

## 61999J0389

Judgment of the Court (Fifth Chamber) of 10 May 2001. - Sulo Rundgren. - Reference for a preliminary ruling: Rovaniemen hallinto-oikeus - Finland. - Social Security - Insurance contributions payable by pensioners who settled in a Member State before the entry into force in that State of Regulations (EEC) Nos 1408/71 and 1612/68 - Right of the State of residence to charge contributions on old-age and invalidity benefits paid by another Member State - Effect of an agreement by virtue of which the Nordic countries reciprocally waive all reimbursement of sickness and maternity benefits. - Case C-389/99.

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Summary

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## Keywords

*1. Social security for migrant workers - Community rules - Persons covered - Retired civil servant receiving a pension from a Member State other than the one in which he resides - Subjection in State of residence to laws relating to Regulation No 1408/71 - Whether covered - Freedom of movement for workers - Regulation No 1612/68 not applicable*

*(Council Regulations Nos 1612/68 and 1408/71)*

*2. Social security for migrant workers - Sickness insurance - Persons entitled to a pension under the legislation of a Member State other than the country of residence - Right to benefits in kind in country of residence - Expression nor is any pension payable in Article 28a of Regulation No 1408/71 - Scope*

*(Council Regulation No 1408/71, Art. 28a)*

*3. Social security for migrant workers - Sickness insurance - Contributions payable by pensioners - Levying by the State of residence of contributions to cover benefits with purpose similar to that of benefits for which the Member State paying the pension has assumed responsibility - Not permissible*

*(Council Regulation No 1408/71, Art. 33)*

*4. Social security for migrant workers - Sickness insurance - Pensions payable under the legislation of a Member State other than the country of residence - Right to benefits in kind in*

*country of residence - Contributions which may be required from pensioners - States concerned reciprocally waiving reimbursement of the costs of benefits in kind - No effect*

*(Council Regulation No 1408/71, Arts 28a, 33(2) and 36(3))*

## **Summary**

*1. Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as last amended at the material time by Regulation No 3096/95, applies to a person who, at the time when the Regulation entered into force in a Member State:*

*- was resident in that State but was not carrying on an occupational activity and was receiving a pension there from another Member State in his capacity as a retired civil servant,*

*- while being subject in his State of residence to laws relating to the branches of social security referred to in the Regulation.*

*However, Regulation No 1612/68 on freedom of movement for workers within the Community does not apply in principle to a person who has moved his place of residence from one Member State, in which he had ceased to be in employment, to another Member State, in which he is not employed and is not seeking employment.*

*( see para. 35 and operative part 1 )*

*2. The expression nor is any pension payable in Article 28a of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, must be interpreted as applying to a situation in which neither a pension based on residence nor a pension based on gainful employment and payable under the legislation of the Member State in which the person concerned is resident is actually paid to that person, without its being necessary to ascertain whether he might hypothetically be entitled thereto.*

*( see para. 50 and operative part 2 )*

*3. The general principle resulting from Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, and applied by Article 33 of that Regulation, according to which a person entitled to a pension cannot, by reason of his residence in the territory of a Member State, be called upon to pay compulsory insurance contributions to cover benefits for which an institution of another Member State has assumed responsibility, precludes the Member State in whose territory he resides from requiring him to pay contributions or similar payments prescribed by its legislation to cover old-age, invalidity and unemployment benefits, where he is entitled to benefits having a similar purpose, for which the institution of the Member State competent in respect of pensions assumes responsibility.*

*( see para. 57 and operative part 3 )*

4. The fact that the Republic of Finland and the Kingdom of Sweden have waived, under Article 36(3) of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, and Article 23 of the Nordic Convention on Social Security of 15 June 1992 (106/93), all reimbursement of the costs of benefits in kind provided by an institution in one of the Member States on behalf of an institution of another Member State is of no consequence for the purposes of interpreting (i) Article 28a of the regulation concerning pensions under the legislation of one or more Member States other than the country of residence and a right to benefits in kind in the country of residence and (ii) Article 33(2) of the regulation relating to the contributions which may be required from pensioners.

