improve their aptitude for work, insofar as such measures concern the children of workers.

Lecourt		Monaco	Pescatore
Donner	Kutscher	Ó Dálaigh	Sørensen

Delivered in open court in Luxembourg on 11 April 1973

A. Van Houtte	R. Lecourt
Registrar	President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 4 APRIL 1973 [1]

Mr President,
Members of the Court,

In 1957 Mr Rocco S., an Italian national, settled in Belgium as a wage-earner. He was accompanied by his family, including his son Michel, born on 1 September 1954, who was then two years and eight months old.

Michel S. is suffering from severe mental deficiency, apparently of congenital origin. He was provisionally placed in a specialist teaching and care establishment, the Institut medico-pédagogique Saint-Lambert at Bonneville (Belgium).

In March 1970, the father submitted on his behalf an application for registration, i.e. for him to be accepted by the National Fund for Social Rehabilitation of the Handicapped, set up by the Belgian Law of 16 April 1963, for physiotherapy and, after specialized occupational training, placing in a suitable employment.

This Law charged the National Fund, a public institution, with the task of granting persons of Belgian nationality, for whom the possibilities of employment are reduced due to deficiency or diminution in their physical or mental capacity, various benefits in kind or in money, with a view to facilitating their entry into or rehabilitation for professional and social life.

A Royal Decree of 29 May 1968 extended the benefit of this Law to persons of foreign nationality, on condition, *inter alia,* (Article 2 (1)), that they 'have established their normal residence within the national territory before their disablement was first diagnosed'.

The National Fund rejected this application on the ground that the mental incapacity of Michel S., in view of its nature and its congenital origin,

1 — Translated from the French.

must have been observed before this young man made his home in Belgium.

His father appealed against this decision to the Appeal Committee created by Article 26 of the Law. Then, having failed to obtain satisfaction, he applied to the Tribunal du Travail of Brussels, the court competent to consider the dispute.

Mr Rocco S. died in August 1971 and the action was continued by his widow.

The plaintiff in the main action invoked before the Tribunal du Travail the benefit of Regulation No 1612/68 of the Council of the European Communities on the free movement of workers, especially the provisions of Article 7 of that Regulation by virtue of which nationals of one Member State of the Communities, working within the territory of other Member States, shall enjoy the same *social benefits* as national workers.

She maintained that, on the basis of this principle of assimilation, the Italian nationality of her son could not validly be held against him.

The Tribunal du Travail decided that the solution of the dispute involved the interpretation of the Community provision which had been invoked. Therefore, by judgment of 10 November 1972, it decided to suspend proceedings until you have ruled on the following preliminary question:

'Do the benefits provided for by the Belgian Law of 16 April 1963 on the rehabilitation of the handicapped constitute social benefits within the meaning of Article 7 of Regulation No 1612/68 of the Council of the Community?'.

Within the framework of references for preliminary rulings you cannot yourself of course judge the applicability of domestic law to an individual case; this question falls to the competent national courts alone to decide on. In this connection, the representative of the National Fund for Rehabilitation of the Handicapped has told you, in court, that following the case law of the Labour Courts of Brussels and Liège, the onus is on the Fund to prove that the disablement was diagnosed before the party concerned arrived in Belgium; and that, as such proof is, in practice, impossible to provide, it follows in this case that the benefit of the Law of 16 April 1963 should be extended to the applicant. But this is a question of considerations outside Community law which we are not able to take into account. On the other hand, it is for you to supply the national court with all factors for the interpretation of Community law which may guide it in deciding on the effects of the Belgian Law of 16 April 1963 by your ruling on the question of whether the concept of social benefits, within the meaning of Regulation No 1612/68, covers the provisions relating to the rehabilitation of the handicapped provided for by that Law.

You have on several occasions given rulings in respect of similar circumstances, in particular by your judgment of 15 July 1964 (*Van der Veen*, Rec. 1964 H, p. 1111) that the Netherlands Law Algemene Weduwen en Wezenwet on pensions for widows and orphans, constitutes social security 'legislation' within the meaning of Regulation No 3 of the Council.

You have also admitted that the income guaranteed to aged persons by the Belgian Law of 1 April 1969 must, insofar as wage-earners and assimilated workers of the Member States are concerned, who are entitled to a right to a pension in Belgium, be regarded as an old age benefit within the meaning of the said Regulation No 3 (judgment of 22 June 1972, *Frilli*, Rec. 1972, p. 457).

Regulation No 1612/68 of the Council applies the principles laid down by Article 48 of the Treaty of Rome. Its objective is to ensure the realization of the recognized right of workers of the Member States to move freely within the Community for the purpose of pursuing an activity as an employed person within the territory of any one of those States.

