OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 28 October 2004 [1]

I — Introduction

1. The applicant in the main proceedings, Mrs García Blanco, received a special form of unemployment benefit in Spain in the past. During that period the State employment agency paid contributions into the statutory pension insurance scheme on her behalf. Having reached the age of 65 years, Mrs García Blanco now wished to receive a statutory retirement pension. A point of dispute in the main proceedings was whether the pension contributions paid while the special unemployment allowance was being drawn should also be taken into account in the calculation of the qualifying period for the statutory retirement pension or whether failure to take them into account constituted discrimination against migrant workers on grounds of nationality.

2. In this context the Juzgado de lo Social nº 3 de Orense ('the referring court') has referred to the Court of Justice two questions concerning the interpretation 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 ('Regulation No 1408/71'). [2] These questions have the same content as those submitted in Case C-306/03 (*Salgado Alonso*). [3]

3. As, however, a statutory retirement pension has been approved for Mrs García Blanco during the proceedings before the Court of Justice, the question now arises whether the request for a preliminary ruling has become devoid of purpose.

1 — Original language: German.

2 — OJ, English Special Edition, 1971(II), p. 416. Articles 90 and 91 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrected in OJ 2004 L 200, p. 1) provide for the repeal and replacement of Regulation No 1408/71. For reasons of time, however, Regulation No 1408/71 remains applicable to the present case; the version of Article 1(r) decisive here derives from Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1), all other provisions cited being contained in the version of Regulation No 1408/71 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

3 — See my Opinion of today's date in Case C-306/03, judgment of 20 January 2005, p. I-705, p. I-707.

II — Legal background

A — *Community law*

4. The background to this case in Community law is formed by Regulation No 1408/71. Article 1(r) of that regulation defines the term 'period of insurance' as follows:

'periods of contribution or of employment or self-employment as defined or recognised as period[s] 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; periods completed under a special scheme for civil servants are also considered as periods of insurance.'

5. Article 3(1) of Regulation No 1408/71 reads as follows:

'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 the State.'

6. Article 45(1) of Regulation No 1408/71 provides as follows with respect to the taking into consideration of periods of insurance and residence:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.'

7. Article 46(2) of Regulation No 1408/71 reads as follows:

'Where the conditions required by the legislation of a Member State for entitlement

to benefits are satisfied only after application of Article 45 and/or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.'

8. With regard to periods of insurance and residence of less than one year, Article 48 of Regulation 1408/71 provides the following:

'1. Notwithstanding Article 46(2), the institution of a Member State shall not be required to award benefits in respect of periods completed under the legislation it administers which are taken into account when the risk materialises, if:

— the duration of the said periods does not amount to one year,

and

— taking only these periods into consideration, no right to benefit is acquired by virtue of the provisions of that legislation.

2. The competent institution of each of the Member States concerned shall take into account the periods referred to in paragraph 1, for the purposes of applying Article 46(2) excepting subparagraph (b).

3. If the effect of applying paragraph 1 would be to relieve all the institutions of the Member States concerned of their obligations, benefits shall be awarded exclusively under the legislation of the last of those States whose conditions are satisfied, as if all the periods of insurance and residence completed and taken into account in accordance with Article 45(1) to (4) had been completed under the legislation of that State.'

B — *National legislation*

9. Article 161(1)(b) of the new version of the Spanish General Law on Social Security (*Texto Refundido de la Ley General de la Seguridad Social*,[4] hereinafter 'TRLGSS') makes the entitlement to a retirement pension dependent on the completion of two qualifying periods:

— a general period of at least fifteen years of contributions;

and

— a specific period of two years of contribution within the fifteen years immediately preceding the date of the operative event.

10. Even before the statutory retirement age, unemployed persons who have reached the age of 52 years are granted, pursuant to Article 215.1.3 TRLGSS, a special form of unemployment allowance (*subsidio por desempleo*, hereinafter 'special unemployment allowance'). One of the conditions is that those concerned are able to prove that they have contributed to the statutory unemployment insurance scheme for at least six years and also satisfy all the requirements for the granting of a statutory retirement pension, with the exception of the retirement age.

11. Article 218(2) TRLGSS requires the statutory unemployment benefit agency (*Organismo Gestor del Seguro de Desempleo*) to pay not only the special unemployment allowance to the recipient but also statutory retirement pension contributions into the

4 — In the version of Real Decreto Legislativo 1/1994 of 20 June 2004 (*Boletín Oficial del Estado* [BOE] No 154 of 29 June 2004), amended by Law No 50/1998 of 30 December 1998 (BOE of 30 December 1998, entered into force on 1 January 1999).

social security scheme, on behalf of the recipient, for each calendar month in which he has been entitled to the allowance.

