OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 September 2001 [1]

1. In the present case, the Oberster Gerichtshof (Austrian Supreme Court) asks whether Community law precludes a provision of national social security law under which periods of child-rearing undertaken in a Member State of the EEA or the EC are recognised as substitute qualifying periods for the purpose of old age pension only where (i) those periods occurred after the entry into force of the Agreement on the European Economic Area on 1 January 1994 and (ii) the mother was entitled under national law to a cash benefit stemming from maternity insurance or a maternity benefit.

2. In order to answer that question, which raises the essential issue of the scope *ratione temporis* of Community law following the accession of a Member State, it falls to be considered whether the national provisions in issue are at variance with the transitional provisions laid down in Article 94(1) to (3) of Regulation No 1408/71 [2] and the Treaty provisions concerning the freedom of movement for persons.

The relevant legislative provisions

Community provisions

3. Article 1 of Regulation No 1408/71, in so far as is relevant to the present case, provides:

'For the purpose of this Regulation:

1 — Original language: English.

2 — 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, OJ, English Special Edition 1971 (II), p. 416, subsequently amended on numerous occasions. The most recent codified version of that Regulation is to be found in Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1997 L 28, p. 1.

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

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;

...

(r) *periods of insurance* means periods of contribution or period[s] of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;

(s) *periods of employment* and *periods of self-employment* means periods so defined or recognised by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or of self-employment;

(sa) *periods of residence* means periods as defined or recognised as such by the legislation under which they were completed or considered as completed'.

4. Article 2 is headed 'Persons covered'. Article 2(1) provides:

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

5. Article 4 is headed 'Matters covered'. Article 4(1) provides, in so far as is relevant:

'1. This Regulation shall apply to all legislation covering the following branches of social security:

(a) sickness and maternity benefits;

...

(h) family benefits.'

6. Article 13, headed 'General rules', is the first provision in Title II of Regulation No 1408/71, headed 'Determination of the legislation applicable'.

7. Article 13(1) provides:

'Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.'

8. Article 14c contains special rules applicable to persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State, which are not relevant to the present case.

9. Article 13(2) lays down a series of rules for determining which legislation applies in particular circumstances. The rules are expressed to be subject to Articles 14 to 17, constituting the remainder of Title II, which contain various special rules none of which is applicable in this case.

10. Article 13(2)(a) provides:

'a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State'.

11. Articles 13(2)(b) to (e) concern respectively self-employed persons, persons employed on vessels flying the flag of a Member State, civil servants and persons called up for service in the armed forces or for civilian service. Article 13(2)(f), inserted into Regulation No 1408/71 with effect from 29 July 1991 by Regulation No 2195/91, [3] provides that:

'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone'.

12. Article 94 of the Regulation, headed 'Transitional provisions for employed persons', provides so far as is relevant:

'1. No right shall be acquired under this Regulation in respect of a period prior ... to the date of its application in the territory of the Member State concerned ...

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State ... before the date of its application in the territory of that Member State ... shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior... to the date of its application in the territory of the Member State concerned ...'.

13. Austria acceded to the European Communities on 1 January 1995. Article 2 of the Act of Accession [4] provides that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act. Regulation No 1408/71 became applicable in Austria, however, on 1 January 1994, by virtue of the Agreement on the European Economic Area. [5] Since the facts giving rise to the main proceedings occurred between 1970 and 1975, the provisions of the EC Treaty and of the Regulation were not in force as Community instruments.

3 — Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1991 L 206, p. 2.

4 — OJ 1994 C 241, p. 21.

5 — OJ 1994 L 1, p. 3; see in particular Article 29, Protocol 1 and Annex VI.

The national legislation

14. Under the provisions of the (Austrian) Allgemeines Sozialversicherungsgesetz (General Law on Social Security, hereinafter: 'ASVG'), pension insurance institutions are obliged, at the request of an insured person, to establish the periods of insurance which will be taken into account under Austrian law for the purpose of calculating that person's old-age pension. [6] In that context, the insurance institutions must take into account periods during which a person has paid insurance contributions ('contribution periods', *Beitragszeiten*) and other periods recognised by law as insurance periods for the purpose of old-age pension ('substitute qualifying periods', *Ersatzzeiten*).

15. Paragraph 227a of the ASVG lays down rules concerning substitute qualifying periods in respect of child-rearing after 31 December 1955. That provision reads, in so far as is relevant, as follows: [7]

'(1) In addition, where an ... insured person has actually been the person mainly responsible for rearing ... her child ..., such child-rearing in the country, up to a maximum of 48 calendar months from the birth of the child, shall constitute a substitute qualifying period after 31 December 1955 in the class of pension insurance within which the last preceding contribution period falls or, where no such period exists, within which the next following contribution period falls.

...

