



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 4 October 2018¹

Case C-322/17

Eugen Bogatu

v

Minister for Social Protection

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling — Social security for migrant workers — Family benefits claimed by a national of a Member State who has lost his job and has members of his family residing in a Member State other than the Member State of employment — Regulation (EC) No 883/2004 — Article 68 — Priority rules in the event of overlapping — Concept of ‘activity as an employed person’)

1. Mr Eugen Bogatu is a Romanian national who has lived in Ireland since 2003. After losing his job in February 2009, he received a number of social benefits. In particular, between 25 May 2010 and 4 January 2013, he received a non-contributory unemployment benefit (jobseeker’s allowance). In January 2015, he was refused family benefits for his children residing in Romania for the period during which he received that unemployment benefit, on the ground that, in the view of the Minister for Social Protection, Mr Bogatu could not be regarded as pursuing an activity as an employed person for the purposes of Article 67 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.² Subsequently, in his action before the High Court (Ireland), Mr Bogatu contested that interpretation of the scope of the concept of ‘activity as an employed person’.

2. However, in view of the fact that it seems apparent from the documents before the Court that Mr Bogatu’s children are also entitled to family benefits under Romanian law, the question of determining the scope of the concept of activity as an employed person arises, rather, in the light of the application of the priority rules in the event of overlapping entitlements to family benefits laid down in Article 68 of Regulation No 883/2004.

3. Unless I am mistaken, this is the first occasion on which the Court has been called upon to rule on the interpretation of that provision. The Court’s response will be of some significance given the fact that, owing to how the priority rules at issue operate, it will necessarily have the effect of defining the scope of the primary responsibility of the State of employment, on the one hand, and of the State of residence of the family members of the person concerned, on the other, as regards the payment of family benefits.

¹ Original language: French.

² OJ 2004 L 166, p. 1.

I. Legal context

A. EU law

1. Regulation No 1408/71

4. Regulation (EEC) No 1408/71 of the Council 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 amended and updated by Regulation (EC) No 118/97 of 2 December 1996 ('Regulation No 1408/71')³ was repealed with effect from 1 May 2010.

5. Article 1 of that regulation, entitled 'Definitions', provided inter alia:

'(a) employed person ... mean[s]:

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

6. Article 73 of that regulation, entitled 'Employed or self-employed persons the members of whose families reside in a Member State other than the competent State', reads as follows:

'An employed ... person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State ...'

7. Article 76 of Regulation No 1408/71, entitled 'Rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family', provided, in paragraph 1:

'Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.'

2. Regulation No 883/2004

8. Article 1 of Regulation No 883/2004, entitled 'Definitions', states:

'(a) "activity as an employed person" means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;

...'

³ OJ 1997 L 28, p. 1.

9. Pursuant to paragraph 1 of Article 2 of that regulation, entitled ‘Persons covered’:

‘This Regulation shall apply to nationals of a Member State ..., as well as to the members of their families ...’

10. Under Article 11 of that regulation, entitled ‘General rules’:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed ... person shall be considered to be pursuing the said activity. ...

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed ... person in a Member State shall be subject to the legislation of that Member State;

...

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.’

11. Article 67 of the regulation, entitled ‘Members of the family residing in another Member State’, states:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State ...’

12. Article 68 of the regulation, entitled ‘Priority rules in the event of overlapping’, provides, in paragraph 1:

‘Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:

(a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed ... person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;

(b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:

...

(iii) in the case of rights available on the basis of residence: the place of residence of the children.

...’

II. The facts, the dispute in the main proceedings, the questions referred and the procedure before the Court

13. Mr Bogatu is a Romanian national who has lived in Ireland since 2003. He is the father of two children who reside in Romania.

14. Mr Bogatu pursued an activity as an employed person in Ireland between 26 May 2003 and 13 February 2009, the date on which he lost his job. Since then, he has received in turn, first, a contributory unemployment benefit (jobseeker's benefit) from 20 February 2009 to 24 March 2010, then a non-contributory unemployment benefit (jobseeker's allowance) from 25 March 2010 to 4 January 2013 and finally a sickness benefit (illness benefit) from 15 January 2013 to 30 January 2015.

15. On 27 January 2009, he submitted an application for family benefits. By letter of 12 January 2011, the Minister informed Mr Bogatu that he had decided to approve his application, whilst refusing to grant him family benefits for some of the period covered by that application, namely the period from 1 April 2010 to 31 January 2013 ('the relevant period'). At the same time, the Minister informed Mr Bogatu that the reason for his refusal in relation to that period was that Mr Bogatu did not fulfil any of the alternative conditions for entitlement to family benefits for his children residing in Romania, since, first, he no longer pursued an activity as an employed person in Ireland and, secondly, he was not in receipt of a contributory benefit from the ministry.

