

2. Article 79 (3) is applicable only to the extent of the amount actually paid by virtue of the pursuit of a professional or trade activity.

Mackenzie Stuart

Pescatore

Touffait

Delivered in open court in Luxembourg on 6 March 1979.

A. Van Houtte

A. J. Mackenzie Stuart

Registrar

President of the Second Chamber

**OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 1 FEBRUARY 1979¹**

*Mr President,
Members of the Court,*

1. The preliminary question which is submitted to you in the present case concerns the interpretation of one of the rules against the overlapping of benefits contained in Regulation No 1408/71, relating to social security for migrant workers: namely a provision of Article 79 (3) included in the chapter which deals in particular with family allowances for dependent children of pensioners.

The plaintiff in the main action, Mr Rossi, an Italian national, worked first in Italy, as an agricultural worker, and later in Belgium, as a labourer, from 1948 to 1958. As he suffered from an occupational disease, he was granted an invalidity pension from 1964, which is provided by the Belgian institution responsible for such benefits.

In addition to the pension, he received, likewise in Belgium, until February 1973,

family allowances for his two daughters. But, from March 1973, the payment of the family allowances was suspended on the ground that, as the plaintiff's wife was working in Italy, she was entitled, in the Belgian institution's view, to receive the allowances for the children from the corresponding Italian authority.

Mrs Rossi then asked the Istituto Nazionale della Previdenza Sociale [National Social Security Institution] to pay her the allowances in question. However, the Istituto, by its decision of 13 April 1976, rejected the application, maintaining that "the status of head of household," for purposes of family

¹ — Translated from the Italian.

allowances, with regard to the children, belongs to the father and cannot be transferred to another person unless the father is an invalid or unemployed”.

Faced by the refusal of both social security authorities, Mr Rossi took the case to the Tribunal du Travail [Labour Tribunal], Charleroi, which, by a judgment of 19 April 1978, submitted to the Court the following preliminary questions:

“1. Is Article 79 (3) of Regulation No 1408/71 of the Council of the EEC made inapplicable by the fact that Italian legislation does not, for the purpose of granting family allowances, allow the capacity of head of household to be transferred to the wife when the husband is receiving a pension (Fonds des Maladies Professionnelles) from another Member State?

In other words, must the Belgian institution assume responsibility for paying family allowances if a right exists in Italy by virtue of the pursuit of a professional or trade activity by a member of the family of the person receiving a pension but such right is imperfect owing to a particular feature of Italian legislation?

2. Assuming that the Italian authority's attitude is no longer justifiable at the present time in view of the principles of equal rights for men and women, should not the Belgian institution award the difference between the amount of the Italian family allowances in order to protect rights acquired under the legislation of the country of last employment and thus prevent unequal treatment of workers who have had to satisfy the same conditions to obtain the pension.”

2. In order to understand the purport of Article 79 (3) of Regulation No 1408/71, it is necessary first of all to take account of the rules governing the

award of benefits for dependent children of pensioners (Article 77 (2)). When, as in the present case, the pension is due under the legislation of one Member State only, the benefits are granted “in accordance with the legislation of the Member State responsible for the pension” (subparagraph (a)). But Article 79 (3) provides that, where entitlement to family benefits or family allowances in respect of the children arises under the legislation of another Member State by virtue of the pursuit of a professional or trade activity, “the right to benefits due under paragraph (2) and under Articles 77 and 78 shall be suspended”.

This provision to prevent the overlapping of benefits has the same function as the analogous rule contained in Article 76, which concerns workers and unemployed persons. In fact Article 76 provides that “entitlement to benefits or family allowances under Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing”. As the Commission has observed, the difference between the two provisions is negligible: both concern cases of duplication of entitlement to family allowances as a result of work undertaken in another Member State.

