



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 13 December 2012¹

Case C-619/11

Patricia Dumont de Chassart

v

Office national d'allocations familiales pour travailleurs salariés (ONAFTS)

(Reference for a preliminary ruling from the tribunal du travail de Bruxelles (Belgium))

(Social security — Regulation (EEC) No 1408/71 — Article 79 — Benefits for orphans of workers subject to the legislation of more than one Member State at the expense of the Member State in which the orphan resides — Failure to take account of the periods of insurance completed in another Member State by the spouse of the deceased worker — Unequal treatment)

1. The question raised in the present case by the tribunal du travail de Bruxelles (Labour Court, Brussels) (Belgium), the referring court, concerns Article 79(1) of Regulation (EEC) No 1408/71² ('Regulation No 1408/71') and, in particular, the *renvoi* made by Article 79(1)(a) to Article 72 of the regulation. Those provisions were completely recast by Regulation (EC) No 883/2004³ which repealed and replaced Regulation No 1408/71 from 1 May 2010. The new provisions are, however, irrelevant to the present case.

2. In the main proceedings, an appeal has been brought before the referring court by the applicant, Ms Dumont de Chassart, against a decision by the Belgian Office for Family Allowances for Employed Persons (Office national d'allocations familiales pour travailleurs salariés; 'ONAFTS'), refusing her application for the grant of family benefits for orphans. In those circumstances, the Court is asked, in essence, to clarify whether the provisions of Regulation No 1408/71, which determine the national legislation applicable for the grant of family benefits for the 'orphan of a deceased employed or self-employed person', exclude the possibility of applying the principle of aggregation taking account of the periods of insurance completed in another Member State by the surviving working parent, when, as in the present case, the national legislation allows the periods of insurance completed by the surviving parent to be taken into account as the basis for the application for family benefits for orphans.

1 — Original language: Italian.

2 — Council regulation 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1). The title cited is that of the consolidated version thereof.

3 — Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1). That regulation repealed and replaced Regulation No 1408/71 from 1 May 2010, when it was brought into effect by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1).

3. The interest of the present case lies in the fact that, in contrast to most of the cases referred to the Court in this field, the issue is not the aggregation of benefits payable in different Member States simultaneously,⁴ but the interaction between the provisions of Regulation No 1408/71 and the applicable national legislation.

I – Legal context

A – *European Union law*

4. Article 72 of Regulation No 1408/71 appears in Chapter 7 of Title III on ‘Family benefits’. Article 72 is entitled ‘Aggregation of periods of insurance, employment or self-employment’ and provides that:

‘Where the legislation of a Member State makes acquisition of the right to benefits conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that State shall take into account for this purpose, to the extent necessary, periods of insurance, employment or self-employment completed in any other Member State, as if they were periods completed under the legislation which it administers.’

5. Articles 78 and 79 of that regulation are contained in Chapter 8 of Title III concerning ‘Benefits for dependent children of pensioners and for orphans’.

6. Article 78 of Regulation No 1408/71, entitled ‘Orphans’, provides:

‘1. The term “benefits”, for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans.

2. Orphans’ benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

...

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State;

...’

7. Article 79 of Regulation No 1408/71, entitled ‘Provisions common to benefits for dependent children of pensioners and for orphans’, provides:

‘1. Benefits, within the meaning of Article[s] ... 78 and ..., shall be provided in accordance with the legislation determined by applying the provisions of those articles by the institution responsible for administering such legislation and at its expense as if ... the deceased had been subject only to the legislation of the competent State.

4 — See, purely by way of illustration, Case 733/79 *Laterza* [1980] ECR 1915; Case 320/82 *D’Amario* [1983] ECR 3811; Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071; Case C-471/99 *Martínez Domínguez and Others* [2002] ECR I-7835; and Case C-225/10 *Pérez García and Others* [2011] ECR I-10111.

However:

- (a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance, employment, self-employment or residence such length shall be determined taking into account, where appropriate, the provisions of ... Article 72;
...'