16. In his action before the High Court, Mr Bogatu does not dispute the facts which formed the basis of the Minister's decision. He does, however, argue that the Minister's refusal to pay family benefits to him in respect of the relevant period is based on a misinterpretation of EU law.

17. In that regard, he notes that the period in respect of which his application was rejected is covered by Regulation No 1408/71, in relation to the part period from 1 to 30 April 2010, and by Regulation No 883/2004, in relation to the part period from 1 May 2010 to 31 January 2013. In addition, Mr Bogatu submits that it follows from Article 73 of Regulation No 1408/71, read in conjunction with Article 1(a)(i) of that regulation, that any person who is insured under a social security scheme for employed persons in a Member State is to be entitled to family benefits in respect of the members of his family who are residing in another Member State, as if they were residing in the first Member State. He further states, having regard to the judgments of the Court in *Dodl and Oberhollenzer* (judgment of 7 June 2005, C-543/03, EU:C:2005:364) and *Borger* (judgment of 10 March 2011, C-516/09, EU:C:2011:136), that that entitlement stems solely from the fact that the person concerned is insured and, consequently, it exists even if that person is no longer pursuing an activity as an employed person when he applies for family benefits and even if, at that time, he is not receiving payments under his insurance.

18. Since it is the equivalent of Article 73 of Regulation No 1408/71, Article 67 of Regulation No 883/2004 must be interpreted in the same way.

19. In his defence, the Minister submits that, for the purposes of interpreting Article 67 of Regulation No 883/2004, account must necessarily be taken of Article 11(2) of that regulation, which had no equivalent in Regulation No 1408/71.

20. In those circumstances, the referring court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- (1) Does EU Regulation No 883/2004, and in particular Article 67 thereof, when read in conjunction with Article 11(2) thereof[,] require that, in order to be eligible for "family benefit" as defined in Article 1(z) of the Regulation, a person must either be employed or self-employed in the competent Member State ... or alternatively be in receipt of [a] cash benefit ...?

(2) Is the reference to “cash benefits” in Article 11(2) of [Regulation No 883/2004] to be interpreted as referring only to a period during which a claimant is in actual receipt of cash benefits, or does it mean any period during which a claimant is covered for a cash a benefit in the future, whether or not that benefit has been claimed at the time of application for family benefit?’

21. Written observations on those questions were submitted by Mr Bogatu, the Minister, the United Kingdom Government and the European Commission. Those interested parties also presented oral argument at the hearing held on 6 June 2018.

III. Legal analysis

A. *The questions referred for a preliminary ruling*

1. *Preliminary observations*

22. First of all, I note that the questions referred for a preliminary ruling by the national court concern not the interpretation of the relevant provisions of Regulation No 1408/71, which apply to the family benefits for the first month of the relevant period, namely from 1 to 30 April 2010,⁴ but rather the interpretation of the relevant provisions of Regulation No 883/2004, which apply from 1 May 2010 to 31 January 2013.

23. Moreover, it must be observed that the request made by the referring court is restricted to the interpretation of Article 67 of Regulation No 883/2004, which guarantees that every person is entitled to family benefits from the Member State in which he is insured for his family members residing in another Member State, in conjunction with Article 11(2) of that regulation, which is concerned with the concept of ‘activity as an employed person’. This can be explained by the fact that, in the main proceedings, Mr Bogatu claimed that he was entitled to receive family benefits from the Irish State on the ground that he had to be deemed to be pursuing an activity as an employed person.

24. However, it is apparent from the documents before the Court in the present case that the family members in respect of whom Mr Bogatu had applied to receive those family benefits, namely his two children, are also entitled to receive family benefits under Romanian legislation, since that legislation provides that such benefits are payable to all children under the age of 18 who are lawfully resident in Romania, which appears to be the case here.

25. In those circumstances, I concur with the observations submitted by the Minister, the United Kingdom Government and the Commission, to the effect that the subject matter of the interpretation sought by the referring court should be widened.

26. More specifically, since the situation at issue is one in which the same family members are, in principle, eligible for the benefits concerned over the same period under the laws of more than one Member State, it is my view that the Court, in the answer to be provided to the referring court, will necessarily have to take account of Article 68 of Regulation No 883/2004,⁵ which sets out the criteria for determining which State has primary responsibility for paying family benefits.

