OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 6 JULY 1976

My Lords,

This is a sad case. It comes to the Court by way of a reference for a preliminary ruling by the Cour de cassation of Belgium, before which there is pending an appeal from the Cour du travail of Liège.

The Appellant before the Cour de cassation is one Pietro Triches. The respondent is the Caisse de compensation pour allocations familiales de la région liègeoise.

The appellant was born in 1923 and has two children. He is Italian. From 1938 to 1945 he was employed in the building industry in Italy. Then, from 1946 to 1960, he worked as a miner in Belgium. In 1960 he became disabled, and thereby entitled to invalidity pensions both in Belgium and (by aggregation and apportionment) in Italy. As to his right to those pensions there is no dispute. The dispute is about his family allowances.

Until 1962 there was no difficulty. The appellant remained in Belgium and drew the family allowances to which he was entitled under Belgian law.

But in 1962 he went back to Italy. Payment of his family allowances was then stopped by the respondent, which was the Belgian social security institution concerned. We were told on behalf of the Commission that this was probably a mistake, but, if so, not a surprising one, because the relevant Community legislation then in force was so complex as to be, in practice, unadministrable. It consisted, in the main, of Article 42 (2) of Regulation No 3, to which Article 42 (3) of that Regulation and certain provisions of Regulation No 4, particularly Articles 69 and 70, were ancillary. The upshot of that legislation was that the appellant was probably entitled to continue to be paid a proportion of his Belgian family allowances. However, he received none.

On 18 December 1963, the Council adopted Regulation No 1/64/EEC, which came into force on 1 February 1964. There is no authentic English text of it, so that my citations from it will be in French.

The preamble to Regulation No 1/64 stated its purpose in the following terms:

'considérant que le mode de calcul des allocations familiales pour les ... enfants de titulaires de pensions ou de rentes prévu à l'article 42 du règlement no 3 et aux articles 69 et 70 du règlement no 4 s'est révélé d'une application trop complexe et qu'il convient de remplacer le système actuel par un système plus simple.' (JO of 8. 1. 1964, p. 1.)

That simplification was achieved by, among other things, substituting a new Article 42 of Regulation No 3 for the old one. The principle on which this new Article was based was that only one Member State should be responsible for the payment of family allowances to a pensioner.

In the case of a person entitled to a pension under the legislation of only one Member State, paragraph 1 of the new Article provided:

'Les bénéficiaires d'une pension ou d'une rente due en vertu de la législation d'un seul État membre et qui résident sur le territoire d'un autre État membre ont droit aux allocations familiales conformément aux dispositions de la législation du pays débiteur de la pension

ou de la rente comme s'ils résidaient dans ce pays.' (JO of 8. 1. 1964, p. 1).

In the case of a person entitled to pensions under the legislation of more than one Member State, paragraph 2 provided:

'Les bénéficiaires de pensions ou de rentes dues en vertue de la législation de plusieurs États membres ont droit aux allocations familiales conformément aux dispositions de la législation

(a) Du pays de leur résidence, s'ils résident sur le territoire d'un État membre où se trouve l'une des institutions débitrices de leurs pensions ou de leurs rentes;

(b) De l'État membre où ils ont accompli leur plus longue période d'assurance-vieillesse, s'ils résident sur le territoire d'un État membre où ne se trouve aucune des institutions débitrices de leurs pensions ou de leurs rentes, comme s'ils résidaient sur le territoire du premier État.' (JO of 8. 1. 1964, p. 1)

Paragraph 2 also contained a sub-paragraph designed to take account of the fact that in some Member States (in particular Italy) pensioners are not entitled to family allowances as such but to supplements to their pensions in respect of children. That sub-paragraph was designed to ensure that such supplements should not be subjected to the process of apportionment, but should be received in full by a pensioner to which paragraph 2 applied.