B – *National law*

8. Article 56a(1) of the laws consolidated on 19 December 1939 on family allowances for employed persons (the 'consolidated laws') provides, in essence, that the supplementary family allowance for orphans is to be awarded to orphans whose deceased parent or surviving parent, during the 12 months immediately preceding the death, satisfied the conditions for claiming at least six flat-rate (basic) monthly payments of the allowance in accordance with those consolidated laws.

II – The facts, the main proceedings and the question referred for a preliminary ruling

9. The applicant in the main proceedings, Ms Dumont de Chassart, is a Belgian citizen, the widow of Mr Descampe, also of Belgian nationality. The couple had a son, Diego Descampe, a Belgian citizen too, born in France in 2000.

10. For several years, the family resided in France, where both parents were employed. In particular, it is clear from the case-file that, from 28 September 1993 to 31 August 2008, Ms Dumont de Chassart was employed as a psychologist in a children's association in France. Mr Descampe, on the other hand, was employed both in Belgium (during the periods from 1968 to 1976 and from 1987 to 1998) and, until 2002, in France. From 2002, however, and until his death on 25 April 2008, he was not engaged in any employment and lived in France in a situation of 'early retirement' without receiving income or benefits.

11. On 31 August 2008, that is to say, a few months after Mr Descampe died, Ms Dumont de Chassart and her child moved to Belgium, where, after working for about a month, she became unemployed.

12. On 13 October 2008, Ms Dumont de Chassart applied to ONAFTS for the grant of family benefits for orphans.

13. Although it had on 9 March 2009 and 6 April 2009, granted Ms Dumont de Chassart, with retroactive effect, family allowances and a supplementary allowance for single-parent families respectively, by decision of 20 October 2009 ONAFTS refused to grant her the family allowance for orphans. ONAFTS gave as the reason for its decision the fact that, during the 12 months immediately before his death, the deceased father had not met the conditions for claiming at least six flat-rate (basic) monthly payments of the allowance, as required under Article 56a of the coordinated laws.

14. On 4 February 2010, Ms Dumont de Chassart brought an action before the referring court challenging that refusal, claiming that ONAFTS ought to have granted her the allowance for orphans by taking account of the periods of insurance which she had completed, in France, before her husband died.

15. That court notes that under Article 78(2)(b)(i) of Regulation No 1408/71 the legislation of the Member State in which the orphan resides is applicable and that, consequently, it was the Belgian legislation that applied to Ms Dumont de Chassart as of 1 September 2008. The referring court points out that, according to Article 56a of the consolidated laws, either the situation of the deceased parent or that of the surviving parent may be relied upon as the basis of the application for family allowances for orphans. In the present case, however, the application could not be based on the situation of the deceased parent because, during the 12 months immediately preceding his death, Mr Descampe did not meet the conditions laid down by Article 56a of the consolidated laws. The situation of Ms Dumont de Chassart could, however, be relied upon in support of her application but only if the periods of employment in France could be treated as periods of employment in Belgium. This would be possible if Article 72 of Regulation No 1408/71, which provides for the aggregation of periods of insurance and employment, were applied to the applicant's situation.

16. According to the referring court, however, in the present case, the application of Article 72 of Regulation No 1408/71 to the situation of Ms Dumont de Chassart is excluded because, as set out in the decision of ONAFTS, Article 79(1) of the regulation contains a *renvoi* to Article 72, but solely in relation to the deceased working parent. That *renvoi* is confined to the deceased parent because the event giving rise to entitlement to family benefits for orphans is the death of the parent. It follows that the ambit *ratione personae* of Article 79(1) of Regulation No 1408/71 and, consequently, of the *renvoi* made by that provision to Article 72 of the regulation, is more restrictive than the ambit *ratione personae* of Article 56a of the coordinated laws which in fact refers to the situation of both parents. In the present case, this means, in the view of the referring court, that the situation of the surviving working parent cannot be taken into account.

