OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 7 June 2001 [1]

I — Introduction

1. Is the legislation of a Member State which makes payment of the highest ('head of household') rate of unemployment benefit subject to the condition that the unemployed person lives with other members of the family (without therefore taking into account those residing in another Member State) compatible with Community law? This, in substance, is the question for a preliminary ruling referred pursuant to Article 234 EC by the Tribunal du travail (Labour Court), Mons (Belgium), concerning, in particular, the interpretation of Articles 1(f) and 68(2) of 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 (OJ, English Special Edition 1971 (II), p. 416; hereinafter 'Regulation No 1408/71'), both in the version in force on 1 December 1990 and in the subsequent version resulting from amendments to and updating of Regulation No 1408/71 pursuant to Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; hereinafter 'Regulation No 118/97') which entered into force on 1 February 1997.

1 — Original language: Italian.

II — Relevant provisions

A — *Community legislation*

2. The provision primarily applicable in this case is Article 1(f)(i) of Regulation No 1408/71 as amended by Regulation No 118/97. That provision is identical in substance to Article 1(f) previously in force as amended by Article 1(2)(c) of Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1981 L 143, p. 1; hereinafter 'Regulation No 1390/81'). In order to avoid confusion in this text, references to Article 1(f), the original numbering of the provision in issue, should be understood as referring only to Article 1(f)(i).

3. Article 1(f)(i) provides:

'"member of the family" means any person defined or recognised as a member of the family or designated as a member of the

household by the legislation under which benefits are provided or, in the cases referred to in Article 22(1)(a) and Article 31, by the legislation of the Member State in whose territory such person resides; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the person in question is mainly dependent on that worker ... .'

4. Article 3(1) of Regulation No 1408/71 (not subsequently amended) provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

5. On the question of calculating unemployment benefits, Article 68(2) of Regulation No 1408/71 (also not subsequently amended) provides:

'The competent institution of a Member State whose legislation provides that the amount of benefits varies with the number of members of the family, shall take into account also members of the family of the person concerned who are residing in the territory of another Member State, as though they were residing in the territory of the competent State. This provision shall not apply if, in the country of residence of the members of the family, another person is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration.' [2]

6. To be borne in mind, finally, although it refers to family benefits, is Article 74 of Regulation No 1408/71 in the version of Regulation No 118/97 (which is identical in substance to the former Article 74(1) of Regulation No 1408/71, as amended by Regulation No 1390/81), which provides:

'An unemployed person who was formerly employed or self-employed and who draws unemployment benefits under the legislation of a Member State shall be entitled, in respect of the members of his family residing in another Member State, to the family benefits provided for by the legisla-

2 — There is a similar provision for sickness benefits (Article 23(3)), pensions (Article 47(3)) and compensation for accidents at work (Article 58(3)).

tion of the former State, as if they were residing in that State ... .'[3]

B — *National legislation*

7. Under Article 66 of the Royal Decree of 25 November 1991 on unemployment (*Moniteur belge* 31 December 1991, p. 29888; hereinafter 'the Royal Decree'), unemployment benefit is issued exclusively to unemployed persons actually residing in Belgium. Those 'with dependent family members', furthermore, receive benefits at a higher rate, known as the 'head of household' rate. To that end, Article 110(1) of the Royal Decree provides:[4]

'"Worker with a dependent family" means a worker who:

(1) lives with a spouse who has neither income from a trade or profession nor other income; in such a case no account shall be taken of the existence of any income of other persons with whom the worker lives;

(2) does not live with a spouse but lives exclusively with:

(a) one or more children, provided that he can claim family allowances for at least one of them, or that none of them has income from a trade or profession or other income;

(b) one or more children and other relatives by blood or marriage, to the third degree inclusive, provided that he can claim family allowances for at least one of those children and that the other relatives by blood or marriage have neither income from a trade or profession nor other income;

(c) one or more relatives by blood or marriage, to the third degree inclusive, who have neither income from a trade or profession nor other income.