( see para. 64 and operative part 4 )

## Parties

*In Case C-389/99,*

*REFERENCE to the Court under Article 234 EC by the Rovaniemen hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court brought by*

*Sulo Rundgren*

*on the interpretation of various provisions 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as last amended at the material time by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10) and of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), and also on the interpretation of Articles 6 and 48 of the EC Treaty (now, after amendment, Articles 12 EC and 39 EC),*

*THE COURT (Fifth Chamber),*

*composed of: A. La Pergola (Rapporteur), President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann and L. Sevón, Judges,*

*Advocate General: S. Alber,*

*Registrar: H. von Holstein, Deputy Registrar,*

*after considering the written observations submitted on behalf of:*

*- the Finnish Government, by T. Pynnä and E. Bygglin, acting as Agents,*

*- the Commission of the European Communities, by P. Hillenkamp and E. Pietiläinen, acting as Agents,*

*having regard to the Report for the Hearing,*

*after hearing the oral observations of the Finnish Government, represented by E. Bygglin and by K. Alaviuhkola, acting as Agent, and the Commission, represented by P. Hillenkamp and E. Pietiläinen, at the hearing on 14 September 2000,*

*after hearing the Opinion of the Advocate General at the sitting on 26 October 2000,  
gives the following*

*Judgment*

## **Grounds**

*1 By order of 5 October 1999, received at the Court Registry on 11 October 1999, the Rovaniemen hallinto-oikeus (Rovaniemi Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC eight questions on the interpretation of various provisions 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as last amended at the material time by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10), and of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), and also on the interpretation of Articles 6 and 48 of the EC Treaty (now, after amendment, Articles 12 EC and 39 EC).*

*2 Those questions were raised in proceedings brought by Mr Rundgren against the decision of the verotuksen oikaisulautakunta (Tax Appeals Board, the lautakunta) refusing his application for exemption from payment of the State pension and sickness insurance contributions required of him by the Finnish authorities.*

*Community legislation*

*3 Article 2(3) of Regulation No 1408/71 provides:*

*[T]his Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.*

*4 Article 4(1) of Regulation No 1408/71 provides that:*

*[T]his Regulation shall apply to all legislation concerning the following branches of social security:*

*(a) sickness ... benefits;*

*(b) invalidity benefits ...;*

*(c) old-age benefits;*

*...*

*(g) unemployment benefits;*

*...*

*5 Article 8(1) of Regulation No 1408/71 provides:*

*[T]wo or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation.*

*6 Section 5 (headed Pensioners and members of their families) of Chapter 1 (headed Sickness and Maternity) in Title III of Regulation No 1408/71, is comprised of Articles 27 to 34 of the Regulation.*

*7 Article 28 of Regulation No 1408/71 is worded as follows:*

*1. A pensioner who is entitled to a pension under the legislation of one Member State, or to pensions under the legislation of two or more Member States, and who is not entitled to benefits under the legislation of the Member State in whose territory he resides, shall nevertheless receive such benefits for himself and for members of his family in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:*

*(a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits.*

*...*

*2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined according to the following rules:*

*(a) where the pensioner is entitled to the said benefits under the legislation of a single Member State, the cost shall be borne by the competent institution of that State;*

*(b) where the pensioner is entitled to the said benefits under the legislations of two or more Member States, the cost thereof shall be borne by the competent institution of the Member State to whose legislation the pensioner has been subject for the longest period of time ...*

*8 Article 28a of Regulation No 1408/71 provides:*

*Where the pensioner entitled to a pension under the legislation of one Member State, or to pensions under the legislation of two or more Member States, resides in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, nor is any pension payable, the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of pensions, determined according to the rules laid down in Article 28(2), to the extent that the pensioner and members of his family would have been entitled to such benefits under the legislation administered by the said institutions if they resided in the territory of the Member State where that institution is situated.*

*9 Article 33 of Regulation No 1408/71 governs the contributions payable by pensioners. It provides:*

1. The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.

2. Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence, these contributions shall not be payable.

10 Article 36 of Regulation No 1408/71, which is the only provision in Section 7 of Chapter 1 in Title III of the Regulation, headed *Reimbursement between institutions*, is worded as follows:

1. Benefits in kind provided in accordance with the provisions of this chapter by the institution of one Member State on behalf of the institution of another Member State shall be fully refunded.

...

3. Two or more Member States, or the competent authorities of those States, may provide for other methods of reimbursement or may waive all reimbursement between institutions under their jurisdiction.