In these circumstances I am of the opinion that the principles of law laid down by the Court of Justice in the *Ragazzoni* case with direct reference to Article 76 (judgment of 20 April 1978 in

Case 134/77, [1978] ECR 963) provide the criteria required to enable us to interpret Article 79 (3) also and to give an answer to the first question submitted by the court in the main action. In the case cited, the Court held that the suspension of entitlement to benefits or family allowances, provided for in Article 76 of Regulation No 1408/71 does not apply when the father works abroad in a Member State and the mother, in employment in the country of residence of the other members of the family, has not become entitled, under the law of that country, to family allowances either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

In the case with which we are concerned now it makes no difference whether the father and mother's places of residence are different or whether they happen to be the same, because the father is a pensioner. Article 79 (3), as we have seen, merely imposes the condition that the children provide an entitlement to benefits or family allowances under the legislation of a Member State (which may also be that in which the pensioner resides), by virtue of the pursuit of a professional or trade activity (usually, but not necessarily, by the mother). The decisive question, therefore, is whether or not entitlement to family allowances in respect of the children has arisen, under the law of the State in which the mother is employed, as a result of such employment; if the answer is in the negative it is clear that the suspension provided for in Article 79 (3) does not occur.

We have seen that, under the Italian provisions in force at the time of Mrs Rossi's application to the Istituto, it was decided that there was no entitlement to family allowances in respect of the children where the mother was working, owing to the fact that the status of head of household was restricted to the father.

Subsequently, by virtue of Law No 903 of 9 December 1977 (which came into force on 18 December 1977) the possibility of paying family allowances alternatively to a working wife was recognized. That implies, of course, the need for an application from the wife and a declaration by the husband that he is willing to renounce the allowances in respect of the same members of the family, assuming that he also is entitled to them and is taking advantage of that entitlement. Until these conditions have actually materialized, it cannot be said that a working wife is entitled to payment of the allowances in respect of the children: thus we arrive at a negative answer to the question formulated earlier for the purpose of applying the above-mentioned Article 79 (3).

3. The second question submitted by the Tribunal of Charleroi is based on the assumption that the attitude of the Italian Social Security Institution "is no longer justifiable at the present time in view of the principles of equal rights for men and women". Of course, this assumption has been rendered obsolete as a result of the above-mentioned amendment to the Italian legislation, an amendment which should now permit Mrs Rossi — if she were to make a further application to the Istituto — to obtain the family allowances for the children. But precisely for this reason — apart from the fact that the argument is of general interest — I believe that it is appropriate to answer the court's second question also.

Let us suppose, then, that a working mother has become entitled to the family allowances in respect of her children under Italian law; in such a case, can the father ask the Belgian institution to pay the difference between the allowances paid under Italian law and the possibly larger amount due under Belgian law? In other words: will the suspension provided for by the above-mentioned Article 79 (3) of Regulation No 1408/71 always and necessarily be total, or can it be partial in a case where a smaller amount of allowances is provided by the other Member State in which the mother works?

With regard to this question, various solutions have been proposed by those who have taken part in the present proceedings.

In the Belgian Government's view no provision of Regulation No 1408/71 confers any right to supplementary family allowances at the expense of a country other than the one required to provide for the payment of the allowances.

The plaintiff, on the other hand, has submitted that, when the payment of the child allowances comes within the scope of Article 77 of the above-mentioned regulation, the application of Article 79 (3) cannot involve a reduction in the substance of the right to the allowances by virtue of the application of a less favourable provision of the law of the country in which the mother works. However, it is not clear whether, in the opinion of the plaintiff, the obligation to make the supplementary payment is based on Belgian domestic law or on Community law.

A clearer position, on this question, is that taken by the Commission during the oral procedure. The Commission, which had initially adopted the same stance as the Belgian Government, subsequently submitted that Article 79 (3) could not impede the application of the more favourable Belgian law, and it referred to

the last paragraph of Article 60 of the Arrêté Royal [Royal Decree] of 19 December 1939, which provides that "si les allocations familiales dues à un autre titre sont inférieures à celles dont l'octroi est prévu par la présente loi, la personne qui est en droit d'invoquer celle-ci peut prétendre à la différence" [if the family allowances due under some other form of entitlement are less than those for the grant of which provision is made by this law, a person who is entitled to rely upon this law may claim the difference].

