OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 28 June 1988

My Lords,

Following my Opinion in this case, the Court, pursuant to Article 61 of the Rules of Procedure, reopened the oral procedure in order to obtain the views of the parties to the national proceedings, the Member States and the Council and Commission of the European Communities on the question whether Article 77 of Regulation No 1408/71 (the 'Regulation') is invalid as being incompatible with, in particular, Article 51 of the EEC Treaty if, on a proper construction, it means that only family allowances within the meaning of Article 1 (u) (ii) of the Regulation, and not family benefits within the meaning of Article 1 (u) (i) thereof, are exportable.

In my first Opinion, I came to the view that Article 77 did have that meaning and that it was consequently invalid for the reasons given in the second limb of the Court's judgment in Case 41/84 *(Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1, paragraphs 23 and 24 of that judgment). The system instituted by Article 77 applies essentially to migrants wishing to return to their home State after retirement even if rarely to nationals such as Mr Lenoir. It is 'not of such a nature as to secure the equal treatment laid down by Article 48 of the Treaty' and was consequently not a legitimate technique for coordinating the national security systems under Article 51.

That result was contended for by the Italian Government and opposed by the French Government and by the Commission in their observations in the first round of written pleadings. Observations substantially to the same effect have been received from those three parties in response to the Court's further question. Mr Lenoir has submitted no supplementary observations and the Council has not done so, preferring to leave the matter entirely to the Court. The only new party to the proceedings is the German Government which has put in observations to the effect that, if interpreted as in the Court's question, Article 77 is nevertheless valid.

I do not reconsider the interpretation of Article 77, given the hypothesis on which the Court's question is based. In my first Opinion, I rejected the attempt to widen the notion of family allowances contrary to the word 'exclusively' in Article 1 (u) (ii). I thus consider only the question of validity.

The Italian Government asserts that the position is worse under Article 77 than

under Article 73 (2) which was struck down by the Court in *Pinna*. Under the latter provision, the migrant worker resident in France whose family members were resident in another Member State could only claim the family allowances available in that State and not French family benefits. Under Article 77, the pensioner is entitled only to family allowances of the State responsible for paying his pension. However, it seems to me that in both cases the migrant worker loses the right to family benefits payable by the State in which he works or has worked. Although I do not accept that Article 77 produces harsher results than those produced by Article 73 (2) (as Italy contends) it seems to me that the Italian Government can justifiably say that it produces results which are equally discriminatory.

The French Government emphasizes the fact that, as the Court has held on many occasions and notably in *Pinna*, the Regulation is intended to coordinate and not harmonize the national social security systems. It is argued that it was therefore open to the Community authorities to provide that only family allowances would be exportable and not such family benefits as might be provided in the national systems. However, this argument takes insufficient account of the Court's ruling in *Pinna* that the coordination techniques available to the Community institutions are subject to an overriding requirement not to discriminate between migrant and national workers.

The French Government and the Commission rely on the judgment in Case 19/76 (*Triches* v *Caisse de compensation pour allocations familiales de la région liégeoise* [1976] ECR 1243) in which the Court found no reason to declare invalid a provision analogous to Article 77 in the Regulation's predecessor.

That case, however, was dealing with a different allegation, namely that the provision in question caused discrimination between those migrant workers who had worked in one Member State only and those who had worked in more than one Member State. In a crucial paragraph (paragraph 18, p. 1252), the Court recognized that, in adopting measures pursuant to Article 51, the Council was free 'to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reason of disparities between the national schemes in question'. It seems to me that measures conflicting with the *Pinna* principle cannot be said to be 'objectively justified'.

Furthermore, nothing in this case, or in *Pinna*, turns on differences in kind or level of benefit available in each Member State. Therefore the second part of the Court's dictum in *Triches*, to the effect that the provisions adopted by the Council are not required to eliminate all potential inequality caused by disparities between the national schemes is not relevant here.

For the same reason, in my view, France in its supplementary observations cannot rely on the case of *Kenny* any more than could the Commission in its original observations, as I said in my first Opinion. It is true that the non-discrimination principle laid down by the Treaty covers discrimination found in

the legislation or practice of one State and not as between Member States, but *Pinna* deals with another matter, the obligation on the Community institutions not to lay down rules, purportedly pursuant to Article 51, which, although on the face of it applying without discrimination on nationality grounds, in fact apply essentially to the detriment of migrant workers.

At the second oral hearing, unlike, as I understood it, in its submissions initially, the Commission contended that a person such as Mr Lenoir who has not moved as a worker, but only moves to another State after retirement, cannot rely on the provisions of the Treaty relating to the free movement of workers and, accordingly, cannot rely on Article 51. I do not accept this argument. As already stated, it seems to me that by virtue of Article 2 of Council Regulation No 1408/71, as amended, Mr Lenoir is a 'person covered' by the Regulation and that his personal pension is protected when he resides in a Member State other than that in which the institution responsible for payment is situated by virtue of Article 10 of the Regulation.

