OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 10 NOVEMBER 1977 [1]

Mr President,
Members of the Court,

1. Like the Beerens case, which was heard a short while ago, the Kuyken case, with which this opinion is concerned, raises the issue of the effect of Community social law as regards unemployment benefit. As the Court will be aware this subject is, in terms of national law, within the ambit both of social security and of social assistance; the conditions of entitlement to unemployment benefit differ appreciably from State to State and in each Member State there may be various types of unemployment benefit. It is accordingly important to establish in what circumstances and within what limits an unemployed worker who has been involved with more than one Member State is able to avail himself of Community regulations on social security. I need hardly stress the distressing nature of the subject at the present time.

The question today is concerned with a Belgian citizen who, after finishing his secondary school education in Belgium in 1971, went to the Hogere Technische School in Apeldoorn, the Netherlands, where, until 24 June 1976, he read for the Technical Academy engineering degree. He subsequently returned to Belgium and, as he failed to find employment there, Mr Kuyken applied to the National Department of Employment on 28 October for the unemployment allowance, which is governed by Article 124 of the Belgian Royal Decree of 20 December 1963. This provides for the grant of unemployment benefit to workers under 25 years of age who have completed their studies in an educational establishment provided, recognized or subsidized by the Belgian State on condition, *inter alia,* that not more than one year has elapsed between the completion of studies and the application for benefit and that, prior to the said application, the person concerned has worked as an employed person for not less than 75 days or his name has appeared for the same minimum period of time on the list of those seeking work and he has not refused a post which he is qualified to fill.

But, as I have stated, Mr Kuyken had completed his schooling in Belgium in 1971 and, consequently, the application for unemployment benefit had been submitted well after the maximum interval of one year provided for under Belgian law. Furthermore, the Belgian institution considered that the said Article 124 of the Royal Decree of 20 December 1963 made it impossible to take into account the studies completed in the Netherlands. In consequence, Mr Kuyken's application was refused by decision of the National Department of Employment dated 20 January 1977.

He contested this decision before the Hasselt Labour Tribunal which, by judgment of 18 May 1977, referred the following question to the Court of Justice under Article 177 of the EEC Treaty:

'Can the provisions of Article 124 of the Royal Decree of 20 December 1963 on the unemployment benefit rules in Belgium be regarded as compatible with the letter and the spirit of the relevant Community law, which seeks to ensure

1 — Translated from the Italian.

free movement of workers within the Community:

— with regard to Belgian subjects who have studied in one of the Member States; or

— with regard to persons who are not Belgian subjects but who possess the nationality of one of the Member States; or

Do the provisions of Article 124 of the Royal Decree of 20 December 1963 constitute, directly or indirectly, an obstacle to the free movement of workers within the Community?'

It is clear that the question cannot be looked at in its present wording because, of course, the preliminary ruling procedure does not provide for judgment to be given concerning the validity or otherwise, under Community law, of national legislative acts. It is also clear however that the burden of the question from the Hasselt Labour Court is primarily concerned with a question of interpretation of Community law. The question to be settled is whether Community law, in particular Regulation (EEC) No 1408/71 of the Council of 14 June 1971, to which the Belgian court has referred in the judgment of reference, requires that, for the purposes of the grant of unemployment benefit to a graduate seeking employment for the first time, a period of study completed in another Member State must be treated as if it were a period of study completed in Belgium. More generally, and in the light of the second part of the question submitted by the Hasselt court, it must be established whether, on account of the principle of the free movement of workers, Community law prohibits the Member State from restricting the grant of unemployment benefit in the case of graduates seeking employment for the first time to young people who have completed their studies in an educational establishment in the State which is responsible for paying the benefit.

2. On the question of unemployment benefit, the ninth recital in the preamble to Regulation (EEC) No 1408/71 declares 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' and that 'it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject'.

These general intentions must be borne in mind for Articles 67 to 71, which appear under the heading 'Unemployment' in Chapter 6 of the regulation, to be understood. In accordance with Article 51 of the EEC Treaty, the essential objective of those articles is to enable workers who move about within the Community to aggregate, for the purpose of acquiring and retaining the right to benefits, all periods of insurance or employment taken into account under the various national laws of the Member States (Article 67) and, in addition, to retain his entitlement to such benefits notwithstanding that the worker has moved from one Member State to another (Article 69).

