Opinion of Advocate General Mischo delivered on 18 October 2001

Doris Kaske v Landesgeschäftsstelle des Arbeitsmarktservice Wien

Reference for a preliminary ruling: Verwaltungsgerichtshof – Austria

Social security for migrant workers - Unemployment insurance - Replacing social security conventions concluded between Member States with Regulation (EEC) No 1408/71 - Preservation of advantages enjoyed previously as a result of a combination of domestic law and the law of the relevant convention - Free movement of workers

Case C-277/99

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Introduction

1.The Verwaltungsgerichtshof (Administrative Court), Austria, has referred questions to the Court for a preliminary ruling, in which it asks, firstly, about the possibility of applying a bilateral convention between Austria and the Federal Republic of Germany relating to unemployment benefits paid to nationals of those two States, rather than the relevant provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (2) and, secondly, about the interpretation of Articles 39 EC and 42 EC.

I - Legal background

A - Regulation No 1408/71

2.Regulation No 1408/71 came into force for the Republic of Austria when the country joined the European Economic Area on 1 January 1994. It contains the following provisions:

'Article 6

Subject to the provisions of Articles 7, 8 and 46(4) this regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively,

...

Article 67

Aggregation of periods of insurance or employment

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

- in the case of paragraph 1, periods of insurance,
- in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.

...

Article 71

1. An unemployed person who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

...

(ii) a worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that

territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such a worker has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.'

B - National law - Arbeitslosenversicherungsgesetz 1977

3.Article 14 of the Arbeitslosenversichergungsgesetz (the Law on Unemployment Insurance, or 'the AlVG') provides for the application of Article 67(1) and (2) of Regulation No 1408/71 as follows:

'Acquisition of the right
1. A right to unemployment insurance is acquired for the first time when the unemployed person has been employed in a job subject to compulsory unemployment insurance in Austria for a total of 52 weeks in the last 24 months before bringing the claim (the reference period).
5. Periods of employment or insurance completed abroad shall be taken into account for acquisition of the right in so far as this is governed by conventions between States or international treaties. When thus taking account of periods of employment or insurance abroad, completion of a minimum period of employment in Austria before making the claim for unemployment benefit is not required if the unemployed person
1. has resided or habitually stayed in Austria for a total of at least 15 years before his last employment abroad, or
2. has moved to Austria for the purpose of reuniting a family and his spouse is resident or habitually resident in Austria for a total of at least 15 years,
and in either case registers as unemployed in Austria within three months of the end of the employment or the insurance obligation abroad.
6. In order to determine when the right was acquired, the periods mentioned in subparagraphs 4 and 5 shall be taken into account once only.'

C - Convention on unemployment between the Federal Republic of Germany and the Republic of Austria

4.The Republic of Austria and the Federal Republic of Germany concluded a Convention on unemployment, which entered into force on 1 October 1979 and has been in force since then. The Convention contains the following provision:

'Article 7
Inclusion of periods of employment subject to compulsory contributions completed in accordance with the legislation of the other contracting State:
(1) Periods of employment subject to compulsory contributions which have been completed in accordance with the legislation of the other contracting State shall be taken into account when assessing whether the qualifying period for acquisition of the right has been completed and when determining the duration of entitlement, the claimant possesses the nationality of the contracting State in which the claim is made and has his habitual place of stay in the territory of that contracting State. The same applies if the claimant has moved to the contracting State in which the claim is made for the purpose of reuniting the family and his spouse already living there possesses the nationality of that contracting State.
(2) For other unemployed persons, periods of employment subject to compulsory contributions which have been completed in accordance with the legislation of the other contracting State shall be taken into account only if the unemployed person, after he last entered the territory of the contracting State in which he makes the claim, has been employed there for at least four weeks without infringing the provisions on the employment of foreigners.'

II - Facts and the questions referred for a preliminary ruling

5.Ms Kaske, who was born in Germany, has been an Austrian national since 1968. She was an employee in Austria from 1972 to 31 December 1982 subject to compulsory pension, sickness, accident and unemployment insurance. She moved to Germany in 1983, and was an employee there until April 1995 subject, *inter alia*, to compulsory unemployment insurance; she then received unemployment benefit from 1 May 1995 to 14 February 1996. She was employed from 15 February to 31 May 1996, again subject to compulsory unemployment insurance. She then returned to Austria and applied to the regional office of the Arbeitsmarktservice (the Labour and Employment Office, 'the Office') for unemployment benefit on 12 June 1996.

