OPINION OF ADVOCATE GENERAL JACOBS

delivered on 16 December 1997 *

1. This case, referred by the Kammarrätt (Administrative Court of Appeal), Sundsvall, Sweden, concerns the interpretation of certain provisions of Regulation No 1408/71 ('the Regulation') [1] in the context of a recipient of Swedish parental benefit who claims to be entitled under the Regulation to continue to receive that benefit after moving to Finland. The Court has been asked in particular for guidance as to whether the applicant is within the personal scope of the Regulation and whether a provision in the Swedish legislation requiring recipients of parental benefit to be resident in Sweden is compatible with the Regulation.

Relevant Community provisions

2. Article 1, in so far as is relevant to the present case, provides:

'For the purpose of this Regulation:

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

...

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed ...'.

* Original language: English.

1 — 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. The text of the Regulation as at the end of 1995 may be found in Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71, OJ 1997 L 28, p. 1.

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

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

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

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

(a) sickness and maternity benefits;

...

(g) unemployment benefits; ...'

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

6. Article 13(1) provides:

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

7. Article 14c contains special rules applicable to persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of

another Member State, which are not relevant to the present case.

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

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

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

10. Articles 13(2)(b) to (e) concern respectively self-employed persons, persons employed on vessels flying the flag of a Member State, civil servants and persons called up for service in the armed forces or for civilian service.

11. Article 13(2)(f), inserted into Regulation No 1408/71 with effect from 29 July 1991 by Regulation No 2195/91, [2] provides that:

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

12. Article 10b of Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71, [3] also inserted by Regulation No 2195/91, is headed 'Formalities pursuant to Article 13(2)(f) of the Regulation' and provides:

'The date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of the Regulation shall be determined in accordance with that legislation.

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

3 — Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self employed persons and to their families moving within the Community; for the latest consolidated version see Part II of Annex A to Regulation No 118/97, cited in note 1.

The institution designated by the competent authority of the Member State whose legislation becomes applicable to this person shall apply to the institution designated by the competent authority of the former Member State with a request to specify this date.'

13. Article 22 of Regulation No 1408/71, which applies to sickness and maternity benefits, provides, in so far as is relevant:

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

...

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State;

...

shall be entitled:

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. ...

2. The authorisation required under paragraph 1(b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment. ...'

Article 18 concerns the aggregation of periods of insurance, employment or residence completed under the legislation of another Member State, and is not relevant to the present case.

14. Article 94 of the Regulation, so far as is relevant, provides:

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

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

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

15. Both Sweden and Finland acceded to the European Communities on 1 January 1995. Regulation No 1408/71 and Regulation No 574/72 became applicable in both those countries, however, on 1 January 1994, by virtue of the Agreement on the European Economic Area. [4] Thus at the time of the facts giving rise to the main proceedings, the Regulation was not in force as a Community instrument. Neither the national court nor any of the parties who have submitted observations to the Court has, however, raised that issue. In those circumstances, I assume that the national court considers that a preliminary ruling by the Court is necessary to enable it to give judgment on the basis that the applicant's entitlement to Swedish parental benefit, if recognised, could continue beyond 1 January 1995 so that the matter falls within the jurisdiction of this Court.

The national legislation

16. The Law on social insurance [5] ('the Law') provides that Swedish nationals and residents shall be insured by law. An insured person who leaves Sweden continues to be regarded as resident in Sweden if the stay abroad is intended to be for a maximum period of one year. [6]

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

5 — Lagen (1962: 381) om allmän försäkring.

6 — Chapter 1, paragraph 3.

17. The Law provides for registration with the social insurance office of all insured persons of 16 years or more, provided they are resident in Sweden. [7] Registration is governed by provisions published by the Riksförsäkringsverket (National Social Insurance Board) [8] which provide, *inter alia*, as follows.

18. A person is regarded as resident in Sweden if he has his actual place of residence there or if he goes to Sweden with the intention of either permanently residing there or staying there for more than one year to work or study. [9] A person who has a right to benefits under Swedish legislation on the basis of Regulation No 1408/71 is regarded as resident in Sweden for so long as he has a right to such benefits even if he does not fulfil those conditions for residence. If an insured person goes abroad intending to stay for more than one year, he shall, if he moves to a Nordic country, be removed from the social insurance register with effect from the day on which he is removed from the national population register (Folkbokföringen) in Sweden. [10] However, where a person covered by Regulation No 1408/71 moves from Sweden to another Member State, he shall be removed from the social insurance register as soon as he is covered, according to the Regulation, by that State's legislation, even if he intends to stay there for less than one year.

