any other person who took similar steps before the declaration of invalidity or whether, conversely, a declaration of invalidity applicable only to the future constitutes an adequate remedy even for persons who took action at the appropriate time with a view to protecting their rights.

# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 21 May 1985 *

*Mr President,*
*Members of the Court,*

1. The French Cour de cassation [Court of Cassation] asks the Court to interpret, in connection with proceedings pending between Pietro Pinna and the Caisse d'allocations familiales de la Savoie [Family Allowances Fund, Savoie], Article 73 (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal English Special Edition 1971 (II), p. 416). That article provides that: 'A worker subject to French legislation shall be entitled, in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by the legislation of the Member State in whose territory those members of the family reside; the worker must satisfy the conditions regarding employment on which French legislation bases entitlement to such benefits'. In particular the court making the reference wishes to know whether the provision is still valid and effective and how the concept of residence referred to therein is to be interpreted.

2. Pietro Pinna, an Italian national, works and resides, together with his family, in France, where he receives French family benefits. In Autumn 1977 his wife and two children travelled to Italy, his son, the elder of the two children, returning to France on 31 December 1977, his wife and daughter on 31 March 1978. In view of that stay in Italy the Caisse d'allocations familiales de la Savoie (hereinafter referred to as 'the Fund') refused to pay Mr Pinna the benefits payable for his son in respect of the period from 1 October to 31 December 1977 and for his daughter in respect of the period from 1 October 1977 to 31 March 1978. The Fund considered, in fact, that, as a result of Article 73 (2) of Regulation No 1408/71 (quoted above), the family allowances had to be paid by the Italian social security institution (Istituto Nazionale della Previdenza Sociale) at the place where the two children had resided in Italy (L'Aquila).

Following an unsuccessful appeal against that decision before the Commission des recours gracieux [Appeals Committee] Mr Pinna instituted proceedings before the Commission de première instance du contentieux de la sécurité sociale [Social

* Translated from the Italian.

Security First Instance Appeals Board], Chambéry. However, by judgment delivered on 6 January 1981 the Board dismissed his application on the ground that his situation was expressly covered by the said Article 73 (2) and that the Fund had simply applied that provision. By judgment of 15 May 1981 the Cour d'appel [Court of Appeal], Chambéry, upheld the Board's judgment. Consequently Mr Pinna appealed to the Cour de cassation on the following grounds:

(a) Under the French legislation in force Mr Pinna's two children were to be deemed to be resident in France. According to Article L 511 of the Code de la sécurité sociale [Social Security Code] any French or foreign national residing in France who has one or more dependent children residing in France is entitled in respect of those children to the family benefits which are listed in Article L 510. Moreover, as a result of Articles 2 and 6 of Decree No 46-2880 of 10 December 1946 (as amended by Decree No 78-378 of 17 March 1978 and Decree No 65-524 of 29 June 1965 respectively) a child who, while maintaining family ties in France, where he has hitherto resided, stays outside that country on one or more occasions so that the total duration does not exceed three months in any one calendar year is deemed to reside in France.

(b) Article 73 (2) of Regulation No 1408/71 constitutes a special derogation from the principle set out in Article 73 (1) according to which: 'A worker subject to the legislation of a Member State ... 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'. The anomalous nature of the contested provision is borne out by Article 98 (now Article 99) of Regulation No 1408/71, which provided that before 1 January 1973 the Council should, on a proposal from the Commission, re-examine the problem of family benefits for members of the family who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States. Therefore, since the Council failed to enact any legislation by that date, Article 73 (2) is to be deemed to have lapsed and the principle laid down in Article 73 (1) applies to *all* workers subject to the legislation of a Member State of the Community, including those subject to French legislation.

(c) Article 73 (2) discriminates doubly against non-French workers subject to French legislation, first as compared with French workers and secondly as compared with workers subject to the legislation of a Member State other than France. It therefore breaches the principle of non-discrimination expressed in Articles 7, 48 and 51 of the EEC Treaty.

(d) Since the two children are resident in France and no evidence has been found capable of disproving that fact, Article 73 does not apply to the specific situation of Mr Pinna's children.

