handicapped as a member of an employed person's family, the equality of treatment cannot cease at the end of his minority if the child by reason of his handicap is prevented from himself acquiring the status of an employed person within the meaning of the Regulation.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 17 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 10 JUNE 1975[1]

Mr President,
Members of the Court,

1. The requests for a preliminary ruling made by the Tribunal du Travail, Nivelles, concern Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community and Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and are related to the application of the Belgian Law of 27 June 1969 on the grant of allowances to handicapped persons. The application of this law has already given rise to two other applications for preliminary rulings: Case 17/73, *Callemeyn* [1974] ECR 553) and Case 49/74, *(Costa v Belgium* [1974] ECR 1251). It is clear from this case-law that legislation such as that which has just been cited falls under social security governed by Article 51 of the Treaty: more particularly, the benefits referred to in Article 4 (1) (b) of Regulation (EEC) 1408/71 of the Council include those provided for by such national legislation on benefits for physically handicapped persons in so far as the letter relates to workers within the meaning of Article 1 (a) of that regulation. Although the Belgian legislation in question relates to the entire population of the State and consequently was not envisaged in relation to workers as such, in the cases just cited the Court has recognized the right of the latter to benefit from it.

1 – Translated from the Italian.

In the present proceedings the question is asked, whether such benefits may also be extended to the members of the worker's family residing in the country of immigration and included in the concept of 'members of the family' of that worker as laid down in Article 1 (f) of Regulation No 1408/71.

2. The situation which has given rise to the preliminary questions is very simple and has as its essential objective the clarification of this problem. Mr and Mrs F. are Italian nationals residing from 1947 in Belgium, where Mr F. is employed, and in 1959 they had a child who was born seriously handicapped. The parents made an application to the Belgian Ministry of Social Security in the name of their child in order to obtain the ordinary benefits for handicapped persons in accordance with the Belgian Law of 27 June 1969. Their application was however rejected because the minor was not of Belgian nationality and as an alien he did not fulfil the conditions required for the acquisition of such benefits under the European Interim Agreement of 11 December 1953 in accordance with the interpretation usually placed upon it by the Belgian Administration: that is, he had not fulfilled the requirement of at least fifteen years' residence in Belgium after attaining twenty years of age. The Law accords the right to receive such benefits to Belgian citizens resident in Belgium who have attained fourteen years of age and have a permanent incapacity for work of at least 30 % and whose means do not exceed certain limits. The minor in question, born as we have seen in Belgium and resident there, appears to suffer from 100 % invalidity.

Faced with this situation, although the Belgian court considered that the above-mentioned Agreement might be interpreted as relating the condition of residence solely to the parent, it asks this Court whether Community law, particularly Article 12 of Regulation (EEC) No 1612/68 or Regulation (EEC) No 1408/71, cannot supply a more definite solution capable of avoiding inequitable discrimination.

The first question put by the Belgian court is whether the arrangements envisaged by Article 12 of Regulation No 1612/68 include benefits in the nature of the grants referred to in the Belgian Law of 27 June 1969 in so far as they are intended to cover the handicapped children of employed persons; it seems to me clear that the reply must be in the negative. In fact Article 12 relates to benefits intended to allow the children of migrant workers to attend general educational, apprenticeship and vocational training courses under the same conditions as nationals. The scope of such a provision cannot encompass benefits which, where they are also provided in favour of the incurably from that expressly provided for by Article 12. In the specific case of a handicapped person with 100 % invalidity, on the other hand, there can be no question of benefits of the type provided for by the above-mentioned provision, which benefits would be futile.

3. The second question put relates to the objective classification of national legislation of the type which the court making the reference must apply in connexion with Regulation No 1408/71 of the Council, and has already been answered in the case-law of this Court. In fact, as we have already seen, it is clear from the criteria laid down in the preliminary rulings in Cases 187/73 and 39/74 that legislation of this type falls within the scope of this regulation and that the benefits which the latter provides in favour of handicapped persons may be classified as invalidity benefits as referred to in Article 4 (1)(b) of the said regulation.

However, these rulings do not resolve the particular problem with which the Belgian court is now faced and which arises on considering the second question in conjunction with the third: that is to say, they do not resolve the question of whether legislation of this type, which relates neither to workers nor to members of their

families as such, applies — under the Community rules in the social sphere — to the children of migrant workers, before or after attaining majority.

