OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 19 April 1988

My Lords,

Mr Borowitz was born in Poland in 1910. After completing secondary and university education there, he entered employment and paid Polish insurance contributions for 28 months during the years 1937 to 1939. Between 1939 and 1945 he was a German prisoner of war.

From 1948 to 1952 Mr Borowitz was employed in the Netherlands, where he paid compulsory insurance contributions for 51 months. Mr Borowitz then became resident in Germany and started paying compulsory insurance contributions there under the clerical staff pension scheme. He became a German national in 1961 and completed a total of 113 months' contributions in Germany before reaching retirement age, when he applied to the Federal Insurance Office for Clerical Staff (Bundesversicherungsanstalt für Angestellte: 'the BfA') for an old-age pension. The question that has arisen between Mr Borowitz and the BfA is whether his periods of secondary and higher education (during which he paid no compulsory insurance contributions) ought to be taken into account in calculating his total pension entitlement. If they ought he gets a higher pension.

The answer to the question has been seen to depend on the interrelation between German domestic and Community law.

So far as German domestic law is concerned Articles 35 and 36 of the Angestelltenversicherungsgesetz (Clerical Staff Insurance Law) provide that in calculating, for the purposes of an old-age pension, the number of insurance years completed, periods known as 'interrupting periods' (which include years of secondary and further education at technical school or university) may be taken into account if, from the date of entry into the insurance scheme until the claim arises, at least half of the period is covered by contributions relating to an occupation or activity which is subject to compulsory pension insurance. Thus although the interrupting periods (and certain other periods) may not be relied on to show that half of the period is covered by contributions, they go to increase the pension once a 'semi-complete' contributions record has been attained. Conversely if the contribution record is not 'semi-complete' the interrupting periods are not taken into account for the purposes of calculating the amount of the pension.

By a Convention concluded between the Federal Republic of Germany and the People's Republic of Poland on Pension and Accident Insurance ('the 1975 Convention'), it was provided by Article 4 (2), *inter alia*,

that for the purpose of calculating an old-age pension under German law insurance periods, periods of employment and assimilated periods completed in Poland should be taken into consideration as if they had been completed in Germany, though the Convention was expressed not to affect 'measures issued by an intergovernmental institution of which the State is a member' (Article 3).

So far as Community law is concerned Council Regulation No 1408/71 (Official Journal 1971, English Special Edition, p. 416), the most recent consolidated text of which is to be found in Annex 1 to Council Regulation No 2001/83 (Official Journal 1983, L 230, p. 6) applies to employed persons who are or who have been subject to the legislation of one or more Member States of the Community. By Article 1 (j) '"legislation" means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security' covered by Article 4 (1) and (2) of the Regulation.

Chapter 3 of the Regulation ('Old-age and Death (Pensions)') deals with the award of old-age benefits where the person concerned has been subject to the legislation of two or more Member States. Article 44 (2) lays down the general principle that the award of a benefit must be made having regard to all the legislations to which the person concerned has been subject. Article 45 (1) obliges the authority calculating the pension entitlement, in cases in which the right to benefit is conditional upon the completion of periods of insurance, to take into account to the extent necessary periods of insurance completed under the legislation of any Member State as if they were periods completed under the legislation which it administers. By Article 46 the award of benefits in respect of old-age pensions (where a worker has satisfied the conditions for entitlement to benefit under the legislation of a Member State to which he has been subject) involves a calculation not only of the amount of benefits corresponding to the total length of periods of insurance or residence to be taken into account under the legislation of that Member State but also of all the periods of insurance or residence completed under the legislation of Member States to which he has been subject. The amount of benefit due from the first-mentioned Member State is then established in the ratio which the length of the periods completed under the legislation of that Member State bears to the total length of the periods completed. The higher of the two amounts — the actual amount due and the calculation resulting from the application of the formula ('the theoretical amount') — is then taken into consideration.

Annex VI (C) of the 1983 consolidated text of Regulation No 1408/71 (formerly Annex V (B)) provides that, in determining whether interrupting periods are to be taken into account as such, compulsory contributions paid under the legislation of another Member State and insurance under the insurance scheme of another Member State shall be treated as compulsory contributions paid under German legislation and as insurance under the German pension insurance scheme.