⁴ I would point out that Regulation No 883/2004 entered into force on 1 May 2010.

⁵ I observe in that regard that, in accordance with settled case-law, when examining questions referred to it pursuant to Article 267 TFEU, the Court may consider provisions to which the national court has not referred where this is necessary in order to ensure that the answer provided will be of use to that court. See, to that effect, judgment of 9 June 2016, *Balogh* (C-25/15, EU:C:2016:423, paragraph 28 and the case-law cited).

27. By way of reminder, that provision lays down a set of priority rules applicable in the case of overlapping entitlements to family benefits in several Member States, the application of which rules involves examining whether the person with those entitlements may rely on them ‘on the same basis’ in the different Member States (that is to say, on the basis of ‘an activity as an employed person’, the ‘receipt of a pension’ or ‘residence’) or ‘on different bases’. The answer to that question makes it possible to identify the State with primary responsibility for paying family benefits to the person concerned.

28. In the present case, the question whether the State required to pay such benefits to Mr Bogatu is Ireland or Romania therefore depends on the determination of the basis on which that claimant was entitled to family benefits from the Irish State, and in particular on the scope given to the words ‘rights available on the basis of an activity as an employed ... person’ provided for in Article 68(1) of Regulation No 883/2004.

29. In the light of those considerations, I consider, like the Commission, that the two questions referred for a preliminary ruling by the High Court should be understood as referring to the interpretation of the words ‘on the basis of an activity as an employed ... person’ within the context of the implementation of the priority rules laid down in Article 68 of Regulation No 883/2004.

30. The two questions should therefore be reformulated. By those questions, the referring court is essentially asking whether Article 68(1) of Regulation No 883/2004 must be interpreted as meaning that a person who, after having been employed in the host Member State, receives only non-contributory benefits from that State, whilst remaining insured under the social security system of that State, is entitled to the payment of family benefits *by virtue of such status* for the purposes of determining the Member State having primary responsibility for paying such benefits.

31. Since, as I have made clear above, the answer to such a question is dependent on the scope of the words ‘on the basis of an activity as an employed ... person’ used in Article 68 of Regulation No 883/2004, I shall endeavour, in this Opinion, to identify the guidance as to interpretation upon which a proper reading of that concept must be based.

32. To that end, I shall begin by dismissing the argument advanced by the Minister, the United Kingdom and the Commission that the concept at issue, as provided for in Article 68 of Regulation No 883/2004, should be interpreted in the light of Article 11(2) of that regulation (part (a)). Next, I shall examine whether, if that is not the case, that concept must be interpreted in accordance with the national laws laying down the conditions for entitlement to family benefits (part (b)). Finally, after explaining that the argument put forward by Mr Bogatu — according to which the concept of ‘employed person’ as established in the case-law on Regulation No 1408/71 may be applied in the context of Regulation No 883/2004 — cannot be accepted in the light of Article 68 of the latter regulation, I shall endeavour to propose an interpretation of the words ‘on the basis of an activity as an employed ... person’ which is capable of ensuring that the priority rules laid down in Article 68 of Regulation No 883/2004 operate in a manner consistent with the intention of the EU legislature (part (c)).

2. Interpretation of the words ‘rights available on the basis of an activity as an employed ... person’

(a) Article 11(2) of Regulation No 883/2004

33. As I have already stated, all the interested parties, with the exception of the applicant in the main proceedings, claim that the determination of the basis on which Mr Bogatu would be entitled to receive family benefits in Ireland for the purposes of application of the priority rules laid down in Article 68 of Regulation No 883/2004 must be made in accordance with the general rules governing the determination of the applicable legislation set out in Article 11 of that regulation and in particular Article 11(2).

34. In that regard, it must be observed that Article 11 of Regulation No 883/2004, which is the ‘cornerstone’ of Title II,⁶ makes it possible to determine which national legislation applies to any person covered by that regulation, inter alia by drawing a distinction between persons *pursuing an activity as an employed person*,⁷ who are subject to the legislation of the Member State of employment, and economically *inactive* persons, who are subject to the legislation of the Member State of residence.⁸ In that context, Article 11(2) clearly indicates that the concept of activity as an employed person must be construed broadly, since receiving cash benefits ‘because or as a consequence of ... activity as an employed ... person’ is treated in the same way as actually pursuing an activity as an employed person in the strict sense.