(3) Where the birth ... of an additional child occurs before the expiry of the 48-calendar-month period, it shall extend only until that additional birth ... Where the rearing of the additional child (paragraph 1) ends before that 48-calendar-month period, the following calendar months shall be counted again until it expires. Child-rearing in a State party to the Agreement on the European Economic Area (EEA) shall be treated as child-rearing in Austria where an entitlement to a cash benefit stemming from maternity insurance under this or another federal law or to a maternity benefit under the Betriebshilfegesetz exists, or existed, in respect of that child and the period of child-rearing occurs after that Agreement entered into force.'

16. As is clear from the wording, the third paragraph of that provision subjects the

6 — However, the insured person may present such a request no earlier than two years prior to attaining the pensionable age.

7 — As published in the BGBl. 1997/47.

recognition of child-rearing periods completed outside Austria, but inside the EEA, to a temporal and a substantive condition. Such periods are considered to be substitute qualifying periods under the ASVG only where (i) they were completed after 1 January 1994 and (ii) the applicant was entitled to a cash benefit stemming from maternity insurance under the ASVG (or another Austrian federal law) or to a maternity benefit under the *Betriebshilfegesetz* in respect of the child reared.

The facts and the question referred

17. The facts, as set out in the order for reference, may be summarised as follows.

18. Liselotte Kauer, the applicant in the main proceedings, is an Austrian national born in 1942. She has three children born in 1966, 1967 and 1969. After completing her studies in June 1960, she worked in Austria from July 1960 to August 1964. In April 1970, together with her family, she transferred her residence from Austria to Belgium. Whilst living in Belgium, she did not work. Thus she did not make contributions to the Belgian pension insurance scheme nor, it appears, did she contribute to any other branch of the Belgian social security system. After returning to Austria, she again worked and completed compulsory periods of insurance as of September 1975.

19. In April 1998 the applicant asked the defendant, the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution), to establish the periods of insurance which would be taken into account for the purpose of calculating her pension. By a decision of 6 April 1998 the defendant recognised a total of 355 months of insurance up to the relevant cut-off date of 1 April 1998. Out of that total, the defendant recognised 46 months corresponding to the period from July 1966, when the applicant's first child was born, to April 1970, when the applicant moved to Belgium, as substitute qualifying periods in respect of child-rearing pursuant to Paragraph 227a of the ASVG.

20. The applicant challenged that decision in the Austrian courts. In her view, the defendant should have recognised 82 months of child-rearing, since the period during which she reared her child in Belgium should be considered to be a substitute qualifying period. The defendant's refusal to recognise a period of child-rearing abroad (in her case 36 months) violated Austrian constitutional law and Community law.

21. The defendant resisted that claim, arguing that a period of child-rearing within the European Economic Area could be treated as a period of child-rearing in Austria only where that period occurred after 1 January 1994 when the EEA Agreement came into force. That condition was not fulfilled in the present case, since the disputed period of child-rearing occurred between 1970 and 1975. In that context, the defendant asserted that it was evident from Article 2 of the Act of Accession that the Community treaties and Community legal acts adopted prior to accession were not binding until after Austria acceded to the European Union on 1 January 1995. Moreover, according to the case-law of the Court of Justice Community law does not apply to circumstances which arose prior to accession.

22. Having failed in substance before the Arbeits- und Socialgericht (Labour and Social Security Court), Vienna and the Oberlandesgericht (Higher Regional Court), Vienna, the applicant applied for a review of the judgment of the Oberlandesgericht by the Oberster Gerichtshof. Before that court she contended, *inter alia*, that the defendant's decision was at variance with the provisions of Regulation No 1408/71. Considering that the case before it raised a point of Community law, the Oberster Gerichtshof decided to stay the main proceedings and refer the following question to this Court:

'Is Article 94(1) to (3) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1249/92 of 30 April 1992, to be interpreted as precluding a national provision under which, for the purpose of pension insurance, periods of child-rearing in the country are to be regarded as substitute qualifying periods but such periods in a Member State of the EEA (in this case Belgium) are to be regarded as such only where they occur after that Agreement entered into force (1 January 1994) and, in addition, only on condition that entitlement to a cash benefit stemming from maternity insurance under the (Austrian) *Allgemeines Sozialversicherungsgesetz* (General Law on Social Security) (ASVG) or another (Austrian) federal law or to a maternity benefit under the (Austrian) *Betriebshilfegesetz* exists, or existed, in respect of that child?'

23. In its order for reference, the Oberster Gerichtshof states that it desires to know, in particular, whether child-rearing is to be regarded as a 'contingency' within the meaning of Article 94(3) of Regulation No 1408/71.

24. The Austrian and Spanish Governments and the Commission have submitted written observations as well as written replies to a question put by the Court of Justice. At the hearing the applicant, the Austrian Government and the Commission presented oral argument.