When first calculating the pension entitlement, the BfA, after correcting an initial error, added the periods of compulsory insurance in the Netherlands to the months when contributions were paid in Germany.

On that basis, it concluded that Mr Borowitz had attained a semi-complete compulsory contributions record, and proceeded to take into account, in arriving at the total pension entitlement, the 'interrupting periods' during which Mr Borowitz was engaged in secondary and higher studies, it being apparently immaterial, under German law, that these studies took place in Poland rather than in Germany.

Following the ratification of the 1975 Convention, the BfA recalculated Mr Borowitz' pension on 9 January 1978, taking into account the provisions of German domestic law, the provisions of the 1975 Convention and the provisions of Regulation No 1408/71. At first it continued to take into account the interrupting periods; later, however, by a reassessment notice of 4 July 1978, it stated that it had done so in error. It then carried out two separate pension calculations. One calculation took into account the Polish and German contributions, but not contributions paid in the Netherlands; the other took into account the German and Netherlands contributions, but not the Polish contributions. In accordance with its administrative practice, the BfA then paid Mr Borowitz the pension produced by the higher of those two calculations. However, under each of the separate calculations Mr Borowitz did not attain a semi-complete compulsory contributions record so that the interrupting periods could no longer be taken into account.

This approach was repeated in an adjustment notice of 29 August 1979 (corrected by a notice of 2 October 1979), which showed Mr Borowitz' entitlement as DM 1 203.50. Mr Borowitz continued to be paid the earlier, higher amount (that is, the amount that was produced by taking into account the interrupting periods) on equitable grounds, but was informed that his pension would only be increased if, in the future, the new method of calculation generated a higher pension entitlement.

Mr Borowitz challenged this approach in an action before the Sozialgericht Reutlingen. He claimed that a single integrated calculation based on the periods of contribution in Germany, the Netherlands and Poland should be made, which would give him a semi-complete contributions record which would enable interrupting periods to be taken into account. The Sozialgericht Reutlingen found in Mr Borowitz' favour by a judgment of 10 February 1982. The BfA appealed to the Landessozialgericht, which upheld the lower court by a judgment of 18 December 1984. The BfA appealed on a point of law to the Bundessozialgericht, which stayed proceedings on 25 November 1986 and referred the following question to the Court:

'Does Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community permit a German insurance institution, in deciding whether to take interrupting periods into account, to treat as compulsory contributions paid under German legislation and as insurance under the German pension insurance scheme not only compulsory contributions paid under the legislation of other Member States and insurance under the insurance schemes of other Member States but also compulsory contributions and insurance in a non-member country (Poland) with which the Federal Republic of Germany has concluded a convention on the reciprocal assimilation of insurance periods?'

In the written pleadings the Commission took the position that a convention such as that made between the Federal Republic of Germany and Poland which was applied in the Federal Republic of Germany constituted legislation within the meaning of Article 1 (j) of the Regulation so that the Polish periods had to be regarded as German periods for the purpose of Chapter 3 of the Regulation. The United Kingdom contended that such a convention was not legislation for such purpose and that no Member State could impose obligations on other Member States in respect of social security matters by making a bilateral convention with another State. At the hearing, however, the Commission and the United Kingdom really adopted a similar approach which would give an affirmative answer to the actual question posed — which it must be recalled is whether the Regulation 'permits' the German authorities to have regard both to periods of compulsory insurance under the legislation of other Member States and to periods of compulsory insurance under the legislation of Poland by reason of the Convention on the reciprocal assimilation of insurance periods.

The Commission has argued that the whole question turns simply on the particular provision of German law relating to interrupting periods. It is suggested that this provision is peculiar to German law. I do not accept that the question is so limited. It seems to me that it has a much wider ambit.

In my view it is plain that Chapter 3 of the Regulation *requires* contribution periods in the Netherlands to be taken into account in the calculation of Mr Borowitz's pension. It seems to me equally plain that there is nothing in the Regulation which *prevents* the Polish periods from being taken into account for the purposes of calculating a pension entitlement under German domestic law.

