employed, had ceased to be in force before the adoption of Regulation No 1408/71, even if that legislation was of a different type from that which is in force at the time when the risk materializes.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 9 June 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 18 MAY 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Raad van Beroep of Amsterdam. The appellant in the proceedings before that Court is Mrs M. Blottner and the essential question in those proceedings is whether she is, by virtue of Community law, entitled to a Dutch invalidity pension. It is clear that she is not entitled to such a pension by virtue of Dutch law alone. The respondent in the proceedings is the Dutch institution which will be responsible for paying the pension to her if she is entitled to it, namely the Nieuwe Algemene Bedrijfsvereniging (New General Trade Association).

Mrs Blottner is a German national. She was born in 1910 in Dresden. She lived and was employed in the Netherlands from 1928 to 1940. She then returned to Germany, where she worked until 1946. She has had no gainful occupation since then. In 1973 she was the victim of an accident, which left her disabled. At present she lives in West Berlin.

Following her accident Mrs Blottner applied to the respondent for a Dutch invalidity pension and to the competent German institution, the Bundesversicherungsanstalt für Angestellte, in Berlin, for a German invalidity pension.

At the time when Mrs Blottner worked in the Netherlands the statute in force there governing the insurance of workers against the risk of invalidity was the 'Invaliditeitswet' (or 'IW') of 5 June 1913. This was what is known in Community jargon as legislation of 'Type B', i.e. it made the amount of benefits dependent on the duration of insurance periods. As from 1 July 1967 the IW was super-

seded by the 'Wet op de arbeidsongeschiktheidsverzekering' (or 'WAO' of 18 February 1966). This, in contrast, is legislation of 'Type A'. The amount of benefits thereunder is independent of the duration of insurance periods. Indeed the WAO has no requirement as to the length of insurance periods even for entitlement to benefit. Entitlement to benefit depends on the worker concerned being subject to the legislation at the time the risk materializes.

The German legislation in point, the 'Angestelltenversicherungsgesetz', is of Type B. The relevance of that is as follows.

Your Lordships will remember that Chapter 2 of Title III of Council Regulation (EEC) No 1408/71, which relates to invalidity benefits, and which consists of Articles 37 to 43 of the regulation, distinguishes between two cases, the first being that of a worker who has been subject only to legislations of Type A and the second being that of a worker who has been subject either only to legislations of Type B or to legislations fo both types.

Article 37 (1) describes legislations of Type A, and Article 37 (2) refers to Annex III in which the legislations of that Type in force in the territory of each of the Member States are listed. The list includes the WAO. The rights to benefit of workers who have been subject only to legislations of Type A are governed by Articles 38 and 39. I need say no more about them.

The rights of workers in the second category are dealt with by Article 40. So far as here material that Article renders applicable 'by analogy' the provisions of Chapter 3, which relate to old-age and death benefits in the form of pensions. Chapter 3 comprises Articles 44 to 51 of the regulation. Of those Articles, two are particularly in point here, namely Articles 45 and 46. Those Articles have fallen to be considered by this Court before, notably in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149. The question at issue here is however quite different from that with which that case was concerned.

Article 45 (1) contains the general rule as to aggregation of insurance periods. As amended by Article 13 (1) of Regulation No 2864/72 (OJ L 306 of 31. 12. 1972) it reads:

'An institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance periods or periods of residence shall take into account, to the extent necessary, insurance periods or periods of residence completed under the legislation of any Member State as though they had been completed under the legislation which it administers.'

Article 45 (2) deals with the case of a worker who has completed insurance periods in an occupation subject to a special scheme or in a specific employment. I need not trouble Your Lordships with the details of it.

Article 45 (3) is the provision on which this case centres. It is as follows:

'Where the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materializes has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any worker who is no longer subject to that legislation shall for the purposes of this Chapter, be deemed to be still so subject at the time when the risk materializes, if at that time he is subject to the legislation of another Member State or, failing this, can establish a claim to benefits under the legislation of another Member State. However, this latter condition shall be

deemed to be satisfied in the case referred to in Article 48 (1).'

(The 'case referred to in Article 48 (1)' is one where the worker concerned has completed insurance periods of less than one year in a Member State and where, under the legislation of that State, no right to benefit is acquired by virtue only of those periods. That does not appear to be Mrs Blottner's case, but I state it because the last sentence of Article 45 (3) is expressly mentioned in one of the questions referred to this Court by the Raad van Beroep).

