OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 27 February 1986

My Lords,

This reference under Article 177 of the EEC Treaty is made in proceedings before the Social Security court at 's-Hertogenbosch.

The plaintiff in those proceedings, who is a Dutch national, worked in Belgium, Germany and the Netherlands. Her last employment was in Germany, where she worked as a riding teacher from January to April 1975.

In April 1975 she developed severe shoulder trouble and has apparently been incapacitated from work since then: although she started work again in 1978, she gave it up after a few days by reason of her incapacity and it is now common ground between the parties that she has been completely and permanently incapacited from work since before 1 October 1976. On 1 August 1975 she returned to live in the Netherlands. She received German sickness benefits from April 1975 until 15 October 1976. On that date payment of these benefits was discontinued on the grounds that the maximum period for their payment had expired. The questions contained in the order for reference are based on the premise that no German benefits have been payable since that date.

The defendant social security institution contends that it is prevented from paying to her a Dutch social security benefit, which would otherwise be due, by virtue of Article 13(1) and 13(2)(a) of Regulation No 1408/71 (consolidated in Official Journal L 230, 1983, p. 8). Those provisions read as follows:

'(1) Subject to Article 14(c), persons 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.

(2) Subject to Articles 14 to 17:

(a) A person 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;'

Accordingly, the national court has posed the following two questions:

'(1) Does a worker who, in connection with the pursuit of an activity in the territory of a Member State, receives sickness benefits under the legislation of that Member State, and who did not take up employment in the territory of another Member State while he was in receipt of those benefits, continue to be

subject to that legislation pursuant to Article 13(2)(a) of Regulation (EEC) No 1408/71 even though almost a year and a half has elapsed since the award of those sickness benefits and the termination of that activity (and of the employment relationship)?

(2) Does the determination of the legislation of a specific Member State as the legislation applicable to a specific worker pursuant to Article 13(2)(a) of Regulation No 1408/71 mean that the worker cannot simultaneously be regarded as insured under the national law of another Member State alone, pursuant to the legislation of that other Member State concerning invalidity benefits, with the result that the operation of Community law deprives him of invalidity benefits to which he is entitled under the national legislation of that other Member State alone?'

Even if Article 13 were read in the plaintiff's favour, she might, it seems, be refused the benefit concerned because she was not continuously resident in the Netherlands from 1 January 1975 to 1 October 1976 as required by Article 91(c) of the Dutch General Law on Incapacity for Work. That provision reads: 'An insured person shall be entitled to invalidity benefits as specified in Articles 89 and 90 provided that . . . (c) either (1) he lived in the Netherlands between 1 January 1975 and 1 October 1976 or (2) he has lived in the Netherlands, Surinam or in the Netherlands Antilles since 1 October 1970 for a period of six years, whether continuously or otherwise'. Consequently, the Dutch court has posed a third and final question which is in the following terms:

'May requirements relating to residence such as those provided for in Article 91(c) of the Netherlands General Law on Incapacity for Work be relied upon as against a migrant worker within the Community?'

As to the first question, it seems to me that the answer must be in the affirmative. Authority for this is to be found in Case 150/82 *Coppola* [1983] ECR 43: the Court said there that although Article 13(2)(a) 'does not expressly mention the case of a worker who is not employed when he seeks sickness benefit, it is appropriate to interpret it as meaning that, where necessary, it refers to the legislation of the State in whose territory the worker was last employed' (at page 55). It follows that in October 1976 the plaintiff continued to be subject to German legislation, even though her employment in Germany had come to an end 18 months previously.

The second question presents greater difficulties as the arguments in this case show. Yet to my mind the principle is clear that a person may not be compulsorily insured under the relevant regulations in more than one State. This principle is now expressly set out in Article 13(1) of the Regulation which I have quoted. It seems to me implicit in Regulation No 3 (OJ 1958, p. 561) although there was no provision in that Regulation corresponding to Article 13(1) of the later Regulation. The Court, as I see it, accepted the principle in relation to both of these Regulations in such decisions as Cases 8/75 *Football Club d'Andlau* [1975] ECR 739, 102/76 *Perenboom* [1977] ECR

815 and 276/81 *Kuijpers* [1982] ECR 3027. The whole purpose of the two Regulations, which is to facilitate the free movement of workers, would be undermined if a migrant worker and his employer could be compelled to pay social security contributions in two Member States.

It is true that in Case 92/63 *Nonnenmacher* [1964] ECR 281 the Court said in regard to Regulation No 3 and Articles 48 to 51 of the EEC Treaty:

'These provisions are designed to establish the greatest possible freedom of movement for workers. This aim includes the elimination of legislative obstacles which could handicap migrant workers.'

