OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 29 APRIL 1982

My Lords,

By an order registered on 3 August 1981, the Social Chamber of the French Cour de Cassation referred to the Court for preliminary rulings under Article 177 of the EEC Treaty two questions on the interpretation of Council Regulation No 1408/71 of 14 June 1971 (Official Journal Special Edition, 1971, p. 416). These questions arise in proceedings brought by Mr Francis Aubin, a French national, against the Union Nationale Interprofessionnelle pour l'Emploi dans l'Industrie et le Commerce (which I shall call "the National Association") and the Association pour l'Emploi dans les Industries et le Commerce des Yvelines ("the Yvelines Association"). These two bodies are concerned with the administration of unemployment benefits in France.

In the present case, as not infrequently happens, the facts are not stated in the order for reference. In references under Article 177 it is in my opinion desirable, and should be regarded as the correct practice, for a national Court to set out succinctly and clearly the essential facts upon which the questions of law turn. This, in my view, should be done in a section of the reference headed "Facts". The facts so stated will either have been found by the Court making the reference, or if the referring Court itself does not have the power to find the facts or to draw inferences of fact, by the lower court which has final jurisdiction on questions of fact. In this way the Court can more readily appreciate the ambit of the questions referred, and can best assist the national court in framing the answer which it gives to the national court's question.

So far as the facts can be gleaned from the papers and from what the Court was told at the hearing, they appear to be as follows. Mr Aubin lived and worked in France at all material times until September 1970, when his employer offered him a post in Brussels, which he accepted. He lived in Brussels, with his family, until December 1972. In that month, he took up a new appointment, with a different employer, in France. He kept his home in Belgium, where his family remained, "for the time being". In August 1973 he began another new job, this time in the Yvelines district of France. On 25 February 1975 he was made redundant.

In March 1975, he enquired about the means of claiming unemployment benefit. The Inspecteur du Travail des Yvelines informed him that as his home and family were in Belgium, he should register with the Belgian authorities as a person seeking work there, and that he could be paid unemployment benefit by

the Belgian authorities. Mr Aubin therefore addressed himself to the Belgian authorities. They required him to obtain and present certain forms which, according to Mr Aubin, the French authorities refused to supply to him on the ground that they were not applicable to his case. Mr Aubin says that in August 1975 the Belgian authorities decided that he was not entitled to unemployment benefit since he had not been employed in Belgium for at least one day in the 18 months preceding the date on which he was made redundant, as is required by a Royal Decree of 20 December 1963. Mr Aubin then applied for unemployment benefit to the Yvelines Association. He was refused it on the ground that he had not registered with the French employment services as a person seeking work. It was accepted at the hearing that Mr Aubin never registered in France as a person seeking work even though he had enquired about obtaining unemployment benefit. He said that he was told he could not register. On 1 October 1976 Mr Aubin moved his home to France where he had found new employment.

Eventually he instituted proceedings before the Tribunal de Grande Instance in Paris claiming unemployment benefits calculated in accordance with French law for the period from 25 June 1975 to 30 September 1976. To this he added a general claim for damages. The Court has been told that he initiated a separate action against the French administration claiming damages on the basis that he had been given misleading information. That action is pending before the Tribunal administratif.

In the action before the Tribunal de Grande Instance, Mr Aubin cited as defendants the National Association and the Yvelines Association. The Tribunal de Grande Instance found the action against the National Association to be inadmissible on the ground that the latter had no responsibility for the payment of benefits, but only for the administrative control and coordination of insurance schemes. The Tribunal dismissed on its merits the action against the Yvelines Association on the ground that Mr Aubin had failed to prove that the Yvelines Association had misinterpreted the governing regulations. The Cour d'Appel of Paris upheld that judgment.

The matter subsequently came before the Cour de Cassation. The questions referred to the Court are:

1. whether a French national, who worked in France until made redundant, who was not registered in France as a person seeking work and was residing in Belgium where he had registered as a person seeking work, was entitled under Community legislation to be paid unemployment benefit by the competent institution of the Belgian State, or whether he was entitled to payment from the French State as well;

2. whether the fact that he had registered in Belgium as a person seeking work is of such a nature as to require the condition of the French legislation that he should be registered in France with the Agence Nationale pour l'Emploi as a person

seeking work to be deemed to be fulfilled.

The concluding words of the first question ("as well" or "aussi") may, it seems to me, have been intended to ask whether benefit could be claimed in one country or the other. If on the other hand they really do intend to ask whether benefit can be claimed in both countries, the answer is clear that they cannot.

