In Case 109/76

Reference to the Court under Article 177 of the EEC Treaty by the Raad van Beroep, Amsterdam, for a preliminary ruling in the action pending before that court between

MRS M. BLOTTNER, Berlin

and

BESTUUR DER NIEUWE ALGEMENE BEDRIJFSVERENIGING, Amsterdam

on the interpretation of Articles 40, 45 and 46 of Regulation No 1408/71 and of Annex V thereto,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following:

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Mrs Blottner, a German national resident in Berlin, was employed in the Netherlands where she resided from 1928 to 1940. She then returned to Germany where she worked until 1946. Since that date she has had no gainful occupation.

On 3 August 1973 she suffered an accident which rendered her unfit for work. Since the competent social security institutions refused to grant her a disablement pension in respect of her periods of employment in Germany and

in the Netherlands, Mrs Blottner twice instituted proceedings, on the first occasion before the Sozialgericht (Social Court) Berlin and on the second before the Raad van Beroep (Court of Appeal), Amsterdam. Before those two courts had issued a ruling the German institution decided to grant Mrs Blottner the pension. This new fact prompted the Netherlands institution, the respondent in the main action, to recognize that Mrs Blottner was in principle entitled to claim benefits under the Netherlands legislation, pursuant to Article 45 (3) of Regulation No 1408/71. Nevertheless, the Netherlands institution refused to pay an invalidity pension on the grounds that, since the person concerned was not in employment when the accident occurred, she did not fulfil the material condition as to insurance prescribed by the Wet op de arbeidsongeschiktheids-verzekering ('Law on insurance against incapacity for work', hereinafter referred to as 'the WAO') in order for her to acquire a right to benefit in the Netherlands, and that furthermore her degree of incapacity to carry out her usual 'work' (household duties) was less than the minimum of 15 % laid down by the WAO.

Since the Raad van Beroep considered that a number of points concerning the interpretation of Community law arose it decided to stay the proceedings and charged its President to submit to the Court, under Article 177 of the EEC Treaty, the following preliminary questions:

1. For the acquisition of a right to benefits on the basis of Article 40 of Regulation (EEC) No 1408/71 payable by an institution of a Member State referred to at the beginning of Article 45 (3) of that regulation — having regard to the background to the adoption of the latter provision — is it sufficient that a worker who is subject to the legislation of another Member State at the time when the risk which was in principle insured against materializes or, if this is not the case, who has a right to benefits under the legislation of another Member State, can establish *only* insurance periods or periods of employment and/or periods treated as such completed by him during the period of validity of the legislation or of a legal provision of the first-mentioned Member State which was not legislation within the meaning of the beginning of Article 45 (3) and which, on the date referred to in Article 94 (2), was no longer existing legislation within the meaning of Article 1 (j) of that regulation, account being taken of the last sentence of Article 45 (3)? (Therefore although he was never subject to the legislation of the firstmentioned Member State within the meaning of the beginning of Article 45 (3)).
2. (a) Must the provision in paragraph 4 (a) under the heading 'H. Netherlands' in Annex V to the abovementioned regulation be regarded as being relevant not only in applying the sole article mentioned in that provision, namely Article 46 (2), but also, in view of subparagraph (b) of paragraph 4, for the acquisition of a right to benefits under Article 45 (3)?

   (b) Or does the abovementioned paragraph 4 (a), in view of the use therein of the word 'also', merely signify that only if a right to benefits payable by the Netherlands institution may be derived from Article 45 (3) on the basis of insurance periods (previously) completed under the Netherlands legislation on insurance against incapacity for work, then, for the purposes of Article 46 (2) of the regulation, not only periods completed under that legislation but also periods of paid employment and periods treated as such completed under Netherlands legislation before 1 July 1967 must be considered as

insurance periods completed under the said Netherlands legislation?

Paragraph 4 of part H of Annex V to Regulation No 1408/71, on the application of Netherlands legislation on insurance against incapacity for work, provides:

(a) For the purposes of Article 46 (2) of the regulation, periods of paid employment and periods treated as such completed under Netherlands legislation before 1 July 1967 shall also be considered as insurance periods completed under Netherlands legislation on insurance against incapacity for work.

(b) The periods to be taken into account in pursuance of subparagraph (a) shall be considered as insurance periods completed under a legislation of the type referred to in Article 37 (1) of the regulation.