One would have thought that those provisions were simple enough to apply to the appellant's case. Indeed there is now no dispute as to how (assuming them to be valid) they should have been applied to him. Being entitled to invalidity pensions in both Belgium and Italy, and being resident in Italy, the Appellant came within paragraph 2 (a), with the result that he was entitled to the full Italian pension supplements in respect of his children and to no Belgian family allowaces.

This, however, is not what happened. Owing to administrative errors and delays, for which it seems that the appellant himself was not to blame, his right to his Italian invalidity pension, and to the consequent supplements, was not established until 1969. In the meantime the respondent treated him as if he were entitled only to a Belgian pension, and therefore entitled under paragraph 1 of the new Article 42 to Belgian family allowances. These it paid to him for the period 1 February 1964 to 31 March 1969.

In 1969 the competent Italian institution awarded the appellant an invalidity pension proportional to his period of employment in Italy, to which were added supplements in respect of his children, the whole being back-dated to 1960. The Commission says that, in calculating the supplements, that institution wrongly applied to them the process of apportionment. Be that as it may, it is not the subject of the present dispute.

The appellant says that one result of the award to him of that Italian pension was that his Belgian pension was retrospectively reduced by the amount of the Italian pension, so that he derived no benefit from that award. He does not however state on what ground the reduction was made. One is left wondering whether it was consistent with the principle of such decisions of this Court as that in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149. But this, again, is not the subject of the present dispute.

What the appellant complains of in the present litigation is that the award to him of his Italian pension resulted in the payment to him of Belgian family allowances being discontinued and, further, in the respondent claiming the right to be reimbursed the amount of the family allowances that it paid to him for the period 1 February 1964 to 31 March 1969. It seems that that amount is being recovered by monthly deductions of 10

percent from his reduced Belgian pension.

Both before the Tribunal of first instance and, on appeal, before the Cour du travail of Liège, the appellant contended, in reliance on certain transitional provisions contained in Regulation No 1/64, that the respondent was liable to make up to him the difference between his Italian pension supplements and the considably higher Belgian family allowances. That contention was rejected both by that Tribunal and by that Court, and has been abandoned by the appellant in the Cour de cassation.

In the Cour de cassation the appellant challenged the validity of the new Article 42 (2) of Regulation No 3 on the ground that it was incompatible with Articles 3, 48, 51 and 117 of the Treaty, in that its effect was to create inequalities between workers which constituted an obstacle to the free movement of persons within the Community. It is the question thus raised that has been referred by the Cour de cassation to this Court for a preliminary ruling.

The written observations submitted to the Court by the appellant, and those submitted in support of his case by the Italian Republic, left it unclear whether reliance was being placed on his behalf upon the principle in the *Petroni* case. It transpired at the hearing, however, that that was not so. It was there conceded by counsel for the appellant that, under Belgian legislation taken alone, family allowances are payable only to persons resident in Belgium. So Article 42 (2) could not be held to have purported to deprive the appellant of a right conferred on him by that legislation. In this the Commission concurred.

An example was put forward to explain the Appellant's contention. It consisted in contrasting the rights of two workers, both becoming disabled in Belgium and both then going to live in Italy. Suppose, it was said, that, of those workers, one had only worked in Belgium for ten years, whilst the other had worked for five years in Italy and for ten in Belgium. The first would be entitled only to a Belgian pension but he would be entitled (because of Article 42 (1)) to Belgian family allowances. The second would be entitled to Italian and Belgian pensions but only, by virtue of Article 42 (2) (a), to the lesser Italian pension supplements in respect of his children.

I find the argument based on that example unconvincing. For aught one knows, in a particular case, the aggregate of the Belgian and Italian pensions and of the Italian pension supplements received by the second worker could exceed the aggregate of the Belgian pension and family allowances received by the first.

