OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 MARCH 1984

My Lords,

Mr Brusse is a Dutch national. Until 1964, it seems, he worked as a journalist in, and was insured under the national insurance scheme applicable in, the Kingdom of the Netherlands. In that year he went to England as the foreign correspondent of the newspaper published by his employers, De Volkskrant BV, whose registered office is in Amsterdam. He continued to work and reside in England with his family, at any rate until 1983. He did not pay social security contributions under the scheme in force in the United Kingdom as he should have done, apparently because he genuinely thought that he was not required to do so. Instead contributions were paid on a voluntary basis on his behalf initially under the Netherlands old age pension scheme, and subsequently in respect of national insurance schemes covering unfitness for work and providing pensions for widows and orphans.

In 1977 the British authorities realized that he had not been paying contributions to the British scheme. In what seems, at first glance, an eminently sensible way, the Netherlands and the British authorities tried to sort out between them his national insurance position. They reached an agreement that Mr Brusse should be treated as subject to the Netherlands social security scheme from 1 September 1964 to 31 December 1977 and thereafter as subject to the British scheme.

His employers then asked the Raad van Arbeid, Amsterdam, the responsible Netherlands authority, to pay to him family allowances under the Netherlands scheme up to the end of 1977. When that authority rejected the claim, on the basis that he was not resident in the Netherlands, he brought proceedings before the appropriate court, the Raad van Beroep, which upheld his claim. The Raad van Arbeid appealed and the appeal court, the Centrale Raad van Arbeid, has referred two questions to the Court of Justice pursuant to Article 177 of the EEC Treaty.

Those questions arise in this way. The agreement between the two governments was expressly made subject to Article 10 of a Convention on Social Security made on 11 August 1954 between the two kingdoms (so far as concerns the period to 1 April 1973) and subject to Article 17 of Regulation No 1408/71 (OJ L 149) so far as concerns the subsequent period.

Both the Convention and the regulation lay down rules which are to apply where the nationals of either of two Member States have worked or resided in the other Member State. In particular, Articles 13 to 16 of the regulation determine the social security legislation which is to apply to workers covered by the regulation — so far as relevant here, those who are or have been subject to the legislation of one or more Member States and who are nationals of one of

the Member States. The overriding rule is that such a worker "shall be subject to the legislation of a single Member State only", and, subject to specified exceptions and special rules, "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 the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State".

Articles 10 of the Convention and 17 of the regulation respectively provide that the two States may agree that certain of those rules shall not apply. By Article 17 the competent authorities of two Member States may "by common agreement provide for exceptions to the provisions of Articles 13 to 16 in the interests of certain workers or categories of workers".

The Raad van Arbeid took the view that the agreement made could not fall within Article 17. That Article empowered Member States to agree exceptions only where application of the earlier provisions "might lead to undesirable or unintended consequences". Mr Brusse did not constitute such an exceptional case since it was his own omission which had caused the difficulties encountered.

Although the Court does not itself interpret national law or agreements of the kind made, or rule on the application of Community law in a national context, yet it clearly can rule on the scope of Article 17 so as to give guidance to the national courts. The two questions referred can, and in my view should, be read as asking two questions which the Court has jurisdiction to answer:

(a) Whether Article 17 enables two Member States to agree that the social security scheme of a Member State in which a worker initially resided shall be made applicable to that worker in respect of a number of years when he has worked in another Member State, without affiliating to the social security scheme applicable to him pursuant to Articles 13 to 16 of the regulation?

(b) Whether, if the social security scheme of a Member State which has been agreed to be applicable to the worker for the relevant years contains a qualifying condition of residence in that Member State, such a qualifying condition can, as a matter of Community law, continue to be applicable to the worker?

As the Court has already made clear the object of this regulation is to ensure that normally only one system of social security shall apply (Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027). Complicated accumulations and divisions of contributions and benefits are to be avoided in favour of a simple practical scheme. Moreover the measures taken in the field of social security are by Article 51 of the EEC Treaty to be such as are necessary "to provide freedom of movement of workers".