11 Similar provisions to those in Article 36 of Regulation No 1408/71 are laid down in Article 63 thereof in respect of contributions for accidents at work and occupational diseases.

#### *National legislation and the Nordic Convention on Social Security*

12 Under Paragraph 1 of the *sairausvakuutuslaki* No 364/1963 (Sickness Insurance Law) all persons resident in Finland, regardless of their nationality, are insured against sickness. Sickness insurance contributions are levied under the tax system. The insured's right to benefits is not linked to the contributions paid.

13 Under Paragraph 1 of the *kansaneläkelaki* No 347/1956 (National Pensions Law), persons aged 16 years or over who are resident in Finland have old-age, invalidity and unemployment insurance. In accordance with Paragraphs 3 and 4 of that law, which were in force in 1994 and 1995, insured persons had to pay contributions calculated on the basis of the total income taken into account for local taxes in respect of the preceding tax year. Since 1 January 1996 insured persons have no longer been required to pay contributions in respect of the State pension. Entitlement to a State pension is not linked to the contributions that have been paid, nor to the pursuit in Finland of any occupational activity, the sole criterion being that a person has been resident in Finland for at least three years.

14 The Nordic Convention on Social Security of 15 June 1992 (106/93, the Convention), which entered into force on 1 January 1994 and to which the Republic of Finland and the Kingdom of Sweden are parties, is one of the conventions to which Article 8 of Regulation No 1408/71 relates.

15 Under Article 23 of the Convention, the Contracting States reciprocally waive reimbursement of the costs of the benefits mentioned in Articles 36, 63 and 70 of Regulation No 1408/71.

*The dispute in the main proceedings and the questions referred for a preliminary ruling*

16 Mr Rundgren, who is originally from Finland but who has been a Swedish national since 18 July 1975, was resident in Sweden between 1957 and 1961 and then from 1964 until he returned to

Finland for good on 29 September 1989. Under Swedish legislation, he has received since 1986, when he stopped working, a State pension, a civil service pension and a life annuity following an accident at work. From 1994 to 1996 Mr Rundgren had no other income apart from those pensions and the annuity, which were paid by the Kingdom of Sweden.

17 It is apparent from the submissions made to the hallinto-oikeus by the competent Swedish institutions, namely the Riksskatteverk (State Tax Office) and the Riksförsäkringsverk (Social Security Board), that, between 1994 and 1996, Mr Rundgren did not pay any social security contributions in Sweden out of his income but that his income was subject to a tax levy pursuant to the law on the taxation of persons residing abroad.

18 In Finland, Mr Rundgren was declared liable to pay contributions calculated by reference to his annual income, amounting to FIM 2 299.20 for the State pension and FIM 4 611.21 for sickness insurance in respect of 1994 and FIM 1 279.01 for the State pension and FIM 4 091.15 for sickness insurance in respect of 1995 and FIM 4 465.40 for sickness insurance in respect of 1996.

19 By decision of 24 November 1997, the lautakunta rejected Mr Rundgren's application for exemption from the State pension and sickness insurance contributions which the Finnish authorities required him to pay. Mr Rundgren submits that those contributions are contrary to Community law since he receives pensions solely from the Kingdom of Sweden and has not applied for the State pension provided for by Finnish law. Moreover, he would not be entitled to the latter pension since his income exceeds the limit below which the State pension is payable. Mr Rundgren produced a certificate in support issued by the kansaneläkelaitos (Social Insurance Office), showing that he had neither applied for nor received a pension in Finland.

20 The lautakunta found that, by virtue of Articles 33(2) and 28a of Regulation No 1408/71, a person residing in Finland is indeed not required to pay sickness insurance contributions if he is not entitled to a pension in Finland. However, according to the lautakunta, those provisions do not apply since Mr Rundgren has not shown that there are no circumstances in which he is entitled to a pension in Finland.

21 Mr Rundgren contested the lautakunta's decision before the Rovaniemen hallinto-oikeus, which decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Is the EC Treaty or Regulation No (EEC) 1408/71 on social security or Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community applicable in the situation at issue, Mr Rundgren having changed residence from Sweden to Finland on 29 September 1989, that is, before the Agreement on the European Economic Area entered into force with respect to Finland?