The Commission accepts, however, that Article 77 as it stands is capable of having a deterrent effect on the free movement of workers — thus a worker who knows that, if he goes to work in another Member State and then seeks to return to his State of origin, he will not receive family allowances which are dependent on employment rather than residence in his State of origin, may be deterred from moving in the first place. Alternatively, the amount of such family allowances may be considerably reduced if he goes to another State after a period of employment in his home State and then returns home on retirement. He too may be discouraged from moving. No less does it seem that a pensioner who has moved as a migrant worker, and who resides in a Member State other than the one responsible for paying the pension, is likely to be worse off than his opposite number who remains in the State responsible for paying family benefits.

It may well be that the Regulation could have been drafted in such a way as to exclude some categories of worker or some allowances from the principle of 'exportability'. The issue before the Court, however, is whether Article 77 as it stands is valid. It does not seem to me that it is possible to interpret the Regulation differently according to the particular worker concerned, or that it is for the Court in effect to rewrite Article 77 by saying that it is valid for some workers or allowances and invalid for others, and that therefore although in some respects the article is incompatible with Article 51 it is not so in respect of Mr Lenoir, so that his challenge fails. If, as I think, he is covered by the Regulation, he has the *locus standi* to challenge the validity of the article relied on. If, as I also think, Article 77 is, in respect of migrant workers, incompatible with Article 51 for the reasons given and those advanced by the Italian Government, then in my view he is entitled to a declaration that the article is invalid.

The Commission and the French and German Governments emphasize the fact that many family benefits, as opposed to family allowances, are granted by reference to conditions prevailing in the granting Member State and may depend on factual situations which are difficult to verify when the potential recipient is resident elsewhere. If granted to a recipient residing in another Member State, they may be wholly inappropriate, exorbitant or inadequate depending on local conditions. The German Government gives, as an example, an allowance intended to defray the costs of purchasing school books which would be inappropriate if the recipient resided in a country in which school books were provided free of charge.

That may be an argument for rewriting Article 77 though it is to be observed that Article 73 which deals with family benefits for employed persons enables an employed person, whose children reside in a State other than that to the legislation of which he is subject, to be paid the family benefits provided for by the latter State. The books allowance, where it exists, must be payable even if books are given free in the State in which the children reside. I am not satisfied that in this respect it is justified to draw a distinction between a worker and a pensioner.

It is also to be noted that, when the Regulation was adopted, it was acknowledged that the solutions it found for the problem at issue were subject to review. Article 99 provides as follows:

'Before 1 January 1973 the Council shall, on a proposal from the Commission, re-examine the whole problem of payment of family benefits to members of families who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States.'

That solution has not yet been reached. In the mean time, the Court in *Pinna* has declared Article 73 (2) invalid for reasons which, in my view, apply equally to Article 77.

The Court seems to me to have followed the same approach in its judgment of 7 June 1988 in Case 20/85 *(Roviello* v *Landesversicherungsanstalt Schwaben [1988] ECR 2805)* in which it declared invalid Point 15 of Section C (Germany) of Annex VI to the Regulation. German legislation subjected entitlement to certain types of invalidity pension to a requirement *inter alia* that the claimant had completed specified periods of compulsory insurance whilst pursuing a professional activity corresponding to levels of skill and responsibility laid down in rules developed by the German courts (highly skilled, skilled, semi-skilled and unskilled).

As well as his qualifications, the claimant's work experience was taken into account to determine into which skill category he should be placed. Point 15, as interpreted by the Court, provided in effect that only work experience obtained in Germany would count. The Court held that, although formally applicable to national and migrant workers alike, the provision essentially applied to migrants who had worked in other Member States. It was particularly disadvantageous to migrants who had not been able to find in Germany work appro-

priate to their qualifications. Point 15 was not apt to secure the equal treatment laid down in Article 48 of the Treaty and therefore had no place in the coordination of national systems provided for in Article 51.

The ruling in *Roviello* confirms the approach adopted in *Pinna*. Provisions which essentially concern migrants and work to their disadvantage compared with national workers are not compatible with Article 51 of the Treaty.

Although the matter is a difficult one, I remain of the view that Article 77 should be declared invalid for the reasons given in my first Opinion and in this Opinion.

The parties to the national proceedings have not submitted observations in reply to the Court's question but if they have incurred costs in connection with this reference they fall to be dealt with by the national court. The costs of the Italian, French and German Governments and of the Commission are not recoverable.