19. Chapter 4 of the Law lays down rules on the right to parental benefit ('föräldrapenning'). According to those provisions, an insured parent who is registered with the social insurance office has a right to parental benefit as a result of the birth of a child for a maximum of 450 days. For the first 360 days, the amount of the benefit depends on the parent's previous income, subject to a guaranteed minimum; for the last 90 days, the amount is the guaranteed minimum. The right to receive the benefit at an amount higher than the guaranteed minimum for the first 180 days depends on fulfilment of certain conditions relating to affiliation to the social security scheme before the birth of the child; otherwise, the benefit is payable regardless of when the applicant became resident in Sweden provided that the child is less than eight years old. Even though the Law does not contain any provisions directly defining how long a benefit can be paid to an insured person who resides abroad, according to the national court it follows from the requirement of registration that a person ceases to be insured and to have the right to receive, *inter alia*, parental benefit if the stay abroad is intended to be for longer that one year, or, if appropriate, the earlier time when he becomes covered by the legislation of another Member State. Parental benefits are non-contributory.

20. The Swedish Government raises in its written and oral observations the question whether the parental benefit is a maternity benefit or whether it is not rather a family benefit, in which case Article 22 of Regulation No 1408/71 will not be applicable.

7 — Chapter 1, paragraph 4.

8 — Instructions (RFFS 1985: 16) concerning registration and deregistration with a social insurance fund.

9 — Paragraph 3.

10 — Paragraphs 9 and 11.

Since, however, the issue of the correct classification of the benefit has not been raised by the national court, and since it appears from the Swedish Government's written observations that, at the time of the entry into force of the Agreement on the European Economic Area, when Regulation No 1408/71 entered into force for Sweden, the parental benefit was notified in accordance with Articles 5 and 97 as a maternity benefit and there is no suggestion that that notification has been superseded, I will assume for the purposes of this Opinion that the parental benefit is a maternity benefit for the purposes of Regulation No 1408/71.

The facts and the main proceedings

21. Anne Kuusijärvi, a Finnish national, worked in Sweden for 11 months, her last day of work being 10 February 1993. Thereafter she drew unemployment benefit until her child was born on 1 February 1994, when she became entitled to a child allowance and parental benefit. On 1 July 1994 she moved to Finland where she remained unemployed. She was removed from the Swedish social insurance register on 2 July 1994, and parental benefit ceased to be paid with effect from that date.

22. Anne Kuusijärvi's application to continue to draw Swedish parental benefit after moving to Finland was rejected by the social insurance office for Norrbotten County. The Länsrätt (Administrative Court), Norrbotten, dismissed her appeal, ruling that the relevant provisions in Regulation No 1408/71 and Regulation No 574/72 meant that she had a right to Swedish benefits under Regulation No 1408/71 so long as the conditions for payment were fulfilled under the Swedish rules; in the light of, *inter alia*, the rules on removal from the Swedish social insurance register, she had upon leaving Sweden no right to continued payment of parental benefit after 1 July 1994. She appealed to the Kammarrätt in Sundsvall, which referred the following questions to this Court:

'1. Does Regulation (EEC) No 1408/71 apply at all to a person who, before the regulation became applicable in Sweden, moved from Finland to Sweden and took up employment here, but who was not in employment in Sweden when the regulation came into force in Sweden and did not come here as an unemployed person after the regulation became applicable in Sweden, but only stayed here at that time as an unemployed person after a previous period of employment and then drew Swedish unemployment benefit. That is to say, can a person in that situation claim that, after 1 January 1994, on

the basis of Regulation No 1408/71, he or she is covered by Swedish legislation as regards entitlement to Swedish social security benefits in the form of parental benefit?

If that question is answered in the affirmative, the following questions also need to be answered:

2. Is Article 13(2)(f) of Regulation No 1408/71, in conjunction with Article 10(b) of Regulation No 574/72, to be understood as meaning that a Member State is not precluded from introducing a condition of residence in its territory in order for a person who has ceased working there to remain covered by that country's legislation as regards cash maternity benefits?

