR I-387 and Case C-245/88 *Daalmeijer* [1991] ECR I-555.

granted on the basis of the relevant provisions of national law, such as the BKGG. [56] The Court continued:

'Furthermore, it does not follow from the Annex that, in situations other than those to which it refers, Community nationals who work in Germany and whose children reside in another Member State have no entitlement to family benefits. As a result, ... in so far as the appellant in the main proceedings has lost his entitlement to family benefits ..., it is by operation of the provisions of the BKGG, not of the Annex to the Regulation.' [57]

59. The Court concluded, therefore, that no factor could be identified such as to affect the validity of the Annex. [58] Furthermore, as regards any possible argument about the validity of the restriction in Article 77 of the Regulation on the rights of recipients of special civil service pensions, the Court, in *Vougioukas* v *IKA*, [59] stated that Article 4(4) of the Regulation leaves a considerable lacuna in the Community coordination of social security schemes, and that, by not introducing any measure for coordination in that sector following the end of the transitional period for the free movement of workers, the Council had failed fully to discharge its obligation under Article 51 of the Treaty. [60] However, this did not affect the validity of Article 4(4) of the Regulation since, having regard to its wide discretion regarding the choice of the most appropriate measures for attaining the objectives of Article 51 of the Treaty, the Council remained at liberty, for the purpose of coordinating special schemes for civil servants, to depart, in some respects at least, from the mechanisms currently provided for in the Regulation. [61]

60. In *Merino García*, the Court proceeded to examine whether Article 48(2) of the Treaty precluded the application of national legislation which, in certain circumstances (relating to periods of unpaid leave during a continuing employment relationship), resulted in an employed person whose children were domiciled in another Member State being refused *Kindergeld* where employed persons whose children were domiciled in the State concerned were entitled to *Kindergeld*. The Court found that the residence requirement in Paragraph 2(5) of the BKGG constituted covert discrimination, in so far as the problem of family members residing outside the Member State responsible for paying benefits arises essentially for migrant workers, and that the case-file contained no material capable of provid-

56 — Cited above, paragraph 29 of the judgment.

57 — Paragraph 30 of the judgment.

58 — Paragraph 31 of the judgment.

59 — Cited above.

60 — Paragraphs 31 and 34 of the judgment. The Court referred, in paragraph 33, to the Commission proposal for a regulation amending the Regulation, designed *inter alia* to bring special civil servant schemes within its material scope, OJ 1992 C 46, p. 1.

61 — Paragraph 35 of the judgment.

ing objective justification for that difference in treatment. Its application in the circumstances of that case was, thus, contrary to Article 48(2) of the Treaty. [62]

61. The same reasoning cannot be applied in the present case, however, as Mr Kulzer is not and never has been a migrant worker. He cannot claim either that he has been a victim of discrimination as a migrant worker, even though, like many migrant workers, he supports a child in another Member State, or that the operation of Paragraph 2(5) of the BKGG dissuades him from exercising his right of free movement, as he would thereby be likely to lose his connection with the German system from which he claims *Kindergeld*.

62. There remains the possibility that Mr Kulzer could rely, by virtue of his daughter's situation, upon the terms of the right of every citizen of the Union 'to move and reside freely within the territory of the Member States' set out in Article 8a of the Treaty, in order to defeat the residence requirement of Paragraph 2(5) of the BKGG. That is a large and novel question. It would entail consideration of whether Article 8a of the Treaty consists of a directly effective prohibition of national rules which restrict or burden, even indirectly, the exercise of the freedoms which it proclaims. [63] In considering those issues, account would have to be taken, *inter alia*, of the existing directives providing for rights of residence for Community nationals and of the continued relevance and applicability of the conditions attached therein to the exercise of those rights. [64] The question is, however, moot in the circumstances of the present case, due to the lack of material information before the Court. The national court has not indicated whether Mr Kulzer would otherwise have satisfied the requirements of the BKGG in respect of Stefanie, in the event of the inapplicability of Paragraph 2(5) of the BKGG, on or after 1 November 1993, the date of entry into force of the Treaty on European Union. On that date, Stefanie was already over 18 years of age, so that her father would have been entitled to receive *Kindergeld* only if she were unemployed or were engaged in further education. Due to the same factual deficit, the Court is unable to ascertain whether she comes within the terms of the directives on the right of residence, which

62 — Paragraphs 33, 35 and 36 of the judgment. Regarding the particular position of migrant workers and their families, the Court cited its judgment in Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 24.

63 — This is, essentially, the view of Advocate General La Pergola, expressed at paragraph 51 of his Opinion in *Stöber and Piosa Pereira*, cited above. This question may be distinguished from that addressed by the same Advocate General in his Opinion of 1 July 1997 in Case C-85/96 *Martinez Sala* v *Freistaat Bayern*, in which he concluded that a citizen of the Union residing in a Member State other than her own was, by virtue of Article 8a, in a situation within the scope of application of the Treaty, and thus entitled to benefit from the directly effective prohibition of discrimination on grounds of nationality in Article 6. See also the Opinion of Advocate General Léger in Case C-214/94 *Boukhalfa* v *Bundesrepublik Deutschland* [1996] ECR I-2253, paragraph 63. The Court has not, to date, interpreted Article 8a of the Treaty.

64 — See, in respect of persons not covered by Title III of the Treaty, Directive 90/365 of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28; Directive 90/364 of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26; and Directive 93/96 of 29 October 1993 on the right of residence for students, OJ 1993 L 317, p. 59.

might be relevant to any decision on the effect of Article 8a. In the absence of a question from the national court, of argument before the Court, or of factual information necessary to determine whether, and to what circumstances, Article 8a of the Treaty might be applicable, I do not think it appropriate to address this question.

## V — Conclusion

63. In the light of the foregoing, I recommend that the Court respond to the questions referred by the Bundessozialgericht as follows:

(1) A person claiming social security benefits can, in principle, come within the personal scope of application of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as modified and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and as further modified by Council Regulation (EEC) No 3427/89 of 30 October 1989, even if he has never lived or worked in a Member State other than his own, where all the material facts are not confined to the territory of that Member State, as, for example, when a family member in respect of whom benefits are claimed resides in another Member State.

(2) Where a retired civil servant is or has been subject to legislation of a Member State to which Regulation No 1408/71 applies, in respect of any of the branches of social security mentioned in Article 4(1), he is a person covered by the Regulation even if he is in receipt of a pension under a special civil service scheme.

(3) A retired civil servant who is a person covered by Regulation No 1408/71 within the meaning of Article 2(3) is not entitled to family benefits in respect of members of his family who are residing in another Member State where he does not fulfil the requirements of Annex I, point I, C, (a).

(4) No factor can be identified such as to affect the validity of Annex I, point I, C, (a) to Regulation No 1408/71.