OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 3 October 1996 *

I — Introduction

1. In these proceedings the Court is called upon to ascertain the compatibility with Community law of Netherlands legislation under which unemployment benefit for frontier workers is granted only where the person concerned has previously received the unemployment benefit paid by the competent Netherlands institution under the general national unemployment scheme.

II — Facts

2. The appellant in the main proceedings, P. J. Huijbrechts, a national of the Netherlands, worked from 1968 to 1972 in the Netherlands, but resided in Belgium during that period. After she was dismissed, the appellant was paid unemployment benefit by the competent Belgian institution. In 1987 she moved to the Netherlands, where she continued to receive that benefit from the Belgian institution for a period of three months.

3. In April 1988 the appellant made an application for unemployment benefit under the Netherlands Law on the Provision of Income for Elderly Unemployed Workers and Unemployed Workers suffering from Partial Incapacity to Work ('the IOAW'). Her application was refused on 15 August 1989 by the municipality of Putte on the ground that she did not satisfy the requirement laid down in Article 2(1)(a)(3) of the IOAW. On 10 October 1989 the municipality of Putte also rejected a complaint lodged by the appellant against a decision of 15 August 1989 refusing her the benefit at issue.

4. The appellant then brought her claim before the Commissie voor de Behandeling van Administratieve Geschillen (the Administrative Appeals Board), the respondent in the main proceedings. The latter, for its part, decided on 27 August 1990 that the appellant's claim was not well founded. It found that she was not unemployed within the meaning of the IOAW, and that the IOAW could not be regarded as an insurance scheme within the meaning of Regulation

* Original language: Italian.

No 1408/71. The appellant appealed against that decision to the Raad van State (State Council).

5. The Raad van State, considering that the dispute brought before it raised matters involving interpretation of Community law, decided that the following questions ought to be referred to the Court for a preliminary ruling:

'1. If a Member State causes the grant of a benefit following on from unemployment benefit, as in the case of Article 2(1)(a)(3) of the IOAW, to depend on the requirement that benefit must have been received under the statutory unemployment provisions in force in the Member State during the whole period for which benefit was payable, should, as a result of Article 67 of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (in the consolidated version set out in Regulation No 2001/83, OJ 1983 L 230, p. 6), the periods during which unemployment benefit was received in another Member State be regarded as periods of insurance or of employment?

2. If not, does the fact that, in assessing whether a requirement laid down in Article 2(1)(a)(3) of the IOAW to the effect that benefit must have been received during the whole period for which benefit was payable under the statutory provisions on unemployment in force in the competent Member State is satisfied, no account is taken of unemployment benefit received in another Member State constitute discrimination on grounds of nationality within the meaning of Article 7 of the EEC Treaty (now Article 6 of the EC Treaty)?'

III — The relevant national legislation

6. Under the first sentence of subparagraph (a) of Article 2(1) of the IOAW, 'unemployed worker' means a person who:

(1) is unemployed and has not yet reached 65 years of age;

(2) became unemployed after he reached 50 years of age but before reaching 57.5 years of age;

(3) has subsequently, throughout the complete term for which benefit is payable under Article 42(1) and (2) or Articles 43(2) and 49(1), together with Article 76 of the Werkloosheidswet (Unemployment Law, 'the WW'), in so far as it is applicable, received a follow-on benefit within the meaning of that law.

IV — The relevant provisions of Community law

7. Article 67 of Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version in force at the time the facts material to the main proceedings took place (Regulation (EEC) No 2001/83 [1]) provides that:

'(1) The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of insurance periods shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation.

(2) The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

(...)'

8. Article 71, in the version set out in Regulation No 2001/83, provides that:

'An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i)(...)

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he

1 — OJ 1983 L 230, p. 6.

resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense.

(...)'

V — Analysis of the dispute

9. The questions formulated by the national court essentially raise this point: whether the period of unemployment during which the appellant received benefit paid by the competent Belgian institution counts for the purposes of obtaining the benefit provided for by the IOAW, to which the appellant would be entitled if she had received unemployment benefit in the Netherlands from the outset.

10. Before dealing with the ;1substance of the question, it is necessary to consider the validity (a) of a number of objections raised by the respondent as preliminary issues and embodied in its decision rejecting the initial appeal and (b) of others raised by the Netherlands and Spanish Governments during the proceedings. Those objections relate to the relevance of the questions under consideration. The first concerns the disputed nature of the IOAW. It is raised in order to argue that that law should not be regarded as an insurance scheme on the basis of which Regulation No 1408/71 can be applied to this case. The second objection is that the appellant's circumstances are without any Community relevance: in the view of the Netherlands and Spanish Governments there are no factors linking the present case to Community law which could justify and entail the application of the provisions relied upon.