(3) lives alone and who has been ordered to pay maintenance by a court or pursuant to a legal document in the context of divorce

3 — As well as Article 74 mentioned above, Regulation No 1408/71 contains a similar provision, Article 73, concerning employed workers whose family members reside in a Member State other than the competent State (the current Article 73 of Regulation No 1408/71, as updated by Regulation No 118/97, is identical in substance to the former Article 73(1) of Regulation No 1408/71 as amended by Regulation No 1390/81).

4 — Unofficial translation of the national provisions.

proceedings or separation by mutual consent.'

8. Article 114(3) of the Royal Decree provides, furthermore, that:

'For a worker with a dependent family, the daily basic amount of unemployment benefits shall be increased throughout the period of unemployment by a single complement for loss of income fixed at 5% of the average daily remuneration.' [5]

9. Regarding the concept of 'living together' referred to in Article 110 of the Royal Decree, Article 59 of the Ministerial Decree of 26 November 1991 setting out enforcement provisions of the Royal Decree (*Moniteur belge* of 25 January 1992, p. 1593; hereinafter 'the Ministerial Decree') provides that:

'Living together means the fact that two or more persons live together under the same roof and principally decide household questions jointly.

Members of the household are also deemed to live together if:

(1) they are called up for military service or serve as conscientious objectors;

(2) they are imprisoned, interned or placed in an establishment for mental patients during the first 12 months;

(3) they are temporarily resident elsewhere for professional reasons.'

III — Facts and the question for preliminary ruling

10. Mr Stallone, of Italian origin, obtained unemployment benefit for the first time in Belgium on 20 February 1978, after working from 16 May 1977 until 19 February 1978. From the documents in this case it emerges that, having received benefit at the rate for persons without dependent family members during the period 1991-1993, Mr Stallone applied on 20 September 1993 to the Office National de l'Emploi (National Employment Office ('ONEM')) for the benefit to be paid at the 'head of household' rate, stating that, although they had returned to Italy and resided there since

5 — See Articles 65 to 69 of the Ministerial Decree of 26 November 1991 mentioned below regarding the concept of average daily earnings.

1991, his wife and children were still dependent on him. The National Employment Office, defendant in the main proceedings, rejected the application, relying on the national provisions mentioned above, in particular Article 110 of the Royal Decree. Mr Stallone was informed that the application had been refused on 1 December 1993 when he went in person to the offices of the competent authority for payment.

11. As a result, Mr Stallone challenged the rejection of his application on 2 December 1993, bringing the action which gave rise to this reference. On the basis of the apparent contradiction between Community law (which for the purposes of calculating the amount of unemployment benefit precludes a condition of residency for family members in the competent Member State) and the Belgian legislation on unemployment, which, in substance, for the purposes of payment of unemployment benefit at the 'head of household' rate requires family members of the unemployed person to be resident in Belgium, the national court considered it appropriate to put the following question to the Court for preliminary ruling:

'Do the EC Treaties, the EC rules, and in particular Articles 1(f) and 68(2) of Council Regulation (EC) No 118/97 of 2 December 1996, in their current versions or in the version they had between 1 December 1990 and the date hereof, preclude Article 110(1), first and second subparagraphs, of the Royal Decree of 25 November 1991 concerning rules on unemployment in that this national provision makes the award of a better rate of unemployment benefit subject to a condition that the unemployed person lives with certain members of the family, and not solely to the condition that they are actually or mainly dependent on the unemployed person?'

IV — Legal analysis

A — *Introduction*

12. In the single question referred to the Court the national court is asking, essentially, whether Articles 1(f) and 68(2) of Regulation No 1408/71, in the original version and that following the entry into force of Regulation No 118/97, are incompatible with a national provision under which enjoyment of a higher rate (the 'head of household' rate) of unemployment benefit provided for workers with a dependent family is subject to the requirement that the unemployed worker live with members of his family within the competent Member State. As I said earlier, the provisions of Regulation No 1408/71 cited above have remained practically unchanged during the period of particular interest to the national court, from 1 December 1990 until today, so the answer to the question is not affected by the amendments introduced by Regulation No 118/97.