A general rule designed to prevent the overlapping of benefits is contained in Article 12 (1) of Council Regulation No 1408/71. That Article provides, subject to immaterial exceptions, that "This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance". The application of this rule to the present case is confirmed by Article 84 (2) of Council Regulation No 574/72 of 21 March 1972 fixing the Procedure for Implementing Regulation No 1408/71, (Official Journal Special Edition 1972 p. 160). This establishes a procedure designed to prevent the cumulation of benefits in cases in which a worker resides in one Member State but seeks employment in another. Mr Aubin's Counsel made it clear at the hearing that she did not contend that her client was entitled to receive unemployment benefit from both countries; rather she contended that he was entitled to receive benefits from the French authorities alone.

She based this claim primarily on Article 13 of Regulation No 1408/71. The first paragraph of that Article sets out the general rule that a worker to whom the Regulation applies shall be subject to the legislation of a single Member State determined in accordance with the provisions which follow. Article 13 (2) (a) provides, *interalia* and subject to immaterial exceptions, that "a worker employed in the territory of one Member State shall be subject to the legislation of that Member State, even if he resides in the territory of another Member State".

Assuming for present purposes (*sed quaere*) that the general rule contained in Article 13 (2) (a) can apply to workers when they are unemployed, that is not the end of the enquiry.

Chapter 6 of the Regulation deals specifically with "unemployment". Section 3 of the Chapter is headed "Unemployed Persons who During their Last Employment were Residing in a Member State other than the Competent State". Such a person is to receive benefits in accordance with the provisions of Article 71 (1), paragraph (a) of which deals with frontier workers, paragraph (b) with workers other than frontier workers. There is nothing to indicate that Mr Aubin was a frontier worker so that the relevant question is whether he falls within paragraph (b). Sub-paragraph (i) provides that a worker who is unemployed "and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution". "Competent State" and "competent institution" are defined in Article 1 of the Regulation. Sub-paragraph (ii) provides that an unemployed worker "who makes himself available for work to the

employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense". If, however, the worker is entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he is to receive benefits from that Member State, and his right to claim from the State in which he resides is suspended. Moreover, if he is entitled under paragraph (b) (i) he may not claim benefits under the legislation of the Member State in which he resides.

It does not seem to me that there can be any question of a worker contending that he falls within Article 13 (so that he can claim the benefits of the legislation of the Member State in which he was employed) and within Article 71 (1) (b) (ii) (so that he can claim from the State of residence) with an option to choose between the two. I take the view that if he falls within the particular provisions of Article 71 (1) (b) (i) or (ii) that is conclusive and the general provisions of Article 13 yield to the particular provision of Article 71. He may take steps to ensure that he "remains available" to the employment services of the competent State for the purposes of Article 71 (1) (b) (i), or to "make himself available for work to the employment services" of the State in which he resides for the purposes of Article 71 (1) (b) (ii). When he has done so as a fact, that decides the question, save that if he is entitled under (b) (i) he cannot rely on (b) (ii) even if as a fact he satisfies the provisions of that sub-paragraph.

It is accepted that the competent State for the purposes of Article 71 (1) (b) (i) is France, the State in which he was insured at the time of his application for benefit. For the purposes of Article 71 (1) (b) (ii) it is argued that he was resident in France at the material time, and reliance was placed on Case 76/76 *Di Paolo* v *Office national de l'Emploi* [1977] ECR 315. That case gives guidance as to how the question of fact is to be decided and may support some of Mr Aubin's contentions. Such a question is, however, one of fact and for the national court to decide. The reference here postulates that the worker was residing in Belgium and this must be accepted for present purposes.

Accordingly, the short question is whether having registered in Belgium, where he resided, he falls within Article 71 (1) (b) (ii), or whether having worked and been insured, but not having registered, in France, he falls within Article 71 (1) (b) (i). The answer depends on the meaning of "availability to" or "availability for work to" the relevant employment services, since no suggestion is made of his remaining

available to his previous employer. The addition of "for work" in sub-paragraph (b) (ii) adds nothing. "Availability to the employment services" seems to me to depend on the worker having indicated to the employment services with sufficient clarity and at the material time that he is available for work in the territory of the Member State where those employment services are established. Article 69 may distinguish between registration and availability but the two are linked for the purposes of that Article. The normal way of indicating availability is by registration. Accordingly here when Mr. Aubin registered for employment in Belgium he made himself available for work to the Belgian employment services. I do not find it possible to accept the suggestion made that the Court should rule on the question as to whether this registration was on the facts a mere formality. It seems to me that it should be taken, as the Cour de Cassation states, as a fact that he had registered.