The Cour de cassation considered that in order to resolve the dispute it was essential to have a ruling of the Court of Justice on the validity and interpretation of a provision of Regulation No 1408/71. Accordingly by judgment No 218 of 11 January 1984 it stayed the proceedings and asked the Court to give a preliminary ruling pursuant to Article 177 of the EEC Treaty on: (a) the validity and continued applicability of Article 73 (2) of Regulation No 1408/71

and (b) the interpretation of the expression 'residence' in the context of that provision.

3. In order to appreciate fully the scope of the two questions it is necessary to consider the legislation to which they refer in greater depth. Article 40 of Regulation No 3 of the Council of the EEC of 25 September 1958 concerning social security for migrant workers (*Journal Officiel* No 30, p. 561) provided that: 'A wage-earner or assimilated worker who is employed in the territory of one Member State, and has children who are permanently resident or are being brought up in the territory of another Member State, shall be entitled, in respect of such children, to family allowances according to the provisions of the legislation of the former State, up to the amount of the allowances granted under the legislation of the latter State'. However, 13 years later Regulation No 1408/71 recast that provision by eliminating the restriction of family allowances to the amount granted under the legislation of the Member State in which the members of the worker's family are resident and by extending the worker's entitlement to cover the whole range of family benefits. Indeed, as I have already pointed out, Article 73 (1) of Regulation No 1408/71 provides that: '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'.

Consequently, that provision constituted a substantial improvement; yet it was defective, since the Council was not unanimous in providing that it should apply throughout the Community. That is the reason for the reservation in favour of France which appears in Article 73 (1) and, in conjunction therewith, for Article 73 (2) which provides that a worker employed in France is entitled, in respect of members of his family residing in another Member State, to family allowances *only* and *solely to those allowances provided for by the legislation of the Member State in whose territory those members of the family reside.* As a result of Article 75 (2) the allowances are paid by the social security institution of the place of residence of the members of the family, which is subsequently reimbursed in full by the institution from which the worker claims entitlement to benefit. Hence, under the system set up by the regulation, France is still liable but it pays the allowances at the rate in force in the country of residence and, unlike all the other Member States, does not export the whole range of family benefits.

However, the Member States themselves considered that the resultant dual system should be superseded, and in Article 98 (now Article 99) of Regulation No 1408/71 they determined that within two years the Council should, on a proposal from the Commission, take steps to amend it. In the result, the Commission played its part: it submitted an initial proposal on 10 April 1975 (Official Journal C 96, p. 4), which was followed on 15 January 1976 by the submission to the Council of a second proposal taking into account the amendments suggested by the Economic and Social Committee (Official Journal C 286 of 24 September 1975, p. 19) and by the European Parliament (Official Journal C 257 of 14 October 1975, p. 10). The proposal recommended that there should be a single system for the grant of family benefits and that the general criterion for coordination to be adopted to that end should be the law of the State in which the worker was employed. That proposal remained on the agenda for several Council meetings and was most recently considered at the informal Council meetings held in September and November 1983. Yet again, however, it was not possible to come to a unanimous decision in accordance with Article 51 of the Treaty.

4. Following the order adopted in the questions referred for a preliminary ruling I shall deal first with the question of the validity of Article 73 (2) of Regulation No 1408/71 by reference to the principle of non-discrimination expressed in Articles 7, 48 and 51 of the Treaty. The Council, the Commission and the Fund consider that the answer should be in the affirmative (the provision is valid). In contrast, the Italian and Greek Governments and the appellant in the main proceedings contend that, contrary to the Treaty, Article 73 (2) discriminates against nationals of other Member States working in France and should therefore be declared invalid.

As has already been pointed out in the description of Mr Pinna's grounds of appeal, the alleged discrimination is double, first with respect to workers subject to the legislation of a Member State other than France and secondly with respect to French workers employed in France. Obviously those submitting observations to the effect that the provision at issue is valid contest that argument, although each of them deploys different arguments for the two forms which, according to those holding the opposite view, the alleged discrimination takes. Let us consider therefore those arguments, beginning with the alleged discrimination between a Community worker employed in France and a Community worker working in one of the other Member States.