Delimitation of the issues

25. Those submitting observations all consider that the Oberster Gerichtshof seeks, in substance, a ruling on the compatibility of Paragraph 227a of the ASVG with Community law. The Court of Justice should accordingly, it is argued, consider two issues. First, is Paragraph 227a(3) of the ASVG contrary either to Article 94 or other provisions of Regulation No 1408/71 or to provisions of the EC Treaty in so far as it limits *temporally* the recognition of child-rearing periods completed in a Member State of the EU or the EEA to periods after 1 January 1994? Second, is Paragraph 227a(3) contrary to Regulation No 1408/71 or provisions of the EC Treaty in so far as it limits *substantively* the recognition of child-rearing by requiring that the applicant was entitled to a cash benefit under the ASVG or a maternity benefit under the *Betriebshilfegesetz*?

26. It is appropriate to begin by examining the first of those issues, since that is the only one explicitly raised in the order for reference. Moreover, if there is no incompatibility between Community law and the temporal limitation inherent in Paragraph 227a of the ASVG, then the applicant's claim in the main proceedings may be dismissed without its being necessary, in the context of the present case, for the Court of Justice to rule on the compatibility with Community law of a substantive limitation such as that laid down in Paragraph 227a of the ASVG.

The temporal limitation: summary of the arguments

27. The observations submitted in this case concerning the temporal limitation inherent in Paragraph 227a(3) ASVG address, first, the compatibility of that limitation with

Regulation No 1408/71 and, secondly, its compatibility with Articles 18 and 39 EC (previously Articles 8a and 48 of the EC Treaty).

Observations on Regulation No 1408/71

28. The Austrian Government and the Commission argue that the temporal limitation laid down in Paragraph 227a(3) of the ASVG is compatible with Article 94(1) to (3) of Regulation No 1408/71, and that the applicant is therefore not entitled, under the Regulation, to recognition for pension purposes of the period she spent in Belgium.

29. According to the Austrian Government, the question of recognition of periods of child-rearing completed before 1 January 1994 falls to be considered under Article 94(2) of Regulation No 1408/71. Under that paragraph periods of insurance, employment or residence shall be taken into consideration for the determination of social security rights where those periods were 'completed under the legislation of a Member State'. It follows, in its view, that Article 94(2) requires the Member States to take into account only periods which were completed by employed persons in accordance with the conditions laid down by national law. In the present case, the period which the applicant spent in Belgium from 1970 to 1975 did not fulfil the conditions for recognition as a substitute insurance period laid down by Austrian law. That period cannot therefore be taken into account for the purpose of calculating her pension.

30. The Austrian Government contends furthermore that the circumstance of rearing a child cannot be considered to be a 'contingency' within the meaning of Article 94(3) of Regulation No 1408/71. That term refers to events which trigger an entitlement to social benefits such as the event of a person reaching the pensionable age, becoming invalid or dying; it does not include all the different circumstances — such as a period of child-rearing — which may be taken into account by a Member State for the purpose of deciding on the entitlement to and calculation of social benefits.

31. To that line of argument, the Austrian Government adds that the applicant's attempt to rely on the provisions of Regulation No 1408/71 in order to obtain recognition under Austrian law of periods

of child-rearing in Belgium is, in any event, excluded since she was, whilst living in Belgium, subject to Belgian rather than Austrian social security law under Article 13(2)(f) of the Regulation.

32. The Commission stresses, first of all, that Article 94(1) limits the temporal scope of Regulation No 1408/71 by providing that '[n]o right shall be acquired under this Regulation in respect of a period prior to ... the date of its application in the territory of the Member State concerned'. Thus while Article 94(1) aims to protect rights already acquired under national law, a right which was not so acquired before the entry into force of Regulation No 1408/71 in Austria on 1 January 1994 cannot be acquired, with retroactive effect, on the basis of that regulation. However, in order to determine in what circumstances, and at which point in time, a right has been 'acquired' it is necessary to look to the transitional provisions laid down in Article 94(2) and 94(3).

33. Referring to the definitions laid down in Article 1(r), (s) and (sa) of Regulation No 1408/71, the Commission contends that only periods completed in accordance with the requirements laid down by national law are to be taken into account under Article 94(2). With regard to Article 94(3) the Commission considers, contrary to the Austrian Government, that a period of child-rearing may be considered to be a 'contingency' within the meaning of that provision. However, the possibility of acquiring rights in respect of a contingency which materialised before the Regulation took effect under Article 94(3) is '[s]ubject to the provisions of paragraph 1' of Article 94. It follows, according to the Commission, that Article 94(3) applies only where a 'pre-regulation contingency' gave rise to an entitlement to social benefits of itself. That condition is not fulfilled in the present case, since it follows clearly from Paragraph 227a of the ASVG that the period of child-rearing spent by the applicant in Belgium does not give rise to any entitlement to social benefits.