B — *Applicability of Regulation No 1408/71*

13. The Belgian Government objects, by way of a preliminary point, that Regulation No 1408/71 is not applicable to this matter because Mr Stallone's case constitutes a situation purely internal to a Member State. He was permitted to receive unemployment benefit on the basis of work carried out exclusively in Belgium, and in his application for unemployment benefit he stated that he lived in Belgium with his wife and one child. Moreover, the Belgian Government submits, he cannot be classified as a migrant worker simply because his family has returned to Italy.

14. In my view, however, this objection is in conflict with the relevant Community provisions and with the case-law of the Court of Justice also. The Court has stated that the regulations coordinating social security are not limited 'solely to migrant workers *stricto sensu* or solely to workers required to move for the purposes of their employment', [6] but apply to all citizens of the Member States insured affiliated to social security schemes established for workers. Indeed, the Court continues (and as the Commission recalled at the hearing), Article 1(a)(i) of Regulation No 1408/71 defines as a worker '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'; [7] Article 2(1) states that the regulation is to apply to employed or self-employed persons who 'are or have been subject to the legislation of one or more Member States.' In addition, according to the fifth recital of Regulation No 1408/71, in the original text, the rules on coordination of national social security legislations provided for in the regulation also include cases where the family members themselves move within the Community. Consequently, it must be taken that a worker such as Mr Stallone who receives unemployment benefit in a Member State and is therefore 'insured' within the meaning of Article 1(a)(i) of Regulation No 1408/71, and whose family has returned to its country of origin, falls within the scope *ratione personae* of the regulation, even where he has carried out his work only in the Member State paying the benefit. [8]

C — *Principles which may be deduced from the applicable Community legislation*

15. To turn to the substance of the question, I would recall, first of all, that the

6 — Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 29, which deals with an almost identical case to that of Mr Stallone.

7 — I refer here to the text of the article in the version currently in force.

8 — As well as *Kulzer*, cited above, see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 44.

legal basis of Regulation No 1408/71 is Article 51 of the EC Treaty (now, after amendment, Article 42 EC) which authorises the Council to adopt measures in the field of social security with the purpose of facilitating, in this respect too, freedom of movement for workers within the Community, as set out in Article 48 of the EC Treaty (now, after amendment, Article 39 EC). The object was to ensure that the worker's right to social security benefits would not be reduced without justification if he were to migrate, thus avoiding the concern that such reductions might discourage or penalise the exercise of freedom of movement. [9]

16. To achieve this the Community legislation, in this area also, is based on the fundamental principle of the freedoms enshrined in the EC Treaty, that is to say on the principle prohibiting discrimination on grounds of nationality. Article 3(1) of Regulation No 1408/71, which explicitly mentions the principle of equality of treatment between migrant workers and citizens of the host Member State, simply gives effect (within the field of application of the regulation) to the principle laid down in Article 48(2) of the EC Treaty and, in more general terms, to Article 6 of the EC Treaty (originally Article 7 of that Treaty and now, after amendment, Article 12 EC) which expressly prohibits any discrimination based on nationality.

17. As is well known, and as the Court has consistently held, the principle of equality of treatment is to be construed very widely, going beyond a mere prohibition on discrimination on grounds of nationality and extending to any restriction affecting workers (and, in general terms, those entitled to free movement) simply because they have exercised that freedom. According to abundant, settled case-law of the Court, '[the principle of equality of treatment of which Article 48(2) of the Treaty constitutes a specific expression], prohibit[s] not only overt discrimination based on nationality but also *all covert forms of discrimination* which, by applying other distinguishing criteria, lead in practice to the same result.' [10] Therefore, equality of treatment must be fully guaranteed and thus implies a strict prohibition on any national measure which, exclusively or predominantly, with respect to Community citizens established in another Member State, prevents or restricts, in law or in fact, the exercise of freedom of movement, whether the measure is direct and unambiguous, or whether

9 — With reference to Article 51, see Case 4/66 *Hagenbeek* [1966] ECR 425, and Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 11.

