OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 16 DECEMBER 1982 [1]

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling the Court is asked to interpret two provisions (Articles 73 and 76) of Regulation 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 (Official Journal, English Special Edition, 1971 (II), p. 416). The Court is also asked to consider Article 10 of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing the earlier regulation (Official Journal, English Special Edition, 1972 (I), p. 159). A question of validity is also submitted regarding the latter provision, calling in question its compatibility with Article 51 of the EEC Treaty.

2. As will be seen, the problem giving rise to those questions is concerned with the payment of family allowances under United Kingdom law where the beneficiaries are the children of divorced parents residing in different Member States.

The facts may be summarized as follows.

Mrs Stephanie Robards, the claimant in the main proceedings, is a United Kingdom citizen. On 7 January 1967 she married Hugh John Robards, also a United Kingdom citizen. Three children were born of the marriage, Tamzin, Jason and Robin, who at present are all under 16 years of age. Until 1970 the Robards family resided in the United Kingdom. The family then moved to Ireland. In 1978 Mr and Mrs Robards separated: Mrs Robards returned to the United Kingdom with the two younger children, Jason and Robin, whilst Mr Robards remained in Ireland with the eldest child, Tamzin. By a custody order of the English High Court of 4 February 1980 custody of the two younger children was awarded to the mother and custody of the eldest was awarded to the father. The husband was ordered to pay maintenance of UKL 9 per week for each of the other two children. The custody order was followed by a decree absolute of divorce pronounced by the same court on 3 June 1980. From the time of her return to the United Kingdom until 5 July 1980 Mrs Robards, who was in paid employment, received the family allowance payable under United Kingdom law for the children living with her. She also received Child Benefit Increase on the ground that she was not residing with her spouse: to use a popular English expression, the family was a "one-parent family".

After the divorce, Mr Robards, who was employed in Ireland, applied to the social security institution in Ireland for family allowances for all three children. It appears that those allowances were granted as from 1 July 1980 in accordance with Irish legislation for the child of whom custody had been awarded to him and in accordance with Article 73 (1) of Regulation No 1408/71 for the two children of whom custody had been awarded to the mother and

1 — Translated from the Italian.

who lived with her in the United Kingdom. In December 1980 the competent United Kingdom authority (the Insurance Officer) reviewed Mrs Robard's social security position and decided, with effect from 5 July 1980, to cease paying her the allowances for the children in her custody; on the one hand — according to the reasons given for his decision — the allowances were being paid in Ireland for the same children and, on the other hand, the exception contained in the second part of Article 10 (1) of Regulation No 574/72 did not apply to Mrs Robards since, after the divorce, she could not be regarded as the spouse of her husband.

Mrs Robards appealed to the local tribunal in Hastings, which confirmed the Insurance Officer's negative decision. However the tribunal conceded that, according to the case-law of the Court of Justice (cf. in particular the judgments of 19. 2. 1981 in Case 104/80 *Kurt Beeck* v *Bundesamt für Arbeit* [1981] ECR 503, and of 6. 3. 1979 in Case 100/78 *Claudino Rossi* v *Caisse de Compensation pour Allocations Familiales des Régions de Charleroi et Namur* [1979] ECR 831), Mrs Robards was entitled to the difference between the higher amount of the allowances in the United Kingdom and the amount of the family allowances received by her husband in Ireland. However, Mrs Robards appealed to the Social Security Commissioner. By order of 5 May 1982 the Commissioner suspended the proceedings and asked this Court to give a preliminary ruling on a number of questions. They are concerned with the interpretation of the expression "member of the family" used in Regulation No 1408/71 as far as the children of divorced parents are concerned and the applicability of the rules against overlapping benefits, that is to say the provisions of Article 76 of that regulation and of Article 10 of Regulation No 574/72. As regards the latter provision, the particular question asked is whether a divorced parent may be assimilated to a spouse and whether that provision is valid in the light of Article 51 of the EEC Treaty.

3. In order to answer those questions it is necessary in the first place to examine the question of entitlement to family allowances and then to clarify how that entitlement is affected by the Community provisions regarded as applicable in this case (which is concerned with the children of divorced parents) which this Court has been asked to consider by the Social Security Commissioner.

The general rule common to a large number of the Member States is that "workers" receive family allowances in accordance with the laws of the State in which they work. The underlying reason for this is clear: the State in which a worker is employed must bear the costs of the social security scheme applicable to him and is therefore obliged, once the qualifying requirements have been satisfied, to grant entitlement to family allowances to any workers for which it has responsibility.