35. In addition, the Commission argued, in its written observations, that, within the context of the system established by Regulation No 883/2004, Article 11 is intended to be applied *every time* it is necessary to determine, as between two competing bodies of legislation, which national social security legislation applies to the person concerned, which is the case for Article 68 of Regulation No 883/2004. In other words, the basis on which Mr Bogatu is entitled to receive family benefits in Ireland can be established, in the light of Article 68 of Regulation No 883/2004, only after the principles enshrined in Article 11 have been applied.

36. Thus, in the Commission’s view, it is necessary to ascertain first of all whether, having regard to the relevant period, Mr Bogatu may be regarded as a ‘person pursuing an activity as an employed ... person’ within the meaning of Article 11 of the regulation, taking into account the expansion of that concept under paragraph 2 of that article. In that regard, the Commission, like the Minister and the United Kingdom, takes the view that, since the benefit received by Mr Bogatu during the relevant period was of a *non-contributory* nature, and was not therefore received ‘because or as a consequence of the activity as an employed person previously pursued by him, Mr Bogatu could not be regarded as a person pursuing an activity as an employed person in the light of Article 11 of Regulation No 883/2004. In addition, if the connecting factor allowing Mr Bogatu to receive family benefits in Ireland was not his status as a ‘person pursuing an activity as an employed person’, it follows, according to the Commission, that the only possible factor is that of residence.

37. I find that argument unconvincing.

⁶ In its case-law on Regulation No 1408/71, the scheme of which was identical to that of Regulation No 883/2004, the Court explained on several occasions that the provisions of Title II of the former regulation constitute a complete and uniform system of conflict rules, which are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them. See, inter alia, judgments of 12 June 1986, *Ten Holder* (302/84, EU:C:1986:242, paragraph 21); of 11 June 1998, *Kuusijärvi* (C-275/96, EU:C:1998:279, paragraph 28); and of 13 September 2017, *X* (C-570/15, EU:C:2017:674, paragraph 14).

⁷ Article 11(3)(a).

⁸ Article 11(3)(e).

38. In my view, the argument in question is based on an incorrect assessment of the scheme of Regulation No 883/2004. In that connection, I am keen to point out above all that it is not my intention to call into question the key role played by Article 11 within the context of that regulation as far as concerns determining the applicable national legislation. However, it appears to me to be clear from that scheme that the scope of that provision should be regarded as being much narrower than that envisaged by the Commission. Indeed, the regulation appears to draw a distinction between *general conflict rules* ('Determination of the legislation applicable'), which are set out in Title II, and *special rules governing connecting factors*, which are contained in Title III ('Special provisions concerning the various categories of benefits').⁹ In my view, that distinction means that, where the situation being examined is governed by one of the special rules governing connecting factors, Article 11 *does not apply*,¹⁰ in accordance with the adage '*lex specialis derogat legi generali*'.¹¹

39. Since the situation of Mr Bogatu in the main proceedings is clearly governed by special rules governing connecting factors, namely the provisions on family benefits (Articles 67 and 68 of Regulation No 883/2004), it is those provisions alone which I am required to interpret in order to determine the legislation applicable to that situation.

40. In any event, Article 11(2) of Regulation No 883/2004, which all the interested parties, with the exception of Mr Bogatu, use to interpret the words 'on the basis of an activity as an employed ... person', itself specifies that its provisions are to be considered solely 'for the purposes of this Title'. In view of the clarity of those words, there appears to me to be no doubt that Article 11(2) cannot be used to interpret provisions contained in any title other than Title II of the regulation. Accordingly, that rule can in no way influence the interpretation of Article 68 of Regulation No 883/2004, since that article appears in Title III of that regulation.¹²

41. In the light of the foregoing considerations, I take the view that the Court should dismiss, in its forthcoming judgment, the argument advanced by all the interested parties, with the exception of Mr Bogatu, that the words 'on the basis of an activity as an employed ... person', as contained in Article 68 of Regulation No 883/2004, must be interpreted in the light of Article 11 of that regulation, and in particular Article 11(2).

(b) The laws of the Member States on entitlements to family benefits

42. At this stage, even though none of the interested parties has raised this issue, I nevertheless consider it appropriate to examine whether the words 'on the basis of an activity as an employed ... person' do not, rather, entail a *reference to the national laws* governing entitlement to receive family benefits.

⁹ See, to that effect, recitals 17 ('... it is appropriate to determine as the legislation applicable, as a *general rule*, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person') and 18 ('In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule') of Regulation No 883/2004.