4. On the basis of the above-noted case-law of the Court the migrant worker who, apart from his nationality, is in the situation postulated by the law in question with regard to Belgian nationals, benefits from it on an equal footing with the latter. Under Article 2, this regulation applies also to members of the workers' families and their survivors. Under Article 3 (1), persons resident in the territory of the State to whom the regulation applies shall be subject to the same obligations and enjoy the same benefits under the national legislation as the nationals.

In the observations which it submitted in Case 39/74 *Costa v Belgium*, [1974] ECR 1251, the Commission however maintained that members of workers' families were not, as such, insured within the framework of the general social security arrangements of the type in question in the case before the Belgian court. The latter court concurred with this submission on the basis *inter alia* of the case-law of the Court relating to 'guaranteed income' Case 1/72, *(Frilli v Belgium*, Rec. 1972, p. 457).

According to the Commission, Community law on social security applies to members of the families of migrant workers only in so far as the national social legislation confers rights on nationals in their capacity as members of the families of workers and thus to the extent to which the rights in question derive from the workers' insurance. In support of this the Commission recalled the special provisions which had to be adopted to apply the social security arrangements prevailing in the new Member States to the members of the families of migrant workers. According to the Commission, the legislative systems of those States, which confer a personal right to most of the social benefits not on members of the families of workers as such but on all resident nationals, could not otherwise have been applied to members of the families of migrant workers even for basic benefits, such as those relating for example to sickness insurance or widows' pensions.

The circumstance that in this connexion special provisions have been adopted *(vide* Regulation No 2864/72 of the Council, OJ Special Edition 1972 (31 December), p. 15) modifying Annex V to Regulation No 1408/71 indeed meets the requirements of clarity and of legal certainty; however, it does not seem to me that it can constitute a weighty argument in support of a narrow interpretation of the scope of Regulation No 1408/71. The argument *a contrario* which might be derived from it, based exclusively on a presumption as to the intention of the legislature, is anything but conclusive, as is generally the case with such arguments.

With regard to the reference to the decision of the Court in Case 1/72, it should be noted that the practical considerations which may be adduced as grounds for the restriction exclusively to migrant workers of the application of legislation on minimum guaranteed income cannot apply to legislation which, like that on the supplementing of the income of needy handicapped persons, is not intended to have a potential general application but to apply only to a very special, and fortunately strictly limited, category of persons.

In the present case however the Commission has endeavoured to arrive at a solution favourable to the handicapped child of the migrant worker, advocating the classification of allowances of the type referred to by the Belgian court in the category of family benefits referred to in Article 1 (u) of Regulation No 1408/71. But the defendant in the main action has explained that the Belgian legislation expressly provides for family benefits in addition to the ordinary allowances for the handicapped children of workers. Payment of these latter benefits is subject to the condition that the handicapped children have an incapacity for work of at least 66 %,

and moreover such benefits are normally paid only up to the age of fourteen years, or at the most up to the age of twenty-five years when the beneficiaries are able to follows courses leading to professional or trade qualifications. The existence of a specific benefit in the nature of a family benefit for handicapped children, provided for within the framework of legislation coming within the category of Article 4 (1) (h), thus precludes the possibility of properly classifying other benefits established in favour of handicapped persons in the same category. Moreover, this particular case relates to legislation which in principle confers its benefits only after the attainment of the age of fourteen years, that is, from the time when family allowances may cease, and which is not expressly intended to compensate for the burden falling on the family but was rather established for handicapped persons as such, who may continue to benefit from it without any restriction as to time.

Even if a benefit of this type must be categorized as an invalidity benefit it nevertheless remains true that handicapped persons who are not nationals of the state where they reside may benefit under the Community provision only through their relationship to the worker, to the extent to which this is necessary to prevent discrimination against the migrant worker with regard to nationals in a corresponding economic and family situation.

5. The scope of the Community provision in question, as regards the persons covered, is based on the concepts of 'worker' and 'member of the family'. The fact that social legislation was not specifically conceived for the benefit of workers as such and that it is valid for all nationals who do not have a sufficient income does not necessarily preclude the workers and members of their families from availing themselves of it on the same conditions as the nationals.

Since the reference in Regulation No 1408/71 to the concept of a 'worker' did not prevent a migrant worker from acquiring the right to social security benefits which were not expressly conceived for workers, one must also reject the view that the reference in the same regulation to the concept of 'members of the family' of the worker prevents them from benefiting under the same social legislation — even if it does not include the concept of 'members of the family' — on an equal footing with the nationals of the host State under Article 3 (1) of the above-mentioned regulation. It moreover appears that such a conclusion is implied by the judgment in Case 39/74 *(Costa)* in which the Court stated that 'national legislation giving a legally protected right to a benefit for the handicapped falls, as regards the person referred to by Regulation No 3, within the ambit of social security, within the meaning of Article 51 of the Treaty and of the Community regulations thereunder'; it is to be observed that in this matter the Court does not refer only to workers but employs a term which also includes members of their families.