In the view of the Commission, the French Government and the Fund, that discrimination is not covered by the prohibition laid down in Article 7 of the Treaty. They argue that that discrimination is the result of the continuing differences as between the national social security systems. They maintain that such differences are *inevitable*, since, as the Court has consistently held, Article 51 of the EEC Treaty and Regulation No 1408/71 simply coordinate the laws of the 10 States and do not aim in any way to harmonize them (see, *inter alia*, the judgment of 6 March 1979 in Case 100/78 *Rossi* v *Caisse de compensation pour allocations familiales des régions de Charleroi et Namur* [1979] ECR 831, and the judgment of 12 June 1980 in Case 733/79 *Caisse de compensation des allocations familiales des régions de Charleroi et Namur* v *Laterza* [1980] ECR 1915). The Commission and the Fund argue in addition that those differences would not disappear if the provision at issue were to be replaced by a system based on the *lex loci laboris*: even a worker to whom Article 73 (1) applies experiences a fall in benefits when he moves from a Member State in which the amount of benefits is high to one which grants a smaller amount of benefits.

The Council goes further. It contends that the discrimination in question is not so much inevitable as *non-existent* in view of the non-comparability of the situation of a non-French worker employed in France with that of one employed in another Member State. The Community citizen who has decided to work in a country other than his own is, in the Council's view, bound to accept the consequences of the exercise of the freedom of movement. That is to say, it is for him to find out about the advantages and drawbacks of the decision which he is about to take above all as regards tax, social security and education: if he does not or if, after making inquiries, he opts for a country with a less favourable system he cannot subsequently claim to be the victim of discrimination and maintain perhaps that the system to which he became subject discourages the free movement of workers.

However, the Council, together with the French Government and the Fund, also concedes that the choice of the law of the State of residence as determining the type and amount of the benefits due in respect of the members of the family of a Community worker employed in France who are not resident in that country results in real and avoidable differences in treatment compared with other systems. But, it is argued, that does not mean that those differences are unlawful. That choice falls within the Council's discretion to implement Article 51 of the Treaty by 'means which, viewed objectively, are *justified*': a power which the Court held the Community legislature to possess in the judgment of 13 July 1976 in Case 19/76 *Triches* v *Caisse de compensation pour allocations familiales de la région liégeoise* [1976] ECR 1243. In that case the Court held that Article 42 (2) of Regulation No 3 as subsequently amended, which provided that beneficiaries of pensions due under the legislation of several Member States were entitled to family allowances in accordance with the legislation of the country in which they were resident, was lawful.

Lastly the Fund considers that Mr Pinna's argument that Article 73 (2) infringes Article 51 of the Treaty is unfounded. It contends that, far from requiring social security benefits to be exported, Article 73 (2) simply requires the payment of social benefits to be ensured regardless of where the dependants reside.

Let us now turn to Mr Pinna's alleged second discrimination, namely that allegedly introduced by Article 73 (2) between a non-French worker employed in France with children resident abroad and a French or migrant worker with children resident in France. The French Government, the Fund and the Commission contend that that discrimination is inevitable; that is to say, in this case too any disparities in the treatment of the various interested parties are due to the continuing differences between the laws of the Member States. As a result, if a non-French worker employed in France with children resident abroad receives less benefit than he would in France he must attribute that disadvantage not to Article 73 (2), but to the fact that the amount of allowances differs under French law and under the law of the Member State of residence. In any event, it is argued, those differences are not contrary to Article 51 of the Treaty. Article 51 would be infringed if the differences in benefits were linked to the movement of workers; in this case, however, the differences are due to the movement of members of their families, which is not protected by Community law.

Once again the Council takes a stricter line: in its view there is no discrimination. On the contrary, it holds that the regulation favours the migrant worker in so far as it grants him in any event the allowances granted in the country of residence whereas under French law a French citizen whose children remain abroad for more than three months in any given calendar year ceases to be entitled to family allowances. Moreover, the Council reiterates that as regards foreign workers employed in France with children resident in other States and those whose children reside in France their situations are not comparable in view of their differing requirements in point of housing, education and maintenance. Even if that were not so, however, the resulting discrimination would not infringe the Treaty or, in particular, Article 48 (2) thereof. Article 48 (2) is concerned that the system adopted by the

Community legislature should not discriminate on the basis of nationality: the system at issue certainly is not based on the nationality of the worker but on the place in which the members of his family reside.