It is clear that Regulation (EEC) No 1408/71 is intended to apply to *persons in paid employment* who move about in the Community or, to be more accurate, as the fourth recital makes clear, 'to all nationals of Member States insured under social security schemes for employed persons'. In principle, therefore, students or former students cannot in that capacity avail themselves of it unless there are national laws which, for the purposes of granting social security benefits which are covered by the regulation, treat a student or former student on the same footing as an employed person.

The application of the rule on aggregation referred to in Article 67 of the regulation accordingly takes for granted, in the first place, that, in the Member State where the graduate applies for unemployment benefit, the right to this benefit is subject to the completion of a specific period of insurance or employment or possibly to the completion of a period of study treated as a period of employment. Secondly, it is essential for the person concerned to have completed, under the laws of another Member State, periods of insurance or of employment or possibly studies treated as equivalent to periods of employment. But in this case the Belgian legislation referred to by the tribunal making the reference does not treat periods of study completed in Belgium and periods of employment as being in any way the same; as has been said, it does no more than provide for the grant of unemployment benefit to a person who has (not more than a year previously) completed a period of study in a Belgian establishment and *in addition* has worked as an employed person or has been for at least 75 days registered as a person seeking work. Nor, again, according to the statements in the Commission's observations, does the legislation of the Netherlands make any provision at all for the assimilation of the work of a student to that of an employed person for the purposes of the acquisition of the right to unemployment benefit.

I note, incidentally, that Belgian laws on unemployment benefit for graduates in search of employment for the first time contain features which might perhaps justify describing them as social assistance rather than social security measures. But these features certainly do not justify the conclusion that the kind of unemployment benefit with which we are concerned lies completely outside the ambit of Regulation (EEC) No 1408/71, Article 4 (4) of which states that the regulation shall not apply to social assistance. I say this on at least two grounds: in the first place because in the declaration specifying the scope of the regulation (within the meaning of Article 5 thereof), Belgium has referred to the 'legislation relating to unemployment insurance', *in its entirety,* as coming within the ambit of the regulation and, secondly, because the tendency of this Court has been to regard the similarity between certain ill-defined social security benefits and those covered by Community regulations on social security as sufficiently strong to regard the former as coming within the scope of the regulation. In this connexion reference should be made to the judgment of 22 June 1972 in Case 1/72, *Frilli* v *Belgium* [1972] ECR 457, in which it was held that national legislation which has certain affinities with social assistance (in particular where it prescribes need as an essential criterion for its application and does not stipulate any requirement as to periods of employment, membership or contribution) nevertheless approximates to social security within the meaning of Regulation No 3 because it does not prescribe consideration of each individual case, which is the characteristic of assistance, and places those concerned in a clearly defined legal position giving them a right to a benefit which is analogous to the old-age pensions mentioned in Article 2 of Regulation No 3. The Court subsequently gave judgment to the same effect in the judgments of 9 October 1974 in Case 24/74, *Caisse Régionale d'Assurances Maladie* v *Biason* [1974] ECR 999, and of 13 November 1974 in Case 39/74, *Costa* v *Belgium* [1974] ECR 1251.

Again, in the case of the retention of the right to social benefits for unemployment it is clear that the provisions of Article 69 require the unemployed person to have the status of 'worker' within the meaning of Regulation (EEC) No 1408/71; to satisfy the conditions laid down by the legislation of a Member State for the

right to benefits; to have gone to another Member State in order to seek employment there; and to possess the qualifications laid down in subparagraphs (a), (b) and (c) of Article 69 (1), in particular to have been registered as seeking employment for at least four weeks before his departure. In order to reach the conclusion that the circumstances of this case undoubtedly fall outside the ambit of Article 69 it is enough to note not only that they involve a former student who is not treated as though he were an employed person but that, in any case, the person concerned had acquired no right to unemployment benefit in the State (the Netherlands) in which he had finished his studies.