The essential point about Regulation No 1/64 is that, as I have shown, it was designed to simplify the system and make it workable in practice, by selecting the legislation of a particular Member State as being applicable in the case of any particular pensioner. The tests that it prescribed for the purpose of making that selection seem to me sensible, not least the test of residence in a case falling within the new Article 42 (2) (a). Inevitably 'inequalities' would be caused, whatever test was prescribed. At the hearing Counsel for the Appellant contended that a better test would have been that of the Member State in which the worker concerned was last insured. No doubt this would have been satisfactory for the Appellant, but it too would have caused inequalities. It would not be difficult to construct an example, converse to that put forward on behalf of the Appellant, to demonstrate that.

In truth, as was pointed out by the Commission, the root of the problem lies in the divergences between the family allowance systems of the different Member States. The attempt to reconcile these in a theoretically ideal manner, which was made by the original Article

42 of Regulation No 3, failed because it led to excessive complications. The fate of the appellant's family allowances between 1962 and 1964 bears witness to that.

But the real question here is whether there is anything in any of the Articles of the Treaty relied upon by the appellant that made it unlawful for the Council to legislate as it did by Regulation No 1/64.

The appellant relies in the first place on Articles 3 and 48 of the Treaty, and particularly on Article 3 (c) and Article 48 (3) (b). The former provides that the activities of the Community shall include 'the abolition, as between Member States, of obstacles to freedom of movement for persons', and the latter that freedom of movement for workers shall entail the right (subject to certain limitations not here relevant) 'to move freely within the territory of Member States' for the purpose of accepting 'offers of employment actually made'. The submission of the appellant is that Regulations No 1/64 infringed those provisions because it could deter a person from going home to his own country after having worked in another Member State. My Lords, it may well be that, if a person finds that he will be financially better off if he stays in a particular Member State where he has worked than if he goes back to the Member State which is his country of origin, he will choose to do so. But it would in my opinion be fanciful to conclude that a Regulation which omitted to prevent that possible situation was incompatible with Article 3 (c) or Article 48 (3) (b).

Then the applicant relies on Article 51 of the Treaty and, in particular, on paragraph (b) of that Article. Article 51 provides, Your Lordships remember, that:

'The Council shall ... adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) 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;

(b) payment of benefits to persons resident in the territories of Member States.'

The argument of the appellant seems to be that, if a person has acquired a right to a particular social security benefit while resident in a particular Member State, Article 51 (b) entitles him to be paid that benefit wherever else within the Community he may become resident. The argument is attractive, but I think it goes too far. Article 51 (b) is in very general terms and, in my opinion, confers a wide discretion on the Council. Its purpose is to require the Council to set up a system for the payment of benefits throughout the Community, but without, I think, binding the Council as to which benefits shall be paid through that system in particular cases.

Lastly the appellant relies on Article 117 of the Treaty. This is the first Article in Title III of the Treaty, which is headed 'Social Policy'. It reads as follows:

'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.'

That Article, in my opinion, is in the nature of a declaration of intent and of faith by the Member States. Directives adopted in pursuance of it might have the effect of conferring on private persons rights enforceable by them in the Courts of the Member States. But, in the absence of such directives, I do not think that that Article can possibly be interpreted as creating any rights that private persons can invoke in those Courts or in this Court.

In the result I am regretfully of the opinion that the contention of the appellant must fail. I say 'regretfully' because it does seem to me that he has been hard done by. But I agree with the submission of counsel for the Commission at the hearing, when she said that the hardship to the appellant seemed to have been caused, not by the Regulation adopted by the Council, but by the inefficiency of the national social security institutions concerned, and in particular by that of the respondent. If the Commission should, on perhaps further investigation, ascertain that this was indeed so, it may find in Article 169 of the Treaty a means of getting matters put right.

So far, however, as the question referred to this Court by the Cour de cassation of Belgium is concerned, I am of the opinion that Your Lordships can only answer it by declaring that consideration of that question has disclosed no factor of such a kind as to affect the validity of Article 42 (2) of Regulation No 3, as replaced by Council Regulation No 1/64.