12. The effect of the pension contributions paid for the recipients of special unemployment allowance is restricted by the 28th Additional Provision of the TRLGSS [5] as follows:

'Retirement contributions paid by the benefit agency in accordance with the provisions of Article 218(2) [TRLGSS] shall be taken into account in calculating the amount of the basis of the retirement pension and the percentage applicable to it. The validity and legal effect of those contributions cannot in any circumstances be invoked in order to claim credit for the minimum period of contributions required under Article 161(1)(b) [TRLGSS], which, under Article 215(1)(3), ought to have been claimed at the time of application for the allowance for persons over 52 years of age.'

5 — Introduced by the 21st Additional Provision of Law No 50/1998 (cited in footnote 4).

13. In administrative practice, however, the contributions paid into the statutory retirement pension scheme by INEM on behalf of the recipients of special unemployment allowance are taken into account in connection with Article 48(1) of Regulation No 1408/71; this is evident from a joint administrative order issued by INSS and INEM in 1999. [6]

III — Facts of the case and procedure

Background

14. Mrs Rosa García Blanco, who was born on 9 October 1935 and died on 14 May 2002, [7] worked as an employee in Germany from 1966 to 1984. She paid contributions

6 — Circular No 3/99 of 16 April 1999 (Circular conjunta sobre modificación de los criterios de reconocimiento del subsidio por desempleo establecido en el artículo 215.1.3 del TRLGSS para mayores de 52 años, que afectan a trabajadores emigrantes retornados de la Unión Europea/Espacio Económico Europeo); the third instruction in this circular reads: '*Las cotizaciones efectuadas por el INEM durante la percepción del subsidio para mayores de 52 años por la contingencia de jubilación ... deberán tenerse en cuenta, a efectos de lo dispuesto en el artículo 48.1 del Reglamento CEE 1408/71 cuando el interesado solicite la pensión contributiva de jubilación española que le corresponda.*'

7 — According to information provided by her representative at the hearing.

into the German statutory pension insurance scheme for 209 months (more than 17 years).

15. From 1 June 1984 until 2 December 1984 Mrs García Blanco received in Spain, on the basis of a German-Spanish agreement, contributory benefits from the State employment agency (*Instituto Nacional de Empleo*, 'INEM') under the statutory unemployment insurance scheme. During that period INEM also paid on her behalf contributions to all sections of the statutory Spanish social security system (including the statutory pension insurance scheme), giving a contribution period of 185 days (about six months).

16. From 1989 Mrs García Blanco received the special unemployment allowance for workers over 52 years of age. In this connection INEM paid on her behalf contributions into the statutory Spanish pension insurance scheme for a period of 4 080 days (more than 11 years) in accordance with Article 218(2) TRLGSS.

17. As is further evident from the case-file, Mrs García Blanco received a statutory pension for family members from 1 December 1989 as a result of the death of her mother, with whom she had lived.

Application for a statutory retirement pension

18. On reaching the age of 65 in the year 2000, Mrs García Blanco applied to the Spanish social security authorities for a statutory retirement pension. By decision of 27 April 2001 the Spanish social security institution (*Instituto Nacional de Seguridad Social*, hereinafter 'INSS') rejected this application. As grounds, INSS stated that Mrs García Blanco had not completed the required minimum contribution period in Spain. Pursuant to the 28th Additional Provision of the TRLGSS, the period of 4 080 days during which INEM had paid pension contributions for Mrs García Blanco as a recipient of the special unemployment allowance could not be taken into account. Pursuant to Article 48(1) of Regulation No 1408/71, the remaining period of 185 days, in which social security contributions had been paid for Mrs García Blanco as a recipient of contributory benefits under the statutory unemployment insurance scheme in Spain, could not be taken into account because it was shorter than one year.

19. Mrs García Blanco applied to the referring court for legal protection against this rejection. She brought an action against

the *Tesorería General de la Seguridad Social* ('TGSS'), arguing in essence that not only her original pension contribution period in Spain of 185 days but also the contributions paid into the statutory pension insurance scheme by INEM on her behalf while she was in receipt of the special unemployment allowance should now be taken into account in her favour; she would then achieve a total of 4 265 days of contributions (more than eleven years and eight months) in Spain.

