worker complies with the substantive conditions laid down by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed.

2. **A wholly unemployed worker who, in the course of his last employment, was employed in a Member State other than that of his residence by an undertaking established in the latter State and who, in respect of that activity, was subject to the legislation of the State of employment may, by virtue of Article 71 (1) (b) (ii) of Regulation No 1408/71, claim unemployment benefits under the provisions of the national legislation of the State where he resides and to whose employment services he makes himself available for work.**

3. **Benefits such as those under Title III A of the Netherlands Law on Unemployment do not constitute 'unemployment benefits' within the meaning of Article 4 (1) (g) of Regulation No 1408/71.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 15 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 2 DECEMBER 1976

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Centrale Raad van Beroep of the Netherlands.

The appellant in the proceedings before that Court is the Bestuur der Bedrijfsvereniging voor de Metaalnijverheid (Board of the Metallurgical Trade Association) which is, it appears, the institution responsible for

administering the Dutch social security legislation relating to unemployment in so far as it affects workers in the Metallurgical trade.

The respondent in those proceedings is Mr L. J. Mouthaan. He is a Dutchman. He was born in 1942 and has at all material times resided in the Netherlands. After having, for a period the precise length of which we do not know, worked in the Netherlands for a Belgian firm, he worked from October to December 1972 in the Federal Republic of Germany for a firm called 'De Schakel' which was, as the Centrale Raad van Beroep has found, established in the Netherlands, and which was affiliated to the appellant's Association. The Centrale Raad van Beroep has also found that, while so employed, Mr Mouthaan went home to the Netherlands three or four times a month. In December 1972 De Schakel ran into financial difficulties and Mr Mouthaan became unemployed. He registered as such in the Netherlands. On 14 February 1973 De Schakel was adjudicated bankrupt.

Mr Mouthaan claimed from the appellant (1) unemployment benefit and (2) the benefit of the special provisions of Chapter III A of the Werkloosheidswet (the Dutch statute on unemployment) under which the competent institution may become liable to pay debts owed by an insolvent employer to his employees.

The appellant in fact paid unemployment benefit to Mr Mouthaan from 1 January 1973 until 26 March 1973, when, it seems, he found another job. However, by a notice dated 30 May 1973 addressed to Mr Mouthaan (Annex I to the order for reference), the appellant demanded from him repayment of the sums so paid to him. These amounted to Fl 2 400.

The appellant's reasons for making that demand were these.

Article 13 (1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on 'the application of social security schemes to employed persons and their families moving within the Community' provides:

'A worker to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.' (OJ L 149 of 5. 7. 1971)

Article 13 (2) provides so far as material:

'Subject to the provisions of Articles 14 to 17:

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

(OJ L 149 of 5. 7. 1971)

The appellant formed the view that none of the provisions of Articles 14 to 17 applied in Mr Mouthaan's case — a view that is endorsed by the Centrale Raad van Beroep — so that he was, while employed by De Schakel, subject to the legislation of the Federal Republic of Germany. It is Common ground that he was not in fact insured there. The Commission says that this was De Schakel's fault, because under German law, as indeed under Dutch law, an employer is responsible for seeing to it that his employees are duly insured for social security purposes. Mr Mouthaan told the Centrale Raad van Beroep that he for his part had assumed that he remained insured in the Netherlands.

That was not however the end of the matter because among the provisions of Chapter 6 of Title III of Regulation No 1408/71, which relates to unemployment, there is Article 71 (1) (b) (ii) which provides:

'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:

.....

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.' (OJ L 149 of 5. 7. 1971)

That is subject to a proviso suspending the right of the worker in question to receive benefits in his country of residence for so long as he is entitled to benefits under the legislation to which he was last subject.

There is no suggestion that Mr Mouthaan was entitled to benefits under German law, so that Article 71 (1) (b) (ii) seems to have fitted his case perfectly and to have entitled him to benefits under Dutch law. There appears to have been, at one time, some doubt whether he should not be regarded as having been a 'frontier worker'. It hardly matters whether he was or not, because, if he was, the same result would ensue by virtue of Article 71 (1) (a) (ii), the terms of which correspond, apart from the proviso, to those of Article 71 (1) (b) (ii). The Centrale Raad van Beroep has however expressly held that he was not a frontier worker (because he did not return home at least once a week) and no question as to that is referred to this Court.