The basic prohibition against any discrimination amongst the workers of the Member States on the basis of nationality, which is set out in Article 48 of the EEC Treaty and repeated in Article 3 of Regulation No 1408/71 with regard also to the members of their families, is particularly treated in Regulation No 1612/68 of the Council on freedom of movement for workers within the Community; in its recitals the latter regulation refers expressly to the need to ensure in fact and in law the equality of treatment of the migrant worker in particular as regards the conditions for the integration of his family into the host country. This requirement, which is related to the worker's right to have his family join him, takes on particular significance if it is juxtaposed to the right accord to members of the worker's family to continue to reside in the State in which the spouse was employed, even after the termination of such employment (Regulation No 1251/70 of the Commission, OJ, Special Edition 1970, p. 402).

To those considerations based on specific provisions of Community regulations there may also be added a general observation drawn directly from the Treaty, to which the Court has referred several times: in order to attain real freedom of movement for workers within the territory of the Community they must be accorded real equality of treatment with the nationals, at least in regard to economic matters and social benefits in particular. In this context it is not important, so as to preclude the extension to members of the families of workers of the right to benefits of the type referred to by the Belgian court and provided for by the national law for the benefit of handicapped children, that the legislation in question was not expressly conceived for workers as such and members of their families, but applies generally to the entire resident population. The employment of the criterion of nationality to distinguish the situation of migrant workers from those of nationals in a corresponding situation would plainly be contrary to the principles and provisions noted above.

The entitlement of migrant workers to the said benefits was recognized by the Court when those benefits were considered as 'supplementary means to persons entitled to insufficient [1] social security benefits who are permanently incapacitated from work' (Judgment in *Callemeyn* [1974] ECR 553, para. 8; Judgment in *Costa* [1974] ECR 1251, para. 8; see also Judgment in *Frilli*, Rec. 1972, p. 457, ground of judgment No 15).

The need to extend its cover to foreign workers and their families is evident precisely because the law relates solely to nationals, affording them all, consequently both handicapped persons directly and workers and their families, benefits which owing to their general nature did not require a specific provision that they constituted a supplement to social security for workers.

Consequently, where in a national legislation on social security of general application which does not as such take into consideration a present or past employer-employee relationship there may be discerned an intention to supplement other social security benefits considered insufficient, workers to whom Regulation No 1408/71 applies may benefit from such legislation. I must emphasize that the foundation of this body of case-law is the need to provide for the Community worker full equality of treatment with the nationals of the host country in all that pertains to benefits under social security legislation. This body of case-law has in substance gone beyond the criterion of the need for a specific connexion between the social benefit and the employer-employee relationship.

The need for equality of treatment further manifests itself beyond the strict bounds of such a relationship. The migrant worker is not regarded by Community law – nor is he by the internal legal systems – as a mere source of labour but is viewed as a human being. In this context the Community legislature is not concerned solely to guarantee him the right to equal pay and social benefits in connexion with the employer-employee relationship, it also emphasized the need to eliminate obstacles to the mobility of the worker, *inter alia* with regard to the 'conditions for the integration of his family into the host country' (Regulation No 1612/68 of the Council, recital 5).

In accordance with this general tendency of Community legislation and case-law, I am of the view that since there is nothing to the contrary in this connexion in the provisions in force, it must be recognized that *a dependent handicapped child* of a migrant worker is entitled to receive those social security benefits conferred by the legislation of the host country on all resident nationals with the same handicap. I consider it expedient to provide fuller explanations for the foregoing in connexion with the third question of the court making the reference.

6. There might be obstacles to admitting a principle automatically extending to

1 – *Translator's note:* The wordt 'insufficient' does not in fact appear in the original version of this case.

members of the families of migrant workers all the benefits provided for nationals by social security legislation of a general nature, as in for example the case with that relating to the guaranteed minimum income considered in the *Frilli* case.

However, any difficulties or abuse could easily be avoided through appropriate amendments by the national legislature, for example requiring for the acquisition of the right, a minimum and non-discriminatory period of residence in the State.