To this end, it aims at the abolition in their favour of any discrimination based on nationality and achieving complete equality of treatment of Community workers and national workers as regards both eligibility for employment (Article 1) and conditions of employment and work, in particular as regards remuneration, dismissal, and should the worker become unemployed, reinstatement or re-employment (Article 7 (1)) as well as collective labour relationships: membership of trade unions and the exercise of rights attaching thereto (Article 8).

This principle of assimilation extends beyond working relationships 'stricto sensu' since, under the terms of Article 7 (2), a Community worker 'shall enjoy the *same social ... benefits* as national workers' and that under paragraph 3 he shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

Thus, the equality of treatment required by Article 48 of the Treaty forms the very foundation of Regulation 1612/68. The only reservation in the Treaty and the provisions of Article 8 of the Regulation inspired by the same idea is in respect of public policy whereby it is possible to exclude Community workers from participating in the management of bodies and from holding an office governed by public law.

The general purport and underlying spirit of the Regulation can, therefore, only lead to recognition, in the expression 'social benefits' mentioned in the second paragraph of Article 7 (2), of the widest possible scope and to admission that it covers especially the benefits granted by the legislation of a Member State to its nationals in the matter of rehabilitation of the handicapped, insofar as such legislation has retraining for employment as its primary objective.

Analysis of the Law of 16 April 1963 shows that the Belgian legislature's aim was essentially the achievement of such an objective.

The field of application 'ratione personae' of this Law, as defined by Article 1 thereof extends, subject to the condition of nationality, to all persons for whom the possibilities of employment are in fact reduced due to insufficiency or a diminution of at least 30 % in their physical capabilities or at least 20 % in their mental capabilities.

Therefore reference is made first to workers whose capacity has been diminished by illness or accident, whether or not occupational.

Certain of the benefits provided by the Law, have, where applicable, the nature of a supplementary protection as compared with those which are granted under social security systems against illness or accidents at work.

Persons who, by reason of their mental or physical deficiency cannot under normal circumstances obtain employment and in particular young handicapped persons, are likewise concerned.

In the interests of both of these, the National Fund has as its primary task, under Article 3, to ensure that the handicapped 'shall enjoy the best medical or surgical treatment with a view to obtaining maximum functional rehabilitation and in this way realising or improving their aptitude for employment.'

The Fund bears all or part of the cost of treatment to the extent to which such charge is justified, bearing in mind other financial intervention resulting from legislative provisions, such as those of social security or assistance and the resources of the handicapped or their families.

In the second place, the Fund is concerned with scholastic education or occupational training and rehabilitation; it is responsible for advising the handicapped or their families and must ensure that they benefit, where applicable, from specialized occupational guidance.

It participates financially in the creation of the approved training or rehabilitation centres in cooperation, where necessary, with the National Employment Office.

Throughout the duration of occupational training or rehabilitation of the handicapped, it grants to them allocations and additional remuneration with the object of ensuring, for them remuneration of an amount equivalent to the allowances and benefits granted to workers taking courses of accelerated occupational training for adults in centres created or subsidized by the National Employment Office.

This public institution organizes the placing of the handicapped in appropriate employment, either in administrative departments and public undertakings or in the private sector, whether industrial, commercial or agricultural. Chapter V of the Law in fact imposes on private undertakings the obligation of providing employment for a certain number of handicapped persons, determined according to the nature and the size of those undertakings as well as the degree of permanent disablement of the parties concerned.

The National Employment Office is responsible for the placing of the handicapped passed fit for work, under the supervision of the National Rehabilitation Fund.

Finally, those of them who, by reason of the nature or gravity of their deficiency, cannot provisionally or permanently pursue an occupational activity under normal working conditions may be employed in protected workshops, set up or subsidized by the National Fund.

As one can see, whether it be on the level of medical or surgical treatment, in the sphere of occupational training or rehabilitation or, finally, of placing and employment, the provisions of the Law of 16 April 1963 have the end result of permitting the entry or reentry into social and occupational life of persons whose disability deprives — or has deprived — them of the possibility of pursuing an occupational activity.

To the extent to which aids and subsidies from the Fund benefit Belgian workers, these social benefits must — on the basis of Article 7 of Regulation No 1612/68 alone — be granted under the same conditions to nationals of other Member States, working in Belgium. The principle of equality of treatment which is laid down for able-bodied workers cannot be set aside with regard to those whose capacity has been diminished and for whom physiotherapy and occupational training is necessary for again obtaining employment. Moreover, if one could have any doubt on this point, it would be dissipated by the terms of Article 7 (3) which expressly apply this same principle to access to training centres.