Only at this stage do the Community regulations, and in particular No 1408/71, come into operation. It was adopted in order to implement Article 51 of the EEC Treaty and, being intended to ensure equality of treatment regarding social security, it treats national workers and migrant workers in the same way. This involves a number of adjustments to the rule which I have mentioned. Thus, whilst Article 13 (2) (a) refers to that

rule, stating that in general migrant workers are subject to the legislation of the State in which they are employed, Article 73 (1) makes some amendments to it, equating residence of members of families in another Member State with residence in the territory of the State in which the worker is employed. Thus a new principle emerges, which departs from the national rules, namely that residence is irrelevant.

As will be seen more clearly, in order to avoid unjustified gains resulting from overlapping benefits, other Community provisions (in the case in point Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72) prohibit overlapping benefits. It is on the basis of this body of legislative provisions that the problem raised by the Social Security Commissioner is to be considered.

4. It seems to me that, in order to give the Social Security Commissioner a useful answer, it is appropriate to change the order of the questions submitted and to consider Question No 3 (a) first. By that question the Social Security Commissioner asks whether "family benefits provided for by the law of a Member State [are] to be regarded (for the purposes of Article 10 of Regulation No 574/72) as due under Article 73 (1) of Regulation No 1408/71 for children normally residing outside the territory of a Member State if the law of that Member State qualifies a person for such family benefits only for children normally residing with him and he is normally residing in that Member State". In other words, the Commissioner, having been called upon to apply the rule contained in Article 10, wishes to know whether recourse to that provision renders necessary, under Community law, an assessment of the conditions upon which the application of Article 73 (1) of Regulation No 1408/71 is dependent. Both consideration of the United Kingdom and Irish national legislation relating to family allowances and the question of the interpretation of the expression "member of the family" used in Regulation No 1408/71 are matters raised by this problem.

But these matters should be examined systematically.

I shall begin by examining the first sentence of Article 10 of Regulation No 574/72. In its "codified" version, it provides as follows: "Entitlement to family benefits or family allowances due under the legislation of a Member State, according to which acquisition of the rights to those benefits or allowances is not subject to conditions of insurance or employment, shall be suspended when, during the same period and for the same member of the family: (a) benefits are due in pursuance of Article 73 or Article 74 of the regulation" (i.e. Regulation No 1408/71) (Official Journal 1980, C 138, p. 71). As I have said, the aim of the provision is to prevent overlapping benefits. Its present wording is a result of the amendments made to the original text on 26 March 1973 by Regulation No 878/73 of the Council in order to take into account the particular features of the social security schemes in the new Member States.

The problem which arises is that of identifying the precise nature of the relationship between that provision and Article 73 of Regulation No 1408/71 to which it refers. Paragraph (1) of Article 73 provides as follows: "A worker subject to the legislation of a Member

State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State."

As is clear, the provision refers to the laws of the State in which the worker is employed as regards both ascertainment of his entitlement to allowances and the concept of "member of the family". Moreover, the latter concept is extended by Article 1 (f) of Regulation No 1408/71 by treating any person who is dependent on the worker as a person living under the same roof whenever the national legislation regards only a person living under the same roof as the worker as a "member of the family". According to Article 1(f) the expression "member of the family" means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided or, in the cases referred to in Article 22 (1) (a) and Article 31, by the legislation of the Member State in whose territory such person resides; where however — and this is the rule extending the concept to which I referred earlier — in both cases the said legislation regards as a member of the family or member of the household only a person living under the same roof as the worker, that condition is to be considered satisfied if the person in question is mainly dependent on that worker.

It appears clear from the foregoing that the Irish social security institution, by granting Mr Robards allowances for the two children not living with him, has considered it appropriate to apply Article 73 (1) to them; that is to say, it has decided to treat those children "as though" they were resident in the territory of Ireland. Under Irish law alone Mr Robards would not in fact be entitled to receive those allowances. By virtue of section 5 of the Social Welfare (Miscellaneous Provisions) Act 1963 — which amended the provisions of the Children's Allowances Act 1964 relevant to these proceedings — only "a person with whom a qualified child normally resides shall be qualified for a children's allowance in respect of that child". Ireland therefore uses the criterion of the child's "normal residence" with the worker.

In that regard, as is implicit in the questions referred to the Court by the Commissioner, it might be asked whether the application of Article 10 of Regulation No 574/72 is in some way made "conditional" by Article 73 of Regulation No 1408/71, that is to say, whether the national authority is required to consider whether the pre-conditions on the basis of which Article 73 is considered applicable in another Member State are satisfied. I am of the opinion that there is no such conditionality. This, as I have observed, is because Article 73 refers to the national legislation as regards identification of the persons entitled to the allowances. On the other hand, it is clear that it is not the responsibility of this Court to express its views on the way in which the authorities in a Member State implement their law. It is therefore sufficient to take note of the application of that provision, subject to subsequent and specific consideration whether this case falls within the scope of the provision designed to prevent overlapping benefits.