6.By decision of 8 August 1996, the Office rejected her claim. It stated as grounds for its decision that Ms Kaske had not completed lastly any periods of employment in Austria before making her claim for benefits, as provided for in Article 67(3) of Regulation No 1408/71. Consequently, on the basis of the regulation, it was not possible to take into account her periods of insurance and/or employment abroad. Given this impossibility, she had not completed the period necessary to claim unemployment benefit.

7.Ms Kaske made an appeal against that decision, which the defendant dismissed as unfounded by the decision of 28 November 1996 which forms the subject of the main proceedings before the national court. In the grounds for its decision, the Office stated that Paragraph 14(1) of the AlVG, adopted for the implementation of Article 67

of Regulation No 1408/71, did not apply in her case because she had not been able to show periods of employment subject to compulsory unemployment insurance in Austria in the 24 months before the claim was made; it also stated that, since the claimant had neither resided in Austria for 15 years before the acquisition of German periods of insurance nor moved to Austria for the purpose of reuniting a family, Paragraph 14(5) of the AlVG did not apply. Accordingly, her periods of employment abroad could not be taken into account in respect of acquisition of the right.

8.Having regard to the circumstance that Ms Kaske might be entitled to unemployment benefit if her periods of employment in Germany were accepted in respect of acquisition of the right to this benefit and that, moreover, she might receive the benefit if the provisions of the aforesaid Austro-German Convention were applied to her, the Verwaltungsgerichtshof (Administrative Court) decided to refer the following questions to the Court for a preliminary ruling:

'1. Does the Court of Justice's decision in *Rönfeldt* apply also to a case in which a migrant worker has made use of "freedom of movement" (or more precisely, has anticipated it) before the entry into force of Regulation (EEC) No 1408/71, but also before the EC Treaty came into effect in her home State, that is, at a time when she could not yet rely on Article 39 et seq. EC (formerly Article 48 et seq.) in the State of employment?

2. If the answer to Question 1 is affirmative:
Does application of the *Rönfeldt* judgment to the insured risk of unemployment mean that a migrant worker may rely on a legal position more favourable than Regulation No 1408/71 which derives from a bilateral convention between two Member States of the European Union (in this case, the Austro-German Convention on unemployment insurance) for the further duration of each period of exercise of freedom of movement within the meaning of Article 39 et seq. EC (formerly Article 48 et seq.), and thus in particular also for claims which are raised after the return from the State of employment to the home State?

3. If the answer to Question 2 is affirmative:
Must such claims be assessed in accordance with the (more favourable) convention only in so far as they are based on periods of insurance under compulsory unemployment insurance which were acquired before the entry into force of Regulation No 1408/71 in the State of employment (in this case, 1 January 1994)?

4. If the answer to either Question 1 or Question 2 is negative or if the answer to Question 3 is affirmative:
Is it permissible from the point of view of the prohibition of discrimination under Article 39 EC (formerly Article 48 of the EC Treaty) in conjunction with Article 3(1) of Regulation No 1408/71 if a Member State provides in its legal system, as regards the inclusion of periods of insurance completed in another Member State, a provision more favourable than Regulation No 1408/71 (in this case, waiver of the requirement of immediately preceding insurance within the meaning of Article 67(3) of Regulation No 1408/71), but makes its application dependent - apart from the case of reuniting a family - on 15 years' residence in that State before the acquisition of the periods of insurance in the other Member State?'

Analysis

9.The following preliminary observations should be made.

10. The questions raised by the referring court concern essentially the conditions of application of the *Rönfeldt* judgment. (3) The Court held in that case that, although it is mandatory that Regulation No 1408/71 should replace the provisions of conventions on social security between Member States, such replacement may not lead to the loss of social security advantages for workers who have exercised their right to freedom of movement, owing to the inapplicability of those conventions, a result which would run counter to the aims of Articles 48(2) and 51 EC (now, after amendment, Articles 39 and 42 EC).