10 — Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 18; emphasis added. On this point see also, amongst many others, Case 237/78 *Toia* [1979] ECR 2465, paragraph 12; Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307, paragraphs 28 to 30; Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraph 32; Case C-57/96 *Meints* [1997] ECR I-6689, paragraphs 45 to 46; Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraphs 29 to 30 and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 39.

it is presented as an indirect or disguised restriction. [11]

18. In this context a number of provisions of Regulation No 1408/71 are relevant, including Article 1(f)(i), Article 68(2), Article 73 and Article 74 whose objective is that a Member State should not refuse social security benefits to a migrant worker simply because members of his family reside in a Member State other than that responsible for the grant of those benefits. As the Spanish Government (a participant in these proceedings) observes, that refusal constitutes a restriction on freedom of movement, given that the problem of family members residing outside the Member State responsible for payment of particular social security benefits usually arises in relation to migrant workers [12] and that, therefore, any other approach might discourage a Community worker from exercising that freedom. [13]

19. Having reconstructed in this way the meaning and the scope of the applicable Community provisions, it does not appear to me to be difficult to evaluate the compatibility with those provisions of the Belgian legislation in issue, in particular Article 110(1) of the Royal Decree in so far as it provides, for the purposes of calculating the unemployment benefit paid to workers actually residing in Belgium, that the highest rate paid to the 'head of household' is granted only if the spouse or other family members dependent on the worker live with him. As I see it, indeed, that requirement is clearly in conflict both with the general principles in this area as mentioned above and with the provisions of Regulation No 1408/71 which embody those principles, in that the requirement in issue, even if applicable without distinction, conceals in reality a discrimination to the detriment of migrant workers, since, as I have pointed out earlier, it is especially those workers who will be in a situation where they do not meet the requirement, that is to say the situation where the members of their family reside in another Member State.

20. The Belgian Government and ONEM, however, raise against that conclusion a whole series of objections which I shall now consider, distinguishing between those referring exclusively to Article 68(2) of Regulation No 1408/71 and those which are also based on the specific features of the Belgian legislation in issue.

11 — Amongst the many judgments laying down those principles see, besides those already cited, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case 41/84 *Pinna I* [1986] ECR 1, paragraph 23; Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 14; Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 10; Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 7, which includes further references, and Case C-266/95 *Merino García* [1997] ECR I-3279, paragraph 33.

12 — See, to this effect, *Pinna I*, cited above, paragraph 24; Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 38; *Merino García*, cited above, paragraph 35; and *Zurstrassen*, cited above, paragraph 19.

13 — See Case 228/88 *Bronzino* [1990] ECR 531, paragraph 12 and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 34, where additional references are given, both referring to Article 73; and Case C-12/89 *Gatto* [1990] ECR I-557, Summary Publication, referring to Article 74.

D — *Arguments based on Article 68(2) of Regulation No 1408/71*

1. Scope of the article

21. First, ONEM submits that Article 68(2) of Regulation No 1408/71 is not applicable in this case because its only purpose is to prevent penalisation of a migrant worker whose family has not been able to move with him and which has therefore been forced to *remain* in the country of origin; whereas in the case of Mr Stallone, the situation is different and, after the worker had moved with his whole family to another Member State, the family members then *returned* to their country of origin. ONEM claims that there is no restriction on freedom of movement in this case because it was the family which moved within the Community and not the worker.