17. The referring court asks, therefore, whether the situation arising from the interaction of Article 79(1) of Regulation No 1408/71 with Article 56a of the coordinated laws does not involve breach of the principles of equal treatment and non-discrimination. That court entertains doubts concerning, in particular, the distinction made between the orphaned children of parents who have never left Belgian territory in order to take up employment in the European Union and orphaned children whose parents, citizens of the European Union, have resided in another Member State in which, during the material period for the purposes of Belgian legislation, the surviving parent worked whereas the deceased parent did not engage in any occupational activity. In the case of orphans falling into the first category, the surviving parent who had worked in Belgium during the reference period could rely on, in addition to the periods of insurance completed by the deceased parent, the periods of insurance which he or she had completed in Belgium, whereas, in the case of orphans falling into the second category, the method of aggregating the insurance periods, so interpreted, would not allow the surviving parent to 'import' to Belgium the periods of insurance he or she had completed in another Member State.

18. In those circumstances, the tribunal du travail de Bruxelles stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does Article 79(1) of ... Regulation ... No 1408/71 ... breach the general principles of equality and non-discrimination, enshrined, *inter alia*, in Article 14 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, read, where appropriate, in conjunction with Articles [20 TFEU, 45 TFEU and/or 49 TFEU], when it is interpreted as allowing the rules equating periods of insurance, employment or self-employment laid down in Article 72 of Regulation ... No 1408/71 ... to apply to the deceased parent alone, with the consequence that Article [56a(1) of the consolidated laws] excludes, in the case of the surviving parent, irrespective of that parent's nationality provided he or she is a national of a Member State or provided he or she comes within the scope *ratione personae* of Regulation ... No 1408/71 ..., who has worked in another country of the European Union during the 12-month period referred to in Article [56a(1) of the consolidated laws], the opportunity for that parent to provide evidence that he or she fulfils the condition that, in his or her capacity as claimant for the purposes of Article 51(3)(1)

of the [consolidated laws], he or she could have received six flat-rate monthly benefit payments during the 12 months preceding the death, whereas the surviving parent, whether he or she is of Belgian nationality or is a national of another Member State of the European Union, who has worked exclusively in Belgium during the 12-month period referred to in Article [56a(1) of the consolidated laws], in some cases because he or she has never left Belgian territory, is allowed to adduce such evidence?’

III – Procedure before the Court

19. The order for reference was received at the Court Registry on 30 November 2011. Written observations were submitted by Ms Dumont de Chassart, the Belgian Government, the Council of the European Union and the European Commission.

20. At the hearing on 7 November 2012, submissions were made by Ms Dumont de Chassart, the Belgian Government, the Council and the Commission.

IV – Legal analysis

21. By its question for a preliminary ruling, the referring court asks, in essence, whether Article 79(1) of Regulation No 1408/71 breaches the principles of equal treatment and non-discrimination inasmuch as, in circumstances such as those of the main proceedings, by allowing the rules on the aggregation of the periods of insurance, employment or self-employment referred to in Article 72 of Regulation No 1408/71 to apply solely in respect of the deceased working parent, it precludes taking account of such periods in respect of the surviving working parent who has worked in another Member State of the European Union for the purpose of granting the allowance for orphans, even though the national legislation allows the situation of the surviving parent to be taken into account as the basis for the application for the grant of such allowances.

22. Before I analyse the question referred by the referring court, it is necessary to answer a preliminary argument raised by the Belgian Government concerning the applicability of Regulation No 1408/71 in the present case.

A – *Applicability of Regulation No 1408/71*

23. The Belgian Government in fact raises the preliminary point that, Mr Descampe having ceased all employment in April 2002 and, consequently, at the time of his death, that is to say, in April 2008, no longer being a member of any social security system, he could no longer be classified as an employed or self-employed person within the meaning of Article 1(a) of Regulation No 1408/71. His dependants cannot, therefore, benefit from the rights conferred by the regulation.