2. If the answer to Question 1 is affirmative, is the expression "nor is any pension payable" in Article 28a of Regulation No 1408/71 then to be interpreted as covering a case in which:

(a) Mr Rundgren is not entitled to a State pension, or

(b) he is not entitled to a pension based on gainful employment, or

(c) does that expression cover only a case in which both point (a) and point (b) hold good for him at the same time?

In interpreting the aforementioned expression, is it also to be taken that entitlement to a pension means in this case Mr Rundgren's right in principle to a pension in Finland, in which case no account is taken of his actual circumstances, such as the effect on the acquisition of a pension in Finland of the pension and annuity income received by him from Sweden, or does the expression refer to the specific circumstances, in which case the effect of the income received by him from

*Sweden on the acquisition of a pension in Finland is taken into account?*

*3. Do the contributions and similar payments referred to in Article 33(2) of Regulation (EEC) No 1408/71 include, besides contributions charged for the receipt of social security in respect of sickness and maternity (in Finland, sickness insurance contributions), also contributions charged in respect of old age, invalidity and unemployment (in Finland, State pension insurance contributions)? If the answer to that question is negative, is it possible that the latter contributions are precluded under some other article of the Regulation, regard being had in particular to the scope of the Regulation apparent from Article 4(1)(b), (c) and (g) thereof?*

*4. What effect, in the interpretation of Articles 28a and 33(2) of Regulation (EEC) No 1408/71, does the fact have that Finland and Sweden have agreed, together with the other Nordic States, in accordance with Article 36(3) of the said Regulation and Article 23 of the Nordic Social Security Convention, to waive inter alia all reimbursement of the costs of care?*

*5. If Articles 28a and 33(2) of the aforesaid Regulation apply so that Mr Rundgren may be charged State pension and sickness insurance contributions in Finland, may he nevertheless apply under Article 17a of the Regulation retrospectively to be exempted from the scope of the legislation of his State of residence, Finland, or must the application have been made before determination of his contribution obligations under Finnish legislation? In the latter case, what importance does the fact have that Mr Rundgren was possibly not aware of the possibility given by Article 17a of the Regulation?*

*6. Are Article 48 of the EC Treaty (now Article 39 EC) and in particular Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community to be interpreted as meaning that Finland is not entitled in the present case to charge Mr Rundgren State pension insurance contributions and sickness insurance contributions in accordance with its own national legislation?*

*7. Is Article 3 of Regulation (EEC) No 1408/71 or Article 6 of the EC Treaty (now Article 12 EC) to be interpreted as meaning that Mr Rundgren has in the present case become the object of prohibited discrimination?*

*8. May Mr Rundgren rely directly on the EC Treaty or on other Community law on the ground that he has possibly had to pay contributions of a tax nature on the same basis both to Finland and to Sweden as a result of the different methods adopted by Finland and Sweden in financing social security schemes?*

*The first question*

*22 By its first question, the national court is essentially seeking to ascertain whether Community law, in particular Regulations Nos 1408/71 and 1612/68, applies in a situation such as that before the national court.*

*The applicability of Regulation No 1408/71*

*23 It is necessary to consider whether a case such as Mr Rundgren's falls within the temporal, personal and material scope of Regulation No 1408/71.*



24 First, Regulation No 1408/71 was made applicable to the Republic of Finland on 1 January 1994 by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) and that the Regulation has applied to the Republic of Finland as a member of the European Union since 1 January 1995. Regulation No 1408/71 was therefore in force in Finland between 1994 and 1996, which is the material period according to the order for reference.

25 Second, pursuant to Article 2(3) of Regulation No 1408/71, civil servants are expressly included among the persons to whom the Regulation applies in so far as they are or have been subject to the legislation of a Member State to which the Regulation applies.

26 The Court has made clear in that connection that, for the same reasons which led it to hold in Case 182/78 Pierik [1979] ECR 1977, paragraph 4, that the term worker also covered retired workers, the term civil servant, which appears in a provision of general scope defining the persons falling within the scope of Regulation No 1408/71, must be construed as covering retired civil servants who no longer pursue a professional activity where they are, or have been, subject to the legislation of a Member State to which Regulation No 1408/71 applies (Case C-194/96 Kulzer [1998] ECR I-895, paragraph 26).

27 Since, according to the order for reference, Mr Rundgren receives a civil service pension, he is therefore, as a retired civil servant, in principle within the personal scope of Regulation No 1408/71.