Request for a preliminary ruling

20. By order of 30 March 2002 the Juzgado de lo Social n° 3 de Orense stayed its proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Do Article 12 and Articles 39 to 42 of the Treaty on European Union (Article 6 and Articles 48 to 52 of the Treaty establishing the European Community) and Article 45 of Council Regulation (EEC) No 1408/71 of 14 June 1971 preclude a national provision under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of completing the various qualifying periods established in the national legislation and of conferring entitlement to the old-age pension, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which are invalidated by law, with the result that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 45 of the aforementioned EEC Regulation, those qualifying periods would have to be regarded as completed?

2. Do Article 12 and Articles 39 to 42 of the Treaty on European Union (Article 6 and Articles 48 to 52 of the Treaty establishing the European Community) and Article 48(1) of Regulation (EEC) No 1408/71 preclude national provisions under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of determining whether the

total duration of insurance periods or periods of residence covered by the legislation of that State amounts to one year, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which fall due and are paid during unemployment, so that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 48(1) of the aforementioned EEC Regulation, the national benefit agency could not be relieved of the obligation to award national benefits?'

Procedure since the referral of the request for a preliminary ruling

21. By letter of 8 April 2003 INSS informed the Court of Justice that the statutory retirement pension for which the — now deceased — Mrs Rosa García Blanco had applied had been approved by decision of 3 April 2003. The decision further included a request that a choice be made between that retirement pension and the pension for family members approved earlier, [8] since the two were not compatible, i.e. could not both be paid at the same time. Mrs Dolores García Blanco, daughter of and legal successor to the insured, immediately opted for a pension for family members.

22. In these circumstances, the Registrar of the Court of Justice asked the referring court by letter of 10 April 2003 to clarify whether it was withdrawing its request for a preliminary ruling. By letter of 11 April 2003 the referring court replied that it was maintaining its request, *inter alia* because the answer from the Court of Justice could be used in other proceedings pending before that national court.

23. In two letters dated 7 July 2003 and 18 September 2003 the Registry of the Court of Justice again asked the referring court whether the main action was still pending before it. The Registry also pointed out that the Court of Justice was competent only to respond to a request for a preliminary ruling relating to proceedings pending before a national court. It reminded the referring court that it was free to submit the same questions to the Court of Justice for a preliminary ruling in another action pending

8 — See paragraph 17 of this Opinion.

before it. In its reply of 1 October 2003, however, the referring court reaffirmed that the main action was still pending before it; in particular, the applicant had not withdrawn her application, and the defendants had not explicitly withdrawn their original refusal of a pension, which was the subject of the main proceedings.

24. In the proceedings before the Court of Justice Mrs García Blanco, the Commission and — jointly — INSS and TGSS have made written and oral observations. The German Government has commented on the proceedings in writing, the Spanish Government orally.

IV — Appraisal

25. The course taken by the proceedings raises doubts as to whether the Court can answer the questions referred to it for a preliminary ruling.

26. It is, of course, solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. It may refuse to rule on a question referred to it by a national court only where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main proceedings or their purpose, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [9]

27. However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, [10] since the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not

9 — See in particular Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 74, and Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* [2004] ECR I-2943, paragraph 72.

10 — *PreussenElektra* (paragraph 39) and *EVN and Wienstrom* (paragraph 75), both cited in footnote 9.

to deliver advisory opinions on general or hypothetical questions. [11]

A — *Original admissibility of the request for a preliminary ruling*

28. The request for a preliminary ruling was originally due, in particular, to the fact that, at the time when she made her application, Mrs García Blanco had apparently completed only one of the two qualifying periods required by Article 161(1)(b) TRLGSS: although the periods of insurance of over 17 years which she had completed in Germany and which must be considered pursuant to Article 45(1) of Regulation No 1408/71 were sufficient for the general qualifying period of 15 years, the information available appears to indicate that Mrs García Blanco had not completed the special qualifying period of two years of contributions within the 15 years immediately preceding the operative event. As evidence of this special qualifying period Mrs García Blanco would thus have had to fall back on the pension contributions paid for her by INEM while she was receiving the special unemployment allowance. This is, however, precluded by the 28th Additional Provision of the TRLGSS, according to which such a contribution period may have the effect merely of increasing, not of establishing entitlement.

29. Thus, when the questions were submitted, it was still relevant to the decision in the main proceedings whether Articles 45 and 48 of Regulation No 1408/71 and Articles 39 EC to 42 EC preclude a national provision such as the 28th Additional Provision of the TRLGSS. Consequently, the request for a preliminary ruling was clearly admissible at that time.

B — *The request for a preliminary ruling devoid of purpose*

30. As the written and oral procedures revealed, however, the following two changes to the circumstances underlying the main proceedings have occurred in the interim: firstly, the statutory retirement pension for which Mrs García Blanco had applied was approved. And secondly, her legal successor decided not to claim that statutory retirement pension — even though it had now been approved — but instead to draw another, higher pension for family members.