In case of doubt the above-mentioned Articles and the measures taken in implementation of them must therefore be construed so as to avoid placing migrant workers in an unfavourable legal position particularly with regard to social security. On the other hand these provisions are not opposed to legislation by the Member States designed to bring about additional protection by way of social security for the benefit of migrant workers. In Case 19/67 *van der Vecht* [1967] ECR 345 the Court also said in relation to Regulation No 3: 'In fact in the interests of both workers and employers as much as of insurance funds, the aim of the Regulation is to avoid any plurality or purposeless confusion of contributions and liabilities which would result from the simultaneous or alternate application of several legislative systems'. It thus appears that the Court accepted that the simultaneous application of two national systems could be compatible with Regulation No 3. It seems to me clear that it is open to a worker to decide voluntarily that he will join a second social security system; it is equally open under the Regulation to a second Member State to confer social security benefits upon a worker even if that State is not the State contemplated by Article 13 of the Regulation. On the other hand it does not seem to me that these two judgments of the Court go so far as to indicate that a worker may be required to be compulsorily insured under the social security benefit schemes of two different Member States even if the benefits under one scheme may be greater than under the other. If that were the position then confusion of contributions and liabilities would be likely to arise. In addition, it is plain that an obligation to join a second social security scheme could provide a deterrent to a migrant worker which the Court has made plain is to be avoided. This result seems to me to follow from the cases later than *Nonnenmacher* and *Van der Vecht* to which I have referred by way of example.

Accordingly, even though a person must be insured in a Member State designated by the Regulation, there is, in my view, nothing to preclude him from entering into further insurance on a voluntary basis or being covered by the social security benefit scheme of another Member State as well. That this is the position is borne out by the line of cases in which it was held that the Regulation does not prejudice rights acquired under national law alone: see Cases 24/75 *Petroni* [1975] ECR 1149, 62/76 *Strehl* [1977] ECR 211 and 733/79 *Laterza* [1980] ECR 1915. Contrary to the arguments advanced by the Dutch

Government and the Commission, it does not seem to me that this principle only applies where rights are acquired under national law in the Member State designated by the Regulation. The judgment in Case 279/82 *Jerzak* [1983] ECR 2603 seems to me to show the contrary.

It is now well established that the Regulation does not impinge on the powers of Member States to lay down the conditions under which benefits are granted even by the Member State designated by the Regulation in respect of a particular person: see Cases 110/79 *Coonan* [1980] ECR 1445, 70/80 *Vigier* [1981] ECR 229 and 275/81 *Koks* [1982] ECR 3013. *A fortiori,* it seems to me, that must be the position in respect of social security systems in States other than the State designated in respect of a particular person by the Regulation.

Accordingly, I take the view that Article 13(1) must be read to mean that, subject to Article 14(c) which is not in point, a person may not be compulsorily insured in more than one State. Yet there is nothing in the Regulation which precludes a person from being granted social security benefits in another Member State at his option or on a voluntary basis.

So far as the third question is concerned it appears from Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213 and Case 92/81 *Camera* v *INAMI* [1982] ECR 2213 that Article 10 of Regulation No 1408/71 is to be read in the sense that a person retains the rights to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State 'but also he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated' *(Camera* v *INAMI* paragraph 14 at p. 2224). I find some difficulty in understanding, as apparently does the Commission, how these cases are to be read with Case 32/77 *Giuliani* [1977] ECR 1857. There is some indication in the wording of Article 10 that the restriction by reason of non-residence is to be read as applying not so much to the acquisition of rights as to the payment of benefits once the rights have been acquired. However, whatever may be the position in regard to benefits resulting from compulsory insurance in the State designated by Article 13(1) of the Regulation it does not seem to me that Article 10 applies to the acquisition of rights under what I have called voluntary insurance, or what may be seen as additional insurance, taken out by a person in a State other than the State in which he is obliged to be insured. Accordingly, it does not seem to me that the provisions of Article 91(c) of the Netherlands General Law on Incapacity for Work are incompatible with Article 10 of the Regulation in so far as they relate to the acquisition of a right to voluntary or additional insurance. What may be the position once rights have been acquired, if any attempt were made not to pay the benefits by reason of non-residence of the person who had acquired the rights, does not seem to me to arise for consideration in this case.

Accordingly, I am of the view that the questions referred by the national court should be answered on the following lines:

(1) By virtue of Article 13(2)(a) of Council Regulation No 1408/71 a person continues to be subject to the legislation of the State in which he was last employed, even if his last employment there has come to an end.

(2) A worker to whom Article 13(2)(a) applies may be compulsorily insured only in the Member State designated by that provision. However, there is nothing to preclude another Member State from granting him social security benefits if it so wishes or from his voluntarily entering a scheme for social security benefits available to him in another Member State.

(3) A residence requirement such as that provided for in Article 91(c) of the Netherlands General Law on Incapacity for Work is compatible with Regulation No 1408/71.

The costs of the defendant in the main action fall to be determined by the referring court. The Dutch Government and the Commission should bear their own costs.