28 Finally, Mr Rundgren is subject in Finland to the laws referred to in paragraphs 12 and 13 of this judgment, which constitute legislation concerning branches of social security coming within the material scope of Regulation No 1408/71, as defined in Article 4(1) thereof.

29 As regards the fact that Mr Rundgren no longer pursues his professional activity and moved from Sweden to Finland before the date on which Regulation No 1408/71 entered into force in Finland, the Court has already pointed out that under Article 94(3) of Regulation No 1408/71 a right is acquired under that Regulation even though it relates to a contingency which materialised prior to the date of application of that Regulation in the territory of the Member State concerned. It has also pointed out that Article 94(2) of Regulation No 1408/71 provides that 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 are to be taken into consideration for the determination of rights acquired under the provisions of the Regulation (Case C-275/96 Kuusijärvi [1998] ECR I-3419, paragraphs 24 and 25).

30 Therefore, the fact that Mr Rundgren gave up his professional activity and changed his residence from Sweden to Finland before the date on which Regulation No 1408/71 entered into force in Finland does not restrict the scope of that Regulation.

31 Consequently, Regulation No 1408/71 is applicable to a situation such as that described in the order for reference.

The applicability of Regulation No 1612/68

32 As to the question whether Regulation No 1612/68 applies in a situation such as Mr Rundgren's, the Court has already held, in particular in its judgment in Case C-85/96 Martínez Sala [1998] ECR I-2691, paragraph 32, that in the context of Article 48 of the Treaty and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended (Case C-57/96 Meints [1997] ECR I-6689, paragraph 40) and a person who is genuinely seeking work must also be classified as a worker.

33 However, in the circumstances of the present case, Mr Rundgren stopped working in Sweden in 1986 and became resident in Finland in 1989 where he was not employed and did not seek employment.

34 In those circumstances, a person in Mr Rundgren's situation cannot be regarded as a worker for the purposes of Regulation No 1612/68 and would be able to avail himself of the rights arising from that status only in relation to his previous occupational activity if - which is not the situation in the main proceedings - he claimed to be entitled to a social advantage intrinsically linked to that activity.

35 The answer to the first question must therefore be that Regulation No 1408/71 applies to a person who, at the time when that Regulation entered into force in a Member State:

- was resident in that State but was not carrying on an occupational activity and was receiving a pension there from another Member State in his capacity as a retired civil servant,
- while being subject in his State of residence to laws relating to the branches of social security referred to in the Regulation.

However, Regulation No 1612/68 does not apply in principle to a person who has moved his place of residence from one Member State, in which he had ceased to be in employment, to another Member State, in which he is not employed and is not seeking employment.

The second question

36 By its second question, the national court is essentially seeking, first, to ascertain whether the expression nor is any pension payable in Article 28a of Regulation No 1408/71 concerns either a pension based on residence, such as the State pension provided for by Finnish law, or a pension based on gainful employment which is payable under the law of the Member State in whose territory the person concerned resides, or both types of pension. Second, it asks whether that expression must be interpreted as meaning that, in order to establish that no pension is payable, it is sufficient that no pension is actually paid to the person concerned or whether it must, for that purpose, also be confirmed that the person concerned does not even have a potential right to a pension.

37 As regards the first limb of this question, it should be observed that Article 1(t) of Regulation 1408/71 defines benefits and pensions as all benefits and pensions, including all elements thereof payable out of public funds.

38 Furthermore, it must be observed that, first, the State pension set up under Finnish law by the *kansaneläkelaki* No 347/1956 is intended, in particular, to insure the persons concerned against the consequences of old-age and invalidity and that, second, in the declaration that it made under Article 5 of Regulation No 1408/71 (OJ 1999 C 234, p. 3), the Republic of Finland mentioned that law as legislation covered by Article 4(1) and (2) of the Regulation.

39 It follows from the foregoing considerations that the expression pension in Article 28a of Regulation No 1408/71 concerns both a pension based on residence and consisting, in particular, of invalidity and old-age benefits, such as the State pension provided for by Finnish law, as well as a pension based on gainful employment, which is payable under the legislation of the Member State in whose territory the person concerned resides.