5. It has thus been seen that, by virtue of the first sentence of the first paragraph of Article 10 of Regulation No 574/72, where, in the country in which the child resides, entitlement to the allowances is not subject to conditions of insurance or employment

and the spouse of the worker does not work in that country, that entitlement is suspended. In other words, the *lex loci laboris* prevails, by virtue of the principle to which I referred earlier, whereby the costs of the social security scheme falls upon the State in which the worker is employed and to whose scheme he contributes.

I shall now consider the exception contained in Article 10 (1) (a) of Regulation No 574/72, which provides as follows: "If, however, the spouse of the worker or unemployed worker referred to in those articles exercises a professional or trade activity in the territory of the said Member State, the right to family benefits or family allowances due in pursuance of the said articles shall be suspended; and only those family benefits or family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State." Obviously, the entitlement the suspension of which is provided for by that rule is the entitlement laid down in Article 73 of Regulation No 1408/71, that is to say the entitlement which has arisen in the country where the migrant worker is employed. Thus, in circumstances where family allowances of the same kind coexist, the entitlement in the State where the child resides always prevails provided that the spouse residing there is engaged in a professional or trade activity. Once more, this is a case where the *lex loci laboris* is applied and in the case of overlapping benefits the law of the State where the children reside prevails.

Like Article 73, therfore, the provisions against overlapping benefits also refer to the national legislation of the State in which the member of the family resides for the ascertainment of entitlement to allowances; and there is no doubt that, according to the law of the State where she is employed (the United Kingdom), Mrs Robards is so entitled in respect of the two children living with her as the result of a court order whereby the custody of them was awarded to her. The United Kingdom Child Benefit Act 1975 provides that the benefit is payable to the person "responsible" for the child (section 1). Pursuant to section 3 (1) of that Act, a person is treated as responsible for a child in any week if (a) he or she has the child living with him in that week or (b) he or she is contributing to the cost of providing for the child at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child for that week. The question might even be asked — and indeed the claimant has done so — whether Article 73 (1) of Regulation No 1408/71 also confers that right on the claimant, as a worker, in respect of the child residing with his father in another Member State. But I believe that the answer must be negative, regardless of the fact that Mr and Mrs Robards are divorced. Article 76 of that regulation and Article 10 of Regulation No 574/72 provide — as will presently become clearer — for suspension of the entitlement provided for in Article 73 where one of the members of the family works in the State in which the children reside. In this case, Mr Robards lives in Ireland, where he works and, under Irish legislation, is entitled to benefit in respect of the child of whom he has custody.

Still on the subject of the manner in which entitlement to allowances is ascertained, I should point out that the Social Security Commissioner has asked whether the divorce affects the status of the children as "members of the family". I believe that, in those terms, the problem is non-existent or is badly expressed: it seems to me that dissolution

of the marriage bond as a result of a divorce decree has no effect on filiation. Once the marriage is dissolved, the award of custody of the children to one or other of the parents does not mean that the children cease to be members of the "family" of both. Hence a kind of competition arises between the rights of the parents to receive the allowances, a matter which is to be settled on the basis of the legislation of the countries in question and of the rules against overlapping benefits laid down by the Community regulations.

6. A matter which is more debatable is the impact on the payment of the allowances and on the respective legal positions which the Insurance Officer attributes to divorce, once again in connection with the application of Article 10 of Regulation No 574/72.

The essential problem raised by the Social Security Commissioner, which has been fully discussed in the written observations and at the hearing, specifically concerns the interpretation of the expression "spouse" used in subparagraph (a) of Article 10 (1) of that regulation. What is needed in fact is to establish whether that problem extends also to situations where the marriage has been dissolved.

Various interpretations of the concept of "spouse" have been put forward.

According to the Insurance Officer, the question is to be resolved on the basis of the law applied by the social security institution which seeks to rely upon Article 10. Under United Kingdom law, only persons whose marriage subsists are regarded as spouses; thus a divorcee is a former spouse and not a spouse. Another argument advanced by the Insurance Officer concerns the effects of the possible re-marriage of a divorced parent. In such a case, he contends, the total amount to be paid might exceed the highest level of the benefits in question in each Member State, since the family allowances payable under the legislation of the Member States of the two parents and of the new spouse would be added together.