Finally, according to the argument advanced by the Italian Government, Article 79 (3), which presupposes that the entitlement to family allowances in respect of children is governed by the law of the State which provides the pension (by virtue of Article 77 (2) (a)), could not in any case lead to the application, without more, of a less favourable provision peculiar to the law of the country in which the mother works. Therefore Article 79 (3) should be interpreted so that the suspension may be total or partial depending on whether the amount of the allowances linked to the pension is either equal to (or less than) or, on the other hand, greater than the amount of the allowances provided in the other Member State.

4. In favour of the argument advanced by the Belgian Government it would be possible to rely on a literal construction of the provision in question. Article 79 (3) speaks of "suspension" without qualification, so that it would seem logical to deduce from that that it was intended to refer only to total suspension. That is to say, the regulation provides for the application of one or other of the two laws involved, regardless of any consequences that might ensue to the detriment of the

rights acquired by the worker, and does not permit the combined application, so to speak, of the two sets of legislation for the purpose of protecting such rights.

In answer to this purely formal argument it may be said that the letter of the provision is not such as to exclude a different interpretation, more consistent with the general principles of the Community system. There are two good arguments which lead one to prefer such an interpretation.

I would point out, first of all, that one of the aims of Regulation No 1408/71 is, as we read in the seventh recital in the preamble thereto, to implement Article 51 of the EEC Treaty in such a way as to "guarantee to workers who move within the Community *their accrued rights and advantages* whilst not giving rise to *unjustified* overlapping of benefits". Therefore, whilst it is true that the Community order, as regards social security for migrant workers, is concerned to avoid the unjustified enrichment of workers as a result of the combination of different systems of legislation, it is equally clear that its aims do not include that of singling out and applying, in the event of a conflict of laws, one system of legislation to the exclusion of any other, even where that is detrimental to the accrued rights of workers.

Secondly, Regulation No 1408/71 can only be interpreted in the light of the principles contained in Article 51 of the EEC Treaty regarding social security, and, more generally, "in the light of the spirit and of the objectives of the Treaty" (see judgment of 29 September 1976 in Case 17/76 *Brack* [1976] ECR 1429 — paragraph 19 of the decision). The Court of Justice has already had occasion to declare that "The aim of Articles 48 and 51 of the Treaty would not be attained but disregarded if the worker were obliged, in order to avail himself of the freedom of movement which is guaranteed to him, to find

himself subjected to the loss of rights already acquired in one of the Member States without having them replaced by at least equivalent benefits" (judgment of 15 July 1964 in Case 100/63 *Kalsbeek (née Van der Veen)* [1964] ECR 565 at p. 574). In the same context one may cite the judgments of 9 June 1964 in Case 92/63, *Moebis (née Nonnenmacher)* [1964] ECR 281; 10 December 1969 in Case 34/69, *Caisse d'Assurance Vieillesse des Travailleurs Salariés de Paris* [1969] ECR 597; 25 November 1975 in Case 50/75, *Caisse de Pension des Employés Privés* [1975] ECR 1473.

I would also refer, in particular, to the judgment of 21 October 1975 in Case 24/75, *Petroni* [1975] ECR 1149, in which the Court declared that Article 46 (3) of Regulation No 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by means of a reduction in the amount of the benefit payable under national legislation alone.

The judgment of 13 July 1967 in Case 19/76, *Triches* [1976] ECR 1243, confirmed that "the measures taken by the Council pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked".

In more recent years this tendency has been reinforced; this is demonstrated by, *inter alia*, the judgments of 3 February 1977 in Case 62/76, *Strebl* [1977] ECR 211 and of 13 October 1977 in Case 112/76, *Manzoni* [1977] ECR 1647.