5. Before considering the arguments summarized above it is worth setting out the principles against which Article 73 (2) must be tested, namely those governing the free movement of labour and social security. Indeed the fifth recital in the preamble to Regulation No 1408/71 states that a primary objective of the legislation is to 'contribute towards the improvement of . . . [the] standard of living and conditions of employment, by guaranteeing . . . firstly *equality of treatment for all nationals of Member States under the various national legislations* and secondly *social security benefits* for workers and their dependants regardless of their place of employment or of residence'.

Accordingly, Article 3 (1) of the regulation provides, under the heading 'Equality of treatment', that: 'Subject to the special provisions' of the regulation persons resident in the territory of one of the Member States to whom the regulation applies 'shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State'. As the judgment of 28 June 1978 in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, states, the intention was to ensure, parallel with Article 48 of the Treaty and pursuant to Article 7 of the Treaty, 'equality in the area of social security without distinction as to nationality, by prohibiting *any* discrimination in such matters arising from the national legislation of Member States'. The use of the adjective 'any' in that extract seems to me to be particularly important. Since it is of a general nature and conditions the operation of the Community system, the principle of non-discrimination must in fact be understood in a broad sense: accordingly, it also prohibits covert discrimination, that is to say discrimination arising because of the adoption of criteria other than nationality (judgment of 16 February 1978 in Case 61/77 *Commission* v *Ireland* [1978] ECR 417; judgment of 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco SA and Desquenne & Giral SA* v *Établissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223).

The principle of non-discrimination in the social security field is closely linked with the determination of the legislation applicable to the social security treatment of the worker and of the national legislation of the State whose institutions are under a duty to pay the relevant benefits. The relevant general rule is set out in Article 13 of Regulation No 1408/71: a person to whom the regulation applies must be subject to the legislation of a *single Member State only*, which is to be determined generally on the basis of the *locus laboris*. It will be observed that Article 73 (1), quoted above, is a specific application of that principle. In any case, the principle corresponds to the principle adopted in employment legislation and, as far as social security is concerned, it is justified by the territorial nature of social security legislation. Indeed it is logical to entrust the administration of social security contributions and benefits to the social security institutions of the country of employment.

However, as I have already remarked, Regulation No 1408/71 should also be interpreted in the light of social security principles (Article 51 of the Treaty) and, more generally, 'in the light of the spirit and of the objectives of the Treaty' (judgment of 29 September 1976 in Case 17/76 *Brack* v *Insurance Officer* [1976] ECR 1429, paragraph 19). Indeed, the Court has

repeatedly stressed in that connection that 'the aim of Articles 48 to 51 ... would not be attained but disregarded if the worker were obliged, in order to avail himself of the freedom of movement..., 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 July 1964 in Case 100/63 *Kalsbeek (née van der Veen)* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 565; judgment of 9 June 1964 in Case 92/63 *Nonnenmacher* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 281; judgment of 10 December 1969 in Case 34/69 *Caisse d'assurance vieillesse des travailleurs salariés de Paris* v *Duffy* [1969] ECR 597; judgment of 21 October 1975 in Case 24/75 *Petroni* v *Office national des pensions pour travailleurs salariés* [1975] ECR 1149; judgment of 3 February 1977 in Case 62/76 *Strehl* v *Nationaal Pensioenfonds voor Mijnwerkers* [1977] ECR 211).

I do not believe that the Court could have expressed itself more clearly. Nevertheless, the concept has been further refined and elucidated, first in the judgment of 13 July 1976 in Case 19/76 *Triches, already mentioned*, (where the Court held that: 'The measures taken... pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked') and subsequently in a series of judgments on the provisions prohibiting overlapping, where Regulation No 1408/71 uses the criterion of the State of residence for the purpose of the payment of family benefits which are due concurrently under the law of the State of residence and that of the State of employment (judgment of 6 March 1979 in Case 100/78 *Rossi*, judgment of 12 June 1980 in Case 733/79, *Laterza*, both already mentioned; judgment of 9 July 1980 in Case 807/79 *Gravina* [1980] ECR 2205; judgment of 19 February 1981 in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503; judgment of 24 November 1983 in Case 320/82 *D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811).