11. With regard to the nature of the IOAW, the Court has already held that that scheme is among those covered by Regulation No 1408/71. [2] Next, as regards the alleged absence of a situation having any relevance for the application of Community law, more than one consideration must be taken into account. The appellant has exercised her right to freedom of movement, on the one hand, by taking up residence in Belgium and, on the other, by working in the Netherlands. Furthermore, she falls into the category of frontier workers referred to in Article 1(b) of Regulation No 1408/71 and therefore benefits by the provisions concerning frontier workers which the Community legislature adopted in order to secure insurance cover and other social advantages for the persons concerned, pursuant to Article 51 of the Treaty. The Spanish Government, for its part, refers to various decisions of the Court [3] to argue that this present case is not concerned with situations governed by the Community rules on freedom of movement and that the appellant cannot, therefore, rely upon those provisions. However, the decisions which it is claimed rule to that effect have been put, to an appreciable extent, into a new perspective by subsequent case-law. The criteria laid down by the Court in *Schumacker*, [4] and later confirmed in *Imbernon*

2 — Case C-66/92 *Acciardi* v *Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland* [1993] ECR I-4567.

3 — Case C-112/91 *Werner* v *Finanzamt Aachen-Innenstadt* [1993] ECR I-429 and Case C-153/91 *Petit* v *Office National des Pensions* [1992] ECR I-4973.

4 — Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, in particular paragraph 28.

Martínez, [5] in some respects constitute a reversal of judicial precedent intended to restore the rules of interpretation which the Court had consistently followed in the past and which had been temporarily set aside in *Werner*, cited above. That judgment, however, concerned a self-employed worker who relied on the application of Article 52 of the Treaty, a provision concerning the right of establishment. The appellant in this case, by contrast, is certainly among those qualifying for the benefit of other provisions of the Treaty, namely those guaranteeing freedom of movement for workers. The situation before the Court falls within the scope of Regulation No 1408/71, adopted pursuant to Article 51 of the Treaty. If that is so, then the decision in *Werner*, which has remained an isolated case and was shortly afterwards contradicted by subsequent decisions, cannot be regarded as a helpful precedent for the purposes of this case.

12. I now turn to the ;1substance of the two questions referred by the national court. The Netherlands Government and the Commission are at one in considering that court's reference in the first question to Article 67 of Regulation No 1408/71 to be without any bearing on this case. I concur with that view. Article 67 concerns insurance schemes which make the grant of unemployment benefit subject to completion of a period of insurance or employment. It is plain that the condition laid down by the IOAW which is in issue does not possess those features. The person concerned is not required to have completed a period of insurance or employment in order to obtain the benefit in question. The requirement laid down is different: the worker is entitled to the award of benefit only if the payment of unemployment benefit under the scheme established by the WW has ceased. The IOAW scheme therefore does not have regard to the length of the period in which the beneficiary completed periods of employment or insurance and merely takes into account the fact that the person concerned was previously but is no longer in receipt of benefit paid under the WW.

13. As formulated, the question referred by the national court does, however, clearly indicate another point of view from which the question should in any event be considered by the Court. On careful inspection, the problem raised before the Court is whether or not unemployment benefits received in other Member States are to be treated in the same way as those awarded under the WW scheme. Once it is established that they are to be so treated, the direct consequence will be that, contrary to the respondent's arguments, the condition permitting the unemployment allowance paid under the IOAW to be obtained must be regarded as satisfied.

14. The question having been set out in those terms, what answer is to be given to the national court? There is a fixed datum which can serve as our starting point. Article 71(1)(a)(ii) provides that a frontier worker who is wholly unemployed is to receive unemployment benefits from the competent institution of the Member State in whose territory he resides. The rule contained in the

5 — Case C-321/93 *Imbernon Martínez* v *Bundesanstalt für Arbeit* [1995] ECR I-2821.

provision in question, as the Court has had occasion to explain elsewhere, [6] is binding and therefore does not permit workers or national institutions to derogate from its provisions. Consequently it was inevitable that the appellant should receive the relevant benefits in Belgium from the beginning of her unemployment. That is so precisely in compliance with a specific provision of Community law.

