OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 February 1987 *

Mr President,
Members of the Court,

1. The Court has already been asked on a number of occasions to give preliminary rulings regarding the conditions of application of Article 73 (1) of Council Regulation No 1408/71 of 14 June 1971 [1] (hereinafter referred to as 'Article 73') and Article 10 (1) (a) of Council Regulation No 574/72 of 21 March 1972 [2] (hereinafter referred to as 'Article 10') laying down the procedure for implementing Regulation No 1408/71. However, the particular circumstances of this case, which result, as the Commission has observed, from a 'coincidence', have not before been submitted to the Court.

The appellant in the main proceedings, Beverly Leila Burchell, who is divorced and unemployed, lives in the United Kingdom with her two children, while her former husband remains in the Netherlands, where he is employed. In 1980, when she submitted an application to the British social security authorities, Mrs Burchell fulfilled all the conditions of eligibility for child benefit under British law.

At the same time her former husband received family allowances in the Netherlands for the same two children, since under Netherlands law — unlike that of any other Member State, according to the Commission — family benefits may be paid even if the members of the family are not resident in the Netherlands.

Thus there arose two separate rights in respect of the same children and for the same periods purely as a result of the application of two national schemes neither of which contained at the time a clause preventing overlapping payments — the Netherlands legislature introduced such a clause only from 1 August 1985.

2. The decisive issue in this case is whether or not Article 73 applies in such circumstances, particularly in the light of the judgment of the Court in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit*, [3] on which the respondent in the main proceedings largely relied in refusing to grant Mrs Burchell the benefits she had applied for under the British legislation.

Only if Article 73 is in fact applicable can Article 10 take effect. [4] Clearly Article 73 does not govern Mrs Burchell's position, since she is not employed and her children, like her, are resident in the United Kingdom.

What, then, of her ex-husband? It follows from the judgment of the Court in *Kromhout* v *Raad van Arbeid Leiden* [5] that if

* Translated from the French.

1 — Official Journal, English Special Edition 1971 (II), p. 416.

2 — Official Journal, English Special Edition 1972 (I), p. 159.

3 — Judgment of 19 February 1981 [1981] ECR 503.

4 — Judgment of 3 February 1983 in Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171 at paragraph 12.

5 — Judgment of 4 July 1985 in Case 104/84 [1985] ECR 2205.

he had received social security benefits in the Netherlands pursuant to Article 73, the rule in Article 10 against overlapping benefits would have been applicable to the appellant in the main proceedings since in such a case 'a child in respect of whom family benefits or family allowances are due is, as a member of the family of one of the recipients of such benefits or allowances, a person covered by the Community legislation ... without there being any need to ascertain whether the other recipient who is also entitled to family benefits or family allowances in respect of the same child is also covered by that legislation' (paragraph 1 of the operative part).

The question whether or not Article 73 applies to the father cannot be resolved without reference to the rules governing the application of Article 51 of the EEC Treaty, the subject-matter of the third question referred by the Social Security Commissioner.

In its judgment in *Pinna* v *Caisse d'allocations familiales de la Savoie*,[6] the Court held, in accordance with its previous case-law on the granting of social security benefits to workers moving within the Community and to members of their families, that:

'Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article 51 leaves in being differences between the Member States' social security systems and, consequently, in the rights of workers employed in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of workers employed in the Member States, are unaffected by Article 51 of the Treaty' (paragraph 20).

That, I think, is the philosophy which must govern the resolution of this case: the rights of workers to social security benefits are based primarily on national law. The role of primary and secondary Community law on social security, as it now stands, is only to ensure that workers are at liberty to exercise their right of free movement within the Community. Consequently, it enters into play only where national law does not afford migrant workers the same guarantees as those enjoyed by nationals of the Member State of establishment or the highest amount of benefits available under one of the applicable national systems,[7] or where it may give rise to unjust enrichment.[8]

It cannot be maintained, as the Adjudication Officer suggested in his observations, that Community law modifies national law on social security. The underlying principle of the relevant Community law is coordination and it plays a purely complementary role in circumstances where the objectives of the Treaty would not otherwise be achieved.