34. The Spanish Government contends, contrary to the Austrian Government and the Commission, that the temporal limitation laid down in Paragraph 227a(3) of the ASVG is contrary to Regulation No 1408/71. It argues that the issue of recognition in Austria of child-rearing periods does not fall under Article 94(1) of Regulation No 1408/71. In its view, there is no question of recognising any completed or acquired rights before the entry into force of the Regulation since child-rearing periods are only constituent elements in the process of acquiring pension rights. If I understand its argument

correctly, the Spanish Government considers furthermore that child-rearing periods should be considered to be a contingency within the meaning of Regulation No 1408/71 and that such periods must therefore be taken into account for the purpose of calculating pensions even though they occurred before the Regulation entered into force in Austria on 1 January 1994.

Observations on Articles 18 and 39 EC

35. The Austrian Government stresses that at the time the applicant moved to Belgium in 1970, the Treaty provisions on the freedom of movement for persons did not yet apply in Austria. The applicant thus did not move in a capacity as a migrant worker or a Community citizen within the meaning of Articles 39 and 18 EC. She therefore cannot rely on those provisions in order to challenge the provisions of the ASVG concerning recognition of periods of child-rearing; that issue falls to be considered exclusively under Article 94 of Regulation No 1408/71.

36. The Commission accepts that the applicant cannot rely on Article 39 EC owing to the fact she did not exercise any economic activity in Belgium. However, in reply to a question put by the Court of Justice on the significance for the present case of the ruling in *Elsen*, [8] the Commission expressed the view that the applicant can rely on the right to freedom of movement for citizens of the Union laid down in Article 18 EC, and that the Austrian legislature's refusal to recognise as substitute qualifying periods periods of child-rearing completed before 1 January 1994 in a Member State of the EEA or the EU is contrary to that provision.

37. In that context, the Commission rejects the Austrian Government's contention that the free movement provisions of the Treaty are inapplicable *ratione temporis* to the recognition of child-rearing periods completed before the entry into force of those provisions in Austria. Article 18 EC is, in the absence of transitional provisions in the Act of Accession, applicable where a national authority, such as the defendant in the main proceedings, constitutes and calculates a person's pension after the entry into force of the Treaty in the Member State in question. Referring to the judgments in *Vougioukas* [9] and *Österreichischer Gewerkschaftsbund*, [10] the Commission argues that the act of constituting and calculating a pension is by

8 — Case C-135/99 *Elsen* [2000] ECR I-10409.
9 — Case 443/93 [1995] ECR I-4033.
10 — Case C-195/98 [2000] ECR I-10497.

necessity based on previous facts. The application of Article 18 to that act thus does not involve the recognition of Community law rights with retroactive effect even though some of the facts to be taken into account — such as periods of child-rearing — occurred before the entry into force of the Treaty. The application of Article 18 in that context merely ensures that there is no current discriminatory treatment of migrant persons.

38. The Austrian authorities are therefore obliged, under Article 18 EC, when deciding whether to recognise periods of child-rearing, not to discriminate against persons who have exercised their right to free movement. The rule laid down in Paragraph 227a(3) of the ASVG discriminates against those persons in so far as it excludes child-rearing periods which would have been taken into account had they been completed in Austria. That discrimination is not, according to the Commission, justified. Paragraph 227a(3) is therefore contrary to Community law, and it is thus incumbent on the Austrian authorities to take into account the periods of child-rearing completed by the applicant in Belgium as if they had been completed in Austria.

The temporal limitation: analysis

39. It emerges from the factual context and the observations submitted to the Court that in order to provide the Oberster Gerichtshof with an answer which will enable it to decide the case before it in the main proceedings, it is necessary to determine whether a provision of national law which limits temporally the recognition for pension purposes of periods of child-rearing spent in a Member State of the EEA or the EU to such periods completed after the date on which Regulation No 1408/71 entered into force in the Member State where recognition is sought are contrary to Community law. In other words, does a rule such as Paragraph 227a(3) of the ASVG infringe Community law in that periods of child -rearing completed in Austria before 1 January 1994 are treated differently from periods completed in other Member States?

40. In order to answer that question, I propose to examine, first, the relevant provisions of Regulation No 1408/71 and, secondly, Articles 18 and 39 EC.

Regulation No 1408/71

41. It is necessary, first of all, to resolve three preliminary points.

42. First, it must be established whether a person in the situation of the applicant in the main proceedings falls within the personal scope of the Regulation.

