OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 7 February 2002 [1]

1. By an order lodged with the Court Registry on 9 December 1999 the Sozialgericht Nürnberg (Social Court, Nuremberg) (Germany) referred two questions to the Court of Justice for under Article 234 EC a preliminary ruling on the interpretation of Articles 77(2)(b) and 78(2)(b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (hereinafter: 'the Regulation'). [2] More particularly, this reference was made in four cases joined by the referring court concerning decisions by the Bundesanstalt für Arbeit, Kindergeldkasse (Federal Office for Employment, child-benefit fund, hereinafter 'the BAK') dismissing applications for family allowances made to it under various provisions by Spanish citizens.

Legal framework

Community legislation

2. Article 77 of the Regulation (as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983), [3] in the matter of benefits for dependent children of pensioners, provides:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

1 — Original language: Italian.

2 — OJ, English Special Edition 1971 (II), p. 416.

3 — OJ 1983 L 230, p. 6.

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

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

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in provided that, taking into account where appropriate Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State,

or

(ii) in other cases, in accordance with that legislation under which he has completed the longest insurance period, provided that, taking into account where appropriate Article 79(1)(a), a right to one of the benefits referred to in paragraph (i) is acquired under such legislation; if no right to benefit is acquired under such legislation, the conditions for the acquisition of such right under the legislations of the other States concerned shall be examined in decreasing order of the length of insurance periods completed under the legislation of those States.'

3. Similarly, Article 78 of the Regulation, which deals with benefits for orphans, provides:

'1. The term "benefits", for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions except those granted under insurance schemes for accidents at work and occupational diseases.

2. Orphans' benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal

person actually maintaining him is resident or situated;

(a) for the orphan of a deceased worker who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) for the orphan of a deceased worker who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account where appropriate Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State, or

(ii) in other cases, in accordance with the legislation of the Member State under which the deceased worker had completed the longest insurance period provided that, taking into account where appropriate Article 79(1)(a), the right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; if no right is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other States in question shall be examined in decreasing order of the length of insurance periods completed under the legislation of these States.

However, the legislation of the Member State applicable in respect of provision of the benefits referred to in Article 77 for a pensioner's children shall remain applicable after the death of the said pensioner in respect of the provision of the benefits to his orphans.'

4. With reference to both provisions cited above, Article 79(1) further provides, 'Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased worker had been subject only to the legislation of the competent State.' However, Article 79(1)(a) states, 'if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of

insurance or employment, such lengths shall be determined taking account where necessary of Article 45 (on overlapping periods of insurance) or Article 72 (on the aggregation of periods of employment) as appropriate.'

National legislation

5. In Spain, Royal Legislative Decree 1/1994 providing generally for social security provides for the payment to pensioners of an allowance for each dependent child up to the age of 18 years provided that the family income does not exceed a specified ceiling. However, for handicapped children with an invalidity rating of over 65% that decree provides for payment of the allowance without limit as to age or income; payment of that allowance for children over the age of 18 is, however, incompatible with the special benefit provided for under Law No 13/1982 on the social integration of handicapped persons, which means that in such circumstances, the person concerned must opt for one or other of the benefits.

6. Under German law, the Bundeskindergeldgesetz (Federal law on child benefit; hereinafter the 'BKGG'), in the version in force until the end of 1995, entitled pensioners to claim family allowances for dependent children until the children reached the age of 16 and, if there was more than one child, on condition that a certain level of income was not exceeded, from 1996 the age-limit was raised to 18 years and the income ceilings were removed; there is, furthermore, provision for family allowances until the age of 27 where the children are undergoing occupational training and until the age of 21 if they are unemployed. In the case of children who are unable to support themselves because of incapacity, the BKGG provides for the payment of an allowance without age-limit.

Facts and questions submitted for a preliminary ruling

7. As stated, this reference for a preliminary ruling is made in four cases joined by the referring court which have in common the fact that they concern, in various respects, Spanish nationals who worked in Germany as migrant workers for a certain period of time.

8. The first case was brought by Mr Martínez Domínguez, a Spanish national resident in Spain, who drew a pension in both Spain and Germany (where he had worked for a period of time). Although he received family allowances in Spain for his dependent daughter under 18 years of age, he was not entitled to those allowances between April 1991 and October 1996 and

between April and October 1997 since he exceeded the income threshold under Spanish law. In order to obtain family benefit, Mr Martínez Domínguez therefore applied in January 1996 to the appropriate authority in Germany where, as stated, there had since 1996 been no income limit on the issue of family allowances. His application was, however, rejected by the BAK, as was his subsequent objection; the final decision to dismiss his application was therefore contested before the referring court.