The letter of the President of the Raad van Beroep, Amsterdam, of 19 November 1976 reached the Court on 22 November 1976.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *respondent in the main action* first of all observes that with regard to invalidity insurance the Netherlands changed over as from 1 July 1967 from a system of aggregation based on the completion of insurance periods (Invaliditeitswet, the Law on invalidity, hereinafter referred to as 'the IW') to a system of apportionment based on the principle of risk (the WAO). In order to ease this change-over it was decided that, with regard to the acquisition of the right to benefit under the WAO, insurance periods completed under the IW should be treated as equivalent to periods completed under the WAO.

In order that, for the purpose of applying Article 46 (2) of Regulation No 1408/71, that is to say of calculating the amount of the benefit, the words 'the legislation of a Member State' are not interpreted as both 'the rules in force at that time' and 'the rules which were in fact applicable to the person concerned', paragraph 4 of part H of Annex V to that regulation provides that periods of paid employment completed in the Netherlands before 1 July 1967 shall be considered as periods completed under the WAO. The question submitted thus amounts to asking whether, for the acquisition of a right to benefits under the WAO, the only periods which may be taken into account under Article 45 are those completed under the WAO. Leaving aside the transitional provisions under the WAO, the rule is that periods completed within the framework of the IW do not confer a right to benefits under the WAO. It is true that the practice derogating from that rule is followed by the respondent in the main action when the person concerned has not been insured against invalidity in another Member State before or after receiving benefits under the IW. An affirmative answer would thus mean that migrant workers who worked in the Netherlands before 1 July 1967 would lose all rights based on their Netherlands insurance.

But was the Netherlands legislature free to withdraw from workers rights protected by Article 51 of the Treaty? Is the migrant worker protected as such and not because he may not receive less favourable treatment because he is a migrant? On this view the migrant worker could claim rights because he is a migrant and would thereby be placed in a favourable position in relation to other workers.

Article 51 (a) of the Treaty merely guarantees the aggregation of all periods taken into account under the laws of the several countries. The periods under the IW which are concerned in the main action are in no way taken into account in calculating the amount of a benefit under the WAO. A literal interpretation of Article 51 (a) thus provides the possibility of protecting the migrant worker as such but that possibility can have no practical effect.

The circumstance that migrant workers may receive less favourable treatment is a consequence not of their being migrants but rather of the change of legislation.

If the Court were to reply to the question in the negative, on the basis of Article 51 of the Treaty alone, would it not have to be inferred from the wording of Regulation No 1408/71 that the equivalence referred to in paragraph 4 of part H of Annex V must also apply to the acquisition of the right to benefits? In Case 4/66, *Labots* (née *Hagenbeek)* ([1966] ECR 425) the Court noted that Regulation No 3 distinguishes much less clearly than the wording of the preliminary question gave reason to suppose between the recognition of the right to benefit and the ascertainment of the amount of that benefit. Does this perhaps apply also to Regulation No 1408/71?

Furthermore, it may be assumed that what applies to Article 45 (3) also applies to Article 45 (1) and to the last sentence of Article 45 (2).

If, pursuant to that provision, only periods under the WAO might be taken into consideration for the acquisition of the right, whilst pursuant to Article 46 periods of employment completed in the Netherlands before 1 July 1967 should also be taken into account in determining the amount of the benefit, a special condition for entitlement to Netherlands benefits would be created for those having the status of persons insured under the IW. On this view it would also be necessary, where Article 45 applies, to communicate to the other Member States Netherlands periods differing from those communicated to them in order to fix the amount of the benefits.

The first question, at any rate in so far as it concerns the Netherlands law on invalidity insurance, must thus be answered in the affirmative.

The reply to the second question must be that paragraph 4 (a) of part H of Annex V must be regarded as applicable also to the acquisition of the right to benefits under Article 45 (3).

The last question must consequently be answered in the negative.

The *Commission* considers first of all the regularity of the reference. It is in fact clear from the wording of Article 177 of the Treaty that questions submitted to the Court under this provision must come from a 'court'. In the context of the main action the questions were submitted by the president of a court in the form of a letter sent by him to the Court of Justice. Nevertheless a court decision was indeed the means by which the Raad van Beroep authorized its president to submit a question for a preliminary ruling to the Court of Justice; furthermore, as the Court has many times had occasion to state, in the procedure under Article 177 of the Treaty it is inappropriate to adopt a formal approach incompatible with the very nature of that article. The Commission thus considers that the reference may be regarded as admissible.