40 As regards the second limb of the question, the Finnish Government submits that the expression pension payable refers to a theoretical entitlement to a pension, given by the national legislation of the Member State concerned, even if the person concerned has not applied for the pension or does not receive it because his income is too high. For its part, the Commission contends that it would be contrary to the objective pursued by Article 28a of Regulation No 1408/71 to hold that a theoretical entitlement to a pension, which has not yet been converted into an actual entitlement by the payment of a pension, means that a pension is payable for the purposes of that provision.

41 In that regard, it should first be borne in mind that, in the absence of any definition of pension payable, it is necessary, according to settled case-law, when interpreting a provision of Community law to consider its wording, its context and its aims (Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 11, Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23, and Case C-151/98 *P Pharos v Commission* [1999] ECR I-8157, paragraph 19).

42 In that connection, the expression pension payable is used not only in Article 28a of Regulation No 1408/71 but also in other provisions of Section 5 of Chapter 1 in Title III of the Regulation, in particular in Articles 27 and 28, which also deal with the entitlement of pensioners to sickness and maternity benefits.

43 Article 27 of Regulation No 1408/71 deals with the situation of a pensioner who is entitled to draw pensions under the legislation of two or more Member States, including that of the Member State in whose territory he resides, and is also entitled to benefits in that Member State. Article 28 of the Regulation deals with the situation of a pensioner who is entitled to draw a pension or pensions under the legislation of one or more Member States, other than the Member State in whose territory he resides, and who is not entitled to benefits in that Member State. Article 28a of the Regulation governs a situation similar to that covered by Article 28, the difference being that there is an entitlement to benefits in kind in the Member State of residence.

44 The purpose of Articles 27, 28 and 28a is to identify, in the various situations they describe, first, the institution responsible for providing persons entitled to a pension with sickness and maternity benefits and, second, the institution responsible for bearing the cost.

45 Where the State in whose territory the pensioner resides does not subject the right to receive benefits in kind to conditions of insurance or employment, Article 28a of Regulation No 1408/71 imposes the cost of those benefits in principle to the institution of one of the Member States competent in respect of pensions, in order that their cost should not be borne by the Member State in which the person concerned resides, merely by virtue of the fact that he resides there. The provision seeks to ensure that Member States whose legislation confers a right to receive benefits in kind merely by virtue of residence in their territory are not penalised for so doing. It does so by determining which institution will bear the costs of the benefits in kind provided by those States in accordance with rules identical to those which apply, pursuant to Article 28 of the Regulation, in

*the case of Member States which do not confer such a right. Under those rules, the institution of the place of residence provides the benefits in kind to the pensioners on behalf of the institution of one of the Member States competent in respect of pensions, which bears the costs.*

*46 Under the system thus established by Articles 27, 28 and 28a of Regulation No 1408/71, the institution which has to bear the cost of the benefits in kind will always be an institution of a Member State competent in respect of pensions, since the pensioner would have a right to those benefits under the legislation of that Member State if he resided in its territory. Where two or more Member States are competent in respect of pensions, the cost of the benefits in kind is attributed to one of them on the basis of specific criteria such as the place of residence of the person concerned or, where none of those Member States is the state of residence of the person concerned, the period of time during which that person was subject to the legislation of each of those Member States.*

*47 The connection thus established under that system between the competence to provide pensions and the obligation to bear the cost of benefits in kind leads to the conclusion that that obligation is incidental to an actual competence in respect of pensions. Therefore, the cost of benefits in kind cannot be borne by the institution of a Member State which has only a hypothetical competence in respect of pensions. It follows that Articles 27, 28 and 28a of Regulation No 1408/71, when they refer to a pension payable, are concerned with a pension which is actually paid to the person concerned.*

*48 That interpretation is borne out by the fact that Article 33(1) of Regulation No 1408/71 provides, in particular, that in cases in which, by virtue of Articles 27, 28 and 28a of the Regulation, the cost of benefits in kind is borne by an institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity borne by the pensioner, that institution shall be authorised to make such deductions ... from the pension payable by [it]. That implies that the pension in question is actually being paid.*

*49 In that regard, it follows from the provisions of Article 33(1) of Regulation No 1408/71 that, contrary to the Finnish Government's submission, the Regulation does not authorise the Member State in whose territory the pensioner resides to require that person to pay the contributions for sickness insurance prescribed by its domestic legislation, calculated by reference to his income from pensions paid by another Member State. Article 33(1) merely authorises, in the cases in which it applies, the relevant institution of a Member State to make deductions, in order to cover inter alia sickness benefits, from the pension payable by it, that is to say, actually paid by it.*