9. The second case was brought by Mr Benítez Urbano, also a Spanish national resident in Spain in receipt of pensions in both Spain and Germany (where he had also worked for a period of time). In August 1996 he applied for a family allowance in Germany for his handicapped adult daughter who, in Spain, received the special benefit under Law No 13/1982 on the social integration of handicapped persons, for which reason she was not entitled to family allowance in Spain (where for that reason, they had not been applied for). His application together with the resultant objection were rejected by the BAK, whose definitive decision to reject the application was challenged before the referring court.

10. The third case was brought by Mr Mateos Cruz, also a Spanish national resident in Spain in receipt of pensions both in Spain and Germany (where he had also worked for a period of time). He received family allowance in Spain for his three dependent children until attainment by them of the age of majority. Since his entitlement to family allowances under Spanish law had ceased, he applied in November 1997 for equivalent benefits in Germany, claiming that his children were pursuing their studies and that, under German legislation, benefit should continue to be paid until the age of 27. In his case also, the application and resultant objection were dismissed by the BAK whose definitive decision to reject the application was challenged before the referring court.

11. However, the fourth case was brought by Mrs Calvo Fernández, the widow of a Spanish national who had worked for a period of time in Germany where, before his death (in 1985), he had acquired entitlement to a pension but not to family benefit. Already in receipt of family allowances in Spain for her three dependent children (all resident in Spain and drawing orphans' pension in Spain and Germany), Mrs Calvo Fernández applied in June 1992 for family allowances in Germany as well; it is not clear, however, whether by that application she sought to obtain full benefits in Germany as well or merely to supplement the benefits awarded in Spain, the benefit provided for under German legislation being greater. As with the other cases, the BAK rejected the application and

the subsequent objection; an appeal was therefore brought before the referring court against the definitive decision to reject the application. The BAK later also dismissed a further application made by Mrs Calvo Fernández for family benefit for her children who were pursuing their studies after the age of 18 years; the dismissal of the objection to that decision was challenged before the referring court. Moreover, it is not stated in the order for reference whether, in the case of Mrs Calvo Fernández, the main proceedings concern both appeals or only one of them.

12. For the purposes of this case it is important to emphasise that the order for reference makes clear that in none of the four cases described above was entitlement to pensions in Germany acquired solely under German social security legislation, since in none of those cases had the minimum contributions required for a pension been paid. The rights in question were recognised in Germany only because other contributions paid in Spain had been taken into account: in the first three cases under the provisions of Regulation No 1408/71 on aggregation of contributions paid in different Member States; and in the fourth case, under the bilateral Convention between Germany and Spain on social security (drawn up in 1973 and also applicable in the present case after the accession by Spain to the Community; hereinafter 'the convention').

13. In light of the intricate problems of Community law raised by the cases before it, the Nuremberg Social Court considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 77(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 to be interpreted as meaning that family allowances for the dependent children of pensioners who acquired entitlement to a pension in a Member State not solely under the legislation of the Member State but under the coordinating provisions of European social law, must be paid as a full benefit where the pension entitlement from the state of non-residence subsists in respect of periods or only as from a period in respect of which there is no (or no longer any) entitlement to family benefit provided for under the legislation of the state of residence owing either to the fact that an age limit or an income limit has been exceeded or it was not applied for.

2. Is Article 78(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 to be interpreted as meaning that family allowances for orphans of a deceased employee or self-employed person, to whom the legislation of several Member States applied, must be paid as a full benefit, where there is no entitlement to an orphan's pension in a Member State whose legislation applied, either solely under the legislation of the Member State or under the coordinating legislation of European social law, and entitlement to the orphan's pension from the state of non-residence subsists in respect of periods or only as from a period in respect of which there is no (or no longer any) entitlement to family benefit provided for under the legislation of the state of residence owing either to the fact that an age limit or an income limit was exceeded or it was not applied for.'