The view taken by the appellant, and which has been throughout maintained on its behalf, was that Article 71 (1) (b) (ii) could only have applied in Mr Mouthaan's case if he had been properly insured in Germany, because the purpose of that provision was not to create a right to benefit but to make such a right duly acquired in one country the basis of a claim in another. Hence the appellant's decision to demand from Mr Mouthaan repayment of the benefits it had paid to him.

Against that decision Mr Mouthaan appealed, Successfully, to the Raad van Beroep of Arnhem. That Court held (see Annex 2 to the Order for Reference) that he was entitled to Dutch unemployment benefits by virtue of the relevant Dutch legislation, independently of Community law, provided that he satisfied the conditions prescribed by the Dutch legislation; and it held that nothing in Regulation No 1408/71 took that right away from him. The Raad van Beroep accordingly annulled the appellant's decision and remitted the case to the appellant to consider whether Mr Mouthaan did satisfy the conditions prescribed by the Dutch legislation.

It is against that order of the Raad van Beroep that the appellant now appeals to the Centrale Raad van Beroep, the grounds of its appeal being, shortly, (1) that Mr Mouthaan could derive no rights directly from Dutch law, because that law was overridden by Article 13 of Regulation No 1408/71, which subjected him to German law, (2) that he could derive no rights from Article 71 of Regulation No 1408/71 because he had not been insured in Germany and (3) that, in any case, benefits under Chapter III A of the Werkloosheidswet were outside the scope of Regulation No 1408/71 because they were attributable not to unemployment but to the employer's insolvency (see Annex 3 to the order for reference).

A question that obviously suggests itself is whether, having regard to the long line of decisions of this Court of which the most recent are its decisions in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149 and Case 50/75 *CPEP* v *Massonet,*

ibid. p. 1473, any provision of Regulation No 1408/71 could take away from Mr Mouthaan rights conferred on him by Dutch law. That question however is not among those referred to the Court by the Centrale Raad van Beroep. Moreover it will be of no practical importance if Your Lordships agree with me as to the answers to be given to the questions that are so referred.

As regards those questions, two preliminary observations are, I think, called for.

First, they are formulated in such a way as to invite the Court to rule on the application of Community law to the facts of this case. Such application is however a matter for the Centrale Raad van Beroep itself. Under Article 177 of the Treaty this Court can only rule on the interpretation of Community law in the abstract.

Secondly, it seems to me that the questions referred to the Court by the Centrale Raad van Beroep number three, and only three — the first being as to the interpretation of the definition of 'worker' in Article 1 (a) of Regulation No 1408/71, the second as to the interpretation of Article 71 (1) (b) (ii), and the third as to whether benefits of the kind conferred by Chapter III A of the Werkloosheidswet are 'unemployment benefits' within the meaning of the Regulation. The Commission has interpreted the order for reference as including questions as to the interpretation of other provisions of the Regulation, in particular Articles 13 and 14. It is perfectly true that the order for reference mentions those provisions as important for the decision of the case. But, as I understand it, the Centrale Raad van Beroep has already decided how they are to be applied here and does not ask this Court any question as to that.

So I turn to the first question, which is in effect whether a person who is not in fact insured under the legislation of the Member State where, according to the Regulation, he should be insured is nonetheless to be regarded as a 'worker' as defined by Article 1 (a).

My Lords, I refrain from reading Article 1 (a). It is rather long and Your Lordships are familiar with it from having had to consider it recently in *Brack* v *Insurance Officer* (not yet reported). Suffice it to say that in all three of the subparagraphs of Article 1 (a) a 'worker' is defined for the purposes of the Regulation in terms of a person insured, compulsorily or voluntarily, against certain contingencies covered by certain types of social security scheme. At first sight it would seem to follow that a person who is uninsured is outside the scope of the Regulation.