3. Is Article 22 of Regulation No 1408/71 to be understood as meaning that, if a person begins to draw cash maternity benefits in a competent state, that person retains entitlement, on the conditions applying according to that article, to those cash benefits when moving to another Member State only on condition that the person concerned fulfils all the provisions of the legislation applied by the competent country, that is to say including the requirement, laid down in those provisions, that the person concerned must be resident in its territory, *or* is Article 22 to be interpreted as meaning that such entitlement exists so long as the person concerned fulfils all other conditions of the national legislation of the country which he or she leaves, apart from the residence requirement?'

23. Written observations have been submitted by the Riksförsäkringsverket, the Commission and the Finnish, Netherlands, Norwegian and Swedish Governments. With the exception of the Norwegian Government, those parties were represented at the hearing.

The first question

24. The first question asks whether the Regulation applies to a person who was not employed in Sweden when the Regulation entered into force there but was staying there as an unemployed person with a right, based on previous employment there, to draw unemployment benefit. It appears from the order for reference that the question was put because of doubts whether in those circumstances the applicant fell within the definition of 'employed person' in Articles 1(a)

and 2(1) rather than because the facts antedate Sweden's accession to the Community.

25. There is a consensus among those submitting observations that the Regulation applies in the circumstances, although their reasons differ slightly.

26. The applicant has not submitted observations; her view, however, may be gleaned from the order for reference. She appears to have argued before the Kammarrätt that the Regulation applied in view of her employment and subsequent period of unemployment in Sweden before the Regulation came into force in that State.

27. The Riksförsäkringsverket refers to the principle established by the Court to the effect that the concept of an employed person is a Community concept to be interpreted widely so as to ensure maximum freedom of movement for workers within the Community. The relevant criterion is whether a person is covered by the social security legislation of the Member State in question. [11]

28. The Swedish Government notes that, before the Regulation entered into force, the applicant had worked in Sweden for 11 months and then drawn unemployment benefit. She was therefore covered by Swedish social security and accordingly within the personal scope of the Regulation.

29. The Finnish Government refers to Article 2 of the Regulation, which states that it applies to 'employed or self-employed persons who are or have been subject to the legislation of one or more Member States', and Article 1(a)(i) which further defines 'employed person' as a person covered by a social security scheme for employed persons. The Court has moreover held that the term 'worker' is not restricted to workers in active employment. [12] The Regulation accordingly covers a person in receipt of unemployment benefit at the time when it became applicable in the Member State in question.

30. The Norwegian Government refers to Article 94(2) and (3) of the Regulation, which provides that all periods of insurance and employment completed under the legislation of a Member State before the date of its application in the territory of that State are to be taken into consideration for the

11 — Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177.

12 — Case 182/78 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik* [1979] ECR 1977 and Case C-215/90 *Twomey* [1992] ECR I-1823.

determination of rights acquired under it and that rights shall be acquired even though relating to a contingency which materialised prior to that date.

31. The Netherlands Government refers to the Court's broad definition of 'worker' as 'any person who has the capacity of a person insured under the social security legislation of one or more Member States'. [13] It is for the national court to determine whether the applicant is insured under Sweden's social security scheme so as to fall within this concept and the definition of 'employed person' in Article 1(a)(ii).

32. The Commission refers to Article 2(1) of the Regulation, which brings within its scope employed persons who are or *have been* subject to the legislation of a Member State. Since the applicant was subject to Swedish legislation both while she was working and while she was receiving unemployment benefit and subsequently parental benefit, the Commission concludes that the applicant is an 'employed person' for the purposes of the Regulation. The fact that the applicant was not in employment when she became entitled to the parental benefit does not affect that conclusion: the Commission refers to the definition of 'employed person' in Article 1(a) and to *Pierik* [14] and notes that, since she received unemployment benefit and parental benefit in Sweden, she must have been covered against relevant risks in accordance with Article 1(a).

33. In my view, a combined reading of Articles 1(a) and 2(1) shows that the Regulation applies to, among others, any person who is insured for one or more of the contingencies covered by the branches of social security dealt with in the Regulation under a social security scheme for all residents and who is or has been subject to the legislation of one or more Member States. Those branches of social security include maternity and unemployment benefits. The national court is presumably in a position to determine whether, as appears, at the time the Regulation entered into force in Sweden the applicant was both so insured and subject to such legislation since she was in receipt of a specified benefit and resident in Sweden. If that is the case, it seems clear that she falls within the personal scope of the Regulation. If further support for that view should be required, it may be found in Article 94(2) and (3) of the Regulation and in the judgment of the Court in *Pierik*.