¹⁰ By contrast, Article 11 does appear to me to be applicable, for example, to old-age benefits. Since the provisions governing such benefits, namely Articles 50 to 60 of Regulation No 883/2004, do not refer to any particular criterion of applicability derogates from the general conflict rules, it is Article 11 which must be used to determine which national legislation is applicable to each situation considered.

¹¹ See, to that effect, inter alia the Opinion of Advocate General Jääskinen in *van Delft and Others* (C-345/09, EU:C:2010:438, point 45). According to the Advocate General, that relationship between Title II and Title III of Regulation No 1408/71 is apparent from the judgments of 27 May 1982, *Aubin* (227/81, EU:C:1982:209, paragraph 11), and of 11 November 2004, *Adanez-Vega* (C-372/02, EU:C:2004:705).

¹² That finding cannot be called into question by the argument advanced by the Minister that the use of Article 11(2) of Regulation No 883/2004 to interpret the words 'on the basis of an activity as an employed ... person', as laid down in Article 68 of that regulation, is supported by the interpretation of those words by the Administrative Commission for the Coordination of Social Security Systems in Decision No F1 of 12 June 2009 (OJ 2010 C 106, p. 11). It is sufficient to observe that, in the judgment in *van der Vecht* (19/67, EU:C:1967:49, p. 355), the Court has already held that the wording of the regulation 'does not affect the powers of the competent courts or tribunals to assess the validity and content of the provisions of the regulation, *in respect of which the decisions of [that commission] have only the status of an opinion*'. It follows that the decision in question does not have binding effect and is not, therefore, binding on the Court.

43. Such an interpretation could appear, *prima facie*, consistent with the underlying principles of the related EU legislation, principles which state that the EU rules seek to establish a system for the coordination of national social security schemes,¹³ whereas the conditions governing entitlement to receive social security benefits fall within the competence of the Member States.¹⁴ The words ‘on the basis of an activity as an employed ... person’ could be perceived as leaving to the Member States the competence to determine the ‘basis’ on which the person concerned is entitled to receive family benefits (activity as an employed person, pension or residence), whilst EU law is confined to establishing which legislation is applicable where entitlements to such benefits overlap, using the criteria laid down in that same provision.

44. However, in my view, there are two factors which argue in favour of rejecting that interpretation.

45. First, a simple textual analysis of the wording of Article 68(1) of Regulation No 883/2004 reveals that that provision does not contain any *explicit* reference to the laws of the Member States.

46. Secondly, the consequences ensuing from that interpretation for the protection of those nationals who exercise their right to free movement appear to be somewhat problematic.

47. This is clear if consideration is given to the result of applying such an interpretation to the situation at issue in the present case.

48. To that end, it is therefore necessary to establish the basis on which Mr Bogatu’s entitlement to the payment of family benefits for his children arises under Irish legislation, on the one hand, and Romanian legislation, on the other.

49. With regard to the Romanian legislation, as I have previously stated and as is clear from the documents before the Court, all children under the age of 18 are entitled to such benefits, *provided that they are lawfully resident in Romania*. Accordingly, under the first system of national legislation examined, the basis on which that entitlement arises is residence.

50. As for the Irish legislation, it is clear from Section 220(3) of Chapter IV of the Social Welfare Consolidation Act of 2005 that, in order to be eligible for the payment of family allowances, the *habitual place of residence* of the person who has applied for such allowances must be in the Irish State when the application is submitted.¹⁵ Accordingly, under the second system of legislation examined, the basis on which the entitlement at issue arises is also residence.

51. Accordingly, the situation forming the subject matter of the present case is covered by Article 68(1)(b) of Regulation No 883/2004, since the family benefits in respect of Mr Bogatu’s children would be payable by Ireland and Romania *on the same basis*. The applicable legislation is thus that of the place of residence of the children, meaning that the Member State with primary responsibility for paying family benefits to Mr Bogatu is Romania.

¹³ See judgment of 1 February 2017, *Tolley* (C-430/15, EU:C:2017:74, paragraph 57).

¹⁴ See judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114, paragraph 24 and the case-law cited).

¹⁵ Moreover, under the Irish legislation, the child in respect of whom allowances are applied for, who must be under the age of 16, must have his or her habitual place of residence within the territory of the State (Section 219(1)(c)) and reside ordinarily with the person who has applied for the family benefits (Section 220(1)). However, as the referring court points out, those conditions cannot be applied because they are incompatible with Article 67 of Regulation No 883/2004.