The power to grant exceptions from the rules laid down is vested in the Member States concerned. They can only exercise that power if they reach common

agreement as to whether and how exceptions will be granted. Moreover they can only do so if to grant an exception to the rules otherwise applicable is "in the interests of certain workers or categories of workers". They cannot do so simply because it is convenient to those administering the scheme or simply because it is in the interests of employers. Subject to the essential criterion, the interests of the workers being satisfied, the discretion is theirs, though it should be exercised in the light of the basis objectives of the Regulation and Article 51 of the Treaty.

Although the Article refers to workers and categories of workers in the plural, it should be read as including "a worker" and "a category of workers". It cannot possibly have been intended that an exception could only be granted if there were two or more categories of workers. In my opinion no more was it intended that no exception could be granted unless two workers were involved.

Contrary to the Raad van Arbeid's contention I would not read into the power given to the Member States a limitation that it can only be exercised prospectively. The power may of course be exercised prospectively but the limitation contended for is neither expressed nor in my view to be implied in the interests of legal certainty. It is open to the Member States to decide that it is in the worker's interest to grant an exception retroactively where, in a case like the present, a genuine mistake has occurred, and where from the worker's point of view, it is wholly beneficial to sort out the position simply and clearly by way of the grant of an exception.

I would also reject the suggestion that the question to ask is whether the application of Articles 13 to 16 would lead to "undesirable or unintended consequences". The question is whether it is in the interests of the worker to make the exception. Member States are not precluded from making an agreement if what has been done is due to an act or omission of the worker, his employer or indeed the authorities, so long as the remedy is in the interests of the worker.

The primary consideration is thus that the worker should belong to one system of social security which basically should be, in a case like the present, that of the Member State in which he works. Member States have it in their power to ensure that unjustified exceptions are not granted and to prevent "shopping around" for the most advantageous system. Each case must be decided on its merits and individual facts and circumstances must be considered by the Member States. If the validity of an agreement is challenged it is for the national court to rule.

As a matter of the interpretation of Article 17, it is in my view open to the Member State to take into account such factors, as are relied on here, as that the worker had for many years paid voluntary contributions which can be treated as valid payments under the

social security scheme of one Member State, and which produce satisfactory benefits for him, whereas he has paid nothing under the scheme to which he should have contributed, and thus is entitled to nothing unless he makes substantial back payments. In this case there is the additional factor that if he did so, it appears from the observations of the United Kingdom Government, he would still not get full benefit since late payments do not fully qualify. Moreover there is no finding that he could recover his contributions to the Netherlands scheme.

Accordingly I accept the result contended for by Mr Brusse and supported, though with different emphasis, by the Netherlands, the United Kingdom and the Commission.

All the parties are agreed that if an exception is granted its effect cannot be thwarted by reliance on a qualifying condition of residence included in the social security system chosen. This seems to me plainly right. Although a particular system is chosen and is to be applied, a condition as to residence included in that system, which wholly deprives the worker of his rights under the agreement, is either to be deemed to be satisfied or is to be excluded. The whole purpose of granting the exception otherwise would be frustrated. This result seems to me, in addition, to be consistent with the provisions of Article 73 of the regulation. The worker is by agreement made subject to the legislation of a Member State. He is then entitled to the family benefits provided for by the legislation of that Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the Member State whose legislation is chosen by agreement to apply.

I would accordingly answer the questions posed on the lines:

(a) Article 17 of Regulation No 1408/71 enables two Member States to agree that the social security scheme applicable in one of those Member States, in which a worker initially resided, shall be made applicable to that worker in respect of a number of years when he has worked in the other Member State without affiliating to the social security scheme applicable to him pursuant to Articles 13 to 16 of the regulation, so long as it is in the interests of the worker for the Member States so to agree.

(b) If the social security scheme of one Member State, which has been agreed by that and another Member State to be applicable to a worker, contains a qualifying condition of residence in the first-mentioned Member State, that qualifying condition does not have to be satisfied by the worker before he can obtain benefit.