On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal du Travail, Liège, by judgment of 11 May 1977, hereby rules:

Article 50 of Regulation (EEC) No 1408/71 of the Council is applicable only in cases in which provision is made in the legislation of the Member State in whose territory the worker resides for a minimum pension.

Kutscher Sørensen Bosco Donner Pescatore

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 30 November 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 NOVEMBER 1977

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Tribunal du Travail of Liège. The plaintiff in the proceedings before the Tribunal is Signor Mario Torri. The defendant is the Belgian Office National des Pensions pour Travailleurs Salariés (the 'ONPTS'). The question at issue in those proceedings is whether Signor Torri, who is an old age pensioner, is entitled to receive from the Defendant a supplement to his pension by virtue of Article 50 of Council Regulation (EEC) No 1408/71.

It appears, according to what we were told, that this is a test case, Your Lordships' ruling in which will govern also the outcome of a number of other cases at present pending in Belgium.

The facts of this case are these.

Signor Torri, who is an Italian national, was born on 25 October 1909. He worked in Italy from 1924 to 1947 and

in Belgium from 1948 to 1974, when he reached the age of 65, the pensionable age for men in Belgium. He still lives in Belgium. In anticipation of his retirement he lodged a claim with the ONPTS for an old age pension. At that time the information available to the ONPTS and to the competent Italian social seucrity institution, as to the periods for which Signor Torri had worked in Italy, was incomplete. As a result of that his pension rights both in Belgium and in Italy were computed on the footing that he had worked in Italy only from 1926 to 1942 and from 1946 to 1947. On that footing it was calculated that he was entitled to a Belgian pension of FB 132 333 a year and to an Italian pension of Lit 224 250, equivalent to FB 12 970 a year. The total of those two pensions was FB 145 303, an amount which fell short by FB 33 777 of Signor Torri's Belgian 'theoretical amount of benefit' as defined by Article 46 (2) (a) of Regulation No 1408/71, i.e. the amount of the pension to which he would have been entitled in Belgium if all the insurance periods completed by him in Italy and in Belgium had been completed in Belgium. His claim in the proceedings before the Tribunal du Travail is for a supplement of FB 33 777. It is common ground that, in the light of the information now available, the figures will have to be revised, in particular by an increases in his Italian pension to Lit 397 900 and by increases in both his Belgian and his Italian 'theoretical amounts of benefit'. But that does not affect the question of principle on which Your Lordships have to rule, which is essentially one of interpretation of Article 50 of Regulation No 1408/71.

That Article forms part of Chapter 3 of Title III of the Regulation, which relates to 'Old Age and Death (Pensions)' and is also, as Your Lordships know, applicable 'by analogy', in certain circumstances, to invalidity pensions.

The heading and text of Article 50, as replaced by the Act of Accession (Annex I (IX) (1)), are as follows:

'Award of a supplement when the total of benefits payable under the legislations of the various Member States does not amount to the minimum laid down by the legislation of the State in whose territory the recipient is permanently resident

A recipient of benefits to whom this Chapter applies may not, in the State in whose territory he is permanently resident and under whose legislation a benefit is payable to him, be awarded a benefit less than the minimum benefit determined by that legislation for a period of insurance or residence equal to all the insurance periods taken into account for the payment in accordance with the provisions of the preceding Articles. The responsible institution of that State shall, if necessary, pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits payable under this Chapter and the amount of the minimum benefit.

The ONPTS, which is supported in this by the Commission, contends that the reference there to 'the minimum benefit determined by that legislation' points to a minimum benefit prescribed by the legislation of the Member State concerned and that where that legislation does not prescribe any minimum benefit, Article 50 can have no application. In Belgium minimum benefits are prescribed only in the case of invalidity pensions for miners and in the case of old age pensions for frontier and seasonal workers. Signor Torri, having never been a frontier worker or a seasonal worker, cannot therefore, the ONPTS and the Commission submit, claim anything under Article 50.

On behalf of Signor Torri it is contended that, in a case such as his, the minimum benefit referred to in Article 50 is the 'theoretical amount of benefit' calculated under Article 46 (2) (a).

I will say at once that I agree with the ONPTS and the Commission, and that for two reasons.

Firstly, it seems to me that, if the authors of Regulation No 1408/71 had intended Article 50 to have the effect contended for on behalf of Signor Torri, they would have worded it differently. They would have used some such formula as 'the minimum benefit determined by that legislation or, where that legislation prescribes no minimum benefit, the theoretical amount of benefit calculated by the competent institution of that State under Article 46 (2) (a)'.

Secondly, Article 5 of Regulation No 1408/71 includes among the matters to be specified in the declarations to be made by the Member States under that Article (as supplemented by Article 96) 'the minimum benefits referred to in Article 50'. This indicates that the minimum benefits in question are to be ascertained by reference to the legislations of Member States and are not amounts that can be calculated under the provisions of Regulation No 1408/71 itself.