We were told by the Commission that Article 45 (3) was in fact aimed specifically, and indeed exclusively, at the Dutch legislation making the grant of benefits conditional only on the worker concerned being subject to it at the time of the materialization of the risk. That this is so appears to be confirmed by a declaration of the Council contained in its Minutes of 14 June 1971, when Regulation No 1408/71 was adopted. That declaration was referred to by the Commission in its observations and the text of it was, at the Court's request, supplied to it by the Commission. Counsel for the Commission told us, however, at the hearing that that text, though generally available from the Commission, had not been officially published. So I doubt if, strictly speaking, it can be taken into account in interpreting the regulation. But I hardly think that that matters, because there can be no doubt that the relevant Dutch legislation now in force, namely the WAO, answers the description in Article 45 (3) of making 'the granting of benefits conditional upon a worker being subject to [it] at the time when the risk materializes' and of having 'no requirements as to the length of insurance periods either for entitlement to or calculation of benefits.'

Article 46, Your Lordships remember, deals with the award of benefits. In so doing it distinguishes between the case of a worker who, having been subject to the legislation of a particular Member State, 'satisfies its conditions for entitlement to benefits, without application of the provisions of Article 45 being necessary' and the case of a worker who, in a Member State, 'does not satisfy the conditions for entitlement to benefits unless account is taken of the provisions of Article 45'. The former case is covered by paragraph 1 of the Article, the latter by paragraph 2, under which the process of apportionment is made applicable. Your Lordships remember also that, for the purpose of applying that process, the competent institution of each Member State is required, by paragraph 2 (a), to calculate the 'theoretical amount of benefit' that the worker concerned could claim if all the insurance periods completed by him under the legislations of Member States had been completed under the legislation of that State. Paragraph 2 (a) contains a provision to the effect that in the case of a Member State with legislation of Type A, the amount of benefit thereunder shall be taken as the 'theoretical amount of benefit'.

I revert to the facts of this case.

Initially Mrs Blottner's application to the Bundesversicherungsanstalt für Angestellte for a German pension was rejected. Why it was rejected is not clear, but it seems probable that it was for purely formal reasons. Its rejection, however, resulted in the rejection also by the respondent of her application for a Dutch pension. This was because the respondent took it as showing that she was not 'subject to the legislation of another Member State' or able to 'establish a claim to benefits under the legislation of another Member State', so as to come within the provisions of Article 45 (3). She was not of course entitled to a Dutch pension unless Article 45 (3) applied, since she was not subject to the WAO at the time of her accident.

Against the rejection of her claim to a German pension Mrs Blottner appealed to the Sozialgericht of Berlin and against the rejection of her claim to a Dutch pension she appealed to the Raad van Beroep.

While her appeal to the Sozialgericht was pending the Bundesversicherungsanstalt für Angestellte altered its decision and awarded her a pension as from 1 January 1974. We are told that this was converted into an old-age pension when she attained the age of 65. We are also told that there are further proceedings pending before the Sozialgericht as to the calculation of the amount of the pension, but nothing turns on that.

Upon hearing of the grant to Mrs Blottner of her German pension the respondent re-examined her case and conceded that she was entitled in principle, by virtue of Article 45 (3), to benefit under the WAO. The respondent, however, took the view that she did not in fact qualify for benefit under that legislation because, at the time of her accident, she was not in gainful occupation but worked only in her home, and she was not incapacitated from performing domestic duties to the extent of at least 15 %, which is the minimum required by the WAO (Article 19 (4)). Thus the respondent maintained its refusal to grant Mrs Blottner a pension, and the proceedings before the Raad van Beroep continue.

The reason for the present reference is that, despite the concession made by the respondent, the Raad van Beroep is not satisfied that Article 45 (3) applies to Mrs Blottner.

The difficulty apprehended by the Raad van Beroep is twofold.