24. In that connection, I must point out that Article 2 of Regulation No 1408/71, which governs the ambit *ratione personae* of the regulation, provides, in paragraph 1, that ‘[t]his Regulation shall apply to employed or self-employed persons and 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 ..., as well as to the members of their families and their survivors’.⁵

5 — Emphasis added. The text of this provision was extended by Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students (OJ 1999 L 38, p. 1), by incorporating into the first phrase the words ‘and to students’.

25. In the present case, it is common ground that Mr Descampe was a citizen of one of the Member States, Belgium, and that, having been employed in France and Belgium, he *was subject* to the legislation of one or more Member States. It is also undisputed that both his orphan son and his spouse constitute family members and survivors within the meaning of Regulation No 1408/71.

26. That being the case, there is, to my mind, no doubt that Regulation No 1408/71 is applicable to the dispute forming the subject-matter of the main proceedings.

27. On the issue of the applicability of Regulation No 1408/71, it may also be pointed out, merely for the sake of completeness, that it is also applicable *ratione temporis*, for Ms Dumont de Chassart submitted her application in October 2008, thus before the entry into force of new Regulation No 883/2004 which, as I have already mentioned, repealed and replaced Regulation No 1408/71 from 1 May 2010.⁶

B – *Consideration of the question referred*

28. Turning to an analysis of the substance of the question referred by the referring court, I must point out, to begin with, that it concerns, in essence, the validity of Article 79(1) of Regulation No 1408/71 in relation to the principles of equal treatment and non-discrimination. However, it must also be said that the issue of validity raised by the referring court is based on a particular interpretation of Article 79(1) of Regulation No 1408/71, namely the restrictive interpretation referred to in point 16 above, which was adopted by ONAFTS and would appear to have been endorsed by the referring court. According to that interpretation, the *renvoi* to Article 72 of Regulation No 1408/71, contained in Article 79(1)(a) of the regulation, being restricted to the situation of the deceased working parent, aggregation of the periods of insurance completed by the surviving parent is, in essence, excluded, even if the national legislation makes it possible to take account of the situation of the surviving working parent in support of the application for family allowances for orphans.

29. Against that background, in order to provide a helpful response to the question referred by the referring court, it is necessary to take as the starting point the settled case-law concerning the actual objectives of Regulation No 1408/71. The Court has, in fact, repeatedly held that Regulation No 1408/71 does not organise a common system of social security but allows the separate national arrangements to remain in place, and is designed solely to ensure that they are coordinated.⁷ The system put in place by Regulation No 1408/71 is, in fact, merely a system of coordination, concerning inter alia the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement.⁸

30. In accordance with settled case-law, it remains, however, a matter for the Member States to determine the conditions governing the grant of social security benefits, and the Member States may make those conditions stricter, provided that they do not give rise to overt or disguised discrimination between European Union workers.⁹ Moreover, according to the case-law, in laying down those conditions, the Member States are required to observe European Union law and, in particular, the objective pursued by Regulation No 1408/71 and the principles on which it is based.¹⁰

⁶ — See point 1 and footnote 3 above.

⁷ — See, among others, Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23; Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27; and Case C-503/09 *Stewart* [2011] ECR I-6497, paragraphs 75 to 77 and the case-law cited.

⁸ — See, among others, Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 20; Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 20; Case C-103/06 *Derouin* [2008] ECR I-1853, paragraph 20; and Case C-440/09 *Tomaszewska* [2011] ECR I-1033, paragraph 25.

⁹ — See, among others, Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27; Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869, paragraph 43; Case C-306/03 *Salgado Alonso* [2005] ECR I-705, paragraph 27; and *Tomaszewska*, cited in footnote 8, paragraph 24.

¹⁰ — See *Tomaszewska*, cited in footnote 8, paragraph 27.

31. In that regard, the Court has also specified that the objective of Regulation No 1408/71, as stated in the second and fourth recitals 2 in its preamble, is to ensure free movement of employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation. To that end, as is made clear in the fifth, sixth and tenth recitals, the regulation upholds the principle of equality of treatment of workers in the context of the application of the various national legislations and seeks to guarantee the equality of treatment of all workers occupied in the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement.¹¹

32. The principles of equal treatment and non-discrimination which the referring court cites in its question for a preliminary ruling thus constitute fundamental principles of Regulation No 1408/71.