34. *Pierik* concerned the interpretation of the term 'worker' which, in the version of the Regulation under consideration by the

13 — *Pierik*, cited in note 12, paragraph 4 of the judgment.

14 — Cited in note 12.

Court, [15] was defined by Article 1(a) as 'any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered' by a social security scheme referred to in Article 1(a)(i), (ii) or (iii). That definition is almost identical to the definition of 'employed person' in Article 1(a) of the current version of the Regulation. The Court stated:

'Laid down "for the purpose of this regulation", such a definition has a general scope, and in the light of that consideration covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them.' [16]

35. I accordingly conclude that a person in the applicant's situation is within the personal scope of the Regulation.

15 — OJ, English Special Edition 1971 (II), p. 416.
16 — Paragraph 4 of the judgment.

The second question

36. By its second question, the national court asks whether Article 13(2)(f) means that a Member State is not precluded from requiring a person who has ceased working in that State to reside there in order to remain covered by its social security legislation. Article 13(2)(f), it will be recalled, provides that a person to whom the legislation of a Member State ceases to be applicable without the legislation of another Member State becoming applicable pursuant to Title II of the Regulation shall be subject to the legislation of the Member State where he resides.

Arguments of the parties

37. It appears from the order for reference that before the Kammarrätt the applicant argued primarily that, in view of her previous employment in Sweden and subsequent entitlement to unemployment benefit, the effect of Article 13 was that, even though she was resident in another Member State, she was covered by Swedish legislation until that legislation ceased to be applicable in accordance with Article 13(2)(f). The applicant considers that Article 13(2)(f) in conjunction with Article 10b of Regulation No 574/72 does not permit Sweden to invoke the residence requirement, which in her view would

mean that as an unemployed person she would lose her right to parental benefit immediately on moving to Finland without being covered by Finnish social security legislation on the basis of the Regulation.

38. The Riksförsäkringsverket refers to the wording of Article 10b of Regulation No 574/72, to the effect that the date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) shall be determined in accordance with that legislation. The Swedish rules provide that an insured person who moves to another Nordic State ceases to be covered from the date of the move. The Riksförsäkringsverket considers that that is a valid condition given that it applies to nationals of all Member States.

39. The Swedish Government, in contrast, considers that Article 13(2)(a) (which provides that the applicable legislation is that of the Member State of employment) and not Article 13(2)(f) is the relevant provision. It refers to the judgment of the Court in *Ten Holder*, [17] which prompted the amendment to Regulation No 1408/71 which inserted Article 13(2)(f). [18] In that case, the Court ruled that a worker who ceased to carry on an activity in a Member State and transferred his residence to another Member State without working there continued to be subject to the legislation of the Member State in which he was last employed, regardless of the length of time which had elapsed since the termination of the activity. Subsequently in *Twomey* [19] the Court ruled that only workers who had definitively ceased all professional or trade activity fell outside the scope of Article 13(2)(a). The Swedish Government considers that Article 13(2)(f) was intended to cover that latter situation; it does not apply to persons who have provisionally ceased to carry on a professional activity, for example because of temporary health reasons. For such a person, the applicable legislation is determined on the basis of the general rule, namely Article 13(2)(a), provided no specific circumstance militates in favour of applying another rule of Title II. The Swedish Government concludes that a person in the applicant's situation is covered by the legislation of the State where she was most recently employed, and hence by the legislation of Sweden. That legislation makes entitlement to parental benefit subject to a residence condition. The Government accepts that that condition cannot be relied on where, as in its view in this case, Article 13(2)(a) applies. [20]

40. The Norwegian Government refers to the principle hallowed in numerous decisions

17 — Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821.

18 — See paragraphs 45 to 49 below.

19 — Cited in note 12.