Those cases confirm that the Community legislature may not deprive workers of a right obtained by virtue only of the legislation of the State in which they were employed. The upshot is that where family benefits are granted under the legislation of more than one Member State, the provision of the regulation providing that the benefits of the country of residence must be paid cannot override the right to a greater amount of benefit which has arisen in the country of employment; the claimant must therefore be paid, if not the whole of that benefit, the amount by which that benefit exceeds the benefit payable in the country of residence. In other words, in order to obviate unwarranted overlapping, the regulation may suspend the payment of benefits in one of the two Member States but not the payment of the amount in excess of the benefit to which the worker is entitled in the other Member State.

6. On the basis of the principles mentioned and of the interpretation given by the Court I consider that I can show that the arguments to the effect that the provision at issue is valid are unfounded. My reasons for that conclusion are as follows.

A — I shall commence, as in section 4 above, with the difference in treatment between a worker employed in France and a worker employed in one of the other Member States.

The arguments which have been advanced with regard to that point by all those who have submitted observations have the merit of bringing out, with all its ramifications, the conflict underlying the choice between the criterion of the country of employment and the criterion of the country of residence as regards the grant of social security benefits and, especially, family benefits. As the Court is aware, the Council debated

that choice at length, first when issuing Regulation No 3, subsequently when recasting it by means of Regulation No 1408/71 and finally following the proposal for a uniform solution which the Commission submitted to it in 1976 (see section 3 above). It would be interesting to go back over those debates but this is not the appropriate place. So it is sufficient to bear in mind that in 1971 the legislature adopted the general criterion of the country of employment and used the other criterion only where it was likely to be more practical in view of the nature of the benefit concerned or the way of determining it. In fact the latter criterion was used: (a) for sickness insurance benefits in kind provided in countries other than that of entitlement; such benefits are equivalent throughout the Community and, in any case, cannot be 'exported' physically; (b) family benefits paid to pensioners entitled to a pension under the legislation of two or more Member States; this is because of the difficulties that would arise in dividing family allowances *pro rata* as well; (c) some benefits granted to frontier workers.

Having said that, I strongly contest the Council's contention that the discrimination which I have taken as my starting point is non-existent. As far as that contention and, in particular, the arguments raised to support it are concerned, I shall simply say that it conflicts clearly or, better, stridently with the principle that migrant workers must be treated in accordance with uniform Community rules wherever they decide to settle. Other, more pungent, criticism would perhaps be appropriate but, I believe, would not be consonant with the office of Advocate General.

The view that the disparity in question is due solely to the differences in the legislation of the 10 States, although it is more seemly, should likewise be rejected. Such differences *may* give rise to discrimination; the provision at issue is ***bound*** to cause discrimination. Let us examine its mode of operation. It causes the grant of family allowances to depend on a combination of laws: French law governs entitlement, whilst the character and the amount of the benefit are determined by reference to the law of the State of residence. Consequently, that reference determines the benefit and, as in the circumstances which gave rise to these proceedings, its effect is to reduce the substance of the right acquired under French law. The point is this: it is not any difference between the two laws which creates the discrimination but the way in which Article 73 (2) coordinates those laws. It is that coordination which eliminates the benefit granted by virtue of the State of employment only and artificially creates another, which is governed by the law of the State in which the members of the worker's family reside.

Is such elimination permissible? My view is that it is not, and I base that opinion on the Court's judgments in the *Rossi*, *Laterza*, *Gravina*, *Beeck* and *D'Amario* cases. Admittedly those cases concerned overlapping benefits arising under the legislation of two or more Member States, whilst in this case only one benefit is involved, although it is governed by a combination of laws. However, it is obvious that a difference of that kind cannot go so far as to prevent the principle laid down by the Court (the worker must not suffer disadvantage as a result of the place in which the members of his family reside) from applying also to the situation with which this case is concerned. Moreover, as the Greek and

Italian Governments and the appellant in the main proceedings observe, if that principle were not to apply to this case we should be faced with a manifest infringement of Article 51 of the EEC Treaty. And I would remind the Commission and the Fund that Article 51 also mentions the *dependants* of migrant workers and requires benefits to be paid (and hence exported) *irrespective of the Member State* in which the recipients of the benefits reside.