By contrast with that interpretation of the expression "spouse", which I would describe as restrictive, the Commission and the Council expressly ask the Court to interpret it widely. The Commission submits that, in the interpretation of Community social security legislation, emphasis should be placed on the position of the worker as regards his professional or trade activity rather than on his *status familiae*. The Council points out that there is a lacuna in the regulation. It therefore proposes that the Court should fill that lacuna by regarding as a "spouse" any person having legal custody of and residing with the children in respect of whom the benefits are payable.

The view of the Insurance Officer is to be rejected. In the first place it overlooks the fact that the reference made in the regulation to national legislation concerns the definition of "member of the family" and not that of "spouse". In addition, the argument relating to the possibility of the divorced spouse's remarriage is without merit. Suppose in fact that having demonstrated that the step-children are dependent on him or her, the new spouse becomes entitled to allowances for the step-children and secures the application of Article 73 (1) of Regulation No 1408/71; that entitlement would nevertheless be "suspended" by the operation of Article 10 of Regulation No 574/72 or of Article 76 of Regulation No 1408/71 in

favour of the member of the family engaged in a professional or trade activity. As regards any allowances received by the spouse to whom custody has not been granted, I consider that those would be suspended by virtue of the general principle common to the social security systems of the Member States (and at the Community level laid down in Article 12 of Regulation No 1408/71) prohibiting overlapping entitlement to allowances on the part of different beneficiaries in respect of the same member of the family.

Consequently, I consider that the question may be resolved without going beyond the logic of the system and the scope of Article 10 and without the need for recourse to more or less liberal interpretations. I have already said that the regulation does not refer to national legislation as regards the definition of a "spouse". I think it is logical to ascertain whether a "useful" interpretation of the expression may be derived from Community legislation. Indeed, if the provisions of Article 10 (1) (a) are considered as a whole, it is clear that the term "spouse", which appears in the second sentence, refers in fact to the person envisaged in the first sentence, namely the person entitled to the family benefits and family allowances. There is no apparent reason why the *status familiae* of the person entitled should not be of importance in the first part of the provision when it is important in the second part.

Furthermore, the interpretation which I regard as most correct is supported by an argument of a systematic nature. I have pointed out that Article 10 prevents the overlapping of family benefits payable under legislation under which entitlement is not subject to conditions of insurance or employment. Article 76, which by contrast applies where the entitlement to allowances arises by reason of the carrying on of a professional or trade activity, takes no account of the *status familiae* of the parents. Why therefore discriminate between two substantially identical situations? If the question relating to the expression "spouse" is dealt with in the manner which I have suggested, it becomes apparent — it seems to me — that the claimant is entitled to receive the allowances for the children of whom she has custody in the United Kingdom and to have her former husband's entitlement suspended.

As regards the Council's proposal that any person having custody of and residing with the children in respect of whom the benefits are payable should be regarded as a "spouse", I do not consider it acceptable in the context of the proceedings before this Court. It is a matter for legislature. That does not mean that it is not valid as a matter of legal policy. In fact, in view of the object of the allowance, which is to supplement remuneration on the basis of family responsibilities, and in view of the fact that the allowances are paid for the benefit of the children, to give preference to the person having custody of them (who may indeed be a person other than either of the parents) ensures more direct enjoyment of those allowances. And this, may I say, is consonant with the approach on which the legislation of the Member States regarding family allowances appears to be based.

7. Finally, I shall consider the other questions submitted by the Social Security Commissioner. I do so merely for the sake of completeness since in view of what I have said earlier they do not affect the present case.

The Social Security Commissioner asks the Court to consider whether the rule against overlapping benefits contained in Article 76 of Regulation No 1408/71 is applicable in this case, with respect to Article 73 (1).

Article 76 provides: "Entitlement to family benefits or family allowances under the provisions of Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing." Article 76 makes an exception to the rule laid down in Article 73. To be more precise it contains, as is moreover indicated by its title, "Rules of priority in cases of overlapping entitlement to family benefits or family allowances in pursuance of the provisions of Articles 73 and 74 by reason of the pursuit of a professional or trade activity in the country of residence of the members of the family". Therefore, in order that the rule against overlapping benefits may come into operation, the exercise of a professional or trade activity in the State of residence of the members of the family is not sufficient. It is also necessary for the allowances to be "payable" under the legislation of that State, in other words the preconditions laid down by that legislation for entitlement to the allowances must be satisfied. This Court upheld that principle in its judgment of 20 April 1978 in Case 134/77 *Ragazzoni* v *"Assubel"* [1978] ECR 963 (paragraphs 7 and 12 of the decision).