5. The considerations examined so far lead one to reject the Belgian

Government's submission: in fact the interpretation on which it relies is clearly not compatible either with the spirit and the aims of Regulation No 1408/71 or with the principles which may be inferred from Articles 48 to 51 of the EEC Treaty (and in particular with the principle whereby the worker cannot receive, as a result of the rules against the overlapping of benefits contained in the above-mentioned regulation, less favourable treatment than that which is accorded to him by the domestic law of a particular Member State).

There remain then two possible interpretations of the rule in question. According to the first interpretation Article 79 (3) does not affect the applicability of any more favourable national rules providing for the payment of supplementary sums when the amount of family allowances paid in another Member State is less than that paid in the State which is responsible for paying the pension. According to the second interpretation, however, Community law governs completely and independently (that is, of the national provisions involved) a case where there is overlapping of benefits accompanied by a disparity in the size of the family allowances in the two countries, and recognizes the worker's right to receive, from the institution obliged to pay him the pension, by way of a supplement, the difference between the two sums.

In the present case both of the interpretations lead us to recognize the worker's right to receive a supplementary allowance from the Belgian institution. But, in general terms, it must be borne in mind that the right to the supplementary payment will be recognized or excluded depending on whether the law of the State paying the higher allowances entitles the worker to the supplement. The Belgian legislation provides for this supplementary allowance, but in other countries a specific provision of this type may not exist, with the result that the worker will be entitled to the sup-

plementary payment only if Community law is considered the direct source of such entitlement.

It is clear that the interpretation suggested by the Commission would give rise to cases in which, precisely through the application of Article 79 (3), the worker would be unable to preserve the rights acquired in the State in which he has worked and would thus come to receive less favourable treatment.

Such a conclusion does not seem to me to accord with the purposes of Article 79 (3) interpreted in the light of the general principles referred to above. The function of Article 79 (3) is, in fact, to eliminate the risk of a full, cumulative application of two national schemes: but to achieve this result I do not think it necessary to go so far as to sacrifice accrued rights which are compatible with the application of the rule against overlapping. On the contrary, general principles require that a compromise be achieved between the need to avoid overlapping and the need to ensure respect for accrued rights.

The principle of equality of treatment of workers who have had to satisfy the same conditions in order to obtain the pension also supports this view. That principle would indeed be endangered if it were to be accepted that a worker may be subjected to less favourable treatment, in the field of social security, than other workers who have performed the same work in the State paying the pension, solely because the regulations of another Member State provide for the payment

of allowances of the same type and for the same reason, but at a lower rate.

If, then, it is on these lines that the Community rules on overlapping must be construed, I do not think it possible to adhere to a proposition which reduces Article 79 (3) to a rule of conflict of laws and which does not take account of the need to ensure in every case the most favourable treatment of the worker and the protection of accrued rights.

Therefore, I am of the opinion that it is preferable to adopt an interpretation

which allows Article 79 (3) to remain consonant with general principles: that is to say, one which attributes to the provision in question the function of suspending totally payment by the institution which grants the father his pension of the family allowances for dependent children, only when the allowances are equal to, or less than, those provided in the country in which the mother works; but of suspending them *partially* when the former allowances are greater than the latter.

6. I conclude, therefore, by proposing that in answer to the two questions submitted by the Tribunal du Travail, Charleroi, in this judgment of 19 April 1978, the Court should rule as follows:

1. Under Article 79 (3) of Regulation No 1408/71 of the Council, the suspension of entitlement to family allowances in respect of the dependent children of a father, who is entitled to a pension from a Member State, is not applicable if the mother has not acquired under the legislation of another Member State a right to the same allowances by virtue of her pursuit of a professional or trade activity, either because only the father is acknowledged to have the status of head of household or, in any case, because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.
2. When the family allowances in respect of the children, linked with a pension under Article 77 of Regulation No 1408/71 of the Council, are greater in amount than the allowances granted in the country in which the mother pursues a professional or trade activity, the pensioner is entitled to receive, in spite of the suspension provided for by Article 79 (3) of the said regulation, a supplementary payment equal to the difference between the greater amount of the allowances for which provision is made by the law of the State in which the pension is paid and the lesser amount of the allowances provided in the other Member State.