15. The fact that the appellant subsequently moved from Belgium to the Netherlands cannot, to my mind, affect the scope of the rights conferred on her by Community law or Netherlands legislation. She has exercised her right to freedom of movement under the Treaty, by moving her residence from one country in the Community to another. Because the appellant has made use of a right guaranteed by the Community legal order — most recently enshrined in Article 8 of the Treaty [7] — her right to receive the social security benefits which would have been awarded to her if she had resided in the Netherlands from the outset may not be limited or negated in any way. The Court has consistently ruled to that effect in its judgments. [8] This has been confirmed by the Netherlands Government, which stated during the proceedings that the appellant would normally have received the unemployment allowance provided for by the IOAW if she had resided in the Netherlands from the outset and in consequence received the unemployment benefit paid under the WW pursuant to Regulation No 1408/71.

16. Articles 48 and 51 of the Treaty, which prohibit discrimination on the grounds of nationality, are specifically applicable to situations such as that before the Court. The condition on which grant of the benefit provided for is dependent should be borne in mind. The IOAW scheme treats a worker who has lived *in the State* from the start of his employment in a different way from a worker who is not in the same situation. More precisely, the criterion favours workers rooted *in their own country*. Here there is discrimination as referred to in the *Schumacker* and *Imbernon Martínez* judgments. The Netherlands legislation excludes workers who have received equivalent benefits under the system in another Member State from the class of potential recipients of the benefit concerned. However, it does not appear that the discriminatory effect produced by such a provision can be justified by any criterion deserving of protection by the Community judicature. The rules applying in the Netherlands must therefore be considered to be contrary to the principle of freedom of movement for workers and to the other related principle that frontier workers must not be discriminated against on grounds of nationality. That is not all. The provision contained in the IOAW sets a considerable obstacle in the way of the exercise of the right of free movement guaranteed by the Treaty by workers resident in the Netherlands: the provision makes the possibility of their finding work opportunities in other Member States more burdensome and discourages them from taking it up. As has been shown, the disputed provision limits, as far as workers moving from the Netherlands

6 — Case 1/85 *Miethe* v *Bundesanstalt für Arbeit* [1986] ECR 1837.

7 — It is irrelevant in this respect whether the appellant lived in Belgium in order to work there or for other than economic reasons. In either case the appellant established residence *utendo juribus* and therefore cannot be denied the protection of Community law.

8 — See Case C-302/90 *Faux* [1991] ECR I-4875 and Case C-102/91 *Knoch* [1992] ECR I-4341. Most recently, see Case C-165/91 *Van Münster* [1994] ECR I-4661; C-481/93 *Moscato* [1995] ECR I-3525 and Case C-482/93 *Klaus* [1995] ECR I-3551.

elswhere in the Community, the benefits which would be granted to them in the event of unemployment if they had been employed and had resided in their Member State of origin. [9]

17. One last comment on this point. It is settled case-law that national legislation which affects rights or interests connected with the Community legal order must be interpreted in accordance with the principles on which that system is based. Consequently, the provision of the IOAW under consideration must also be construed in accordance with that precept. It cannot be construed and applied in such a way as to deny national workers rights which they would have had if they had not exercised their right to freedom of movement. *A fortiori*, the condition in question must be applied in the light of Community provisions, namely those contained in Regulation No 1408/71, intended to give effect to the principles of the Treaty. Those provisions may not be used to deprive workers of rights conferred on them by the Community legal order. Even if the letter of the Community regulation should perchance deprive national workers who have exercised their freedom of movement of rights to which they would as a rule have been entitled in their Member State of origin, such a provision cannot be relied upon against the person concerned. This is precisely what the principle of freedom of movement demands. It is a principle enshrined as fundamental in the Treaty. The secondary sources of Community law itself may not hinder or impede compliance with that principle.

18. The answer to the second question must be regarded as being subsumed within the explanations set out above in answering the first question and does not call for separate consideration here.

VI — Conclusions

19. For the reasons set out above, I propose that the Court reply as follows to the questions referred by the Raad van State, The Hague:

Community law, in particular Articles 48 and 51 of the Treaty, precludes the imposition of a condition such as that laid down in Article 2(1)(a)(3) of the IOAW on a wholly-unemployed frontier worker who received unemployment benefits in the Member State in which he resided at the time of his last employment and subsequently transferred his residence to the Member State in which he was last employed, with the result that such a worker is denied the benefits provided for by that legislation.

9 — See Case C-349/87 *Paraschi* [1991] ECR I-4501.