22. As is apparent, the objection echoes in part that which I examined and rejected above regarding the applicability of Regulation No 1408/71. However, apart from that fact and the fact that, as we shall see, it contradicts other arguments developed in defence of the Belgian legislation in issue, I must confess that I fail to understand on what basis the distinction drawn by ONEM rests. Given that there is no trace of it in the text of Article 68(2), I must take it that it arises from an arbitrary interpretation of the article, all the more questionable in that it draws on criteria diametrically opposed to those which, according to settled case-law of the Court, must take precedence in the interpretation of provisions designed to encourage freedom of movement in the Community. It is clear that the argument under consideration amounts to restricting in a completely unjustifiable way the scope of a provision which, as ONEM itself recognises, seeks on the contrary to guarantee that freedom by reducing the negative effects of exercising it in cases (not in the least infrequent) where it leads to separation of members of a family. From that point of view, clearly, the exact time of the separation (whether at the same time as the worker's move or later) is irrelevant, as is the destination of the move (to the State of origin or another State) or the reason (family reasons, study, medical treatment, etc.). [14]

2. Difficulty of carrying out controls as required under the article

23. Still with a view to justifying the inapplicability of Article 68(2) in the case of Mr Stallone, ONEM goes on to invoke the administrative difficulties which it would face if migrant workers in the same situation as Mr Stallone were permitted, under that article, to receive unemployment benefit at the 'head of household' rate,

14 — For example, with reference to the prohibition on discrimination in the area of social advantages as set out in Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), the Court has recognised that it also applies to education grants paid to the children of migrant workers who have returned to study in their country of origin (see Case C-308/89 *Di Leo* [1990] ECR I-4185, paragraph 4; see also Case C-3/90 *Bernini* [1992] ECR I-1071, paragraphs 3 and 4).

given that the institution does not have suitable means for verifying whether the family members of the person concerned who have returned to the country of origin are actually dependent on him.

24. In that respect, I must point out first and foremost that, as Mr Stallone's representative emphasised at the hearing, Article 84 of Regulation No 1408/71, entitled 'Cooperation between competent authorities', provides that, for the purposes of implementing the regulation, those authorities are to lend their good offices and act as though implementing their own legislation. ONEM would therefore be able to ask for collaboration from the competent Italian institution in order to verify whether the members of Mr Stallone's family are actually dependent on him. That aside, however, I must also point out that the difficulties mentioned by ONEM in the case of members of a Community worker's family who have returned to the country of origin in no way differ from those which might arise if those family members have not from the outset wished or been able to accompany the migrant worker, a case which, as I have just pointed out, ONEM considers to be definitely covered by Article 68(2). Finally, I might also point to the fact that the alleged difficulties are, in all likelihood, of a lesser order than the difficulties which ONEM has to face in verifying compliance with the condition, required under Belgian legislation as we shall see shortly, that family members are living under the same roof, since the checks for that purpose might actually be more complex than those necessary to verify actual economic dependence, which involves only inquiring whether the family members have resources of their own or not. In any case, even if those checks were to involve difficulties of the kind indicated by ONEM, that could not in itself justify discrimination prohibited by Community law. As we know, it is settled case-law of the Court that a Member State may not plead provisions, practices or situations within its own legal system in order to justify failure to comply with obligations imposed by Community law. [15]

E — *Arguments based on the specific features of the Belgian legislation in issue*

1. Relevance of the *Acciardi* case

25. For the purposes of answering the question referred by the Belgian court, that court, but also certain participants in these proceedings, have made mention of a previous judgment by the Court which appears to confirm fully the allegation of the discriminatory nature of the Belgian rules in issue. I am alluding, of course, to the judgment in *Acciardi*, [16] where the Court held that 'subject to the second

15 — With reference specifically to the case of application of a Community regulation, see, lastly, Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 44, where there are further references.

16 — Case C-66/92 [1993] ECR I-4567.

sentence of Article 68(2) of Regulation No 1408/71, a provision ... under which the benefits granted to a national of another Member State are calculated without taking account of his spouse who lives in another Member State is contrary to the first sentence of Article 68(2) of that regulation' (paragraph 27). The Belgian Government and ONEM maintain, however, that the *Acciardi* case presents two major differences with respect to the one under consideration here which preclude its relevance for the purposes of the present case. As both the alleged differences concern aspects which have been heavily emphasised on the Belgian side, they should be given particular attention.

