OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 10 NOVEMBER 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Arbeidsrechtbank of Hasselt, in Belgium. The plaintiff in the proceedings before that Court is Mevrouw Elisabeth Ermin (*née* Beerens). The defendant is the Belgian National Employment Authority (De Rijksdienst voor Arbeidsvoorziening or, in French, l'Office National de l'Emploi). It is a feature of the case that neither the plaintiff nor the defendant has submitted any observations to this Court. We have however been much assisted by very helpful observations submitted by the Commission and by the Dutch Government.

The question at issue before the Arbeidsrechtbank is whether the plaintiff is entitled to receive unemployment benefit in Belgium. The Order for Reference does not state the facts of the case, but that has been remedied by the Commission, which, in so far as it has been able to elucidate them, has set those facts out in its written observations. It appears that the plaintiff was born in 1956 and that she was by birth a Dutch national. She was employed in the Netherlands for a very short period in 1975: from 1 to 9 June. She then fell ill, and her employer terminated her employment as from 1 August 1975. From 1 October 1975 to 14 July 1976 she drew Dutch unemployment benefit. On the latter date, having married a Belgian, she went to live in Belgium. She promptly registered herself as unemployed in Belgium and claimed unemployment benefit from the defendant. This the defendant refused her. She now appeals to the Arbeidsrechtbank, claiming to be entitled to draw unemployment benefit in Belgium by virtue of Council Regulation (EEC) No 1408/71 (OJ L 149 of 5. 7. 71). It is common ground that she is not entitled to such benefit by virtue of Belgian law alone.

The relevant provisions of Regulation No 1408/71 are these:

Article 1 (j):

'For the purposes of this Regulation:

...

'legislation' means all the laws, regulations, and other provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2).

(I commented in Case 109/76 *Blottner* v *Nieuwe Algemene Bedrijfsvereniging* (not yet reported) on the imperfections of the English text of that provision, but they need not detain us here).

Article 4 (1):

'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(g) unemployment benefits;

...

Article 4 (2):

'This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory ...

Article 4 (4):

'This Regulation shall not apply to social and medical assistance ...'

Article 5:

'The Member States shall specify the legislation and schemes referred to in

Article 4 (1) and (2) ... in declarations to be notified and published in accordance with Article 96.'

Article 69 (1):

'A worker who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the conditions and within the limits hereinafter indicated:

(a) before his departure, he must have been registered with the employment services of the competent State as a person seeking work ...;
(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes ...;
(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left ...'

Article 70 (1):

'In the cases referred to in Article 69 (1), benefits shall be provided by the institution of each of the States to which an unemployed person goes to seek employment.

The competent institution of the Member State to whose legislation a worker was subject at the time of his last employment shall be obliged to reimburse the amount of such benefits.'

Thus what is at stake here is unemployment benefit for the period of three months from the date of the plaintiff's departure from the Netherlands. One might have thought that she was not entitled to such benefit on the simple ground that her reason for going to Belgium was not so much to seek employment there but her marriage. However, the point that has given rise to the questions referred to this Court by the Arbeidsrechtbank is quite different. It is whether the Dutch legislation under which the plaintiff drew unemployment benefit in the Netherlands was legislation of a kind relevant for the purposes of Regulation No 1408/71, and in particular Article 69, i.e. whether it is to be classified as legislation concerning social security or as legislation concerning social assistance.

It appears that there are in the Netherlands three statutes under or by virtue of which unemployment benefit may become payable, affording, as it were, three successive safety nets for those who are unemployed.

The first is the Werkloosheidwet of 9 September 1969 (as amended), which establishes a scheme of compulsory unemployment insurance for workers. No-one doubts that this is social security legislation. The Arbeidsrechtbank, the Commission and the Dutch Government all say that it is.

The second is the Wet Werkloosheidsvoorziening or ('WWV') of 10 December 1964 (as amended). This, according to the Commission, is the statute under which the plaintiff benefited. The Arbeidsrechtbank expresses the view in the Order for Reference that it is social assistance legislation, but the Dutch Government asserts unequivocally that, in that regard, the Arbeidsrechtbank is mistaken, that the WWV is social security legislation.

The third statute is the Algemene Bijstandswet of 13 June 1963 which is a general statute on social assistance. Under powers conferred by that statute, a regulation (the Rijksgroepsregeling werkloze werknemers or 'Rww') was made on 2 December 1964 relating specifically to the unemployed. No-one suggests that this is other than social assistance legislation.

The declarations made by the original Member States under Articles 5 and 96 of Regulation No 1408/71 were consolidated in March 1973 and are to be found in the Official Journal (C 12 of 24 3. 1973, p. 11). According to Heading F (1) (d), the Dutch legislation and schemes relating to unemployment benefits referred to in Article 4 (1) and (2) of the Regulation are the Werkloosheidwet and the WWV.