Neither let it be said that the criterion of the State of employment may also be discriminatory, where a migrant moves from a country where benefits are very high to another where benefits are lower. Two objections may be levelled against that argument. In the case of Article 73 (1), which itself relies on the *locus laboris*, the position is different, since the benefits are lower because the worker has moved and not, as in Article 73 (2), on account of the place of residence of the members of his family. Secondly, to calculate advantages and disadvantages by comparing the 'benefits' received in each case is incorrect: the calculation must take account of the fact that the worker employed in France to whom Article 73 (2) applies receives 'family *allowances*' only whilst Article 73 (1) requires all 'family *benefits*' to be granted in the other nine Member States.

B — Let us now examine the question of discrimination between the Community worker employed in France and French nationals employed in France. It is unnecessary to answer the arguments put forward by the Commission, the Fund and the French Government, since they are no different from those criticized above. However, the Council's argument warrants two comments.

First, it is not true in every case that the contested provision favours the Community worker, for under the French legislation a member of the family may stay abroad for more than three months if his health or education so require (see Article 6 of the Decree of 10 December 1946 as amended by the Decree of 17 April 1972 and by the Decree of 14 May 1968 and, as regards case-law, Cassation (section sociale) 27 January 1972 and 22 March 1973 in Droit Social, 1972, p. 530, and 1973, p. 537). Secondly, it is wrong to say that there is no discrimination. Discrimination is present but covert, for, as the Italian Government points out, the operation of the 'residence' parameter differs according to the worker's nationality. In other words, the family unit of a person working in his country of origin is generally united whereas the migrant worker's family is generally separated. That some members of his family should reside in countries other than the one in which he is employed is in fact a normal effect of a worker's moving within the Community.

C — Lastly there is the question of discrimination between non-French workers employed in France, depending on whether their children live with them or abroad. As we have seen, the Council considers that that discrimination is compatible with Article 48 (2) of the Treaty. In my view, it is not. By prohibiting all discrimination as regards *employment*, Article 48 (2) is designed to apply to the whole set of conditions determining the *status* of the employed worker and hence to, *inter alia*, his social security situation. On this assumption, it is impossible to understand why, given that they pay the same social security contributions to the competent

institutions and/or the same taxes to the revenue authorities of the same country, some Community workers should be treated less favourably because of the place of residence of members of their families or even, as Mr Pinna points out, be equated to non-Community nationals without the benefit of a bilateral agreement providing for more favourable arrangements.

7. Consequently, there can be no doubt as to the tendency of Article 73 (2) to operate to the disadvantage of Community workers employed in France with members of their family residing elsewhere. So it remains to be established whether the choice made by the legislature comes into the category of 'means which, viewed objectively, are justified' for implementing Article 51 of the Treaty, in accordance with the *Triches* judgment. Let me say straight away that, in my opinion, the answer to that question must be in the negative.

What justification is relied on in this case? The only justification expressly given by the legislature appears in the twelfth recital in the preamble to the regulation, which states that it is not appropriate to lay down rules common to all the Member States in the case of benefits 'aimed largely at encouraging an increase in population'. That argument has, in my view, a certain plausibility but, as the Commission itself observes, the Court's judgment of 12 July 1979 has cut the ground from under it by laying down that Regulation No 1408/71 'does not make any distinction between ... social security schemes ... according to whether those schemes do or do not pursue objectives of demographic policy' (Case 237/78 *Caisse régionale d'assurance maladie, Lille*, v *Palermo* [1979] ECR 2645, paragraph 15).

Then there are the arguments which were adduced in justification by those who supplied observations in the course of the oral and the written procedure, all of which are less plausible. For instance, in the light of the *Rossi* and *Laterza* judgments the justification relating to the nature and territorial character of the benefits is simply non-existent. Moreover, the argument that the dual system at issue protects the financial interests of the State of employment is not much more substantial. On the one hand, the dual system does not absolve France from having to pay the benefit because it has to reimburse the State in which the members of the migrant worker's family reside. On the other, the finances of the French Republic do not seem to be threatened to such an extent as to warrant a special rule or at least to warrant such a rule's remaining in force. It is possible that the French benefits were particularly high in 1971: that is no longer the case today, as the table produced by the Commission shows.