*50 In the light of all the foregoing considerations, the answer to the second question must be that the expression nor is any pension payable in Article 28a of Regulation No 1408/71 must be interpreted as applying to a situation in which neither a pension based on residence, such as the State pension provided for by Finnish law, nor a pension based on gainful employment and payable under the legislation of the Member State in whose territory the person concerned resides, is actually paid to that person, without its being necessary to ascertain whether he might hypothetically be entitled thereto.*

*The third question*

*51 By its third question, the national court is essentially asking whether Article 33(2) of Regulation No 1408/71, or, as the case may be, some other provision of that Regulation, precludes the Member State in whose territory the pensioner resides from requiring him to pay the contributions or similar payments prescribed by its legislation for covering old-age, invalidity and unemployment benefits.*

52 In that regard, it must be borne in mind that Article 33(2) of Regulation No 1408/71 concerns the cases referred to in Article 28a of that Regulation, in which the cost of sickness and maternity benefits in kind provided by the institution of the place of residence is borne by an institution of one of the Member States competent in respect of pensions. As the Court has already pointed out, Article 33(2) prohibits the Member State of residence, which operates a general insurance scheme and under whose legislation no pension is payable, from requiring the pensioner, by virtue of his residence in its territory, to pay contributions to cover benefits payable by the institution of another Member State (Case C-140/88 Noij [1991] ECR I-387, paragraph 12).

53 The Court has also held that the rules set out in Article 33 of Regulation No 1408/71 concerning sickness or maternity benefits constitute the application of a more general principle according to which a pensioner cannot be required, because he resides in the territory of a Member State, to pay compulsory insurance contributions to cover benefits payable by an institution of another Member State (Noij, paragraph 14).

54 In the circumstances of the case in the main proceedings, Mr Rundgren is entitled under Swedish legislation to a State pension, a civil service pension and a life annuity following an accident at work, which constitute benefits whose purpose is similar to that of old-age and invalidity benefits to which he might in principle be entitled by Finnish legislation under the *kansaneläkelaki* No 347/1956. Moreover, although the State pension provided for by that law may also constitute unemployment benefit, such a benefit is not one with which Mr Rundgren is concerned.

55 In such circumstances, if Mr Rundgren were to pay the contributions towards the State pension which are prescribed by Finnish legislation, that would not afford him any additional protection, in view of the benefits which he already enjoys.

56 In those circumstances, the general principle mentioned in paragraph 53 of this judgment precludes any contributions, such as the contributions towards the State pension prescribed by Finnish legislation, from being claimed from Mr Rundgren, since he is entitled to benefits having a similar purpose, for which the Kingdom of Sweden assumes responsibility as the Member State competent in his regard in respect of pensions.

57 The answer to the third question must therefore be that the general principle resulting from Regulation No 1408/71 and applied by Article 33 of that Regulation, according to which a person entitled to a pension cannot, by reason of his residence in the territory of a Member State, be called upon to pay compulsory insurance contributions to cover benefits for which an institution of another Member State has assumed responsibility, precludes the Member State in whose territory he resides from requiring him to pay contributions or similar payments prescribed by its legislation to cover old-age, invalidity and unemployment benefits, where he is entitled to benefits having a similar purpose, for which the institution of the Member State competent in respect of pensions assumes responsibility.

The fourth question

58 By its fourth question, the national court asks whether the fact that the Republic of Finland and the Kingdom of Sweden have, pursuant to Article 36(3) of Regulation No 1408/71, reciprocally waived reimbursement of the costs of benefits in kind provided by an institution of one of the Member States on behalf of an institution of another Member State has any effect for the purposes of interpreting Articles 28a and 33(2) of the Regulation.

59 In that regard, it should first be noted that Article 36 of Regulation No 1408/71 forms part of a section headed *Reimbursement between institutions*.

60 The purpose of Article 36 of Regulation No 1408/71 is to make clear the consequences that flow, so far as relations between institutions are concerned, from the fact that benefits in kind have been provided by the institution of one Member State on behalf of the institution of another Member State.