With regard to the substance of the case, the Commission notes that the German legislation which is applicable is of Type B (that is to say, it makes the amount of the benefit dependent upon the duration of the insurance), whilst the Netherlands legislation is of Type A (that is to say, it is based upon the materialization of the

risk). Pursuant to Article 45 (3) of Regulation No 1408/71 any worker who is no longer subject to legislation of Type A is deemed still to be so subject at the time when the risk materializes if he is subject to the legislation of another Member State or, failing that, can establish a claim to benefits under the legislation of another Member State.

The first question refers to Article 1 (j) of Regulation No 1408/71, which states that 'legislation' within the meaning of that regulation means 'all the laws, regulations, and other provisions and all other present or future implementing measures ...'. The Raad van Beroep finds that on the date when the regulation entered into force, namely 1 October 1972, the IW was no longer a 'present law' within the meaning of this definition.

The Court has stated that Regulation No 3 'must be interpreted in the light of Article 48 to 51 of the Treaty which constitute the basis, the framework and the bounds of the social security regulations'. This principle also holds good with regard to the interpretation of Regulation No 1408/71. In accordance with Article 51 of the Treaty, one of the principal objectives to be attained by regulations adopted in implementation of that provision is the establishment of a system of aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries. The attainment of this objective is not ensured by a uniform rule. The rules contained in Articles 38 and 45 of Regulation No 1408/71 are in fact different in order to take account of the peculiarities of the various national legislations. Consequently, it is of little importance to know the type of legislation in force when the insurance periods were completed in order to select the rule of aggregation applicable when the risk materializes. Since the WAO is the only Netherlands legislation presently applicable it follows that the system of aggregation of insurance periods to be applied can only be that which appears in Article 45 (3). With regard to the condition contained in that provision to the effect that the worker must have been previously subject to 'that legislation', in the Commission's view this expression must be interpreted as embracing the social security scheme relating to a specific risk which may result from successive laws. A narrower interpretation would mean that, for an important part of the field of social security, it would be impossible, in the absence of a specific rule, to aggregate insurance periods, which is incompatible with the objective of Article 51 (cf. the abovementioned Judgment in *Labots née Hagenbeek)*.

The terms 'present and future' appearing in Article 1 (j) of Regulation No 1408/71 seem to rule out the application of a previous law. This interpretation of principle must be adopted with regard to the law to be applied, but only for that purpose; it must not be applied to exclude insurance periods completed under previous laws which are taken into account in calculating a benefit payable under a present or future law. A different interpretation would in particular deprive Article 94 (2) of Regulation No 1408/71 of part of its content, according to which all insurance periods completed under the legislation of a Member State before the date of entry into force of the said regulation shall be taken into consideration for the determination of rights to benefits under that regulation.

Head (a) of the second question appears to have been submitted solely in case the Court were to consider that Article 45 (3), interpreted in the light of Article 1 (j), refers only to 'previous' insurance periods completed under a law of Type A.

Since the Commission considers that such an interpretation should be adopted the question is rendered irrelevant. In case the Court does not share this view it

should be noted that in the abovementioned Case 4/66 Annex G (III) (B) (b) to Regulation No 3, which contains a similar provision, received a wide interpretation which is applicable to the main action. This is clear from the wording of paragraph 4 (b) of part H of Annex V and from the intention of the authors of Regulation No 1408/71 (cf. the statement of reasons in the Commission's proposal).

On the basis of what has been stated above the Commission proposes that the reply to the questions submitted should be as follows:

1. For the purposes of applying Article 45 (3) of Regulation No 1408/71 it is sufficient that the legislation in force in the relevant Member State fulfils the conditions laid down in that provision and that the worker concerned has previously been subject in that Member State to a social security scheme covering the same risk as that covered by the scheme presently in force and that the present scheme may be considered as the chronological successor to the previous scheme.
2. Article 1 (j) of Regulation No 1408/71 must be interpreted as meaning that the definition of the term 'legislation', which refers to the laws, regulations and other provisions and all other 'present or future' implementing provisions, refers exclusively to legislation in force when the regulation is to be applied. Nevertheless, this definition does not prevent the taking into consideration, for the calculation of the benefits or for the acquisition of the right to benefits, of insurance periods completed under a law, regulation or other provision or any prior implementing measure relating to the same risk.
3. Paragraph 4 of part H of Annex V to Regulation No 1408/71 must be considered as a general provision, subparagraph (a) of which, whilst referring in particular to the application of Article 46 (2), also applies to the determination of whether, taking account in particular of Article 45 (3), there exists a claim to benefit under the Netherlands Law on insurance against incapacity for work.
4. The term 'mede' employed in paragraph 4 (a) of part H of Annex V to Regulation No 1408/71 means 'as well' (eveneens) and not 'moreover' (daarenboven), so that the periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967 are also considered as insurance periods even though no further insurance periods were completed after that date.