33. As specifically regards benefits for orphans, which form the subject-matter of the main proceedings, they are governed in Regulation No 1408/71 by Articles 78 and 79 contained in Chapter 8 of Title III.

34. As far as Article 78 of Regulation No 1408/71 is concerned, the Court has already had occasion to rule, in several instances, that it is designed to determine the Member State whose legislation governs the grant of benefits for orphans, which are then awarded, in principle, in accordance with the legislation of that Member State alone, in conformity with the principle, laid down in Article 13(1) of Regulation No 1408/71, that the legislation of a single Member State is applicable. It is clear in particular from Article 78(2)(b)(i) that, when a deceased worker has been subject to the laws of more than one Member State, the benefits in question are to be paid in accordance with those of the State in whose territory the orphan of the deceased worker resides.¹²

35. Once the Member State whose legislation governs the grant of the benefits for orphans has been determined, Article 79(1) of Regulation No 1408/71 stipulates that the benefits are to be provided by the institution responsible for administering such legislation, and at its expense, as if the deceased worker had been subject only to the legislation of the competent State. Therefore, Article 79(1), on the one hand, provides which institution is to bear the cost of the benefits for orphans and, on the other, deals with the procedures for applying the legislation of the competent State which, in accordance with the principle that the legislation of a single Member State is applicable, as set out above, must be applied ‘as if’ the deceased worker had been subject to that State’s legislation alone. In my view, the latter provision constitutes a kind of guarantee for the individual that, having exercised his right to freedom of movement, he will be able to benefit from the provisions of Regulation No 1408/71. That guarantee is designed to prevent the worker’s being discriminated against in the context of the procedures for actual application of the law determined on the basis of the linking factor referred to in Article 78 of the regulation.

36. However, Article 79(1)(a) moderates the principle of the application of the law determined ‘as if’ the deceased worker had been subject to that law alone, by establishing that if that national legislation provides that the acquisition, retention or recovery of the right to benefits is to be dependent on the length of periods of insurance, then the principle, under Article 72 of Regulation No 1408/71, of aggregating the periods completed in the different Member States must, where necessary, apply. In my view, that provision too acts as a sort of guarantee for the individual that, having exercised his right to freedom of movement, he will be able to benefit from the provisions of Regulation No 1408/71. It is, in

11 — See *Tomaszewska*, cited in footnote 8, paragraph 28; *Piatkowski*, cited in footnote 8, paragraph 19; and *Derouin*, cited in footnote 8, paragraph 20.

12 — See, among others, *Bastos Moriana and Others*, cited in footnote 4, paragraph 15, and *Martínez Domínguez and Others*, cited in footnote 4, paragraph 23.

fact, designed to ensure that the application of the national legislation ‘as if’ the deceased worker had been subject to that legislation alone does not preclude the application of the principle of aggregation established by Article 48(a) TFEU and implemented, for present purposes, by Article 72 of Regulation No 1408/71.

37. In that context, and apparently in agreement with the stance adopted by ONAFTS, the referring court takes the view that the fact that Article 79(1) of Regulation No 1408/71 refers solely to the deceased working parent means that the *renvoi* made by Article 79(1)(a) to Article 72 of the regulation cannot be used to allow the periods of insurance completed by the surviving working parent to be aggregated in circumstances in which, as in the main proceedings, the national legislation allows the situation of the surviving parent to be taken into account in support of the application for the grant of the benefits for orphans.

38. I do not agree with that interpretation of Article 79(1) of Regulation No 1408/71.

39. In that connection, it is necessary, in the first place, to state that it is clear from the considerations above that the provisions of Regulation No 1408/71 generally, and of Article 79(1) in particular, do not in any way concern the conditions that must be satisfied for the grant of the benefits for orphans. In keeping with the objectives of Regulation No 1408/71, as identified in the Court’s settled case-law and set out in points 29 and 31 above, those provisions merely lay down rules on the conflict of laws designed to determine the Member State whose legislation is applicable and whose competent institution must bear the cost of the benefits, and also specifying certain procedures for the application of that legislation.