43. Under Article 2(1) of the Regulation, its provisions are to apply to Community nationals who are employed or self-employed persons and are, or have been, subject to the social security legislation of one or more Member States, as well as to their families. According to Article 1(a) of the Regulation, and the Court's case-law, the concept of 'employed or self-employed persons' covers any person who has the status of a person insured under the social security legislation of one or more Member States, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme, whether or not he pursues a professional or trade activity. [11] The applicant has according to the order for reference for many years been compulsorily insured in Austria for the purposes of grant of old-age benefits. There is therefore no doubt that the applicant falls within the personal scope of the Regulation as an employed person within the meaning of Articles 1(a) and 2(1).

44. The fact that the applicant did not, according to the facts established by the referring court, exercise any economic activity in Belgium does not exclude her from the scope of the Regulation. It is true that the Court of Justice has repeatedly held that the Treaty provisions governing freedom of movement for persons and measures adopted to implement them, including Regulation No 1408/71, do not apply to activities which are confined in all respects within a single Member State. [12] I consider however that that case-law is not applicable to the situation of persons who have moved from one Member State to another Member State together with their spouses, who have worked in the second State, and have devoted time to bringing up children in that State. In any event, it is clear from the text of Article 2(1) of the Regulation that its provisions apply to the

11 — See, in particular, Case 182/78 *Pierik* [1979] ECR 1977, paragraph 4 of the judgment; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 36; Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 21 and, most recently, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 85.

12 — See, in particular, Case 153/91 *Petit* [1992] ECR I-4973, paragraph 8 of the judgment; Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16; Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis* [1998] ECR I-4239, paragraph 22 and, most recently, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 26.

members of the families of migrant workers. [13] According to information provided to this court by the Austrian Government, the applicant's spouse worked in Belgium and paid social contributions there. The applicant thus falls within the personal scope of the Regulation. Moreover, in her capacity as a family member within the meaning of Article 2(1), the applicant can rely on all the provisions of the Regulation with the exception only of provisions concerned with benefits which are exclusively applicable to employed persons, such as unemployment benefit. [14]

45. Second, it is necessary to examine whether the social benefits sought by the applicant in the main proceedings are within the material scope of the Regulation, in so far as they fall under the branches of social security which are, according to Article 4(1), covered by the Regulation.

46. According to the Court's settled case-law, the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation. Moreover, the Court has consistently held that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of the Regulation. [15] It is in my view clear that the award of supplementary pension periods in respect of child-rearing under the ASVG meets those criteria, a view which has not been contested by the Austrian Government.

47. Third, it is necessary to ascertain whether, under Regulation No 1408/71, Austrian legislation is applicable to the situation of a worker who ceased her occupational activity in Austria, then had a child and subsequently transferred her residence to another State for a period of about five years before returning to Austria where she recommenced occupational activities.

48. The Austrian Government considers that Austrian law is not applicable, under the Regulation, in those circumstances. It

13 — See also to that effect Case 7/75 *Mr and Mrs F.* [1975] ECR 679, paragraph 16 of the judgment; Case C-211/97 *Gomez-Rivero* [1999] ECR I-3219, paragraph 26.

14 — See Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, paragraph 34 of the judgment; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32; Case C-185/96 *Commission* v *Greece* [1998] ECR I-6601, paragraph 28. See similarly the Opinion of Advocate General Alber, delivered on 26 June 2001, in Case C-189/00 *Ruhr*.

15 — See, most recently, the judgment of 15 March 2001 in Case C-85/99 *Offermanns*, paragraphs 27 and 28.

points out that the applicant ceased all occupational activities in August 1964, more than 21 months before the birth of her first child on 25 June 1966, and did not carry out any other economic activities between that date and her move to Belgium in April 1970. The applicant was therefore not, it is argued, subject to Austrian social security law under Article 13(2)(a) of the Regulation; she was subject to that law only under Article 13(2)(f) owing to her continued residence in Austria. However, according to the Court's judgment in *Kuusijärvi*, [16] by virtue of Article 13(2)(f) the law of that State ceases to apply the moment a person transfers his or her residence to another State. It follows that the question of recognition of child-rearing periods spent by the applicant in Belgium must be determined on the basis of Belgian law. The fact that Belgian law apparently does not provide for such recognition, and that the applicant may therefore suffer a disadvantage as a result of having moved to Belgium, is a consequence of the existing differences between the national social security systems left in place by Regulation No 1408/71. Thus it cannot affect the compatibility of Austrian law with Community law.

49. I find that argument unconvincing. Article 13(2)(f) was inserted into Regulation No 1408/71 many years after the facts in issue in the present case by Regulation No 2195/91. [17] The question which legislation was applicable to the applicant must therefore be decided in accordance with Article 13(2) of the Regulation as it stood prior to amendment by Regulation No 2195/91. According to the judgments of the Court of Justice in *Ten Holder* [18] and *Twomey*, [19] subparagraph (a) of that provision was, prior to amendment, to be interpreted as meaning that a worker who ceased to carry on an activity in the territory of a Member State continued to be subject to the legislation of that Member State so long as he did not take up employment in another Member State.