The appellant and the Commission are however at one in rejecting that suggestion. Unfortunately no observations, written or oral, have been put forward on behalf of Mr Mouthaan. I am left wondering, not for the first time, whether the second paragraph of Article 104 of the Rules of Procedure of the Court should not be given greater publicity.

Be that as it may, the appellant and the Commission must, in my opinion, on this question, be right. As the appellant points out, Title II of the Regulation (Article 13 *et seq.)* contains the provisions determining the legislation under which 'a worker to whom this Regulation applies' is to be insured. The authors of the Regulation cannot therefore have envisaged that a 'worker' must be insured before the Regulation can apply to him. So Article 1 (a) must include everyone who, by virtue of the Regulation itself, should be insured under a scheme of a kind there described. The real purpose of Article 1 (a), in my opinion, is not to define a 'worker' by reference to the fact of his insurance, but to define, by reference to the appropriate mode of their insurance, the workers to whom the

Regulation applies, in particular by excluding, in general, the self-employed.

I am accordingly of the opinion that the first question referred to the Court by the Centrale Raad van Beroep should be answered in the affirmative.

The second question is whether a worker who was not in fact insured in the Member State where he was employed can nevertheless claim the benefit of Article 71 (1) (b) (ii).

The appellant, of course, submits that that question should be answered in the negative. The Commission submits that it should be answered in the affirmative. It is not, to my mind, an easy question. There is a certain logic in the view urged by the appellant. On the other hand the Commission says that it was not through any fault of Mr Mouthaan's that he was not insured in Germany and that he ought not to be made to suffer for it.

At the end of the day I think that the question can only be resolved by reference to the actual wording of Article 71 (1) (b) (ii). That provision does not in terms link the receipt of benefits thereunder with insurance in the Member State where the worker concerned was last employed. Nor does it do so by necessary implication. On the contrary it says that the institution of the place of his residence 'shall provide such benefits at its own expense'. Moreover, Article 71 (1) (b) (ii) must be read in the context of Chapter 6 of Title III of Regulation No 1408/71 as a whole. This includes Article 67, which deals with aggregation and, in so doing, differentiates between 'periods of insurance' and 'periods of employment'. I conclude that the second question too should be answered in the affirmative.

The third question is, as I have indicated, whether benefits of the kind afforded by Chapter III A of the Werkloosheidswet are within the scope of Regulation No 1408/71. More precisely it is whether such benefits are 'unemployment benefits' within the meaning of Article 4 (1) (g) of the Regulation. Article 4 (1), Your Lordships remember, lists certain 'branches of social security' and provides that the Regulation is to apply to all legislation concerning them. Among them, under (g), it lists 'unemployment benefits'.

Here again the appellant and the Commission are at one. They both submit that the benefits in question are not 'unemployment benefits'. I agree, for it appears that those benefits are not confined to the unemployed. They are payable to anyone whose employer becomes insolvent: within certain limits the competent institution makes up to the employees of an insolvent employer their arrears of remuneration. The risk covered by Chapter III A of the Werkloosheidswet is thus not unemployment but insolvency of the employer. It appears that Chapter III A was added to the Werkloosheidswet by way of amendment in 1968 and that the illogicality of introducing such provisions into a statute dealing with unemployment was at the time recognized in the Dutch legislature. It was done for practical reasons. Thus, in my opinion, and in this too I agree with the Commission, Mr Mouthaan's entitlement (if any) to benefit under Chapter III A of the Werkloosheidswet is a matter wholly governed by Dutch law.

In the result, I would answer the questions referred to the Court by the Centrale Raad van Beroep as follows:

(1) A person who, under the terms of Regulation No 1408/71, should be insured under a social security scheme for employed persons is to be

regarded as a 'worker' within the meaning of Article 1 (a) of that Regulation even though in fact uninsured;

(2) The right of a worker to claim benefits under Article 71 (1) (b) (ii) of the Regulation is not dependant on his having been in fact insured in the Member State where he was last employed;

and

(3) Benefits are not 'unemployment benefits' within the meaning of Article 4 (1) (g) of the Regulation unless they are payable by reason of unemployment.