Furthermore, even in the absence of such amendments, it would perhaps be possible, if this were to appear necessary in order to avoid undue extensions, to limit the acquisition of such benefits through a concept of 'member of the family' adapted to the type of legislation and of social benefits in question.

Be that as it may, there is no difficulty of this nature in applying legislation such as that considered by the Belgian court in the proceedings which constitute the main action.

In the present proceedings the defendant social security institution has not invoked the risk of practical difficulties in connexion with the acquisition by children of migrant Community workers of the right to the benefits in question. Certainly it does not seem impossible to overcome the technical difficulty which may arise from the fact that in general legislation of the type in question there is an absence of any reference to workers and consequently to the concept of 'members of their families'.

If in the State whose legislation is in question there is no concept of 'member of the family' generally valid for the application of social legislation, reference might perhaps be made by analogy to the group of persons who, in accordance with Article 10 of Regulation No 1612/68, have the right to install themselves with the migrant worker on the territory of a Member State of which they are not nationals and to remain there, in accordance with Regulation No 1251/70 of the Council, even after the termination of the employer-employee relationship of the worker himself.

However, although there may be problems of definition in this matter, they will never relate to the worker's children, whose membership of the family could not be contested even on the narrowest acceptation of the concept of 'member of the family'.

The Belgian court displays a keen awareness of the injustice of the solution which might be reached by the internal law on the basis of the interpretation normally placed on the relevant provisions under the European Interim Agreement of 11 December 1953 on social security schemes, and has not made the request to the Court purely in order to resolve doubt as to the interpretation of Community law, but asks something more of the Court: assistance in eliminating once and for all a situation which would conflict with its conscience.

Even if the rules in force do not contain express provisions capable of providing a definite solution to the problem, this is clear from the principles and the objectives of the social law of the Community, from the general tendency expressed in the provisions of the Council and of the Commission and from the caselaw of the Court.

If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and to the requirements of European integration, not only of the economy but of the people, we cannot disappoint the Belgian court's expectations, which are more than those of legal form.

In the absence of a definite provision for or against that solution of the problem which

alone appears to conform to the true requirements of the Community system with regard to the free movement of workers, as well as to a higher principle of justice, Regulation No 1408/71 should be interpreted in accordance with such requirements.

The criterion of supplementing social security benefits which the State considers insifficent, a criterion to which the Court has referred in the above-mentioned judgments in recognizing the worker's right to benefit from social security legislation of the type before the court making the reference, appears capable of justifying the recognition of such a right for the children of the worker.

But this reply which I suggest the Court should give to the court making the reference, it must be recognized that Community law, within the particular context of the requirements of freedom of movement for workers, supplements and partially enlarges the criterion laid down by Belgian law, adding to the basic criterion of possession of nationality as the direct qualification for beneficiaries that of membership of the family of a national of another Member State who is an employed person in Belgium.

7. In connexion with the third question referred by the Belgian court I must observe first of all that within the framework of Regulation No 1408/71 the child of a foreign worker is entitled to receive the allowance available to handicapped persons not in his own right, as on the contrary is the case with handicapped persons who are nationals of the host country, but solely as a corollary of the protection afforded to the worker. The extension of the scope of a general social law to the children of workers is justified as it serves to relieve the latter of a burden of which their Belgian counterparts are relieved. In fact it is to be supposed that a handicapped child, even if only partially handicapped, would otherwiese constitute a burden for the parents who are legally obliged to support him even after he attains majority.

On this view the right of the child necessarily remains dependent on the position of the father in the country in question; the result is that if the latter were to terminate his connexion with that country (for example by removing his residence to another State), which connexion alone provides a basis for the child's claim, it would remove the condition for the obligation imposed on the State in Community law to pay the allowance to the handicapped person who is not a national.

In my view it would be too much to concede a right to the handicapped person to retain the allowance without any regard for the position of the father in relation to the State to whom the legislation in question pertains. This could give rise *inter alia* to situations which it would be difficult to accept; this would be so in the case of a migrant worker who worked for a short period in a particular State and then decided to go and work in another State, leaving the handicapped child in the former State at the charge of its social security system.

In conclusion I suggest that the reply to the Belgian court should rule that handicapped children of employed persons or persons treated as such, residing in a Member State of which they are not nationals and to whom Regulation No 1408/71 of the Council applies, are entitled to receive the special allowances for handicapped persons provided for by a law of this State which is applicable to all resident nationals. This right persists so long as the worker, the parent of the handicapped beneficiary, does not terminate his connexion with the state, which gave rise to the right.