50. In accordance with those preliminary observations, I consider that a person in the applicant's situation, and the Austrian rules in issue in the main proceedings, fall within the personal and material scope of the Regulation. Moreover, under the rules of the Regulation, Austrian rather than Belgian law was applicable at the material time.

51. The question, then, is whether a provision such as Paragraph 227a of the ASVG infringes Article 94(1) to (3) of Regulation

16 — Case C-275/96, cited in note 11.

17 — Cited in note 3. For the circumstances which led to the adoption of that provision, see my Opinion in *Kuusijärvi*, cited in note 11, especially paragraphs 44 to 52.

18 — Case 302/84 [1986] ECR 1821.

19 — Case C-215/90 [1992] ECR I-1823.

No 1408/71 in so far as it limits the recognition of periods of child-rearing spent in a Member State of the EEA or the EC to such periods completed after the date on which that regulation entered into force in the Member State where recognition is sought.

52. The transitional provisions laid down in Article 94(1) to (3) have a long history. Article 53 of Regulation No 3 of 1958,[20] the predecessor of Regulation No 1408/71, contained similar rules, and equivalent provisions are to be found in a number of international conventions concerned with the strengthening and coordination of social security for employed and self-employed persons.[21] The proposal for a new regulation on the coordination of social security, which was put forward by the Commission in 1998,[22] also replicates Article 94(1) to (3) of Regulation No 1408/71.[23]

53. However, while the Court has occasionally considered the meaning of Articles 53(1) to (3) of Regulation No 3 of 1958[24] and Articles 94(1) to (3) of Regulation No 1408/71,[25] its case-law does not provide a clear-cut answer to the question referred in the present case. Nor does the legislative history of those regulations, or the explanatory memoranda issued by the Commission concomitantly therewith, shed any light on that question.

54. In order to answer the question referred, it is therefore necessary to interpret the wording of Article 94 in the light of the purpose of the Regulation, taking into account the Court's case-law concerning the principles of temporal application of Community legislation.

55. Article 94(1) provides that no right shall be acquired under the Regulation in respect of a period prior to the date of its application in the territory of the Member State concerned. That provision reflects the principle that Community legislation does not ordinarily have retroactive effect.[26] As such, it sets out the general rule for the temporal application of the Regulation. The provisions in Articles 94(2) and (3) are not, in my view, intended to derogate from that rule. Those provisions reflect

20 — Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, OJ English Special Edition 1958, p. 561.

21 — See, for example, Article 53 of the European convention on social security for migrant workers, signed 9 December 1957 by the six original members of the European Coal and Steel Community, *Tractatenblad* (1958) No 54; Article 74 of the Council of Europe European Convention on Social Security, done in Paris on 14 December 1972, European Treaty Series No 78.

22 — Proposal for a Council regulation (EC) on coordination of social security systems, COM(1998) 779 Final.

23 — See Article 70 of the proposal.

24 — See Case 44/65 *Singer* [1965] ECR 965, at p. 972; Case 68/69 *Brock* [1970] 171, paragraphs 7 to 9 of the judgment.

25 — See Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 8 of the judgment; Case C-105/89 *Buhari Haji* [1990] ECR I-4211, paragraph 21; Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 15; *Kuusijärvi*, cited in note 11, paragraphs 24 and 25.

26 — For an application of that principle in the context of social security, see Case 104/76 *Jansen* [1977] 829, paragraph 7 of the judgment.

another established principle, namely that legislation applies — except where otherwise provided — to the effects in the future of situations which have arisen under the law as it stood before amendment,[27] unless the immediate application of the legislation would be contrary to the protection of legitimate expectations.[28] The function of paragraphs (2) and (3) within the scheme of Article 94 is thus, essentially, to explain in what circumstances rights are to be considered as 'acquired' within the meaning of Article 94(1).

56. Given that the applicant in the main proceedings cannot acquire any new rights under Article 94(1) in respect of the period of child-rearing she spent in Belgium, the question arises whether those periods must be taken into account under Article 94(2) or (3).

— Article 94(2)

57. It will be recalled that Article 94(2) lays down the rule that '[a]ll periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State ... before the date of its application in the territory of that Member State ... shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation'.

58. The text of Article 94(2) does not clarify the concepts of 'periods of insurance' and 'periods of employment or residence', and reference must therefore be made to the definitions in Article 1(r), (s) and (sa) of the Regulation.[29]

59. Article 1(r) defines 'periods of insurance' as 'periods of contribution or period[s] of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

60. In my view, it follows from that definition that only periods which satisfy the substantive conditions for recognition laid down by national law must be taken into account under Article 94(2) of the Regulation. That rule is however subject to compliance with the Treaty provisions on

27 — See, in the context of social security, *Singer*, at p. 972 and *Brock*, paragraph 7, both cited in note 24.