52. In so far as the amount of the family benefits provided for under the Irish legislation would exceed the amount guaranteed by the Romanian legislation, which does not seem implausible to me, Ireland would be required in principle, pursuant to Article 68(2) of Regulation No 883/2004, to pay the difference in the form of a differential supplement. However, since the present case is concerned with an entitlement to family benefits *based on residence only*, the Irish State is not even required, according to the last sentence of Article 68(2), to provide such a supplement. Mr Bogatu would therefore receive only the, probably lower, amount of family benefits provided for in the Romanian legislation.

53. However, given the significant number of national laws providing for entitlement to family benefits on the basis of residence,¹⁶ that result would, in my view, be likely to arise in a wide range of situations.

54. This does not appear to me to be consistent with the underlying logic of Article 68 of Regulation No 883/2004, as set out in the travaux préparatoires for that regulation.

55. I am aware that, in the course of the procedure culminating in the revision of Regulation No 1408/71, the Council amended the wording of Article 68 of Regulation No 883/2004 proposed by the Commission, which allowed migrant nationals to receive, in all cases of overlapping entitlements to such benefits, the highest amount,¹⁷ replacing it with the wording currently in force.¹⁸ However, it must be noted, as indeed the Commission does in its communication on the common position of the Council, that the amendments made by the Council are not such as to alter the principle established by the Commission's proposal, namely that of guaranteeing that the recipient is paid the highest amount of benefits,¹⁹ but are rather concerned solely with the allocation between the Member States concerned of the responsibility for that payment.

56. In those circumstances, the last sentence of Article 68(2) of Regulation No 883/2004 must, in my view, be interpreted as an exception to that principle, meaning that the situations in which the differential supplement is not payable to a migrant should be residual in nature. As I have previously stated, if the words 'on the basis of an activity as an employed ... person' were to be regarded as containing a reference to national laws, the conditions governing the application of the last sentence of Article 68(2) would be fulfilled in a significant number of situations, with the result that the residual nature of the situations covered by that provision would be lost.

57. In that regard, it is also important to note, without prejudice to the assessment of Mr Bogatu's situation, that, if interpreted thus, that provision would likewise apply to the situation of persons pursuing an activity as an employed person in the host State. Such an outcome, which I shall examine in greater detail in part (c) of this Opinion, cannot be accepted.

58. The foregoing considerations confirm my previous arguments, namely that the words 'on the basis of an activity as an employed ... person', as provided for in Article 68(2), cannot be interpreted as making a reference to the laws of the Member States governing entitlement to family benefits.

¹⁶ See, in that regard, the compilation of the national legislation on family benefits produced by the Commission, available online at the following address: https://europa.eu/youreurope/citizens/family/children/benefits/index_en.htm

¹⁷ See Proposal for a Council Regulation (EC) on coordination of social security systems presented by the Commission to the Council on 21 December 1998, COM(1998) 779 final, Article 53, in accordance with which: '*where, during the same period and for the same family member, family benefits ... are due from several Member States pursuant to their legislation or this Regulation, the competent institution of the Member State whose legislation lays down the highest amount of benefits shall grant all of the said amount*'. It is interesting to note that that criterion was adopted in the final version of the priority rules, but only as a *subsidiary criterion* where the rights to the family benefits in question are all available *on the basis of an activity as an employed person*. See Article 68(1)(b)(i) of Regulation No 883/2004.

¹⁸ See Common Position (EC) No 18/2004 of 26 June 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a regulation of the European Parliament and of the Council on the coordination of social security systems (OJ 2004 C 79 E, p. 15).

¹⁹ Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the coordination of social security systems, COM(2004) 44 final, p. 11.

(c) *Proposed interpretation*

59. In view of my conclusions in parts (a) and (b), I consider it necessary to propose an alternative reading of the words ‘on the basis of an activity as an employed ... person’. Before setting out that interpretation, the argument advanced by Mr Bogatu in his written observations must be rejected.

60. As I have already observed, Mr Bogatu, unlike the other interested parties, submits that the basis on which he is entitled to receive family benefits in Ireland must be determined by reference to the case-law on Regulation No 1408/71, in particular the case-law which interpreted Article 73 of that regulation as granting ‘employed persons’ entitlement to family benefits in respect of family members residing in the territory of another Member State.

61. In that regard, Mr Bogatu notes that the Court has established that the concept of ‘employed person’ must be interpreted as encompassing any person falling within the scope of Regulation No 1408/71, as defined in Article 1(a) thereof, namely persons insured under a social security scheme applicable in a Member State, regardless of whether an employment relationship exists.