20 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755.

of the Court that the objective of the free movement of workers would be frustrated if a migrant worker were to lose benefits granted under the legislation of a Member State as a consequence of such movement. The effect of *Ten Holder* is that Article 13(2)(a) applies, and the applicant continues to be covered by Swedish legislation until her entitlement to benefits ceases for reasons other than the change of residence, since a residence condition cannot be relied on against a worker within the scope of Article 13(2)(a). [21] The Norwegian Government considers that the legislative history of Article 13(2)(f) shows that it is secondary to all other provisions of Title II and applies only after the period for payment of benefits from the last State of employment has expired. If a Member State were free to determine that its legislation ceased to apply to a worker who moved from that State while entitled to social security benefits there but before acquiring entitlement to such benefits in the State to which he moved, the first State could terminate social entitlements which Community law sought to protect and apply the provisions of the Regulation only in so far as the conditions for cover and for payment of benefits were fulfilled under national rules, which would be contrary to the whole scheme of the Regulation. Finally, the Norwegian Government considers that Article 10b of Regulation No 574/72 is an administrative implementing rule and cannot be invoked as an independent legal provision with direct and detrimental consequences for the person concerned: in particular, it cannot permit a Member State to lay down different conditions for recipients of benefits who continue to reside in the competent State and for workers who move to other Member States.

41. The Commission considers that Article 13(2)(f) has not made *Ten Holder* otiose: on the contrary, that supplementary provision applies only as from the date when the right to a benefit from the other State expires and determines the legislation which applies thereafter. It is otherwise where the person concerned has ceased all professional activity (see *Noij*, [22] *Daalmeijer* [23] and *Commission* v *Netherlands* [24]), but that is not the case here: it cannot be concluded that the applicant has definitively ceased all professional activity simply because she is temporarily devoting herself to bringing up her child.

42. The Finnish Government notes that in *Ten Holder* the Court broadened the scope of Article 13(2)(a) to a worker who had ceased work, however long had elapsed since employment; subsequent cases, however, restricted its scope so that it did not apply to a person who had definitively ceased work. [25] In the latter case, the question of the applicable legislation is governed by

21 — *Kits van Heijningen*, cited in note 20.

22 — Case C-140/88 [1991] I-ECR 387.

23 — Case C-245/88 [1991] ECR I-555.

24 — Case C-198/90 [1991] ECR I-5799.

25 — *Noij*, cited in note 22, *Daalmeijer*, cited in note 23, and *Commission* v *Netherlands*, cited in note 24.

Article 13(2)(f). The Finnish Government considers that Article 13(2)(f) is not limited to cases where there is a permanent cessation of work and suggests that it applies in a situation where it can be concluded on the basis of objective considerations that the worker has definitively stopped working in one State and moved to another; that may be for reasons other than retirement. It cannot however be interpreted so as to permit a Member State to decide freely at what point its legislation ceases to be applicable for the purposes of that provision; the question of the applicable legislation must always be settled by reference to the rules of Title II. However, whether Article 13(2)(f) applies is not decisive in this case; what is decisive is that Sweden was the competent State at the point when the benefit at issue was granted so that, whichever legislation is applicable, Article 22 precludes Sweden from invoking the residence condition to defeat the applicant's entitlement to that benefit: that point is dealt with in the Finnish Government's observations on the third question.

another. It is not however limited to old-age pensioners, but should cover anyone who definitively terminates his gainful employment in one particular State. The work link is then broken and it is open to the State — as shown by Article 10b — to determine whether and on what conditions such persons remain insured under their social security legislation. The Netherlands Government considers that, for the purposes of determining the applicable legislation, those conditions may include a residence condition, so that Swedish legislation no longer applies to the applicant since her move to Finland. The Netherlands Government considers, however, that its conclusion as to the applicable legislation does not mean that the applicant's entitlement to parental benefit ceased when she returned to Finland: that issue is governed by Article 22, which it considers in the context of the third question.

The scope of Article 13(2)(f)

43. The Netherlands Government considers that Article 13(2)(f) lays down an explicit conflict rule which applies to situations such as the present and means that the case-law which might suggest that Article 13(2)(a) applies in this case, in particular *Twomey*, has become obsolete. Article 13(2)(f) applies where a person has definitively ceased activities in one Member State and resides in

44. Article 13 is the first provision in Title II of Regulation No 1408/71, headed 'Determination of the legislation applicable'. The Court has ruled on numerous occasions that the provisions of Title II constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State

from being applicable and to avoid the complications which may result from that situation. [26]

45. Article 13(2)(f) was inserted into Regulation No 1408/71 by Regulation No 2195/91. [27] The third recital in the preamble to Regulation No 2195/91 states:

'Whereas it has proved necessary, following the judgment delivered by the Court of Justice in Case 302/84 (Ten Holder) on 12 June 1986, to insert a new subparagraph (f) in Article 13(2) of Regulation (EEC) No 1408/71 in order to determine what legislation is applicable to persons to whom one Member State's legislation ceases to be applicable without the legislation of another Member State becoming applicable to them, in accordance with one of the rules laid down in the previous subparagraphs of the same Article 13(2) or one of the exceptions provided for in Articles 14 to 17 ...'