It is further argued that the mechanism of Article 73 (2) encourages the free movement of labour on the ground that since the level of benefits is determined by the State of residence that affords the worker greater freedom of choice. In common with the Commission I doubt whether that gain is sufficient to justify discriminatory treatment which is incompatible *per se* with Community law; but above all I doubt whether the criterion of the State of residence is the only factor encouraging the free movement of labour. There is as good if not a better case for arguing that the criterion of the country of employment encourages the worker to move in order to obtain the benefits most favourable to him, irrespective of the place in which the members of his family reside.

Finally, neither can it be argued that the criterion of the country of residence is fairer since it enables the level of benefits to match

the cost of maintaining a family in the various States and thus makes for equality as between members of families residing in a given country. In reality, as the Italian Government quite rightly stated, none of the 10 Member States tailors benefits specifically and directly to the cost of maintaining a family. Admittedly, the two tend to correspond, but that is simply a secondary effect of the principles of solidarity underlying all the rules governing employment and social security. Family benefits in particular are an element supplementary to basic pay: the actual economic and social situation of the worker therefore depends on a combination of both those items.

Now let us suppose that a given State offsets the low level of wages or (as actually happened in Italy) the adoption of measures restricting the impact of the cost-of-living escalator by sharply increasing family benefits; in such a situation the criterion of the country of residence would be anything but fair in its operation. On the contrary, it would have unjust and illogical effects, since a worker whose family resided in a country where lower wages were accompanied by lower benefits would lose the benefit of the offsetting measure. The same would occur in States which grant very high levels of family benefits but do not have a system of tax deductions for maintenance of dependants. If the criterion of the country of residence were applied the worker would run the risk of paying tax in full while, at the same time, receiving lower levels of benefit.

In the final analysis, Article 73 (2) of Regulation No 1408/71 (a) discriminates against Community workers who are subject to French legislation and whose families reside in other Member States; (b) as a result conflicts with the rules laid down in the Treaty; and (c) lacks any objective justification. It should therefore be declared invalid. I recommend that the Court adopt that solution, while, naturally, attenuating its effects by means of the corrective measures which the Court has laid down, with a view to legal certainty, in a series of judgments, the most recent being that of 27 February 1985 (Case 112/83 *Société des produits de maïs SA).*

8. There remain the other two questions put by the court making the reference, namely the present effectiveness of the contested provision and the interpretation of the concept of residence used therein. In point of fact those questions are superseded by the conclusion which I have just reached, but Advocates General are required to deal with each case in full and it is not my intention to shirk that duty.

As regards the first point, Mr Pinna contends that Article 73 (2) has lapsed owing to the expiry of the period laid down in Article 98 of Regulation No 1408/71, leaving the *lex loci laboris* (Article 73 (1)) effective throughout the Community. He maintains that that interpretation is borne out by the judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, and the judgment of 29 March 1979 in Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447. The argument put forward by the Italian Government is similar but more elaborate. Its representative contended that Article 98 does not simply provide for the issuing of new rules. On the

contrary, the argument runs, Article 98 requires the 're-examination' of the rules in force — which was to be carried out before 1 January 1973 — to supersede the dual system on which those rules were based. According to that line of reasoning, therefore, the date of 1 January 1973 constituted the final date as regards not the duration of the re-examination but the validity of the provision which was to be re-examined. For its part, the Greek Government reaches the same conclusion, arguing that Article 73 (2) is not only in the nature of a derogation but is also and above all *transitional*.

In contrast, the Council, the Commission, the French Government and the Fund all reject the argument that Article 73 (2) has lapsed. In their view, the disputed provision requiring re-examination is not a novelty. It appears in other Community instruments, where (as in this case) it does not imply any temporal restriction on the validity of the provision to which it refers. They argue that, as a result, Article 73 (2) remains applicable until such time as it is amended or repealed. According to the Council, one reason why that should be so is that if it were without effect the result would be a legal vacuum, since Article 98 does not stipulate whether the re-examination should cause the *lex loci laboris* or the criterion of the State of residence to become of general application. The judgments relied on by Mr Pinna, it is argued, are not in point. The judgment in the *Defrenne* case refers to a duty to bring about a specific result which under Article 119 of the Treaty must be mandatorily achieved within a fixed period. As for the judgment in Case 231/78, that was concerned with ascertaining the scope of a transitional provision in the Act of Accession by which the United Kingdom became a Member of the Community.