First, there can be no doubt, as I have pointed out, that the description at the beginning of Article 45 (3), 'the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materializes' and which 'has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits', is apt to cover the WAO. On the other hand it is not apt to cover the Dutch legislation that the WAO replaced, namely the IW, which, as I mentioned, was of Type B. Mrs Blottner, however, although at one time subject to the IW, was never subject to the WAO. Thus, if the description is to be interpreted as referring, so far as material, to the WAO alone, it cannot be said of Mrs Blottner, that she is 'no longer subject to that legislation', nor can she be 'deemed to be still so subject', so as to satisfy the terms of Article 45 (3). The question is therefore whether the description can be interpreted as referring to the material Dutch legislation from time to time in force, although it was formerly of Type B.

That problem is by no means novel. A similar problem arose under the corresponding provisions of Regulation No 3 and the answer to it was given by this Court in Case 4/66 *Labots* v *Raad van Arbeid, Arnhem* [1966] ECR 425 (Rec. 1966, p. 617). The Court there held that those provisions must be interpreted in the light of Article 51 of the Treaty, one of the purposes of which was to enable a migrant worker to acquire and retain the right to benefit for all periods of work completed by him in various Member States without discrimination as compared with other workers by reason of the exercise of his right to freedom of movement. That purpose would be defeated if by exercising that right, a worker were to lose his entitlement to social security in a Member State in which he had worked.

The structure and wording of the provisions of Regulation No 1408/71 here in question are not quite the same as those of Regulation No 3 that were in question in the *Labots* case. Nonetheless, the competent Dutch social security

institutions have consistently, so we were informed in very helpful observations put in by the respondent, treated the principles underlying the Court's decision in that case as equally applicable in the interpretation of Regulation No 1408/71. Hence the concession made by the respondent in favour of Mrs Blottner once her claim to a German pension had been established.

The second difficulty felt by the Raad van Beroep arises from the terms of the definition of 'legislation' in Article 1 (j) of Regulation No 1408/71. The English text of that reads as follows:

'For the purposes of this Regulation:

...

(j) "legislation" means all the laws, regulations, and other provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2);'

(Article 4 (1) and (2), Your Lordships remember, describe the branches of social security to which the regulation applies).

The English text of Article 1 (j) is in two respects slightly ambiguous, but it is, in those respects, out of line with the texts in the other official languages. Firstly it is clear from the other texts that the word 'laws' should be 'statutes'. The corresponding terms in those texts are: in Danish 'love', in German 'Gesetze', in French 'lois', in Italian 'leggi' and in Dutch 'wetten'. Secondly it is clear from the other texts that the epithets 'present or future' do not qualify only 'other ... implementing measures', for in the Danish, German and Dutch texts those epithets are placed before the collocation of nouns 'statutes, regulations, etc.', whilst in the French and Italian texts they are in the masculine and so cannot qualify only 'mesures' or 'misura'.

Thus, Article 1 (j) may seem to raise a doubt whether the IW, a statute that was no longer in force when Regulation No 1408/71 was adopted, can be within the scope of the term 'legislation' in any provision of that regulation, including Article 45 (3).

The Raad van Beroep has also given consideration to two other ancillary provisions of the regulation.

First: Article 94 (2) which, before it was amended, in a way not here material, by the Act of Accession, read:

'All insurance periods and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before the date of entry into force of this regulation shall be taken into consideration for the determination of rights to benefits under this regulation.'

Second: paragraph 4 of part II ('Netherlands') of Annex V to the regulation, which is headed 'Application of Netherlands legislation on insurance against incapacity for work, and which provides as follows (Part H was originally part F but was relettered by the Act of Accession):

(a) For the purposes of Article 46 (2) of the regulation, periods of paid employment and periods treated as such completed under Netherlands legislation before 1 July 1967 shall also be considered as insurance periods completed under Netherlands legislation on insurance against incapacity for work.

(b) The periods to be taken into account in pursuance of subparagraph (a) shall be considered as insurance periods completed under a legislation of the type referred to in Article 37 (1) of the regulation.'

Your Lordships see that subparagraph (a) in terms applies only for the purposes of Article 46 (2). It does not refer to Article 45. Having regard to that, and to the use of the word 'also' in that subparagraph, the Raad van Beroep wonders whether the subparagraph is not intended to apply only to a worker who has been

subject (for however short a time) to the WAO: whether only such a worker may claim to have taken into account 'also' insurance periods completed by him under the IW. At the same time the Raad van Beroep wonders what significance is to be attached to subparagraph (b), which in effect deems insurance periods completed under the IW to have been completed under legislation of Type A.