46. Guidance as to the scope and purpose of Article 13(2)(f) may accordingly be sought in the judgment of the Court in *Ten Holder*. [28] Since however *Ten Holder* applied a principle previously laid down by the Court in *Coppola*, [29] that case is perhaps a better starting point.

47. Both cases concerned Article 13(2)(a), which sets out the principal rule in Title II of *lex loci laboris*, namely that a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State.

48. *Coppola* concerned the legislation applicable to a worker who had been employed in the United Kingdom and then Italy before falling ill. The Court ruled that, although Article 13(2)(a) did not expressly mention the case of a worker who was not employed when he sought sickness benefit, it was appropriate to interpret it as referring, where necessary, to the legislation of the State in whose territory the worker was last employed. [30]

49. *Ten Holder* concerned a Netherlands national who was employed in Germany when she became incapacitated for work and entitled to sickness benefits. She returned to live in the Netherlands; subsequently the German sickness benefits were discontinued

26 — See most recently Case C-131/95 *Huijbrechts* v *Commissie voor de Behandeling van Administratieve Geschillen* [1997] ECR I-1409, paragraph 17 of the judgment.

27 — Cited in note 2.

28 — Cited in note 17.

29 — Case 150/82 *Coppola* v *Insurance Officer* [1983] ECR 43.

30 — Paragraph 11 of the judgment.

on the ground that the maximum period for their payment had expired. The Court, applying *Coppola*, ruled that the effect of Article 13(2)(a) was that a worker who had ceased to carry on an activity in the territory of a Member State and who had not taken up employment in another Member State continued to be subject to the legislation of the Member State in which he was last employed, regardless of the length of time which had elapsed since the termination of the activity in question and the end of the employment relationship. [31]

50. The application of that apparently very broad proposition was restricted in a trio of subsequent cases. In *Noij*, [32] the Court ruled that neither Article 13(2)(a) nor any other provision of Title II applied to a worker who had taken early retirement and hence had definitively ceased to be employed. Article 13(2)(a) in particular was designed to resolve conflicts of legislation which may arise where, during a single period, the place of residence and the place of employment are not situated in the same Member State: such conflicts could no longer arise in the case of workers who had definitively ceased all professional or trade activity. [33] That principle was upheld in *Daalmeijer*, [34] where the Court ruled that Article 13(2)(d), which states that civil servants are to be subject to the legislation of the Member State to which the administration employing them is subject, did not apply to persons who had definitively ceased to carry on any professional or trade activity, [35] and in *Commission* v *Netherlands*, [36] where the Court ruled that Article 13(2)(a) was not applicable to employed persons who had taken early retirement. [37]

51. Finally, *Twomey* [38] concerned a United Kingdom national who worked and resided for a time in the United Kingdom, terminated her employment and moved to Ireland where she did not work. Some months after moving to Ireland, she was certified as unfit for work and sought United Kingdom sickness benefit. At that time, she was 20 years old. Article 13 was not mentioned in the question referred, but the German Government argued at the hearing that Article 13(2)(a) did not apply to a person in Mrs Twomey's position since she was no longer employed in the United Kingdom. It argued that she was accordingly subject to the legislation of the State of residence. The Court rejected that argument, reiterating the principle laid down in *Ten Holder* that a worker who had ceased to carry on an activity in the territory of a Member State continued to be subject to the legislation of that State if he had not taken up employment in another Member State, and that laid down in *Noij*

31 — Paragraphs 14 and 15 and operative part.
32 — Cited in note 22.
33 — Paragraph 10 of the judgment.
34 — Cited in note 23.
35 — Paragraphs 12 and 13 of the judgment.
36 — Cited in note 24.
37 — Paragraph 10 of the judgment.
38 — Cited in note 12.

that only workers who have definitively ceased all professional or trade activity fall outside the scope of Article 13(2)(a).

52. It is clear that Article 13(2)(f) sought at least to provide for the situation of a worker who has definitively ceased all professional or trade activity and resides in a Member State other than the State of last employment. [39] The legislation applicable to such a worker will now be that of the State of residence.