14. The German and Spanish Governments and the Commission, as well as the applicants in the main proceedings, submitted observations in the proceedings before the Court. In order to ascertain the relevant national legislation and rules under the agreement, the Court, by letter of 24 July 2001, requested the intervening governments to provide clarification on certain points; those explanations were provided by letters lodged on 2 and 30 August 2001.

Legal analysis

Preliminary remarks

15. It is clear from the text of Articles 77 and 78 of the Regulation that the same rationale applies to both benefits for dependent children of pensioners and to benefits for orphans. They provide in particular that where pensioners (in the former case) or deceased workers (in the latter) have been subject to the legislation of more than one Member State, as in this case, the benefits provided for are in principle awarded by the recipient's State of residence (paragraph 2(b)(i)). If, however, entitlement to the benefits in question is not acquired under the legislation of that State (also taking account, for that purpose, of those provisions of the regulation on overlapping insurance periods and the aggregation of periods of employment under Article 79), the benefits are issued by the State whose legislation has applied longest to the pensioner or deceased worker (provided, of course, that entitlement is acquired under the legislation of that State, and taking into account, in that case as well, the rules on overlapping insurance periods and the aggregation of periods of employment) (paragraph 2(b)(ii)).

16. In the cases giving rise to this reference for preliminary ruling, as has been seen, the recipients of benefits for dependent children or orphans resided in Spain, where, in principle, those benefits were payable. However, under Spanish legislation, entitlement to the benefits in question:

— had ceased to subsist during certain periods because the income ceiling under Spanish legislation had been exceeded (case of Martínez Domínguez); or

— had lapsed owing to the age attained by the dependent children (case of Mateos Cruz and Calvo Fernández); or

— could not be exercised owing to the fact that the person in question had opted for other benefits incompatible with the benefits in question (case of Benítez Urbano); or

— finally (as may be inferred from the information concerning the case of Calvo Fernández) involved the payment of amounts less than those already paid in the State other than the State of residence.

17. Since the pensioners (in the cases of Martínez Domínguez, Mateos Cruz and Benítez Urbano) and the deceased worker (in the case of Calvo Fernández) had, for a period of time, been subject to German legislation, the referring court in its two questions is seeking to ascertain in practice whether, under Articles 77, 78 and 79 of the Regulation, the German authorities are obliged to pay the benefits not paid in Spain for the reasons mentioned (or to supplement those benefits) in so far as those benefits would have been paid if German legislation had applied.

18. In order to reply to those questions, which should be examined together, I shall begin with some general observations on the interpretation of the relevant provisions of the Regulation in light of Community case-law and then go on to evaluate more specifically the solution to the questions with reference to the various facts in the main proceedings.

General observations

19. As has been seen, Articles 77 and 78 of the Regulation lay down the criteria for determining the Member State responsible for awarding benefits for dependent

children or for orphans, where the pensioners (in the first case) or deceased workers (in the second case) have been subject to the legislation of more than one Member State. The Member State determined under those criteria is required to pay the benefits in question even if entitlement thereto has not been acquired in that State on the sole basis of its national legislation, but under the provisions of the Regulation on overlapping insurance periods and the aggregation of employment periods.

20. As a rule, and in accordance with the principle that the legislation of a single Member State is applicable enunciated in Article 13(1) of the Regulation,[4] that Member State has sole competence to award the benefits in question, in accordance with its applicable legislation and within the limits defined by it. It is possible, however, that under that principle, the persons concerned may be deprived of entitlement to more favourable benefits acquired in other Member States on the basis of national legislation alone; that would run counter to the principle, which has been repeatedly reaffirmed in Community case-law, under which 'the objective of Articles 48 to 51 of the Treaty would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose social security advantages guaranteed to them in any event by the laws of a single Member State.'

4 — See, on this point, Case C-113/96 *Gómez Rodríguez* [1998] ECR I-2461, paragraph 27.

21. Thus, in order to avoid any inconsistency, the Court has stated on a number of occasions that 'the provisions of the regulation [No 1408/71] cannot apply if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws.'[5] As regards the problem now before the Court it has been held that Articles 77 and 78 of the regulation must be interpreted 'as meaning that entitlement to family benefits from the State in whose territory a recipient of a retirement or invalidity pension or an orphan resides does not take away the right to higher benefits awarded previously by another Member State. In those circumstances, a supplement equal to the difference between the two amounts is payable by the latter Member State.'[6]

22. It is important to emphasise, however, that the case-law referred to applies only to cases where the persons concerned have acquired entitlement to social security in a Member State other than their State of residence under the legislation of that state alone (and not under the provisions of the regulation on overlapping insurance periods and the aggregation of employment

5 — Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071, paragraph 17, where reference is made in particular to Case 24/75 *Petroni* [1975] ECR 1149, paragraphs 13 and 16.