Although Regulation No 1408/71 regulates pension calculations in respect of periods spent subject to the social security legislation of more than one Member State, it does not take away rights otherwise due under domestic law. Under German domestic law Mr Borowitz was entitled to have the Polish periods taken into account for the purpose of calculating his pension. The fact that under Regulation No 1408/71 he is also entitled to have the Netherlands periods taken into account does not take away his rights under domestic law. If Regulation No 1408/71 were to be read as preventing the Polish periods from being taken into account it would in my view conflict with the general principle stated in Article 51 of the EEC Treaty under which, *inter alia*, it was made (namely to adopt such measures as are necessary to provide freedom of movement for workers), since if a national of one Member State knew that if he moved from that Member State to work in another Member State he would lose the benefit of contribution periods spent in a third State, which were recognized in the first-mentioned Member State, he would be deterred from moving.

Whether Regulation No 1408/71 *requires* (as opposed to *permits*) the Polish periods to be taken into account is a question not asked by the national court. If it fell to be answered it seems to me that there is

nothing in Articles 6, 7 or 8 of the Regulation which affects the answer and that the only argument in favour of such a requirement which has been advanced is that Article 4 (1) read with the definition in Article 1 (j) is sufficiently wide to incorporate bilateral conventions recognized by or made part of domestic law.

The definition in Article 1 (j) of the Regulation is clearly wide since it includes not only statutes, regulations and other provisions but 'all other implementing measures present or future' relating to the branches of social security covered by Article 4 (1) and (2). That is capable of including provisions and measures in some Member States giving effect to a bilateral convention with a third State. On the other hand, getting away from the literal wording it does not seem to me that this Article was intended to cover, and it should not be read as covering, periods spent in a third State which are merely recognized as equivalent to periods covered by contributions in the Member State for the purposes of calculating a pension under domestic law. Even if such periods in a third State are taken into account for the purposes of the domestic calculation they cannot affect the obligations of other Member States on an apportionment following the aggregation of relevant periods. Such a result seems to me to be consistent with the Court's decisions in Case 16/72 (*Allgemeine Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein* [1972] ECR 1141) and paragraphs 8 and 9 of Case 75/76 (*Kaucic* v *Institut national d'assurances maladie-invalidité* [1977] ECR 495).

Case 87/76 (*Bozzone* v *Office de sécurité sociale d'outre-mer* [1977] ECR 687) seems to me a special case where a colonial decree of 7 August 1952, affirmed by a Belgian law of 16 June 1960, subsequently amended by Belgian national legislation, was found 'as a whole' to constitute national legislation, since Regulation No 1408/71 did not apply simply to the metropolitan territory of a Member State but could equally cover its former colonial territories.

Although the breadth of Article 1 (j) was emphasized in *Bozzone* and reiterated in Case 300/84 (*Van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097), judgment of 23 October 1986, the latter case seems to me to be concerned with a person who as a Community national had a connection with the social security system of his Member State before going to work abroad. The Court's judgment in paragraphs 30 and 31 accepts that a national rule extending social security provisions to persons who either partially or exclusively work outside the Community can be considered 'legislation' in the sense of Article 2 of Regulation No 1408/71. I do not, however, read that judgment as requiring periods spent in a third State before the individual became a Community national and subject to the legislation of a Member State in social security matters (although recognized under domestic law as being assimilated as a result of a bilateral convention) to be taken into account for the purposes of aggregation and apportionment under Regulation No 1408/71.

In my opinion, the question referred by the Bundessozialgericht therefore falls to be answered along the following lines:

'Council Regulation (EEC) No 1408/71 does not prevent a German insurance institution, in deciding whether to take interrupting periods into account, from treating as compulsory contributions paid under German legislation and as insurance under the German pension scheme, not only compulsory contributions paid under the legislation of other Member States and insurance under the insurance schemes of other Member States, but also compulsory contributions and insurance in a non-member country (Poland) with which the Federal Republic of Germany has concluded a convention on the reciprocal assimilation of insurance periods, save that such latter contributions and insurance periods shall not impose any greater liability on other Member States in the application of the Regulation than if those latter contributions and insurance periods were not taken into account.'

The costs of the parties to the main proceedings fall to be dealt with by the national court. The costs of the Commission and of the Federal Republic of Germany and the United Kingdom, which have submitted observations in these proceedings, are not recoverable.