61 Under Article 36(1) of Regulation No 1408/71, the institution that has provided sickness or maternity benefits in kind is entitled to be fully refunded by the institution responsible for bearing the cost of those benefits. However, Article 36(3) of the Regulation authorises two or more Member States to waive all reimbursement between institutions under their jurisdiction, with the result that the repayment obligation, which falls on the institution bearing the cost of the benefits in kind, is not enforced.

62 It follows that Article 36 of Regulation No 1408/71 is designed merely to make clear the financial consequences for the institutions concerned of the provisions of Title III, Chapter 1, of the Regulation and has neither the object nor the effect of derogating from the rule laid down by Article 28a of the Regulation, according to which, in the case described therein, the cost of benefits in kind provided to the pensioner is borne by the institution of one of the Member States competent in respect of pensions.

63 Nor does the fact that certain Member States take advantage of the right under Article 36(3) of Regulation No 1408/71 to waive all reimbursement between the institutions under their jurisdiction have any effect on the application of Article 33(2) of the Regulation, which concerns contributions which may be required from pensioners.

64 Therefore, the answer to the fourth question must be that the fact that the Republic of Finland and the Kingdom of Sweden have waived, under Article 36(3) of Regulation No 1408/71 and Article 23 of the Convention, all reimbursement of the costs of benefits in kind provided by an institution of one of the Member States on behalf of an institution of another Member State is of no consequence for the purposes of interpreting Articles 28a and 33(2) of Regulation No 1408/71.

*The fifth, sixth, seventh and eighth questions*

65 In view of the answer to the third question, there is no need to reply to the fifth, sixth, seventh and eighth questions, which in essence relate to the point whether, on the assumption that the provisions of Section 5 of Chapter 1 in Title III of Regulation No 1408/71 do not preclude the Republic of Finland from requiring Mr Rundgren to pay the contributions towards State pension and sickness insurance prescribed by its legislation, he could nevertheless avoid any liability by relying on Article 17a of the Regulation (fifth question), Article 48 of the Treaty and Regulation No 1612/68 (sixth question), Article 3 of Regulation No 1408/71 and Article 6 of the Treaty (seventh question) or any other provision of Community law (eighth question).

## **Decision on costs**

Costs

66 The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

## Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Rovaniemen hallinto-oikeus by order of 5 October 1999, hereby rules:

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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as last amended at the material time by Council Regulation (EC) No 3096/95 of 22 December 1995 applies to a person who, at the time when the Regulation entered into force in a Member State:

- was resident in that State but was not carrying on an occupational activity and was receiving a pension there from another Member State in his capacity as a retired civil servant,
- while being subject in his State of residence to laws relating to the branches of social security referred to in the Regulation.

However, Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community does not apply in principle to a person who has moved his place of residence from one Member State, in which he had ceased to be in employment, to another Member State, in which he is not employed and is not seeking employment.

2. The expression *nor is any pension payable* in Article 28a of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as last amended at the material time by Regulation No 3096/95, must be interpreted as applying to a situation in which neither a pension based on residence, such as the State pension provided for by Finnish law, nor a pension based on gainful employment and payable under the legislation of the Member State in which the person concerned is resident, is actually paid to that person, without its being necessary to ascertain whether he might hypothetically be entitled thereto.

3. The general principle resulting from Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as last amended at the material time by Regulation No 3096/95, and applied by Article 33 of that Regulation, according to which a person entitled to a pension cannot, by reason of his residence in the territory of a Member State, be called upon to pay compulsory insurance contributions to cover benefits for which an institution of another Member State has assumed responsibility, precludes the Member State in whose territory he resides from requiring him to pay contributions or similar payments prescribed by its legislation to cover old-age, invalidity and unemployment benefits, where he is entitled to benefits having a similar purpose, for which the institution of the Member State competent in respect of pensions assumes responsibility.

4. The fact that the Republic of Finland and the Kingdom of Sweden have waived, under Article 36(3) of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as last amended at the material time by Regulation No 3096/95, and Article 23 of the Nordic Convention

*on Social Security of 15 June 1992 (106/93), all reimbursement of the costs of benefits in kind provided by an institution in one of the Member States on behalf of an institution of another Member State is of no consequence for the purposes of interpreting Articles 28a and 33(2) of the said Regulation.*