Finally, this solution falls in line with your decisions in a very similar field. Indeed, you have decided that the prohibition of discrimination applies to the special protection which, for reasons of a social nature, the legislation of a Member State might grant to specific categories of workers (Judgment of 13 December 1972, Case 44/72, *Marsmann).*

We therefore have no hesitation in proposing that your reply to the question posed as to whether the rights granted by a national legislation with the object of ensuring occupational training for handicapped *workers* and also procuring for them employment in accordance with their aptitudes must, by virtue of Article 7 of Regulation No 1612/68, be accorded to Community *workers* under the same conditions as national workers.

But, it is evident that the action brought before the Belgian Court concerns the situation not of a migrant worker, but of his minor son. Without encroaching on the area of applicability to Michel S. of the Law of 16 April 1963, you cannot disregard this fact.

The question asks therefore whether the provisions of Article 7, which are applicable to workers themselves, also

establish a rule of equality of treatment in favour of their children.

This is what the Belgian Court seems to think when it states that 'it is not disputed that Regulation No 1612/68 applies not only to the workers of Member States of the Community, but also to their families'.

From the grounds of the decision referring the matter, it appears that the Tribunal du Travail considers that an affirmative reply to the question which it has put on the basis of Article 7 would be sufficient to grant Michel S. the right to benefit under the national legislation on the rehabilitation of the handicapped, in his capacity as the son of a migrant worker.

This deduction is, in our view, incorrect.

The wording of Title II of Regulation No 1612/68 alone — 'Employment and equality of treatment' — would lead one to consider that the social benefits referred to in Article 7, which comes under this Title, must be attached to the pursuit of a wage-earning activity within the territory of one of the Member States, are connected to the very condition of migrant worker and must therefore be reserved to persons who come — or who have come — within this definition.

Our opinion is reinforced by the fact that the Regulation makes a distinction between, on the one hand, the rights and benefits granted to the worker himself (Articles 7 to 9) and, on the other hand, those enjoyed by members of his family.

It is, in fact, Articles 10 to 12 of the Regulation which deal with the situation of the worker's family. By an amendment published in the Official Journal of the Communities on 7 December 1968, a Title III explicitly entitled 'Workers' families' was inserted before Article 10.

The statement of the grounds of the Regulation specifies, in its fifth recital, that 'the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that ... obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country.'

To these ends, Article 10 (1) grants to a worker's spouse and descendants who are under the age of 21 years or who are dependents of the worker and also the dependent relatives in the ascending line of the worker or his spouse, the right to install themselves in the territory of a Member State where the worker pursues his activity. Paragraph 3 of the same Article is aimed at eliminating any discrimination between migrant and national workers with regard to the right to family housing.

Article 11 guarantees the worker's spouse and his minor children or those who are dependent on him, the right to take up any activity as an employed person throughout the territory of the host State.

Finally, Article 12 lays down that his children shall be admitted to general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if they are residing in its territory.

It is of these latter provisions, which are specifically applicable to the children of Community workers, that it is appropriate, in our opinion, to give the interpretation expected by the Belgian court from the Court. We consider that the close relationship existing between the provisions granting rights to the workers themselves and the provisions concerning the rights of members of their family must permit you to settle the question put forward, on the basis of the facts appearing from the file forwarded by the national court, with a view to supplying that court with the factors apposite to a solution of the dispute before it.

But the representative of the Fund raises the objection that Article 12 of the Regulation relates only to general educational, apprenticeship and vocational training. It does not mention occupational retraining.

In our view this disparity in drafting is in no way decisive. It is explained by the fact that retraining in Article 7 relates to persons who, having pursued an occupational activity whilst they enjoyed their complete mental and physical faculties, have seen their possibilities of employment reduced due to a diminution in their capacities. Therefore it is a question either of assisting them to regain their full capacity or of enabling them to find employment compatible with permanent partial incapacity.

In the case of children who have not yet started working and who have not yet been employed, the problem appears in different terms.

In order to give real content to the right granted to them by Article 11 to take up any activity as an employed person in the territory of the State where they reside, it was necessary to guarantee them admission to general educational, apprenticeship and vocational training under the same conditions as the children of nationals of that State, that is to permit them an equal chance to that of nationals to prepare themselves for employment.

The application of this principle does not, in law, raise any difficulty in the case of children having their full physical and mental faculties. Does this mean to say that for those not possessing their full faculties and therefore with only limited possibilities of employment, the rule of equality of treatment is no longer applicable?

Such an interpretation would, according to the statements of the Commission and of the Italian Government, be contrary both to the spirit of the Community legislature and to the objectives of Regulation No 1612/68. We fully share this opinion.