28 — See, in particular, Case 1/73 *Westzucker* [1973] ECR 723, paragraphs 6 to 10 of the judgment; Case 96/77 *Bauche* [1978] ECR 383, paragraph 54 to 58; Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraphs 34 to 37.

29 — See, to the same effect in the context of Article 28 of Regulation No 3 of 1958, Case 14/67 *Welchner* [1967] ECR 331, at p. 337.

freedom of movement for persons.[30] If national legislation — by taking into account for the purposes of acquisition of entitlement to old-age benefits only periods of insurance completed on the national territory to the exclusion of similar periods completed in the territory of other Member States — infringes those provisions of the Treaty, recognition of the latter periods cannot be denied on the basis of Article 94(2) of the Regulation.

61. That interpretation of Article 94(2) is consistent with the Court's settled case-law which holds that '[t]he Member States are free to organise their social security systems, in particular by determining the conditions for entitlement to benefits, provided that they do not infringe Community law when exercising that power',[31] and that 'Article [42 EC] and Regulation No 1408/71 provide only for the aggregation of insurance periods completed in different Member States and do not regulate the conditions under which those insurance periods are constituted'.[32]

62. The view that the periods which must be taken into account under Article 94(2) are defined by national law, subject to compliance with the Treaty, is moreover supported by the Court's case-law concerning the interpretation of the notion of 'insurance periods or assimilated periods' in Articles 27 and 28, read in conjunction with Article 1(p) and (r), of Regulation No 3 of 1958[33] and the notion of 'periods of insurance' in Article 45(1), read in conjunction with Article 1(r), of Regulation No 1408/71.[34] For example, in *Iurlaro* the Court held, after citing Article 1(r) of Regulation No 1408/71, that 'for the purposes, *inter alia*, of applying Article 45 of Regulation No 1408/71, "periods of insurance" means periods defined or recognised as such by the legislation under which they were completed ... subject however to compliance with Articles [39 EC to 42 EC]'.[35]

63. If, as I have argued, Article 94(2) does not confer any entitlement to recognition of insurance periods which do not satisfy the conditions laid down by national law, what is then its purpose and effect? That provision is, as the Commission has explained, concerned with the situation of persons who have completed periods of insurance under the legislation of a Member State in which Regulation No 1408/71 did not — at the time when those periods were completed — yet apply.[36] In that context it aims to ensure that the competent authorities take into account such completed

30 — See, to that effect, Case C-302/90 *Faux* [1991] ECR I-4875, paragraphs 25 to 28 of the judgment.

31 — See, in particular, Case 1/78 *Kenny* [1978] ECR 1489, paragraph 16 of the judgment and, most recently, Case C-33/99 *Fahmi*, judgment of 20 March 2001, paragraph 25.

32 — Case C-349/87 *Paraschi* [1991] I-4501, paragraph 15 of the judgment.

33 — *Welchner*, cited in note 29; Case 2/72 *Murru* [1972] ECR 333.

34 — Case C-324/88 *Vella* [1990] ECR I-257; Case C-322/95 *Iurlaro* [1997] ECR I-4881.

35 — Paragraph 27 and 28 of the judgment.

36 — See also the judgment of 10 May 2001 in Case C-389/99 *Rundgren*, paragraph 29.

'pre-regulation periods' for the purpose of determining the rights flowing from Regulation No 1408/71; a refusal to take such periods into account merely on the ground that they were completed before the Regulation entered into force would be unlawful. Thus, when the Court of Justice was asked in *Rönfeldt* [37] to consider the lawfulness of a refusal by the German authorities to take into account, for the purpose of constituting a German national's retirement pension, insurance periods which that person had completed under Danish legislation before Regulation No 1408/71 entered into force in Denmark, it held that such periods would have to be taken into account under Article 94(2) of the Regulation. [38]

64. In the present case, it follows that there is no obligation, under Article 94(2) of the Regulation, to take into account the period during which the applicant reared her child in Belgium for the purposes of constituting her Austrian pension since she did not during that period fulfil the residence condition laid down in the ASVG for recognition of child-rearing as substitute qualifying periods. It will be examined below whether that result is compatible with the Treaty rules on freedom of movement for persons. [39]

37 — Case C-277/89, cited in note 25.

38 — Paragraphs 15 and 16 of the judgment.

39 — See paragraphs 70 to 74.

— Article 94(3)

65. Article 94(3) provides that '[s]ubject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior ... to the date of its application in the territory of the Member State concerned'.