The Commission argues that, in addition, had the legislature wished the provision to apply for a limited time only it would have employed the formula used in that very connection in the Act of Accession of the Hellenic Republic, Article 48 of which provides that: 'Until 31 December 1983, the provisions of Articles 73 (1) and (3) . . . shall not apply to Greek workers employed in a Member State other than Greece, whose family members are resident in Greece. The provisions of Articles 73 (2) . . . shall apply by analogy to these workers'.

Personally, I consider that Article 98 (now Article 99) cannot be held to have sufficient force to have caused Article 73 (2) to have lapsed automatically on 1 January 1973. That view is supported by the wording of the provision, which the arguments of the Italian and Greek Governments, for all their ingenuity, ignore or distort. The fact cannot be underestimated that, as far as concerned the legislature (that is to say, in practical terms the 10 Member States), Article 73 (2) continued to be in force on the many occasions on which the Council discussed it and during the drafting of the Treaty with Greece. From that point of view it must be admitted that the Commission's final argument simply cannot be disregarded.

But we must be careful: all that is not the same as saying that Article 98 (now Article 99) is merely optional or is neutral in substance. It is not true that Article 98 may be assimilated to the numerous provisions requiring re-examination which may be found in Community legislation: the latter aim simply to ensure the 'physiological' development of the system by making provision for technical adjustments or improvements, whereas it appears from the wording of the article in question that its authors were aware that they had created a defective system which they were under a duty to put right as soon as possible. Secondly, I very much doubt whether, as the Council maintains, the solution to which the re-examination should have led was left open in 1971. I doubt it because I consider it inconceivable that the legislature could have contemplated extending to the whole

Community a criterion, like that of the State of residence, which would result to a greater or lesser degree in the diminution of rights acquired under national legislation. In any event, on the assumption that the solution was left open in 1971, the reform contemplated by Article 98 ceased to be an open question on 13 July 1976, that is to say with effect from the date of the first judgment (in the *Triches* case) in which the Court made it clear that such a diminution is incompatible with Community law.

9. I shall conclude with a few words on the concept of residence. The French Government and the Fund contend that in order to define it reference must be made to the law of the competent State. The remainder of those who submitted observations (with the exception of the Council, which did not state its view on the matter) consider that the concept of residence — which is employed in, *inter alia*, Article 51 of the Treaty, which Regulation No 1408/71 is intended to implement — is a Community concept.

I also hold that opinion. Indeed, the regulation does not merely refer to the concept of residence, since Article 1 (h) defines it as 'habitual residence' (whereas 'stay' is defined in Article 1 (i) as 'temporary residence'). Moreover, that definition corresponds to that given to the term by the Court in a number of judgments concerning social security for migrant workers. According to those judgments, the concept of residence signifies a person's 'habitual or permanent centre of interests'; a person resides in a particular place if he has occupational or family ties there, and the length of his stay there is relevant only in so far as it throws light on those ties (see the judgment of 12 July 1973 in Case 13/73 *Anciens Établissements D. Angenieux Fils Aîné* v *Hakenberg* [1973] ECR 935, and the judgment of 17 February 1977 in Case 76/76 *Di Paolo* v *Office national de l'emploi* [1977] ECR 315).

In other words, 'residence' is not based simply on a physical fact, such as that of determining a person's address; what is more important is the intention that the stay should be of a permanent character. As a result, a person may be resident in a place even if he spends only a few months there and, conversely, a long stay may not constitute residence — for instance where the person concerned extends his stay for the purposes of study, work, treatment or recreation but does not intend it to be permanent. It will be for the national court, with that in mind, to establish in the light of the case before it whether the stay of the members of the migrant worker's family in another Member State has aspects from which an intention may be inferred to transfer the centre of their interests to that country and hence to change their residence.

10. For all the above reasons I propose that the Court should answer the questions referred to it by the French Cour de cassation by judgment No 218 of 11 January 1984 in connection with the proceedings between Pietro Pinna and the Caisse d'allocations familiales de la Savoie as follows:

Article 73 (2) of Regulation No 1408/71 of the Council is incompatible with Articles 48 to 51 of the EEC Treaty because it infringes the principle of non-discrimination as regards employment and social security.

In view of that answer, I suggest that the Court should not give a ruling on the other questions.