6 — *Bastos Moriana*, cited above, paragraph 16, where reference is made in particular to Case 733/79 *Laterza* [1980] ECR 1915; and Case 807/79 *Gravina and Others* [1980] ECR 2205.

periods), since only in those cases might the application of the regulation deprive them of the more favourable benefits to which they would otherwise be entitled.

23. Those limits to the case-law in question are clearly apparent in *Bastos Moriana and Others* in which it was held that, 'Articles 77(2)(b)(i) and 78(2)(b)(i) of the regulation must be interpreted as meaning that the competent institution of a Member State is not bound to grant supplementary family benefits to pensioners or orphans residing in another Member State [7] where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State if entitlement to the pension, or to the orphan's pension, has not been acquired solely by virtue of insurance periods completed in that State.' [8] The reason is, as I stated earlier, that 'where the entitlement of the pensioner or orphan exists only by virtue of the application of the aggregation rules provided for by the regulation..., the application of Articles 77 and 78 does not deprive the persons concerned of the benefits granted under the laws of another Member State alone.' [9]

24. Similarly, in the subsequent judgment in *Gómez Rodríguez*, the Court ruled that 'where entitlement to benefits which arose in the State of residence is lost because an age-limit has been reached, the competent institution of another Member State is not required to grant benefits to the persons concerned, unless they have acquired their entitlement there solely on the basis of the periods of insurance completed in that State.' [10] The Court therefore concluded that, 'Article 78(2)(b)(ii) does not become applicable in circumstances where a right to an orphans' pension, which initially arose under Article 78(2)(b)(i) in the Member State in which the recipient resides, has been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also applicable to the insured person, a right to orphans' pension would run beyond that date on application of the rule on aggregation laid down in Article 79 of the Regulation.' [11]

Analysis of the cases at issue

25. Those matters having been stated in general terms, it is my view that the questions formulated by the Nuremberg Social Court by reference to the various

7 — For clarification of what is meant by 'supplementary family benefits' see paragraph 5 of *Bastos Moriana* which states: 'The plaintiffs applied to the Bundesanstalt für Arbeit for German dependent child allowances in respect of their children, inasmuch as those allowances are granted for longer periods, or in a higher sum, than those granted by their State of residence. The plaintiffs are therefore seeking an additional amount ("benefit supplement") equal to the difference between the German allowance and that of their State of residence.'

8 — *Bastos Moriana*, paragraph 23.

9 — Paragraph 19.

10 — Cited above, paragraph 32.

11 — Paragraph 33.

factual situations in the main proceedings may readily be resolved in the light of the Community case-law cited above, in particular *Bastos Moriana* and *Gómez Rodríguez*. In fact, like the Commission and the German Government, I am of the opinion that in the cases before the Court, entitlement to social-security benefit was acquired in the State of residence, with the consequence that, under the case-law in question, the other benefits applied for in another Member State were not payable unless entitlement to them was acquired solely under the legislation of that State.

26. In fact, there is in my view no ground for asserting, as the applicants in the main proceedings and the Spanish Government appear to do, that in the four cases in question, entitlement to benefits for dependent children or orphans was not acquired in the country of residence. There is certainly no room for doubt in that connection in the cases of Mateos Cruz and Calvo Fernández, since, as in *Bastos Moriana* and *Gómez Rodríguez*, the benefits were actually paid in the State of residence, albeit for shorter periods and in smaller amounts than provided for under the legislation of the other Member State to whose legislation the insured persons had also been subject. The same solution must be adopted in the case of Martínez Domínguez, since in that case as well the benefits had actually been paid in the State of residence, albeit with certain interruptions owing to the fact that income ceilings under Spanish legislation had from time to time been exceeded. None the less, the same solution must, I consider, also be applied in the case of Benítez Urbano, since the person concerned was in principle entitled to the benefits at issue in his State of residence and non-payment of those benefits was attributable solely to his opting for other benefits incompatible with the benefits at issue.