40. However, according to the case-law referred to in point 30 above, the Member States continue to bear responsibility for determining the conditions governing the grant of benefits for orphans.

41. Consequently, it seems to me to follow from the very nature of rules on the conflict of laws possessed by Regulation No 1408/71 that it cannot prevent the national authorities from taking into account the conditions laid down by the national legislation for the grant of benefits for orphans.¹³

42. In the second place, it is necessary to bear in mind that, according to settled case-law, the provisions of Regulation No 1408/71 must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers.¹⁴

43. In that regard, the first recital in the preamble to Regulation No 1408/71 states that the provisions which that regulation contains for the coordination of national social security legislations fall within the framework of freedom of movement for workers and should contribute towards the improvement of their standard of living and conditions of employment.¹⁵

44. In that connection, the Court has held that it would both go beyond the objective of Regulation No 1408/71 and exceed the purpose and scope of Article 48 TFEU to interpret the regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of the regulation.¹⁶

13 — See, by analogy, point 51 of my Opinion in Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095.

14 — See, most recently, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012], ECR, paragraph 53 and the case-law cited. To that effect, see also Case C-205/05 *Nemec* [2006] ECR I-10745, paragraphs 37 and 38, and Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraph 29.

15 — See *Bosmann*, cited in footnote 14, paragraph 30, and *Hudzinski and Wawrzyniak*, cited in footnote 14, paragraph 54.

16 — See *von Chamier-Glisczinski*, cited in footnote 13, paragraph 56, and *Hudzinski and Wawrzyniak*, cited in footnote 14, paragraph 55.

45. In point of fact, bearing in mind in particular its underlying objectives, the European Union legislation on the coordination of national social security legislation cannot, except in the case of an express exception compatible with those objectives, be applied in such a way as to deprive a migrant worker, or those claiming under him, of benefits granted solely by virtue of the legislation of a single Member State.¹⁷ Consistently with the upholding of that principle, the Court has, therefore, unswervingly opposed an interpretation of Regulation No 1408/71 that could lead to workers losing the social security advantages guaranteed them by the legislation of a Member State.¹⁸

46. In the present case, it is, in my view, clear that the effect of an interpretation of Article 79(1) of Regulation No 1408/71 of the kind proposed by ONAFTS, and apparently endorsed by the referring court, would be to deprive of the right to the social security benefits conferred on her by the applicable law a migrant worker who, like Ms Dumont de Chassart, had exercised her right to freedom of movement. By analogy with what I stated on another occasion¹⁹ and with the case-law cited in point 44 above, such a consequence would not be in keeping with the spirit of the regulation or with the objectives pursued by means of the coordination of the national social security legislation sought by Article 48 TFEU.

47. Moreover, an interpretation of that kind, while not entailing, as maintained by the Belgian Government at the hearing, discrimination on the ground of nationality, given that the legislation applies regardless of citizenship, does give rise to unlawful discrimination between workers who have exercised their right to freedom of movement and workers who have not.

48. In the third place, an interpretation of Article 79(1) of Regulation No 1408/71 that does not prevent the surviving working parent, who has exercised his or her right to freedom of movement, from benefiting from the rules which provide for the aggregation of periods of employment is not merely the only interpretation consistent with the objectives of the regulation, but is also faithful to the wording of the provision.

49. While it is true that Article 79(1) of Regulation No 1408/71 refers to the situation of the deceased person in order to indicate how the legislation determined under Article 78 of the regulation is to be applied, the fact remains that Article 79(1)(a), which makes the *renvoi* to the principle of aggregation under Article 72, makes no mention of the situation of the deceased person. There is nothing in that provision to suggest that the European Union legislature intended to restrict the application of the principle of aggregation solely to the deceased person, thereby excluding the surviving working parent, when the national legislation provides for the possibility of taking the periods of insurance completed by the surviving parent into account in support of the application for benefits for orphans.