62. Taking the view that the scope of Regulation No 1408/71 corresponds to that of Regulation No 883/2004, Mr Bogatu concludes that the entitlement to family benefits provided for in Article 67 of the latter regulation must also be regarded as being available to all nationals of a Member State who are insured under a social security scheme applicable in another Member State, including where their employment relationship in the second Member State has ended.

63. In those circumstances, Mr Bogatu considers that he is entitled to receive family benefits in relation to that period, since he was still covered for certain benefits, such as sickness benefit, during the relevant period.

64. In that regard, I observe as a preliminary point that in his arguments Mr Bogatu refers to the interpretation of *Article 67* of Regulation No 883/2004. However, given the reformulation of the questions referred for a preliminary ruling which I propose in this Opinion, the interpretation suggested by Mr Bogatu must, of course, be assessed in the light of *Article 68*, and not *Article 67*, of Regulation No 883/2004.

65. In my view, such an interpretation requires an examination, first of all, of whether the case-law on Regulation No 1408/71, which is extensively cited in Mr Bogatu’s written observations, can remain relevant in the context of Regulation No 883/2004.

66. To that end, it appears to me necessary to set out a number of preliminary considerations concerning the scope of the revision of the rules on the coordination of social security systems brought about by the adoption of Regulation No 883/2004.

67. It follows from recital 3 thereof that Regulation No 883/2004 is intended to replace the coordination rules laid down by Regulation No 1408/71, which had become complex and lengthy on account of the numerous amendments and updates made in order to take into account developments at European Union level and changes in legislation at national level, by *simplifying*²⁰ and *modernising* those rules.²¹

20 See, in that regard, the proposal for a Council Regulation (EC) on coordination of social security schemes presented by the Commission to the Council on 21 December 1998, COM(1998) 779 final, p. 2, in the part which states: ‘... the main driving force behind revision of the coordination rules, as established under Regulation No 1408/71, was a desire to make the legislation less complex and more manageable — in other words the intention was not to completely rewrite a system which had worked relatively well for more than 25 years, but rather to simplify things’.

21 See, in that regard, judgment of 27 February 2014, *United Kingdom v Council* (C-656/11, EU:C:2014:97, paragraphs 61 to 66).

68. Within that context, the most significant change as compared with its predecessor undoubtedly concerned the *scope ratione personae* of those rules.

69. I note that Article 2 of Regulation No 1408/71 ('Persons covered') established unequivocally that that regulation applied to *employed and self-employed persons*.²² This can be explained, as is apparent from recital 2 of the regulation, by the fact that, at the time, freedom of movement for persons concerned only employed persons, within the context of the freedom of movement for workers, and self-employed persons in the framework of the freedom of establishment and the freedom to supply services. In those circumstances, in order to prevent the differences existing between national legislations as regards the definition of an employment relationship from restricting its scope *ratione personae*, Regulation No 1408/71 had opted to extend the concepts of 'employed person' and 'self-employed person', so that they included all *persons insured* under the social security scheme of a Member State for employed or self-employed persons.²³

70. That scope *ratione personae* was extended by Regulation No 883/2004, prompted by the progressive affirmation of the right to move and reside freely within the European Union brought about by the introduction of European citizenship. More specifically, that change was achieved by replacing the concept of 'employed persons' and 'self-employed persons' with that of 'nationals of a Member State' in Article 2(1) of that regulation ('Persons covered'). This means that the system of coordination, as revised by Regulation No 883/2004, also covers people who are not, strictly speaking, part of the 'working population', regardless of the risk in respect of which they are insured.²⁴

71. However, I consider that, since Regulation No 883/2004 now applies to all the nationals of a Member State, a broad interpretation of the concept of 'activity as an employed person', within the context of that regulation, is no longer justified in the way that it was for the concept of 'employed person' within the framework of Regulation No 1408/71.

72. The concept of 'activity as an employed person', in conjunction with other concepts, is used in a significant number of provisions of the new regulation in order to draw a distinction between the legal rules applicable to economically active persons and those governing the situation of economically inactive persons.

73. If the words 'on the basis of an activity as an employed ... person', as laid down in Article 68 of Regulation No 883/2004, were interpreted in the same way as the concept of 'employed person' was interpreted within the framework of Regulation No 1408/71, namely as requiring only that the person concerned be insured under a social security scheme of one of the Member States for employed persons, the distinction between the rules applicable to economically active and inactive persons, which appears to me to be fundamental for the application of Article 68 of Regulation No 883/2004, would be rendered meaningless.

74. In the light of the foregoing, I am of the view that, in order to formulate a proper interpretation of the words 'on the basis of an activity as an employed ... person', it is necessary to adopt a different approach, rooted in the concepts used by Article 68 of Regulation No 883/2004.