66. That provision is, as I understand it, concerned with situations where a contingency, such as a work-related accident causing the death of a person falling within the scope of the Regulation or the dismissal of a person causing that person to become unemployed, [40] arose prior to the entry into force of the Regulation in the Member State concerned, and that contingency has legal effects — either in the form of an entitlement to social benefits or in the form of an entitlement to recognition of certain periods as equivalent to contribution periods — which continue after its entry into force. In such situations, the rights which flow from the Regulation must be granted to the affected person with immediate effect from the point in time when the Regulation enters into force. [41] The aim of Article 94(3) is thus, essentially, to prevent the Member State in question from denying those rights solely on the grounds that the contingency which trig-

40 — See to that effect *Singer*, cited in note 24, at p. 972; *Kuusijärvi*, cited in note 11, paragraphs 23 and 24 of the judgment.

41 — See for a similar interpretation of Article 53(3), Regulation No 3 of 1958, *Brock*, cited in note 24, paragraphs 6 to 9 of the judgment.

gered them arose before the Regulation entered into force.

67. That rule is however explicitly 'subject to the provisions of paragraph 1' according to which no right shall be acquired under the Regulation in respect of a period prior to the date of its application in the territory of the Member State concerned. In my view, and here I agree with the Commission, it follows from that wording that the duty of the Member States to grant rights under the Regulation with effect from the date of the entry into force of the Regulation in respect of contingencies which materialised before that date, applies only where those contingencies gave rise to an entitlement to social benefits or to recognition of certain periods as equivalent to contribution periods under national law. Otherwise Article 94(3) would have the effect of creating — with retroactive effect — new rights contrary to Article 94(1).

68. In the present case, it is clear that the child-rearing periods undertaken by the applicant in Belgium do not give rise to an entitlement to recognition of those periods as substitute qualifying periods for the purpose of old-age pension under Paragraph 227a(3) of the ASVG. It follows that, even if the event of taking responsibility for the rearing of a child might — as the Commission maintains — fall within the notion of 'contingency', Article 94(3) cannot in any event have the effect of obliging the Austrian authorities to recognise those periods as substitute qualifying periods.

69. I conclude for those reasons that a provision such as Paragraph 227a of the ASVG does not infringe Article 94(1) to (3) of Regulation No 1408/71 in so far as it limits the recognition of periods of child-rearing spent in a Member State of the EEA or the EU to such periods completed after the date on which that regulation entered into force in the Member State where recognition is sought.

Articles 18 and 39 EC

70. It is common ground between the Austrian Government and the Commission that Article 39 EC is inapplicable in the present case.

71. That view may be accepted. The applicant ceased to work more than 21 months before moving to Belgium, where she did not carry out any occupational activity. She therefore cannot therefore be considered a

migrant worker within the meaning of Article 39 EC.

72. According to the Commission the applicant in the main proceedings may however rely on Article 18 EC. In its view, the failure to recognise as substitute qualifying periods periods of child-rearing completed before 1 January 1994 in a Member State of the EEA or the EU is contrary to that provision. [42]

73. That line of argument raises a number of difficult issues on both the temporal and the material scope of Article 18 EC. Those issues have not been addressed in this case, since they were not raised in the order for reference or in the terms of the question referred, and since, as already mentioned, Article 18 EC was invoked by the Commission only in reply to a question put by the Court on a different point. There has consequently been no opportunity for the possibly wide-ranging implications of the Commission's interpretation of Article 18 EC to be addressed by, in particular, the Member States. In those circumstances it does not seem appropriate to embark on an analysis of Article 18 EC; I would say only that in my view it seems doubtful whether Article 18 EC, which is essentially designed to extend rights of free movement from workers to all citizens of the Union, is applicable on the facts of the present case.

74. I accordingly conclude — without it being necessary for the Court to make a specific ruling on these points — that a provision such as Paragraph 227a of the ASVG does not infringe Articles 18 and 39 EC in so far as it limits the recognition of periods of child-rearing spent in a Member State of the EEA or the EU to such periods completed after 1 January 1994.

The substantive limitation

75. In the light of the conclusion reached above, it is unnecessary to consider in the present case whether Paragraph 227a(3) of the ASVG is contrary to Community law in so far as it limits the recognition of child-rearing periods undertaken in a Member State of the EEA or the EU *substantively* by providing for such recognition only where the mother is entitled to a cash benefit stemming from maternity insurance under the ASVG or another Austrian federal law or to a maternity benefit under the *Betriebshilfegesetz*. [43]

42 — See above paragraphs 35 to 38.

43 — See paragraph 26.

Conclusion

76. In the light of all the foregoing observations, I am of the opinion that the question referred by the Oberster Gerichtshof should be answered as follows:

Article 94(1) to (3) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community does not preclude a provision of a Member State under which, for the purpose of pension insurance, periods of child-rearing completed in another Member State of the European Union or the European Economic Area are regarded as substitute qualifying periods only where they occur after the Regulation entered into force in the first State, whereas such periods completed in the first State are regarded as substitute qualifying periods without temporal limitation.