27. Given that, in all the cases, entitlement to benefits for dependent children or orphans was acquired in the State of residence, the benefits applied for in another Member State are payable under the decisions in *Bastos Moriana* and *Gómez Rodríguez* only if entitlement thereto was acquired solely under the legislation of that State. It is not, however, for the Court to assess whether in the various cases before it, those conditions are or are not satisfied (a matter dwelt on by some of the applicants in the main proceedings), since that plainly is a question of national law which must be resolved by the national court.

28. I would merely point out at this juncture that a particular difficulty arises in this connection with regard to the Calvo Fernández case. The order for reference states that in this case entitlement to orphans' pensions was acquired in Germany under the 1973 agreement between Germany and Spain. According to the

information provided by the German Government in response to a specific question put to it by the Court, the agreement continued to apply to such cases even after Spain's accession to the Community and the consequent entry into force in Spain of the Regulation; this was so because the benefits under the agreement were higher for the persons concerned than under the regulation. I might add in that connection that application of the agreement appears to be warranted in this case since the deceased worker acquired the rights under it before Spain acceded to the Community, with the result, in accordance with the case-law of the Court, that the rights (and those at issue here) could not be lost by the entry into force of the Regulation. [12]

29. Having said that, I consider that for the purposes of applying the principle laid down in *Bastos Moriana and Others* and *Gómez Rodríguez,* that in the specific case now under consideration, rights acquired in a Member State under a bilateral convention with another Member State must simply be assimilated to those arising under the social security legislation of the first State. The Court has already had occasion to state, in fact, that its case-law on additional benefits must be interpreted as meaning that: '"benefits awarded by virtue of the legislation of a single Member State" refers not only to the benefits provided under national legislation alone, as formulated by national legislatures, but also the benefits available under international social security conventions in force between two or more Member States and incorporated in national law, which place the worker concerned in a more favourable position than under Community provisions.' [13] It is clear, furthermore, that if such were not the case, there would be a breach of the principle enunciated several times, according to which application of the Regulation must not deprive migrant workers of more favourable benefits to which they would be entitled.

30. On the basis of the foregoing, it follows that, in the case of Calvo Fernández, the benefits acquired in Germany under the bilateral convention must be assimilated to those acquired under German social-security legislation. It is then, naturally, for the national court to establish whether the family allowances at issue in this case are actually payable in Germany under the convention.

12 — See, on this point, Case C-227/89 *Rönfeldt* [1991] ECR I-323 in which the Court ruled that, 'Articles 48(2) and 51 of the EEC Treaty must be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Council Regulation (EEC) No 1408/71, of conventions operating between two or more Member States and incorporated in their national law' (paragraph 29). The scope of that case-law was later set out in Case C-475/93 *Thévenon* [1995] ECR I-3813 which makes clear that the principle enshrined in it applied only where the right to freedom of movement was exercised before entry into force of the Regulation. In *Gómez Rodríguez,* cited a number of times, it is also stated that the principle in *Rönfeldt* is applied in cases such as the one in question where the deceased worker completed his periods of insurance in Germany and Spain before the accession of Spain to the Community (paragraph 41). For subsequent confirmation see, lastly, Case C-277/99 *Kaske* [2002] ECR I-1261.

13 — *Rönfeldt*, cited above, paragraph 27.

31. In light of the foregoing, I therefore consider that the reply to the Nuremberg Social Court must be that Articles 77(2)(b) and 78(2)(b) of the Regulation, in conjunction with Article 79(1), are to be interpreted as meaning that where entitlement to benefits for dependent children or orphans mentioned in those articles is acquired in the recipient's State of residence, further benefits applied for in a different Member State must be paid only if entitlement to them was acquired in that State solely by virtue of its national legislation or a convention between it and another Member State still applicable following entry into force of the Regulation.

Conclusion

32. In light of the foregoing, I propose that the Court reply as follows to the questions submitted by the Nuremberg Social Court for a preliminary ruling:

Articles 77(2)(b) and 78(2)(b) of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community in conjunction with Article 79(1) thereof are to be interpreted as meaning that where entitlement to allowances for dependent children or orphans as mentioned in those articles is acquired in the recipient's State of residence, additional benefits applied for in a different Member State must be paid only if entitlement thereto was acquired in the latter State solely under its national legislation or under a convention between it and another Member State still applicable after entry into force of Regulation No 1408/71.