²² For the sake of completeness, I note that, in accordance with Article 2, Regulation No 1408/71 also applied 'to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and survivors'.

²³ See recital 3 of Regulation No 1408/71.

²⁴ To that end, Regulation No 883/2004 uses, alongside Article 42 EC (now Article 48 TFEU), a second legal basis, namely Article 308 EC (now Article 352 TFEU). See recital 2 of Regulation No 883/2004.

75. In order to determine which Member State has primary responsibility for the payment of family benefits to the person concerned, Article 68 of Regulation No 883/2004 makes reference to three concepts, namely those of ‘activity as an employed person’, ‘pension’ and ‘residence’, the combination of which gives rise to different results according to whether the family benefits in question are payable ‘on different bases’ or ‘on the same basis’.

76. In particular, where the bases of the entitlements to family benefits differ, the provision at issue *classifies* those concepts *by order of priority*: first, activity as an employed person, then pension and, lastly, residence. Accordingly, the Member State having primary responsibility for paying the family benefits is the State of employment, whilst the State in which a pension is received has primary responsibility only where the competing basis of entitlement is that of residence.

77. The only plausible reason for providing for such an order of priority appears to me to be that, by entailing a more significant contribution to the economic life of the Member State in question, the pursuit of an activity as an employment person reflects a *degree of connection* to that Member State which is greater than receipt of a pension or residence, and the degree of connection associated with receipt of a pension is similarly greater than that associated with residence.

78. That conclusion is not called into question by the fact that, where the basis of the entitlements to family benefits is the same, Article 68(1) of Regulation No 883/2004 establishes that the Member State having primary responsibility is that of the place of residence of the children. If the bases of entitlement, and therefore the criteria of applicability, do not differ, the place of residence of the children may duly be regarded as identifying the greatest degree of connection.

79. If we wish to preserve the practical effect of the order of priority of the concepts of activity as an employed person, pension and residence provided for in Article 68 of Regulation No 883/2004, as well as the function as criteria of applicability which those concepts fulfil within the context of that article, it is necessary, in my view, to refer to the definitions laid down in Article 1 of Regulation No 883/2004 in order to interpret ‘on the basis of’.²⁵

80. In particular, the concept of activity as an employed person, which forms the subject matter of the question referred for a preliminary ruling by the High Court, as I have reformulated it, means ‘any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists’.²⁶

81. It follows that it is the pursuit of such an activity, or the existence of such an equivalent situation, which makes it possible to identify the Member State of employment as the Member State having primary responsibility for the payment of family benefits.

82. It is for the referring court to ascertain whether that connecting factor exists in the case in the main proceedings.

²⁵ As for the concepts of pension and residence, which do not form the subject matter of this assessment, the first ‘covers not only pensions but also lump-sum benefits which can be substituted for them and payments in the form of reimbursement of contributions and, subject to the provisions of Title III, revaluation increases or supplementary allowances’ (Article 1(w)), whereas the second is defined as follows: ‘the place where a person habitually resides’ (Article 1(j)).

²⁶ Article 1(a) of Regulation No 883/2004.

83. More specifically, the referring court will be required to determine whether, for the purposes of applying the Irish social security legislation as a whole, Mr Bogatu is to be regarded as having pursued an activity as an employed person, or having been in an equivalent situation, during the relevant period. If he is, the referring court will be obliged to find that Ireland is the State having primary responsibility for paying the family benefits payable to the applicant in the main proceedings, which means that Mr Bogatu is entitled to receive family benefits during the relevant period, contrary to the submissions made by the Minister in response to Mr Bogatu's application.

84. Within the context of such an assessment, the fact that Mr Bogatu remained insured in Ireland during the relevant period may be material, provided that it means that he is regarded as pursuing an 'activity as an employed person', or as being in an equivalent situation, within the meaning of Article 1(a) of Regulation No 883/2004.

IV. Conclusion

85. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the High Court (Ireland), as I have reformulated them in this Opinion, as follows:

Article 68(1) 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 must be interpreted as meaning that a person who, after having been employed in the host Member State, receives only non-contributory benefits from that State, whilst remaining insured under the social security scheme of that State, is entitled to the payment of family benefits by virtue of such status for the purposes of determining the Member State having primary responsibility for paying such benefits, provided that his situation is covered by the concept of 'activity as an employed person' or 'equivalent situation', as defined by Article 1(a) of Regulation No 883/2004. It is for the referring court to ascertain whether that is the case.