11. Both the Commission and the Austrian Government have expounded views challenging the need for questions to be referred to the Court.

12. The Commission asserts that Article 71(1)(b)(ii) of Regulation No 1408/71 may be applicable in the main proceedings. Although the national court did not mention in the questions referred for a preliminary ruling the possibility of the applicant in the main proceedings basing her claim on this provision, the Commission takes the view that this could provide a solution to the dispute.

13. In this regard, the Commission points out that it is apparent from the judgment in the *Bergemann* case (4) that the State of residence is competent to pay unemployment benefit when there has been a change of residence shortly before unemployment arises and for family reasons. According to the Commission, these two conditions appear to be satisfied in the present case, since the claimant returned to Austria, her State of residence, to join her husband, and made herself available for work to the Austrian employment services only twelve days after the loss of her last job.

14. The only other party to raise this issue is the applicant in the main proceedings, who merely mentions in this regard that her case is not covered by Article 71, without explaining why, however.

15. There can be no doubt that, if the facts of the case were analogous to those of the *Bergemann* case, Article 71(1)(b)(ii) would apply to Ms Kaske, in accordance with the approach taken by the Court in that case.

16. However, it is apparent from the order for reference that, contrary to the situation in the *Bergemann* case, it was only after the end of her employment relationship that the applicant in the main proceedings left Germany to go and live in Austria.

17.I do not see, therefore, how she could be considered to be an 'unemployed person who, during [her] last employment, was residing in the territory of a Member State other than the competent State' and thus covered by Article 71(1)(b)(ii).

18. The Commission has argued, however, that there could be an indirect application of this provision. It points out that, in the *Miethe* judgment, (5) the Court held that it was for the national court to determine whether a worker covered by Article 71(1)(b), who continues to have a better chance of getting back into work in the State of employment, may thus choose the country in which he will receive unemployment benefit.

19. Furthermore, the Commission has pointed out that, in the *Bergemann* case, the Court accepted the existence of a right to apply to the employment services in either the State of residence or the State of employment, based *inter alia* on the fact that, in such circumstances, the person concerned may enjoy more favourable conditions for seeking a new job in the State of employment.

20. The Commission asserts consequently that it may also be for the national court to decide, in this case, whether the applicant will find conditions in the current State of residence more favourable to getting back into work.

21. But it is clear that the case-law cited by the Commission concerned workers who, during their last employment, had actually lived in a Member State other than the State of employment, unlike the applicant in the present case, and could therefore benefit from the option arising from the case-law relating to Article 71.

22. However, this cannot be relied on to free the unemployed person from the terms of the provision - in particular, from the requirement that he should have lived, during his last employment, in a Member State other than the competent State.

23. It is not apparent, therefore, from the arguments expounded by the Commission that relying on Article 71 would allow us to dispense with an examination of the questions referred by the Austrian Verwaltungsgerichtshof.

24. The Austrian Government puts forward two arguments to show that the answer to the questions referred by the Verwaltungsgerichtshof on the applicability of the *Rönfeldt* judgment is irrelevant to the main proceedings.

25. Firstly, it challenges the referring court's assertion that Ms Kaske could be entitled to unemployment benefit in Austria if her periods of employment in Germany were taken into account for acquisition of the right.

26. In this regard, it argues that, having been employed in Germany from 1983 to April 1995, she received unemployment benefit there from 1 May 1995 to 14 February 1996, so she 'used' this period of employment as the basis of her claim for unemployment benefit.

27. It follows that the right to a new benefit in Austria could be based only on the period of employment from 15 February 1996 to 31 May 1996. This period of 15 weeks is far lower than the 52 weeks required in Austria.

28. However, it should be remembered that, according to settled case-law, it is for the referring court to determine both the necessity and the relevance of the questions referred to the Court.

29. Therefore, the Court cannot be prevented from answering them by the fact that the Member State of the defendant in the main proceedings applies a different analysis to its national provisions than does the referring court, with the implicit but necessary inference that there is, according to that Member State, no need to raise the questions submitted to the Court.