11 — *Bosman* (paragraph 60), *Der Weduwe* (paragraph 32) and *EVN and Wienstrom* (paragraph 75), all cited in footnote 9.

31. Each of these two changes to the circumstances has since then precluded the relevance to the decision of the questions referred, since the approval of the statutory retirement pension in the interim has made it clear that there is no longer any disagreement between the parties about the completion of qualifying periods. Secondly, by opting for a pension for family members, the applicant in the main proceedings has demonstrated that she no longer wishes to receive the statutory retirement pension for which an application was originally submitted.

32. Nor does there appear to be any disagreement between the parties to the main proceedings regarding outstanding payments. Thus the defendants confirmed at the hearing before the Court of Justice, in response to a comment by the applicant's representative, that the statutory retirement pension had been approved for Mrs García Blanco from the age of 65 years and that there was therefore no disagreement concerning possible outstanding payments.

33. Even if, then, as the referring court has repeatedly emphasised, the main action is still (formally) pending before it and its request for a preliminary ruling has not been withdrawn, the issues of Community law raised in the two questions submitted are now no more than hypothetical in nature. The request for a preliminary ruling is now superfluous.

34. Should the same points of law arise again in other proceedings, the referring court is free to make them the subject of further requests for preliminary rulings. In the present case, however, answering the questions submitted would not help to resolve a dispute but merely constitute an advisory opinion on Community law, for which the Court of Justice lacks jurisdiction under the procedure for which Article 234 EC provides.

C — *Implications for the preliminary-ruling procedure*

35. The Court is thus faced with the rather rare case of a request for a preliminary ruling which, though originally admissible, has

since become superfluous as a result of a change of circumstances.

36. A first option for the Court would be to remove the case from the register of the Court's own motion. [12] Articles 77 and 78 of the Rules of Procedure of the Court of Justice [13] provide for such removal in the event of the parties reaching an agreement or of the proceedings being discontinued. If these provisions — or at least the ideas underlying them — were to be applied in the present case, the nature of the preliminary-ruling procedure would certainly have to be taken into account in accordance with Article 103(1) of the Rules of Procedure, that procedure being a cooperative procedure between the Court of Justice and the courts of the Member States. A discontinuance comparable to Articles 77 and 78 of the Rules of Procedure would therefore have to be declared by the referring court as the initiator of the request for a preliminary ruling. In the present case, however, the national court has never declared to the Court of Justice that it was withdrawing its request for a preliminary ruling or that the dispute pending before it had become devoid of purpose. On the contrary, it has reaffirmed in response to several queries that it was upholding its request. In contrast to the circumstances covered by Articles 77 and 78 of the Rules of Procedure, the removal of the case from the register would therefore in no way be the mere procedural consequence of what had previously been declared to the Court of Justice.

37. A second conceivable option for the Court of Justice would be to declare the request for a preliminary ruling inadmissible or to declare itself lacking in jurisdiction. This solution would not, however, take due account of the development of the circumstances in the case since the questions were referred to the Court. Those questions were not inadmissible from the outset: they became groundless only after the request for a preliminary ruling had been submitted. This should be reflected in the Court's decision.

38. This being the case, I feel that preference should be given to a third solution. The Court should rule *that an answer to the questions referred for a preliminary ruling is no longer necessary*. This was the approach adopted by the Court in the *Djabali* case, [14] which has clear similarities to the facts of the main action. In that case, too, the competent

12 — As argued by Advocate General Jacobs in paragraph 23 of his Opinion in Case C-314/96 *Djabali* [1998] ECR I-1149, I-1151.

13 — Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ 1991 L 176, p. 1, last amended by decision of 19 April 2004, OJ 2004 L 132, p. 2).

14 — Case C-314/96 *Djabali* [1998] ECR I-1149.

government agency had initially denied the applicant a social benefit and granted it to her later, after an action had been brought and a request for a preliminary ruling had been submitted by the national court concerned.

39. By stating that there is no longer any need to answer the questions referred for a preliminary ruling, the Court of Justice will indicate that the questions submitted were not inadmissible from the outset, but that because of events occurring during the proceedings the Court no longer has jurisdiction to answer them.

V — Conclusion

40. In view of the foregoing, I propose that the Court should rule on the questions referred to it by the Juzgado de lo Social n° 3 de Orense for a preliminary ruling as follows:

There is no longer any need to answer the questions referred for a preliminary ruling.