(a) Number of dependent members of the family

26. Firstly, ONEM submits, in particular, that the Netherlands legislation in issue in *Acciardi* made the amount of the benefits dependent on the number of family members dependent on the recipient; this therefore fell squarely within the scope of Article 68(2) of Regulation No 1408/71 which refers specifically to legislation in which 'the amount of benefits varies with the number of members of the family' and for this reason expressly requires those family members resident abroad to be taken into account. On the other hand, again according to ONEM, in accordance with Article 110(1) of the Royal Decree the 'head of household' rate for unemployment benefit, once it has been granted, does not vary according to the 'number of family members' who live with the worker; for the purposes of granting it, it is sufficient for the worker to live with just one of the persons listed in that provision, a person, furthermore, who may even not be part of the family circle (as we have seen, Article 110(1), in certain circumstances, even provides for cases where the worker lives alone). Whether there are one or more persons or whether they are family members is therefore immaterial for the purposes of the grant and the amount of the social advantage in question, because what counts is the fact that the worker does not live with a person who has earned income or other income. For that reason, ONEM submits, Article 110(1) of the Royal Decree does not in fact fall within the scope of Article 68(2) of Regulation No 1408/71 because, as already stated, it refers only to legislation under which 'the amount of benefits varies with the number of members of the family'.

27. Truth to tell, my impression is that the Netherlands rules considered in *Acciardi* were not very different in substance from the Belgian rules. However, it seems unnecessary to linger on this point, as, in my view, the argument which has just been mentioned amounts to straining the sense of Article 68(2) of Regulation No 1408/71 and proposes an interpretation of that provision which, by its extremely and unjustifiably restrictive nature, is diametrically opposed to the stated aims of the Community rules and makes a complete mockery of the interpretative criteria which

the Court has long and unequivocally set out regarding the provisions favouring freedom of movement. According to that argument, the provision requires national legislation which links the amount of a social advantage to the size of the family to take into account all dependent family members, whatever their place of residence; however, those family members are not to be taken into account where it is a case of preventing their residence in another Member State from prejudicing actual recognition of that social advantage. Thus, as ONEM itself recognises, a provision which is designed to protect migrant workers and which for this reason excludes any limitation on increasing the rate of benefit on the basis of the place of residence of family members, is said actually to authorise, for that very reason, a refusal to grant the higher rate. So, if by chance Belgian legislation had provided for a 'head of household' rate which varied according to the number of family members, dependent family members resident abroad would also have had to be included in its calculation; since, however, the rate is not variable, the benefit may even be refused altogether. Such a result appears to me to be so paradoxical as to render superfluous any other argument which might be used to emphasise how the contention under consideration completely betrays the meaning and the scope of the provision and, in a more general sense, the Community rules on freedom of movement. If the logic of the system and the indications in the legislation (Article 68(2) of Regulation No 1408/71 itself and also the definition of 'family member' under Article 1(f)(i) above) unequivocally militate in favour of precluding penalisation of a worker by reason of the residence of the members of his family in another Member State, an interpretation which purports to be consistent with those indications and not simply to play with words must take it that the 'plus' of the variation on the basis of the amount of benefits must necessarily include the 'minus' of the grant of those benefits.

(b) The requirement of living together

28. The other difference, according to the Belgian Government and ONEM, which *Acciardi* presents in relation to the circumstances under consideration here is that, whilst that case was concerned with a national rule which expressly made the amount of benefits dependent on *residence* of the family member in the Member State providing the benefits, the Belgian rules under discussion in these proceedings instead require family members *to live with* the unemployed worker in the competent Member State. This, the defendant submits, is therefore a very different condition, not dependent on place of residence, because it might not be complied with even if all the persons concerned reside in the same State. That is why, moreover, it is claimed, that that condition does not entail any kind of discrimination between migrant workers and other workers, given that it affects in the same way all workers residing in Belgium, whatever their nationality and independently of whether the members of the family who do not live with the worker reside in Belgium or elsewhere.