30. Secondly, however, the Austrian Government pleads that, since Ms Kaske has already benefited from the application of Regulation No 1408/71, by this fact alone, she can no longer benefit from the rule in *Rönfeldt*.

31. In this regard, the Austrian Government recalls that she received unemployment benefit in Germany when Community law was already in force and under the provisions of Regulation 1408/71. This would, therefore, preclude the application of the *Rönfeldt* judgment.

32. If the opposite were true, then all migrant workers who are in the same situation as Ms Kaske could at any time claim the application of either the regulation or the Convention, depending on the most advantageous outcome for them. Such a comparison of advantages, which would have to be made throughout a person's working life every time he became unemployed, would, moreover, impose considerable difficulties of administration on the competent authorities in Member States, and has no basis in the regulation.

33. In support of its argument, the Austrian Government cites the *Gómez Rodríguez* judgment. (6) However, that case was clearly not comparable to the present one. The Court did not apply *Rönfeldt* there, on the ground that, under Article 118(1) of Regulation (EEC) No 574/72, (7) a comparison between the advantages arising from a convention and the advantages arising from the regulation showed that the regulation was more favourable for the applicants.

34. Indeed, this provision, which applies only if, unlike the present case, the risk materialised before the regulation came into force, is entitled 'Transitional provisions relating to pensions for employed persons' for employed persons. It necessarily follows that it is not applicable to unemployment benefits.

35. Furthermore, I do not see why the simple fact that Ms Kaske has, at a given time, benefited from the application of the regulation should automatically deprive her of enjoyment of her rights under the Convention. On the contrary, the rule in *Rönfeldt* is designed to protect such rights, provided that the worker exercised his right to freedom of movement before the regulation came into force and could therefore legitimately expect that his position would be maintained and not eroded by the entry into force of the regulation.

36. The determining factor for applicability of the *Rönfeldt* judgment is, therefore, the existence of a worker's rights, which he would still enjoy under the convention but lose by application of the regulation. Therefore, only after all rights which the worker derives from the convention have been exhausted can substitution of the convention for the provisions of the regulation be precluded once and for all.

37. It is not apparent from the file that that is the case.

38. Finally, I wish to point out that the governments which have submitted their observations in connection with these proceedings have examined the issue of the application of the *Rönfeldt* judgment to unemployment benefits under the first question referred for a preliminary ruling.

39. However, the wording of this question is directed only at applying this judgment *ratione temporis* and not *ratione materiae*. Therefore, like the Commission, I will examine the issue of the applicability of the *Rönfeldt* judgment to the situation of unemployment in connection with the second question referred for a preliminary ruling.

The first question

40. The referring court argues that, since the *Thévenon* judgment, (8) the case-law of the Court relating to the application of bilateral conventions made prior to the entry into force of Regulation 1408/71 may be understood as being directed at protecting legitimate expectations derived from Article 39 et seq. EC. A worker who, relying on the existing legal position under a bilateral convention, went before the entry into force of Regulation No 1408/71 to a Member State bound by that convention and there exercised his rights under Article 39 et seq. EC is not to have those expectations frustrated as a result of the fact that the regulation lays down stricter conditions for benefits or results in smaller benefits than the convention.

41. Therefore, according to the referring court, the question arises as to whether this case-law applies also to a case in which a person has moved, before the entry into force of the Treaty and hence also of Article 39 et seq. EC, from his home State to another Member State.

42. The Verwaltungsgerichtshof notes, however, that this was the situation in the *Grajera Rodríguez* case (9) and that it did not prevent the Court from applying the rule in *Rönfeldt*.

43. In this regard, my comment is that this judgment is an example of the settled case-law of the Court, since the Court has also applied the *Rönfeldt* judgment in other cases where the worker had left his home State before the Treaty came into force there to go to another Member State. (10)

44. The case-law of the Court therefore does not permit the inference that it is to apply only where the Treaty has come into force in the home State of the worker in question.

45. I share the Commission's view that this is explained by the fact that the case-law does not rest essentially on the legal basis of the exercise of a 'right to freedom of movement', but above all on the need, connected with the protection of legitimate expectations, to avoid existing rights and advantages being withdrawn from a worker on the entry into effect of Regulation No 1408/71.