53. The issue in the present case however is whether the scope of Article 13(2)(f) is wider than that, so that the provision also applies where a person who is resident in a State other than the State of last employment has temporarily ceased to work, for example because of sickness or childbirth, and the legislation of the State of last employment provides that in such circumstances it ceases to apply.

54. To my mind, there is nothing in the wording of Article 13(2)(f) to suggest that it was intended to be restricted to workers who have definitively ceased all occupational activity. On the contrary, its wording and history suggest that it was rather intended to have the status of, in effect, an alternative general provision. The scheme of Article 13(2) would thus broadly be that the law of the State of employment, articulated in subparagraphs (a) to (e), would apply where the person concerned was working and the law of the State of residence would apply where he was not. The legislation of the Member State of last employment would, as provided for by Article 10b of Regulation No 574/72, determine the date and conditions when it ceased to apply. As will be seen, however, in the context of the third question, where at that date a person is entitled to a specific benefit payable by the State of last employment, the fact that the legislation of that State ceases to be applicable will not necessarily, or even usually, mean that that person simultaneously loses his entitlement to continued payment of that benefit.

55. That view finds support, moreover, in the preamble to Regulation No 2195/91, which suggests that Article 13(2)(f) was intended to cover precisely the type of situation at issue in *Ten Holder*, namely the transfer of residence by a person in receipt of a benefit such as sickness benefit which is likely to prove temporary, thus in effect reversing the judgment. The preamble states: 'Whereas it has proved necessary, following the judgment ... to insert a new subparagraph (f)'. [40]

39 — See the Explanatory Memorandum on the Commission's proposal for a Council Regulation (EEC) amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1990 C 221, p. 3; COM(90) 335 final.

40 — Third recital.

56. Further guidance as to the Commission's intentions may be found in the explanatory memorandum on the proposal, [41] which states as follows:

'The *Ten Holder* judgment revealed a gap in Title II of Regulation (EEC) No 1408/71. There is indeed no specific provision determining what legislation is applicable to persons who have ceased to engage in any occupational activity under the legislation of one Member State and who reside in the territory of another Member State.

The proposed Article 13(2)(f) is intended to eliminate this gap.'

There is nothing in that explanation, or elsewhere in the Explanatory Memorandum, to suggest that Article 13(2)(f) was intended to be restricted to persons who have definitively ceased work.

57. It is also relevant to note that, at the time the Commission submitted its proposal for Regulation No 2195/91 the Court had not yet delivered its judgments in *Noij* and *Daalmeijer*; accordingly it may be thought unlikely that the Commission intended to cater solely for a category of persons whose exclusion from Regulation No 1408/71 had not yet been established.

58. A wider interpretation of Article 13(2)(f) would moreover avoid the consequence of the alternative view — highlighted by the Netherlands Government at the hearing — that a recipient of long-term benefits from one Member State who moves to another State without working there would retain his entitlement to such benefits from the first Member State indefinitely, which does not seem wholly sensible. That consequence would also follow from the solution advanced by the Commission, namely that Article 13(2)(f) would become applicable after any existing entitlement to benefits under the legislation of the Member State of last employment expires.

59. Finally, I would allay the concerns expressed by the Norwegian Government to the effect that, if Article 13(2)(f) were to apply in the circumstances under consideration, the scheme of the Regulation, and in particular its aim of promoting free movement of workers, would be frustrated. The Norwegian Government fears that a consequence of ruling that in circumstances such as those of the present case the applicable legislation is that of the State of residence would be that persons in the applicant's situation would lose entitlement to benefits which existed at the time of the transfer of residence. That consequence however will

41 — Cited in note 39.

not necessarily follow since, as will be seen in the context of the reply to the third question, both the benifit at issue in this case and numerous other benefits within the scope of the Regulation are covered by provisions designed to ensure their continued payment, notwithstanding change of residence, in situations analogous to that of the applicant.

60. It accordingly seems to me that there are sound arguments for interpreting Article 13(2)(f) as meaning that where a person who has temporarily or permanently ceased occupational activity transfers his residence from the Member State of last employment to another Member State and the legislation of the former State provides that it ceases to be applicable on such a transfer, the legislation of the State of residence becomes the applicable legislation with effect from the transfer of residence. However, as both the Netherlands and the Finnish Government point out, the interpretation of Article 13(2)(f) does not, on the facts of the present case, affect the applicant's entitlement to continued receipt of the parental benefit. That conclusion follows from the correct interpretation of Article 22, which is the subject of the national court's third and final question and to which I shall now turn. It is consequently unnecessary, in the light of the answer to the question 3, to take a definitive view on the scope of Article 13(2)(f).