29. The first objection to be raised against that contention, as mentioned in the order for reference itself, is that it appears to be contradicted in Article 1(f)(i) of Regulation

No 1408/71, a provision whose general scope in this field is clear, and which requires national legislation that 'regard[s] as a member of the family or a member of the household only a person living under the same roof as the worker' to deem that condition to be met where the person is dependent on the worker. To expect them to live under the same roof, as the Belgian legislation requires, amounts, therefore, to infringing that obligation.

30. The response on the part of the Belgian Government and ONEM is that, in reality, Article 1(f)(i) of Regulation No 1408/71 is not in any sense applicable in the case here, because it concerns legislation which 'regard[s] as a member of the family or a member of the household only a person living under the same roof as the worker', while the Belgian legislation authorises the grant of the 'head of household' rate also where the parties concerned do not live under the same roof. This is so, in particular, in the cases listed in the second paragraph of Article 59 of the Ministerial Decree, that is to say, persons who are called up, persons who are carrying out a service as conscientious objector, persons in prison or in a similar situation or persons who are temporarily abroad for professional reasons.

31. Apart from the fact that, put in these terms, the argument is in conflict with the next argument I shall deal with, which is strictly based on the requirement of living together in order to justify the grant of the social advantage in question, I must point out that it fails to address a consideration which, in my view, is decisive, that namely that, in reality, in the cases listed above, the persons are 'living together', but only in law and not in fact. In other words, the second paragraph of Article 59 of the Ministerial Decree establishes a *legal presumption* of living together which treats the persons listed in that provision as 'living together' and, precisely because this is a legal presumption, it precludes any verification of the facts. Moreover, in these cases, it is certain that the persons concerned are not in fact living together; however, thanks to the legal rule, it is 'pretended' that they are. This means that the cases listed constitute, not an exception, but a confirmation of the rule on living together, given that in order to offset the consequences of particular situations whilst preserving the rule, the law has recourse to that presumption. Article 1(f)(i) is therefore fully applicable also to the national legislation in issue here.

32. The Belgian Government and ONEM object, however, that whilst the last-mentioned Community provision simply mentions the fact of *living under the same roof*, the Belgian legislation speaks of *living together*; the Belgian law thus lays down a further, different condition which qualifies that laid down in the Community provision in that, much more openly and directly, it emphasises the idea of a family 'community', that is to say the idea, as is made clear in Article 59 of the Ministerial Decree, of a group of persons who not only live under the same roof, but who deal with and settle domestic matters jointly. In my view, however, that clarification, too, on which much stress was laid during the

proceedings, cannot succeed in preserving the compatibility of the Belgian legislation with Community law.

33. I would observe, first of all, that while living under the same roof is not in itself synonymous with 'living together', as the Belgian legislation acknowledges, the fact of not doing so does not in turn necessarily imply the absence of a family community. Thus, it cannot be ruled out in absolute terms that members of a family group residing in different Member States may, nevertheless, constitute a 'community', dealing with and settling — in ways made less easy, certainly, by the distance involved, but always possible, especially nowadays — the principal problems of the family group. For this purpose, what appears to me to be really decisive is not so much living under the same roof, which at most may give rise to a presumption, but the *animus*, the will to preserve the unity and the cohesion of the family. Nor, moreover, in that sense, can one rule out that a family, forced by legitimate obligations to live apart, but in spite of that determined to maintain and preserve the family community, may sometimes succeed in doing so, and even more so and better than those who live or who are presumed to live under the same roof. Certainly, its chances of succeeding will be greater than — to take an example from Article 59 of the Ministerial Decree mentioned a number of times during the hearing — in the case of a family which counts among its members a person who is imprisoned or interned, perhaps for some action or offence against his (own) family, and whom, nevertheless, the Belgian legislation regards, by definition, as 'living together' with its members. But even without recourse to such extreme, although not imaginary, cases, the fact remains that the very examples taken from Article 59 of the Ministerial Decree prove that living under the same roof is not always indispensable in order to be able to speak of living together, and that where the law has considered it necessary to have recourse to a legal presumption of this kind in order to deal with legitimate requirements, then there is all the more reason to proceed along the same lines in cases of separation brought about by the exercise of freedom of movement, thus bringing the national legislation into conformity with Community law. In short, my point is that, in light of the principles and rules in force in this field, the Belgian legislation in issue should be interpreted as meaning that the requirement of living together should be presumed as satisfied, in line with the cases listed in Article 59 of the Ministerial Decree and with the provisions of Article 1(f)(i) of Regulation No 1408/71 as regards living under the same roof, in the case also of members of the family of a migrant worker who have returned to their State of origin.