46. This analysis was confirmed by the recent *Thelen* judgment, (11) in which the Court pointed out that it followed from the case-law of the Court that replacement of the convention by the regulation cannot deprive a worker of his rights and advantages under the convention. The Court added, in paragraph 22 of the judgment, that the worker could legitimately expect to retain a right which he derives from the convention.

47. I therefore propose, like the Commission, that the Court give the following answer to the first question:
'The case-law of the Court relating to retaining the validity of social security conventions which have been replaced by Regulation No 1408/71 applies also where a migrant worker has made use of "freedom of movement" (or more precisely, has anticipated it) before the entry into force of Regulation No 1408/71, but also

before the EC Treaty came into effect in his home State, that is, at a time when he could not yet rely on Article 39 et seq. EC in the State of employment.'

48. Since the subsequent questions were to be asked if the answer to Question 1 was affirmative, they must be considered.

The second and third questions

49. Both the second and the third questions relate to the same issue, namely that of the consequences deriving from the applicability of the *Rönfeldt* judgment to unemployment benefits in this case. Therefore, it is hardly surprising that these questions have been considered together by those parties who have made representations on this point, and I propose to do the same.

50. In order to do this, it is necessary first to consider the issue of applicability *ratione materiae* to unemployment benefits.

51. In this context, the Austrian and Spanish Governments assert that, because of the particular nature of the benefits in question, the *Rönfeldt* judgment cannot be applied in this case.

52. The Austrian Government points out that the *Rönfeldt* judgment was expounded in a context of pension rights, which are significantly different from unemployment insurance benefits. It notes that for pension insurance, periods of insurance, once completed, remain established until pensionable age, while for unemployment insurance, only periods immediately preceding the materialisation of the risk must be taken into account.

53. In particular, the Austrian Government takes the view that, if the person concerned has received unemployment benefit, then the immediately preceding period of employment and all other relevant periods have been used, and a new right to unemployment benefits may be acquired only by a new period of employment of sufficient length.

54. It adds that entitlement to unemployment benefits is acquired only in the last State of employment, even when the employee is seeking a job in another State.

55. Finally, the Austrian Government submitted that the Austro-German Convention applies only for periods before the regulation came into force and preceding the first period of unemployment.

56. The Spanish Government points out that, unlike retirement and disability benefits, to which entitlement may exist regardless of the State in which the situation arose, the regulation applicable in this case makes the right to unemployment benefit subject to the condition that the last period of insurance or employment was completed in the State in which the benefit is claimed.

57. The Spanish Government explains this difference by the nature of unemployment benefits. In this regard, it points out that entitlement to them is not a complete or full right, as are rights to retirement or disability pensions. By contrast, the right to these benefits is a potential right, in the course of being acquired, which is transformed into a real entitlement immediately and without any transitional period, in the strict legal sense, if the person loses his employment and if the conditions to which the benefit is subject are satisfied. It concludes that the *Rönfeldt* judgment is not applicable to benefit rights in the course of being acquired, which, by their very nature, are never complete, as is the case for unemployment benefits.

58. However, in *Thelen* the Court clearly held that the replacement of the convention by the regulation cannot deprive a worker of the rights and advantages accruing to him from the convention, even where these relate to an unemployment insurance scheme, which has special characteristics as regards the qualifying period, and not, as in previous judgments, to a retirement or invalidity pension scheme. (12)

59. Therefore, I share the point of view of the Commission, the Portuguese Government and the applicant in the main proceedings, who have asserted that nothing prevents the application of the *Rönfeldt* judgment to unemployment benefits.

60. As regards the consequences of this judgment for the present case, there are two opposing points of view.

61. As we have seen, the Austrian Government is of the opinion that the bilateral convention applies only for periods before the regulation came into force and preceding the first period of unemployment.

62. By contrast, the Commission, the Portuguese Government and the applicant in the main proceedings submit that such a restriction would be contrary to the case-law of the Court.

63. I share this analysis.

64. As has already been pointed out, the rationale of the case-law of the Court is to prevent a worker who has exercised his right to freedom of movement before the regulation came into force being deprived by that of

advantages that he could legitimately count on securing because they arose from the convention applicable at the time when he migrated.