It was argued on Mr Aubin's behalf that availability is not to be determined for formal criteria alone: it is the worker's intention that counts. It is said that he intended to work in France and did not intend to work in Belgium. I would keep open the possibility that a worker, who presents himself to the employment services of a Member State and declares that he is ready, willing and able to accept an offer of employment there, might be said to be "available for work" even if he was for some reason prevented from registering or was not formally registered. The argument advanced on behalf on Mr Aubin in this case is, in my view, however, open to a fatal objection. The referring court has given this Court no basis for concluding that Mr Aubin presented himself to the French authorities as a person seeking work, but only as one claiming unemployment benefits. Mr Aubin's Counsel did not contend that her client had presented himself to the French authorities, at the material time, as a person in search of work in France.

Accordingly, the facts postulated by the Cour de Cassation do constitute making "available for work to the employment services in the territory of the Member State in which the worker resides" within the meaning of Article 71 (1) (b) (ii) and do not constitute "remaining available to the employment services in the competent State" within the meaning of Article 71 (1) (b) (i).

Belgium has not intervened in this case so that the Court has not heard submission by the Belgian authorities as to the effect of the Royal Decree requiring at least one day's work to have been done in the eighteen months preceeding the date on which the worker was made redundant. In the absence of any argument to the contrary, it is my view that the provision of Article 71 (1) (b) (ii) that a worker is to receive benefits in accordance with the legislation of the Member State where he resides (and has made himself available for work) "*as if he had last been employed there*" means that that provision of the

Decree is overridden by Community law or is deemed to have been satisfied. If it were not so the legislation of Member States could easily frustrate the obvious intentions of Article 71 (1) (b) (ii).

This view is confirmed by Article 67 (2) of the Regulation which provides that the competent institution of a Member State whose legislation makes the acquisition of the right to benefits subject to the completion of periods of employment shall take into account periods of employment completed under the legislation of any other Member States as though they were completed under the legislation which it administers. The application of that rule to cases covered by Article 71 (1) (b) (ii) is confirmed, by clear implication, in Article 67 (3).

As to the second question it is contended that if free movement of workers is to exist, a condition satisfied in one Member State for entitlement to benefit must be taken as having been satisfied to an equivalent extent in another. Where as here the registration is said to have been mistakenly made in Belgium, without fault on the part of the worker, it is argued that the worker should be deemed to have registered in France. I am not satisfied that, so long as there is no conflict with the provisions of Community law, national requirements of this kind are to be overridden in the way suggested. The question to my mind is whether the regulations contain provisions which can be relied upon by Mr Aubin.

Reference has been made to Article 86 of Regulation No 1408/71. That provides as follows:

"Any claim, declaration or appeal which should have been submitted in order to comply with the legislation of one Member State, within a specified period to an authority, institution or court of that State, shall be admissible if it is submitted within the same period to a corresponding authority, institution or court of another Member State. In such a case the authority, institution or court receiving the claim, declaration or appeal, shall forward it without delay to the competent authority, institution or court of the former State . . ."

These words cannot, in my view, be taken to imply that the registration of a worker as a person seeking work in one Member State is tantamount to the registration of that worker in another Member State. Article 86 is an administrative provision designed to assist the worker who finds himself in a Member State other than that from which the benefit is due and makes his application to the authorities of the State in which he is. Accordingly, like its predecessor (Article 47 of Regulation No 3 of 25 September 1958, Official Journal, Special Edition, 1958, p. 561) it refers only "to the case where the worker lives in a Member State other than that whose law has to be applied": Case 42/74 *Kingdom of Belgium, Costers and Vounckx v Berufsgenossenschaft der Feinmechanik und Elektrotechnik* (1974) ECR 1323 at p. 1332. That article assumes that the competent State has

already been identified and it does not play a part in determining the applicable law. In other words, Article 86 applies only where the claim "should have been submitted" to one Member State but was submitted to another. It does not apply in a case under Article 71 (1) (b) of the regulation, where the worker could have made himself available to at any rate each of the two States.

For these reasons, I am of the opinion that the questions posed by the Cour de Cassation should be answered as follows:

1. By virtue of Article 71 (1) (b) of Council Regulation No 1408/71, a worker other than a frontier worker, who is employed in one Member State (such as France) until made redundant and who makes himself available for work to the employment services in the territory of another Member State, where he resides (such as Belgium) is entitled to receive benefits in accordance with the legislation of that second State as if had last been employed there. It is for the national court to determine whether the worker did in fact make himself available for work in the first Member State and reside in the second Member State.

2. Where the legislation of one Member State requires, as a condition of the provision of unemployment benefit, that a worker should be registered with a national authority as a person seeking work, that condition is not deemed to be fulfilled by virtue only of the fact that the worker in question has registered as a person seeking work in another Member State.