The Commission of the European Communities, represented by Mr Haagsma, a member of the Commission's Legal Service, acting as Agent, submitted its oral observations at the hearing on 27 April 1977.

The Advocate-General delivered his opinion at the hearing on 18 May 1977.

Decision

1 By letter of 19 November 1976 which arrived at the Court Registry on 22 November 1976 the Raad van Beroep, Amsterdam, submitted, pursuant to Article 177 of the EEC Treaty, a number of preliminary questions on the interpretation of Articles 40, 45 and 46 and of Annex V to 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 (OJ, English Special Edition 1971 (II), p. 416).

2 Those questions have been submitted within the framework of a dispute relating to the refusal by the competent Netherlands institution to pay an invalidity pension to a German national who pursued activities as an employed person in the Netherlands from 1928 to 1940.

3 The person concerned returned to Germany in 1940 where she worked until 1946 and thereafter had no further gainful occupation.

4 In 1973 she suffered an accident which rendered her unfit for work and the Bundesversicherungsanstalt für Angestellte (the Federal Insurance Office for Employed Persons) granted her a pension from 1 January 1974.

5 The Nieuwe Algemene Bedrijfsvereniging (New General Trade Association) recognized that the person concerned was in principle entitled to claim benefits under the Netherlands legislation, pursuant to Article 45 (3) of Regulation No 1408/71, but refused to pay them on the grounds that, since she was not in employment at the time of the accident, the person concerned did not fulfil the material condition as to insurance prescribed by the Law on insurance against incapacity for work (Wet op de arbeidsongeschiktheidsverzekering, hereinafter referred to as 'the WAO') in order for her to acquire a right to benefit in the Netherlands and that furthermore her degree of incapacity to carry out her usual work (household duties) was less than the minimum rate required by the WAO.

6 The first question asks whether, 'for the acquisition of a right to benefits on the basis of Article 40 of Regulation (EEC) No 1408/71, payable by an institution of a Member State referred to at the beginning of Article 45 (3) of that regulation — having regard to the background to the adoption of the latter provision — it is sufficient that a worker who is subject to the legislation of another Member State at the time when the risk which was in principle insured against materializes or, if this is not the case, who has a right to benefits under the legislation of another Member State, can establish only insurance periods or periods of employment and/or periods treated as such completed by him during the period of validity of the legislation or of a legal provision of the firstmentioned Member State which was not legislation within the meaning of the beginning of Article 45 (3) and which, on the date

referred to in Article 94 (2), was no longer existing legislation within the meaning of Article 1 (j) of that regulation, account being taken of the last sentence of Article 45 (3) (therefore although he was never subject to the legislation of the firstmentioned Member State within the meaning of the beginning of Article 45 (3))'.

7 At the time when the appellant in the main action became an invalid the Netherlands legislation was of Type A, that is to say legislation according to which the amount of invalidity benefits is independent of the duration of insurance periods, whilst at the time when she worked in the Netherlands the legislation had been of Type B, that is to say legislation according to which the amount of benefits depends on the duration of insurance periods.

8 Article 40 (1) of Regulation No 1408/71 provides that 'A worker who has been successively or alternately subject to the legislations of two or more Member States, of which at least one is not of the type referred to in Article 37 (1), shall receive benefits under the provisions of Chapter 3, which shall apply by analogy ...'

9 According to the provisions of Article 1 (j) of that 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)'.

10 The question arises whether the words 'present or future' exclude from the scope of that definition measures which were no longer in force at the time of the adoption of the regulation in question and of the regulation taken in implementation thereof, Regulation No 574/72 of the Council of 29 March 1972 (OJ, English Special Edition 1972 (I), p. 159), so that *the provisions of Article 40 (1)* are not applicable to a worker who was subject in a Member State to measures which ceased to be in force before the adoption of Regulation No 1408/71, although he is subject in another Member State to measures which are still in force.