Consequently, it must always be determined whether it is necessary to apply regulations adopted pursuant to Article 51 in order fully to achieve those objectives. If they have already been met by the application of national law alone, there is no need to have recourse to Community law.

Nor is it possible to accept the argument put forward by the Adjudication Officer and the

6 — Judgment of 15 January 1986 in Case 41/84 [1986] ECR 17.

7 — See in particular the judgment of 12 June 1980 in Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915.

8 — *Krombout*, referred to above, in particular paragraph 13.

Netherlands Government to the effect that the principle that regulations are directly applicable gives individuals rights in social security matters which are independent of those they enjoy under national law. That reasoning is perfectly well-founded with regard to harmonizing provisions of Community law but it loses much of its force where coordinating provisions are concerned. In such circumstances regulations are directly applicable only in so far as co-ordination is necessary in order to achieve Community objectives.

That analysis is not, I think, contradicted by anything that was said in the *Beeck* judgment, in which the Court held that:

'Article 73 (1) of Regulation No 1408/71 *affords* a worker subject to the legislation of a Member State *entitlement*, in respect of the members of his family residing on the territory of another Member State, to the family benefits provided for by the legislation of the first-mentioned State as if they resided on the territory of that State' (paragraph 6; my emphasis)

and that the 'arrangement' created by that provision in combination with the rule laid down in Article 13 (2) (a) of the same regulation

'stems from the objective of Regulation No 1408/71, which is to guarantee all workers who are nationals of the Member States and who move within the Community equality of treatment in regard to the different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence, and it must be interpreted uniformly in all Member States regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits' (paragraph 7).

In the *Beeck* case, although family benefits could be granted both under German national law as interpreted by the Bundessozialgericht, the final court of appeal in such matters, and on the basis of Article 73, the applicable rules against overlapping benefits were not the same under the two systems. It appears from the judgment and from the Opinion of the Advocate General that under German law no family allowances at all could be paid where comparable family benefits were paid outside the area of application of that law. Such treatment did not meet the guarantee afforded by Community law — and reiterated in that judgment — under which the application of the Community rule preventing overlapping payments entailed the suspension of payment of family benefits payable under the legislation of the State of employment 'only up to the amount received, in respect of the same period and the same member of the family, in the State of residence by the spouse pursuing a professional or trade activity within the territory of that State' (Mrs Beeck was employed in the State of residence). That is why the Court followed the Advocate General, Mr Reischl, who warned against the danger of leaving Member States the possibility, in their legislation, of 'ousting' the provisions of Community law on overlapping benefits. It was therefore necessary for the Court to declare Article 73 applicable in such circum-

stances in order that workers' rights should be fully safeguarded when rules governing overlapping benefits were applied. In other words, where national law alone does not ensure that rights guaranteed by Community law are respected in the resolution of the overlap between one entitlement and another higher entitlement, reference must be made to the Community rule.

In this case it must be observed that, during the relevant period, Dutch law

(i) provided for the payment of family benefits for children who were resident in another Member State;

(ii) contained no provision regarding overlapping benefits.

That legislation thus precluded recourse to Article 73, and Article 10 was therefore inapplicable.

There is thus nothing in Community law to prevent the overlapping application of the British and Dutch substantive rules. The result, of course, is that during the period in question the children of the appellant in the main proceedings enjoyed an exceptional situation in comparison with the children of migrant workers who did not have the benefit of such a 'coincidence'. That situation cannot be regarded as unjust enrichment as referred to in the *Krombout* judgment since it does not result from the application of a Community rule and its continued existence is a matter for the national legislatures alone.

3. I therefore propose that the Court give the following answer to the Social Security Commissioner:

The rule against overlapping benefits laid down in Article 10 (1) (a) of Regulation No 574/72 applies only to benefits granted under Articles 73 or 74 of Regulation No 1408/71.

Family benefits paid solely pursuant to national legislation do not fall within the scope of Article 73 of Regulation No 1408/71 — or, therefore, that of Article 10 of Regulation No 574/72 — where there is no provision against overlapping benefits in national law such as to call in question the principle underlying the Community rules or the level of entitlement guaranteed by them.