34. Failing that, whilst understanding the choices of legislative policy made by the Belgian State, I can only reiterate the opinion I have expressed earlier that the requirement of living together must be regarded as contrary to the Community legislation. That requirement is, in fact, tantamount, as all the other participants in these proceedings and the referring court itself have pointed out, to imposing in fact on the members of the family of a migrant worker a similar requirement (even more stringent, in fact, in certain aspects) to that

of residence in the competent State, that is to say, to imposing a restriction strictly prohibited by Community law in order for a worker to receive a social advantage. With respect to that restriction, therefore, the same reasons apply as those which prohibit the residence requirement, because, notwithstanding the claims on the Belgian side, the requirement of living together does not affect migrant workers and non-migrant workers in the same way, and it therefore also constitutes disguised discrimination based on residence.

35. The truth is, as I stated earlier, that ONEM contests the existence of that discrimination and even turns the objection on its head. In its opinion, what leads to discriminatory results is precisely the argument that would extend the application of Article 68(2) of Regulation No 1408/71 to workers in Mr Stallone's situation. An extension of this kind implies, ONEM claims, discrimination against Belgian workers who have dependent members of their family not living under the same roof, although also resident in Belgium; unlike the migrant workers, those workers are not entitled to unemployment benefit at the 'head of household' rate. In making that rate subject to the same conditions for all workers, the Belgian legislation avoids such discrimination.

36. In my opinion, however, that reasoning once more overlooks the fact that the two situations mentioned are not identical and that, precisely for this reason, in accordance with well-known principles, they may not be treated in the same way. In particular, it overlooks the fact that in one case, but not in the other, there has been emigration from one Member State to another. Moreover, precisely for this reason, well-known and settled Community case-law has made it clear that Articles 48 and 51 of the EC Treaty, as well as Regulation No 1408/71, do not apply to situations all of whose elements are confined to one Member State [17] and that, 'consequently, Community legislation regarding freedom of movement for workers cannot be applied to the situation of workers who have never exercised the right to freedom of movement within the Community'. [18] That rule does not therefore preclude a non-migrant worker from not being entitled to a social advantage to which, in contrast, in that same Member State, a worker from another State is entitled by reason of the fact that he is a migrant. [19]

37. In short, in the light of the foregoing observations, I consider that it may be concluded that the national provisions referred to in the question for preliminary ruling involve discrimination prohibited by Community law.

17 — For all other cases see Case C-153/91 *Petit* [1992] ECR I-4973, paragraphs 8 and 10, including additional references, and Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paragraphs 10 et seq., including additional references.

18 — *Koua Poirrez*, cited above, paragraph 12.

19 — *Koua Poirrez*, cited above, paragraph 15 and operative part; on the same subject see Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraphs 16 to 21.

V — Conclusion

38. On the basis of the considerations set out above, I therefore propose that the Court should declare that:

The rules of Community law, and in particular Articles 1(f) and 68(2) 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, both in the original version and as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, must be interpreted as meaning that they preclude, without prejudice to the second sentence of Article 68(2), legislation of a Member State such as the first and second subparagraphs of Article 110(1) of the Belgian Royal Decree of 25 November 1991 on unemployment which makes the award of a higher rate of unemployment benefit to an unemployed worker with a dependent family subject to the requirement that he live together with certain members of the family in the territory of the competent Member State.