The Commission cited, as supporting that interpretation, its own explanatory memorandum accompanying its original proposal to the Council that led to the adoption of Regulation No 1408/71. But, in my opinion, it is not permissible to resort to that memorandum as an aid to the interpretation of the Regulation, first, because it is unpublished, and, second, because there is no warrant for assuming that the members of the Council, or the authors of the Act of Accession, shared in all respects the Commission's intentions as to the meaning of Article 50.

As Your Lordships know, the declarations made by the original Member States under Articles 5 and 96 of Regulation No 1408/71 were published in consolidated form in the Official Journal (C 12 of 24. 3. 1973, p. 11). Under the heading 'Minimum benefits referred to in Article 50 of the Regulation', Belgium, the Federal Republic of Germany, and the Netherlands all declared 'None'. France, Italy and Luxembourg on the other hand each specified a number of social security benefits which were under their respective legislations subject, in differing circumstances, to minima. The declarations of the new Member States were published in the Official Journal (C 43 of 18. 6. 1973, p. 1). Under the relevant heading, Denmark declared 'None', whilst Ireland and the United Kingdom each specified certain benefits that were subject to minima or at flat rates. On 12 October 1973, in the Official Journal (C 84, p. 7), there was published a corrigendum to Belgium's declaration, whereby 'None' was replaced by 'Invalidity pensions for miners'. On 25 October 1975, in the Official Journal (C 245, p. 2), there was published a 'replacement' of the United Kingdom's declaration, consequent upon the consolidation of the United Kingdom legislation on social security by the Social Security Act 1975. On 14 May 1977 there was published, in the Official Journal (C 89, p. 2), an amendment to the United Kingdom's declaration, which substituted 'None' for the particulars given in the declaration of 25 October 1975. Your Lordships will remember the Commission's comments on that. It is not however a matter of direct relevance in the present case.

What is of interest in the present case is that there is no mention in any declaration made by Belgium of the minima applicable to the old age pensions of frontier and seasonal workers. The ONPTS told us that it was unable to give any explanation of that omission. The minima in question were introduced by a statute of 27 December 1973. This added a new paragraph, paragraph 5, to Article 10 of Arrêté Royal No 50 of 24 October 1967, which is the legislation governing old age and widows' benefits for employed persons in Belgium.

At the hearing before this Court an argument was for the first time put

forward on behalf of Signor Torri to the effect that Article 10 (5) was incompatible with Community law, in particular in that (a) the benefit of it was expressly confined to Belgian nationals and in that (b) it was confined to frontier and seasonal workers. It does seem that, in the first respect, Article 10 (5) is, on the face of it, incompatible with Article 3 of Regulation No 1408/71. But I would not be prepared to hold, on the basis of the incomplete argument we heard, that that provision was incompatible with Community law in the second respect. It appears from what we were told on behalf of the ONPTS that the Belgian Parliament was persuaded that there were valid reasons for treating frontier and seasonal workers differently from others, and it is a fact that Regulation No 1408/71 itself contains a number of special provisions applicable to frontier and seasonal workers. In any case it seems to me that the question of the compatibility of Article 10 (5) with Community law is outside the scope of the questions referred to this Court by the Tribunal du Travail of Liège.

Before I turn to those questions, I should I think mention that, as appears from the Annexes to the written observations lodged on behalf of Signor Torri, the ONPTS has in large part brought the present litigation upon itself, by including in the 'Explanations' printed on the back of the form that it uses in order to notify people of the amount of pension to which they are entitled, and of the way in which that amount has been computed, a paragraph (4) which is so worded as to make it appear that a minimum benefit is prescribed for all cases. It seems indeed that, in some cases (though not in Signor Torri's own case), the ONPTS has recorded the amount of a minimum benefit on the front of the form, even though no such minimum was applicable. The minimum benefit so recorded has sometimes, but not always, coincided with the person concerned's theoretical amount of benefit. It was submitted on behalf of Signor Torri that, if the contentions put forward on behalf of the ONPTS in these proceedings are correct, those confusing practices ought to be discontinued. I agree.

The questions referred to the Court by the Tribunal du Travail are these:

'What is to be understood by 'minimum benefit' within the meaning of Article 50 of Regulation No 1408/71 of the Council where, in the legislation of a Member State, no minimum pension of a fixed amount is known because the calculation of benefits rests on the amount of wage or salary and on the duration of the insurance periods completed?

Does the minimum benefit correspond in that case to the amount of the "theoretical pension" calculated in accordance with the provisions of Article 46 (2) (a) of the Regulation?'

I would answer those questions by saying simply that, where the legislation of a Member State prescribes no minimum benefit, Article 50 of Regulation No 1408/71 does not apply.