The Insurance Officer and the Commission have taken the view that Article 76 is not relevant to this case. I concur in that view. The choice between the Community provisions against overlapping benefits is to be made in the light of the basis of entitlement to the benefits in the country of residence and it is established that in the United Kingdom family benefits are not payable by reason of "the exercise of a trade or professional activity" but by virtue of a system whereby the acquisition of entitlement is not subject to conditions of insurance or employment. The wording of the provision is clear and may not, in my view, be disregarded. In short, in this case there is room for the application of only one provision against overlapping benefits, namely Article 10 of Regulation No 574/82. Moreover, since the underlying reasons for the two provisions are identical, the effects which it produces are no different from those deriving from Article 76. The general principle that the *lex loci laboris* of the country where the children reside should prevail in all cases.

8. Finally, some consideration should be given to the alleged invalidity of Article 10 of Regulation No 574/82 "in so far as it operates to deprive a worker of family benefits to which he would be entitled under national law alone". The question is of course raised by the Social Security Commissioner on the assumption that the claimant is not to be awarded entitlement to family allowances for the children residing with her. I have rejected that view by explaining the detailed rules for implementing the rule against overlapping benefits. Like the other provisions preventing overlapping entitlement to benefits, that provision is not contrary to Article 51 of the EEC Treaty. The *ratio* of Article 51 and the very logic of the Community rules on social security in fact lead to the view that no harmful consequences for the worker are acceptable unless they are offset by advantages and in any case only

if they are not of such a nature as to compromise the objectives of the Treaty.

In that regard, I should point out that the objectives of Regulation No 1408/71 include, as may be seen from the seventh recital in the preamble thereto, that of implementing Article 51 of the EEC Treaty so as to "guarantee to workers who move within the Community their accrued rights and advantages".

This, moreover, is the solution which clearly emerges from the Court's previous decisions. The Court has repeatedly upheld the inviolability of rights in matters of social security acquired by individuals under national legislation. Indeed, in its first pronouncement on that subject, the Court held that "The aim of Articles 48 to 51 of the Treaty would not be attained but disregarded if the worker were obliged, in order to avail himself of the freedom of movement which is guaranteed to him, to find himself subjected to the loss of rights already acquired in one of the Member States without having them replaced by at least equivalent benefits" (judgment of 15. 7. 1964 in Case 100/63 *Kalsbeek* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 565). Finally, it should be remembered that the Court has already expressed its views on Article 10 of Regulation No 574/72, without suggesting that it is invalid in any respect. The Court stated however that the rule "is applicable only to the extent to which it does not, without cause, deprive those concerned of an entitlement to benefits conferred on them by the legislation of a Member State. Accordingly, where the amount of the allowances the payment of which is suspended exceeds that of the allowances received by virtue of the pursuit of a professional or trade activity, the rule on overlapping benefits ... should be applied only in part and the difference between those amounts should be granted as a supplement" (judgment of 19. 2. 1981 in Case 104/80 *Kurt Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503, paragraph 12 of the decision). I believe that that statement may without hesitation be repeated with regard to the present case.

9. In the light of all the considerations which I have put forward, I suggest that the following answers should be given to the questions submitted to the Court by the Social Security Commissioner by order of 5 May 1982:

1. The term "spouse" appearing in the second sentence of Article 10 (1) (a) of Regulation No 574/72 of the Council, as amended, refers to the person entitled to the family benefits or family allowances referred to in the first sentence of that article. For the purpose of those benefits, it is not the *status familiae* as an abstract legal situation which is of importance but rather the status of parent which subsists notwithstanding dissolution of the marriage.

2. The interpretation of the expression "member of the family" as used in Regulation No 1408/71 of the Council depends essentially on the legislation of the Member State by virtue of which the benefits are payable. However, where that legislation confines the concept of member

of the family to persons residing under the same roof as the worker, Community law assimilates the latter concept to that of a person who is dependent on that worker.

3. The rule on overlapping entitlement contained in Article 76 of Regulation No 1408/71 of the Council is not applicable where the acquisition of entitlement to family benefits or family allowances is not subject to conditions of insurance or employment, even though the person entitled is engaged in a professional or trade activity.

4. Article 10 (1) (a) of Regulation No 574/72 of the Council, as amended, is not incompatible with Article 51 of the EEC Treaty in so far as it does not deprive a person of a right conferred on him by the legislation of a Member State independently of Community law. Therefore, where family allowances for children, paid by virtue of a right acquired under Article 73 (1) of Regulation No 1408/71 of the Council, are of an amount in excess of the allowances paid in the State where the other parent is engaged in professional or trade activity, the latter is entitled to a supplement equal to the difference between the higher amount of the allowances provided for by the law of the State in which the right accrued under Article 73 and the lower amount of the allowances paid in the State where the children reside.