50. In that connection, it must be pointed out also that the principle of aggregating periods of insurance, residence and employment is directly established in the Treaty on the Functioning of the European Union (TFEU), and in Article 48(a) specifically, and is put into effect in various normative provisions of Regulation No 1408/71, including Article 72.²⁰ The Court has already held that this is one of the basic principles governing the coordination, at European Union level, of social security schemes in the Member States, its purpose being to ensure, in accordance with the general objectives of Regulation No 1408/71, that exercise of the right, conferred by the TFEU, to freedom of movement

17 — See Case 100/78 *Rossi* [1979] ECR 831, paragraph 14; Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraph 75; and *Hudziński and Wawrzyniak*, cited in footnote 14, paragraph 56.

18 — See, among others, Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 21; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22; Case C-282/91 *de Wit* [1993] ECR I-1221, paragraphs 16 and 17; and Case C-165/91 *van Munster* [1994] ECR I-4661, paragraph 27. See also Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* [1997] ECR I-5501, paragraph 20; Case C-153/97 *Grajera Rodríguez* [1998] ECR I-8645, paragraph 17; and *Nemec*, cited in footnote 14, paragraphs 37 and 38.

19 — See point 56 of my Opinion in *von Chamier-Glisczinski*, cited in footnote 13.

20 — The principle of aggregation is put into effect in Regulation No 1408/71 in, for example, Articles 18, 38, 45, 64 and 67. In new Regulation No 883/2004 (cited in footnote 3), it is now recognised in a provision of a general nature (Article 6).

does not have the effect of depriving workers of social security advantages to which they would have been entitled if they had spent their entire working life in only one Member State, which might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.²¹

51. In the light of all those considerations, I therefore take the view that Article 79(1) of Regulation No 1408/71 cannot be interpreted as meaning that it authorises the application of the rules on aggregation of periods of insurance, employment or self-employment, provided for under Article 72 of Regulation No 1408/71, solely with reference to the deceased working parent. Consequently, Article 79(1) may not be relied upon by the national authorities to exclude taking into account, in accordance with their national legislation, the periods of insurance completed by the surviving parent who has worked in another country of the European Union and who could, if the requisite conditions are met, benefit from the rules on aggregating periods of insurance, employment or self-employment under Article 72 of Regulation No 1408/71. Accordingly, Article 79(1) of Regulation No 1408/71 is not apt to breach the principles of equal treatment and non-discrimination.

52. As regards the application of the principle of aggregation, it is, lastly, necessary also to analyse the point raised by the Belgian Government and argued at the hearing that the employment of the surviving working parent in another Member State of the European Union could be taken into account only in order to supplement a period of insurance, employment or self-employment already completed in Belgium, with the result that the situation of Ms Dumont de Chassart, who, in the year preceding her husband's death, had worked in France exclusively, could not in any event be taken into consideration for the purposes of aggregation under Article 72 of Regulation No 1408/71.²²

53. In that context, I must point out that the Court has recently had occasion to state that it is not possible to uphold an interpretation of the term 'aggregation' under Article 72 of Regulation No 1408/71 that requires at least two periods of activity to have been carried out in different Member States. Accordingly, it is not open to the Member State in which the institution competent to award the allowance is located to provide that one period of employment must have been completed in its territory, thereby making it impossible for a single period completed in another Member State to count towards obtaining a right to a social security benefit.²³

54. The Court has, in fact, stated that the wording of Article 72 of Regulation No 1408/71 makes it necessary to take account, for the purposes of aggregation, of 'periods of insurance, employment or self-employment completed in any other Member State', as if they were periods completed under the legislation which the competent institution administers.

55. In fact, in line with its objectives mentioned in points 29 and 31 above, Regulation No 1408/71 puts into effect a system which makes it possible to guarantee migrant workers and their dependants the aggregation of 'all the periods' taken into account by the various national legislations in relation to both the acquisition of the right to benefits and to the calculation of such benefits.