This Court has pointed out more than once that, although the terms of Article 4 of the Regulation suggest that there is a clear dividing line to be drawn between social security legislation and social assistance legislation; in reality the two concepts overlap — see Case 24/74 *CRAM de Paris* v *Biason* [1974] 2 ECR 999 (para. 9 of the Judgment) and Case 39/74 *Costa* v *Belgium,* ibid. p. 1251 (para. 6 of the Judgment). It appears indeed that, in the case of unemployment benefits, the authors of the Regulation themselves were conscious of the possibility of such overlap: the preamble to the Regulation recites, among other things, that 'in order to secure mobility of labour under improved conditions, it is necessary henceforth to ensure closer coordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States'. The words of that recital are picked up in the text of the questions referred to this Court by the Arbeidsrechtbank.

Those questions are these:

'Given that the objective of Regulation (EEC) No 1408/71 is to facilitate the free movement of workers within the Community and *inter alia* to secure mobility of labour under improved conditions by means of closer coordination between unemployment insurance schemes and unemployment assistance schemes, may it be taken that the Netherlands laws relating to assistance applicable by reason of the unemployment of a worker allow of reliance on Article 69 of the abovementioned regulation?

More particularly, may it be taken, as those laws are not in the Netherlands social security legislation, that the plaintiff satisfies the conditions of the legislation of a Member State (the Netherlands) for entitlement to unemployment benefits within the meaning of the regulation relied on, Regulation (EEC) No 1408/71, with all ensuing consequences for the transferability of her entitlement to unemployment benefits to another Member States (Belgium) where such benefits are indeed social security benefits.'

Thus the Arbeidsrechtbank asks, on the footing that the relevant Dutch legislation is to be classed as social assistance legislation rather than social security legislation, whether, nevertheless, that legislation may be treated as giving rise to rights transferable under Article 69 (1).

It seems to me that the real question is whether there are grounds here for going behind the declaration made by the Netherlands under Article 5 of Regulation No 1408/71.

It is clear, having regard to what the Court said in Case 100/63 *Kalsbeek* (née *van der Veen)* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 565, at p. 573, and Case 24/64 *Dingemans* v *Same,* ibid., 647 at p. 653 (Rec. 1964 at pp. 1123 and 1274), that such declarations by Member States cannot be regarded as conclusive in all circumstances. The Commission submits, however, that such a declaration does at least place it beyond doubt that the legislation specified in the declaration is within the scope of Regulation No 1408/71. I infer that, in the view of the Commission, the only way in which such a declaration may not be conclusive is that it may omit legislation that it ought to include. That no doubt is the possibility expressly

envisaged by the Court in the Judgments in the *van der Veen* and *Digemans* cases. But I think, for my part, that the better view is that such a declaration constitutes sufficient evidence of which items of the legislation of the Member State concerned are and which are not within the scope of the Regulation, unless and until it is shown affirmatively that the declaration is in some respect wrong. Your Lordships will remember that, during the argument in Case 64/77 *Torri* v *ONPTS,* the Commission drew our attention to what it considered to be an inconsistency between a declaration made by Ireland and one made by the United Kingdom. It would in my opinion be strange if the Courts were able to resolve such an inconsistency only in one way.

In the present case either formulation leads to the same result, for no-one has attempted to demonstrate that the WWV should not have been included in the Dutch declaration or, for that matter, that the Rww should have been so included. The most that can be said is that some of the things we were told by the Commission (particularly at the hearing) about the WWV — for instance that, in certain circumstances, the authorities administering it, which are the municipal Councils, have a discretion as to whether or not to award benefit — led one to think that its case was probably a borderline one.

So I do not consider it necessary to examine afresh in this case the tests mentioned by the Court in the *Biason* and *Costa* cases and adverted to again in Case 79/76 *Fossi* v *Bundesknappschaft* [1977] ECR 667 for determining whether particular legislation may or may not be classified as social security legislation. Nor need I express an opinion on the interesting point made by the Dutch Government, by reference to Article 5 of the European Convention on Social and Medical Assistance signed at Paris on 11 December 1953, that a characteristic of social assistance is the right in appropriate circumstances for the authority granting it to recover the cost of so doing from third parties.

I would answer the questions referred to the Court by the Arbeidsrechtbank by saying that, in the absence of persuasive reasons to the contrary, a court should treat a declaration made by a Member State under Article 5 of Regulation No 1408/71 as affording a sufficient identification of such items of its own legislation as are within the scope of the Regulation.