65. In this regard, the terms of the *Rönfeldt* judgment should be borne in mind, in which the Court held that the Treaty would be infringed 'if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the legislation of a single Member State', (13) including advantages under bilateral conventions incorporated in national law.

66. If the only period to be taken into account under the convention, which is by definition more favourable, is the period when the right was exercised before the regulation came into force, this will indisputably have precisely the consequence rejected by the Court, namely the loss of advantages under the convention and this loss will relate to the period of exercise of the right after the regulation comes into force.

67. The only case where that would not apply would be the very different case of a new exercise of the right to freedom of movement after rights under the convention had been exhausted. In such a case, the worker's situation would be governed exclusively by Regulation No 1408/71.

68. The same reasoning holds good for the third question referred for a preliminary ruling.

69. To take the view that a worker's entitlements could be determined under the more favourable terms of the bilateral convention only in so far as they are based on periods of compulsory unemployment insurance completed in the State of employment before Regulation No 1408/71 comes into force would likewise lead to the loss of the worker's advantages under the convention and is, therefore, precluded by the *Rönfeldt* judgment.

70. Having regard to the above considerations, I propose that the Court give the following answer to the second and third questions referred for a preliminary ruling:
'Provisions under a convention between two Member States, more favourable than the scheme deriving from the application of Regulation No 1408/71, are applicable for the whole period of exercise of freedom of movement within the meaning of Article 39 et seq. EC, even if, *inter alia*, the claims involved are raised after the return from the State of employment to the home State. Claims based on periods of insurance which were acquired before the entry into force of Regulation No 1408/71 must also be assessed in accordance with the more favourable convention.'

The fourth question

71. It should be noted that the referring court raises this question only if the answer to one of the first two questions is negative or if the answer to the third is affirmative.

72. In view of the proposed answers to these questions, there is no need to answer this question.

73. Therefore, I will make the following observations only in the alternative.

74. The rule at issue allows a worker who, after exercising his right to freedom of movement, returns to live in Austria, to receive unemployment benefits even if he has not, as Article 67(3) of Regulation No 1408/71 requires, worked in the State in which he is claiming the unemployment benefits.

75. It therefore allows such a worker to receive more favourable treatment than that provided for by the regulation, but makes this advantage subject to two conditions: 15 years' residence in Austria before the last employment abroad, or reuniting a family.

76. According to the Austrian Government, this provision accords with Community law, since it does not constitute a barrier to freedom of movement and does not apply solely to Austrian nationals. It adds that the provision makes it easier for these unemployed people to get back into work in Austria.

77. It is indisputable that nothing prevents a Member State from adopting more favourable legislation than that provided for by Regulation No 1408/71.

78. However, the advantage in question is subject to a 15-year residence condition or to reuniting a family.

79. As both the Commission and the referring court have noted, the residence requirement is easier for Austrian nationals to satisfy than for nationals of other Member States, and therefore constitutes indirect discrimination. No objective reason has been put forward to justify this requirement.

80. Since the above remarks have been made only in the alternative, I propose that the Court give the following answer to the fourth question referred for a preliminary ruling:
'There is no need to answer the question.'

Conclusion

81. For the above reasons, I propose that the Court give the following answers to questions referred by the Verwaltungsgerichtshof:

The first question:

The case-law of the Court relating to retaining the validity of social security conventions which have been replaced by Regulation No 1408/71 applies also where a migrant worker has made use of 'freedom of movement' (or more precisely, has anticipated it) before the entry into force of Regulation No 1408/71, but also before the EC Treaty came into effect in his home State, that is, at a time when he could not yet rely on Article 39 et seq. EC in the State of employment.

The second and third questions:

Provisions under a convention between two Member States, more favourable than the scheme deriving from the application of Regulation No 1408/71, are applicable in the present case for the whole period of exercise of freedom of movement within the meaning of Article 39 et seq. EC, even if, *inter alia*, the claims involved are raised after the return from the State of employment to the home State. Claims based on periods of insurance which were acquired before the entry into force of Regulation No 1408/71 must also be assessed in accordance with the more favourable convention.

The fourth question:
There is no need to answer the fourth question.