21 — See, by analogy, *Tomaszewska*, cited in footnote 8, paragraph 30; Case C-481/93 *Moscato* [1995] ECR I-3525, paragraph 28; and *Salgado Alonso*, cited in footnote 9, paragraph 29.

22 — To substantiate its argument, the Belgian Government refers also to Article 15(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 160), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Commission Regulation (EC) No 101/2008 of 4 February 2008 (OJ 2008 L 31, p. 15). According to the Belgian Government, that provision, contained in Chapter 1 of Title IV of Regulation No 574/72 and headed 'General rules for the aggregation of insurance periods', justifies that government's position since it refers to 'adding' periods of insurance or residence completed under the legislation of any other Member State, in order to 'supplement' the periods of insurance. It must, however, be pointed out that Article 15(1)(a) cannot be used to substantiate the Belgian Government's argument. It is in fact absolutely clear from paragraph 1 that Article 15 applies to certain provisions of Regulation No 1408/71, and specifically to the provisions concerning sickness and maternity benefits, invalidity, old-age or death benefits (pensions), as well as death or unemployment benefits, but not family benefits. In point of fact, the provisions to which that article specifically refers do not include the provisions relating to family benefits and, in particular, there is no reference to either Article 72 or Article 79 of Regulation No 1408/71.

23 — See Case C-257/10 *Bergström* [2011] ECR I-13227, paragraphs 39 to 44, and paragraphs 39 and 40 in particular.

56. Accordingly, the competent institution of a Member State, in this case Belgium, may not, for the purpose of awarding a family benefit, require an insurance period to have been completed in its own territory, in addition to a period of employment or self-employment completed in another State, in this case, France.

57. Contrary to the argument advanced by the Belgian Government at the hearing, the Court's interpretation of the term aggregation in its judgment in *Bergström*²⁴ cannot be called in question either by paragraph 43 of its judgment in *Pérez Garcia and Others*,²⁵ which certainly does not imply that the application of Article 72 of Regulation No 1408/71 requires a period of employment or self-employment to have been completed in the territory of the State responsible for awarding the family benefit, or by the judgments in *Coonan* and *Vigier*,²⁶ which in no way concern the award of family benefits.

58. Furthermore, it is necessary, finally, to point out that a solution that makes it possible to apply the principle of aggregation under Article 72 of Regulation No 1408/71 to the surviving parent too is consistent with Belgium's decision to apply that principle in relation to family benefits specifically. That decision is explicitly confirmed in Annex VI(A)(7) to Regulation No 1408/71, entitled 'Special procedures for applying the legislations of certain Member States'.²⁷

V – Conclusion

59. In the light of the foregoing, I propose that the Court reply as follows to the question submitted by the tribunal du travail de Bruxelles for a preliminary ruling:

Article 79(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, does not breach the general principles of equality and non-discrimination inasmuch as, in circumstances such as those of the main proceedings, it cannot be interpreted as meaning that the rules for equiparation of periods of insurance, employment or self-employment under Article 72 of Regulation No 1408/71 are to be applied taking into account only those periods of insurance completed by the deceased working parent, thereby excluding any consideration of the periods of insurance completed by the surviving parent who has worked in another country of the European Union, when the relevant national legislation allows the periods of insurance completed by the surviving parent also to be taken into account in support of the application for benefits for orphans.

²⁴ — Cited in footnote 23.

²⁵ — Cited in footnote 4.

²⁶ — Case 110/79 *Coonan* [1980] ECR 1445 and Case 70/80 *Vigier* [1981] ECR 229.

²⁷ — It is in fact set out explicitly in that paragraph that '[p]ursuant to Articles 72 and 79(1)(a) of the regulation, account shall be taken of periods of employment and/or periods of insurance completed under the legislation of another Member State where entitlement to benefit under Belgian legislation is subject to the condition that, for a specified previous period, the qualifying conditions for family benefits in the framework of the scheme for employed persons have been met'.