Nevertheless the question arises whether this is not a case for applying the provision in Article 71 (1) (b) (ii) of Regulation (EEC) No 1408/71 under which 'a worker, other than a frontier worker, who is wholly unemployed and 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'.

Let us even suppose that, as a result of a liberal application of the principles laid down by this Court in its judgment of 17 February 1977 in Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315, the person concerned could be held to have retained his residence in his country of origin (Belgium) despite the long absence. Even in that case, the provision referred to would not apply.

It is clear from the first part of the provision and from the title of the section in which it appears ('Unemployed persons who during their last employment were residing in a Member State other than the competent State') that there is an assumption in this case, too, that the individual concerned has acquired a right to unemployment benefits in the country where he was employed or treated as though he were employed. The provision referred to goes no further than to create an exception in certain specific cases from the rule in Article 67 (3) that the unemployed worker can claim unemployment benefits only if he has completed lastly periods of insurance or of employment in accordance with the provisions of the legislation under which the benefits are claimed. But the derogation does nothing more than allow the worker to claim the benefits from the State in which he resides instead of the State in which he has completed his latest periods of insurance or employment.

The conclusion is therefore inevitable that the provisions relating to unemployment contained in Regulation (EEC) No 1408/71 cannot be interpreted in such a way as to vest a person who has completed a period of study in a Member State with the right to an unemployment benefit which another Member State grants to anyone who has completed studies in its own educational establishments and who is seeking employment for the first time.

3. In keeping with the spirit of the question submitted by the Belgian court consideration must now be given to the question whether the restrictions laid down by a national law, along the lines described, for the purposes of the grant of unemployment benefit to young graduates who are unemployed can be held to be contrary to the principle of Community law prohibiting discrimination or at least incompatible with the principles of the free movement of workers and the freedom to provide services within the Community.

It must first of all be emphasized that the Belgian Royal Decree gives rise to no discrimination based on the nationality of the graduate. It is clear from Article 124 of the decree, referred to above, that the stipulation regarding completion of a

course of studies in an educational establishment provided, recognized or subsidized by the Belgian State applies without distinction both to nationals of the State itself and to aliens. It must however be borne in mind that the case of a former student in search of employment for the first time is not covered by the Community provisions designed to ensure genuine equality of treatment between native and foreign workers in so far as they require a relationship of employment, whether present or past. For this reason there can be no application to the present case of the provision in Article 7 (2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, which lays down that migrant workers shall enjoy the same social advantages as those accorded to national workers.

Restrictions such as those contained in Article 124 of the Royal Decree of 20 December 1963 are, without doubt, likely to discourage Belgian nationals from going to study in other Member States. However, this is not in my view enough to constitute a breach of the principle of non-discrimination. Only if the work of a student were assimilated to that of an employed worker would it be possible to invoke the provisions of the EEC Treaty, in particular those in Articles 48 to 51, which are designed for the protection of workers. But, as has been said, there is no such assimilation.

Nor is it possible to invoke the provisions relating to freedom to provide services, since those provisions are designed to remove obstacles to the free movement between the Member States of those who provide services and not of those who use those services, which is how those who go abroad to study may be described; in this connexion reference should be made to the opinion of Mr Advocate-General Trabucchi in Case 118/75, *Watson and Belmann* [1976] ECR 1201).

Finally the absence of sufficient harmonization of national policies and legislation in the matter of social welfare and, more specifically, of any Community provision whatsoever for coordination in the field of social assistance for graduates who are not yet in employment necessarily means that in cases where the legislation of individual Member States provides social benefits for such persons there is nothing to prevent it from prescribing its field of application and restricting it to circumstances and conditions prevailing in the national territory, to the exclusion, consequently, of similar circumstances prevailing in other States.

4. For these reasons, I conclude by recommending the Court to rule, in answer to the question submitted under Article 177 of the EEC Treaty by the Hasselt Labour Tribunal in its judgment of 18 May 1977, that neither the Treaty establishing the EEC nor the Community regulations on social security and freedom of movement for workers require a Member State to treat periods of study completed abroad as though they had been completed at home by the grant of unemployment benefit to graduates who, after the end of their course of study, are seeking employment for the first time.