The third question

61. Article 22 is in Title III of Regulation No 1408/71. That Title is headed 'Special provisions relating to the various categories of benefits'. Chapter 1 of Title III, comprising Articles 18 to 36, concerns sickness and maternity benefits. Article 22 provides that an employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits and who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to transfer his residence to the territory of another Member State, shall be entitled to cash benefits provided by that institution in accordance with the provisions of the legislation which it administers. Authorisation for a transfer of residence may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

62. For the purposes of the Regulation, 'employed person' includes any person who is insured for one or more of the contingencies covered by the branches of social security dealt with in the Regulation, under a social security scheme for all residents, [42] 'competent State' is defined as 'the Member State in whose territory the competent institution is situated' [43] and 'competent institution' is defined *inter alia* as 'the institution

42 — Article 1(a)(ii).
43 — Article 1(q).

with which the person concerned is insured at the time of the application for benefit' [44] and 'the institution from which the person concerned is entitled or would be entitled to benefits if he ... were resident in the territory of the Member State in which the institution is situated'. [45]

63. Article 22 thus applies in the present case regardless of the applicable legislation, since even if the effect of Article 13(2)(f) is that Finnish legislation became applicable to the exclusion of Swedish legislation at the time the applicant moved to Finland, Sweden remains the competent State for the purposes of Article 22 in relation to the maternity benefit in question.

64. The national court's third question essentially asks whether the requirement in Article 22 that persons to whom it applies satisfy the conditions of the national legislation means that, where that legislation includes among such conditions a requirement of residence on national territory, a recipient who moves to another Member State ceases to be entitled to payment of the benefit.

65. Article 22(1)(b) by its terms applies where a person entitled to sickness or maternity benefits returns to the Member State where he resides or transfers his residence to another Member State and ensures that in such circumstances the recipient retains his entitlement to the benefits in question. It is evident that if that entitlement could be defeated by a national residence requirement the provision would be entirely devoid of purpose, which can scarcely have been intended. Article 22 is moreover one of a series of provisions of the Regulation which seek to ensure that Member States may not in general refuse payment of social security benefits within the Regulation solely because the putative recipient resides in another Member State: see, for example, Articles 10 (invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants), 52 and 55 (accidents at work and occupational diseases), 69 to 71 (unemployment benfits), and 73 (family benefits). I accordingly conclude that the right to continued payments of benefits conferred by Article 22 cannot be defeated by a residence requirement imposed by national legislation as a condition of entitlement to such benefits.

66. It may be noted that that view is shared by all the parties except the Riksförsäkringsverket, which considers that Article 22 does not regulate the type of conditions to which the competent State may subject entitlement to benefits, but merely requires those conditions to be satisfied. Accordingly in its view that article does not apply since the applicant

44 — Article 1(o)(i).
45 — Article 1(o)(ii).

has left Sweden to stay for more than one year in Finland. By contrast the applicant, the Swedish, Finnish, Netherlands and Norwegian Governments and the Commission all concur in the view that Article 22 entitles a recipient to continue receipt of the benefit after transferring her residence to another Member State provided that the conditions of entitlement laid down by national legislation, other than any residence condition, are satisfied. The Commission and the Netherlands Government note in addition that authorisation for a transfer of residence may be refused only if it is established that movement of the person concerned would be prejudicial to their state of health, which does not seem to be the case, and submit that to restrict entitlement to the benefit by imposing a residence condition would be contrary to the meaning and aim of Article 22.

67. Those submissions are plainly well founded and I accordingly conclude that a person in receipt of cash maternity benefits in a Member State retains entitlement to those benefits after moving to another Member State provided that she fulfils all the conditions of the national legislation of the first Member State apart from any residence requirement.

Conclusion

68. Accordingly I am of the opinion that the questions referred by the Kammarrätt, Sundsvall, should be answered as follows:

(1) 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 applies to a person who was insured in a Member State within the meaning of Article 1(a) and subject to the legislation of that State at the time the Regulation became applicable there even though at that point that person was neither employed nor in receipt of unemployment benefit in that State.

(2) Article 22 of Regulation No 1408/71 precludes a Member State from refusing to continue payment of maternity benefit to a person otherwise entitled to such benefit by reason solely of a transfer of residence to another Member State.