Insofar as the legislation of the host State organizes, for its own subjects, *specialized* occupational guidance and training with the object of permitting young handicapped persons to adapt themselves to an occupational activity compatible with their deficiencies, the children of Community workers cannot be treated differently. They must enjoy the same advantages without discrimination on grounds of nationality. The occupational training to which they are entitled to be admitted cannot be taken in a restrictive sense. This applies equally to the methods of training particularly adapted for those whose physical or mental capacities are diminished.

It is interesting to note that this wide acceptance of occupational training was adopted in the European Social Charter of 18 October 1961, which Belgium also signed, which entered into force on 26 February 1965.

According to Article 10 of this convention, which was drawn up within the framework of the Council of Europe:

'With the object of ensuring the effective exercise of the right to occupational training, the Contracting Parties undertake: ... to ensure or to stimulate, insofar as is necessary, technical and occupational training of all persons, *including those who are handicapped*'.

Article 9 of the Charter is drafted in comparable terms with regard to the exercise of the right to professional guidance.

Finally, by virtue of Article 15 of this convention, the signatory States undertake to take appropriate measures first to make available to persons physically or mentally handicapped, the particular means for occupational training including, where necessary, specialized institutions of a public or private nature; secondly, to ensure they are suitably placed by means of specialized services; and thirdly, to offer them possibilities of protected employment and to encourage employers to engage physically handicapped persons.

Thus, according to the definitions accepted by the European Social Charter, occupational training must comprise specific measures adapted to young handicapped persons.

In this connection, as we have seen, the benefit of the Belgian Law of 16 April 1963 is in no way limited to handicapped workers only; it is also ensured for 'potential' workers, for those who, by reason of their young age, have not yet taken up an occupational activity and for whom the possibilities of employment are effectively reduced owing to a deficiency in their physical or mental capacity.

The National Rehabilitation Fund must provide these young handicapped persons with the medical or surgical treatment to enable them to become fit for employment. It is responsible for ensuring that they receive scholastic education and occupational guidance suitable to their circumstances, that they enjoy specialized occupational training and, finally, that they are provided with adequate employment, if necessary in a protected workshop.

Therefore, the task of the National Fund is aimed, so far as they are concerned, at their introduction into occupational life.

The representative of the Belgian National Fund pointed out, against the solution proposed by us, that to allow the handicapped children of migrant workers the benefit of an internal legislation for assistance to physically or mentally affected persons on the basis of Regulation No 1612/68 would be to anticipate the drafting, currently pending, of Community Regulations in this field.

This argument is based on confused thinking.

Although it is correct that, up to the present, no regulation adopted in application of the Treaty of Rome specifically and exclusively concerns the position of handicapped persons, the reason for this is that the action of the Community to which the National Fund refers is on a different level. It has as its objectives the coordination and approximation of national legislations and also improvement in their effectiveness. Work undertaken under the aegis of the Commission is aimed at promoting 'equality in progress'.

With regard to the recovery of handicapped persons, the very substantial number of whom is in fact a subject of concern, this means that one is endeavouring to harmonize the initiatives of the Member States and to achieve more complete and better adapted protection.

The fact that such action has not yet been completed is certainly not a sufficient reason to deny the children of migrant workers the right to equality of treatment which is guaranteed to them by Regulation No 1612/68, insofar as domestic legislation already in force enables them effectively to enjoy the benefit thereof.

Finally, as to the argument that the European Social Fund has hitherto granted its financial assistance to the Belgian National Fund for the Social Rehabilitation of the Handicapped only in respect of the rehabilitation of wage-earners who are unemployed, this seems to us to be irrelevant.

In fact, the Decision of the Council of the Communities of 1 February 1971 on the reform of the European Social Fund, expressly provides for its intervention not only for the purpose of eliminating unemployment and lasting under-employment and for the training of highly qualified labour, but also for action aimed at the introduction or reintroduction of handicapped persons to economic activity; it in no way limits this possibility of intervention to workers who have lost their employment owing to a reduction in their physical or mental capacities.

Finally, we conclude that you should rule:

1. That by virtue of Article 7 of Regulation No 1612/68 of the Council, national workers of a Member State whose possibilities of employment are

reduced owing to a diminution in their physical or mental capacities must enjoy, in the territory of another Member State where they reside and pursue — or have pursued — their occupational activity, the benefits provided by the legislation of such State, relating to the social rehabilitation of the handicapped, under the same conditions as nationals of that State.

2. That by virtue of Article 12 of the same Regulation, minor children or dependent children of those workers should also enjoy equality of treatment with nationals in this field.