11 Article 51 of the Treaty makes provision for the establishment of a system of social security securing for migrant workers aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries.

12 The objective of that article would not be attained if the worker lost the status of an insured person within the meaning of the regulations in question solely because of the fact that, at the time when those regulations were adopted, the national legislation in force at the time when the worker was insured had been replaced by different legislation.

13 It follows that the words 'present or future' must not be interpreted in such a way as to exclude measures which were previously in force but had ceased to be so when the said Community regulations were adopted.

14 Article 45 (3) of Regulation No 1408/71 provides that 'Where the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materializes has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any worker who is no longer subject to that legislation shall for the purposes of this Chapter, be deemed to be still so subject at the time when the risk materializes, if ... he ... can establish a claim to benefits under the legislation of another Member State'.

15 Since the appellant in the main action has never been subject to Netherlands legislation of Type A, to which the abovmentioned provision refers, the question arises of the application of the latter.

16 The structure of the system of harmonization of national legislation established by the regulation is based upon the principle that a worker must not be deprived of the right to benefits merely because of an alteration in the type of legislation in force in a Member State.

17 This consideration infers that the concept of 'legislation' contained in Article 45 (3) must be widely interpreted so as to refer both to measures in force at the time when the risk materializes and to measures in force at the time when the worker was subject to the legislation.

18 The reply to the first question must therefore be that for the acquisition of a right to benefits on the basis of Article 40 of Regulation (EEC) No 1408/71 payable by an institution of a Member State referred to at the beginning of Article 45 (3) it is in principle sufficient that a worker who is subject to the

legislation of another Member State at the time when the risk insured against materializes or, if this is not the case, who has a right to benefits under the legislation of another Member State, can establish insurance periods or, at least, periods of employment and/or periods treated as such completed under a legislation which, although in force at the time when the worker was employed, had ceased to be in force before the adoption of Regulation No 1408/71, even if that legislation was of a different type from that which is in force at the time when the risk materializes.

19 Having regard to the reply to the first question the second question is rendered irrelevant.

Costs

20 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

21 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

In answer to the questions submitted to it by the Raad van Beroep, Amsterdam, by letter of 19 November 1976, hereby rules:

For the acquisition of a right to benefits on the basis of Article 40 of Regulation (EEC) No 1408/71 payable by an institution of a Member State referred to at the beginning of Article 45 (3) it is in principle sufficient that a worker who is subject to the legislation of another Member State at the time when the risk insured against materializes or, if this is not the case, who has a right to benefits under the legislation of another Member State, can establish insurance periods or, at least, periods of employment and/or periods treated as such completed under a legislation which, although in force at the time when the worker was

employed, had ceased to be in force before the adoption of Regulation No 1408/71, even if that legislation was of a different type from that which is in force at the time when the risk materializes.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 9 June 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 18 MAY 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Raad van Beroep of Amsterdam. The appellant in the proceedings before that Court is Mrs M. Blottner and the essential question in those proceedings is whether she is, by virtue of Community law, entitled to a Dutch invalidity pension. It is clear that she is not entitled to such a pension by virtue of Dutch law alone. The respondent in the proceedings is the Dutch institution which will be responsible for paying the pension to her if she is entitled to it, namely the Nieuwe Algemene Bedrijfsvereniging (New General Trade Association).

Mrs Blottner is a German national. She was born in 1910 in Dresden. She lived and was employed in the Netherlands from 1928 to 1940. She then returned to Germany, where she worked until 1946. She has had no gainful occupation since then. In 1973 she was the victim of an accident, which left her disabled. At present she lives in West Berlin.

Following her accident Mrs Blottner applied to the respondent for a Dutch invalidity pension and to the competent German institution, the Bundesversicherungsanstalt für Angestellte, in Berlin, for a German invalidity pension.

At the time when Mrs Blottner worked in the Netherlands the statute in force there governing the insurance of workers against the risk of invalidity was the 'Invaliditeitswet' (or 'IW') of 5 June 1913. This was what is known in Community jargon as legislation of 'Type B', i.e. it made the amount of benefits dependent on the duration of insurance periods. As from 1 July 1967 the IW was super-