The questions referred to the Court by the Raad van Beroep are these:

'1. For the acquisition af a right to benefits on the basis of Article 40 of Regulation (EEC) No 1408/71 payable by an institution of a Member State referred to at the beginning of Article 45 (3) of that regulation — having regard to the backgrond to the adoption of the latter provision — is it sufficient that a worker who is subject to the legislation of another Member State at the time when the risk which was in principle insured against materializes or, if this is not the case, who has a right to benefits under the legislation of another Member State, can establish *only* insurance periods or periods of employment and/or periods treated as such completed by him during the period of validity of the legislation or of a legal provision of the firstmentioned Member State which was not legislation within the meaning of the beginning of Article 45 (3) and which, on the date referred to in Article 94 (2), was no longer existing legislation within the meaning of Article 1 (j) of that regulation, account being taken of the last sentence of Article 45 (3)? (Therefore although he was never subject to the legislation of the firstmentioned Member State within the meaning of the beginning of Article 45 (3)).

2. (a) Must the provision in Paragraph 4 (a) under the heading 'H. Netherlands' in Annex V to the abovementioned regulation be regarded as being relevant not only in applying the sole article mentioned in that provision, namely Article 46 (2), but also, in view of subparagraph (b) of paragraph 4, for the acquisition of a right to benefits under Article 45 (3)?

(b) Or does the abovementioned paragraph 4 (a), in view of the use therein of the word 'also', merely signify that only if a right to benefits payable by the Netherlands institution may be derived from Article 45 (3) on the basis of insurance periods (previously) completed under the Netherlands legislation on insurance against incapacity for work, then, for the purposes of Article 46 (2) of the regulation, not only periods completed under that legislation but also periods of paid employment and periods treated as such completed under Netherlands legislation before 1 July 1967 must be considered as insurance periods completed under the said Netherlands legislation?

My Lords, I do not think that Article 1 (j) has of itself the effect of excluding the IW from the possible scope of the term 'legislation' in Article 45 (3). Four considerations lead me to that conclusion.

In the first place the wording of Article 1 (j) suggests to my mind that its purpose is not to exclude anything from the scope of the term 'legislation' but rather to give to that term a wide definition, comprising every kind of measure, and including future measures. It is to be observed that it does not define the word 'present' by reference to any particular date, whether the date of the adoption of the regulation, or of its publication, or of its entry into force, or any other.

Secondly, I do not think that, in the field of social security at all events, it is

realistic to seek to draw a sharp line between past legislation and current legislation. In most if not all Member States, social security legislation is the subject of frequent alteration, sometimes taking the form of simple amendment, sometimes the form of consolidation, sometimes the form of repeal and re-enactment with amendments, and perhaps sometimes other forms. Where there is alteration, the extent to which what has taken place in the past is relevant for the future varies a great deal. Even in the case of the supersession of the IW by the WAO, we were told that some of the provisions of the latter came into operation in advance of 1 July 1967, namely on 1 September 1966, and that certain transitional provisions remained in operation after 1 July 1967. So I find it impossible to attribute to the authors of Article 1 (j) an intention to draw such a line.

Thirdly, if Article 1 (j) were to be held to mean that past legislation is not 'legislation' for the purpose of Regulation No 1408/71, it would mean that past legislation was not 'legislation' for the purposes of *(inter alia)* Article 94 (2). That would lead to a patent absurdity. It would mean that insurance periods and, where appropriate, periods of employment or residence completed by a worker under the legislation of a Member State before the date of entry into force of the regulation could only be taken into consideration for the determination of his rights to benefits under the regulation if that legislation happened to be current at the date of entry into force of the regulation. Not only would the operation of such a provision necessarily be haphazard, but the authors of the regulation could not even have known when they adopted it what its operation would be, for the regulation was to enter into force on the first day of the seventh month following the publication in the *Official Journal* of the Communities of an implementing regulation which had then yet to be adopted: see Articles 97 and 99. (In the event that implementing regulation was adopted nine months later as Council Regulation (EEC) No 574/72). The Commission suggested that Article 1 (j) might be interpreted as excluding the 'application' of past legislation in any particular case but not as excluding from consideration, in the computation of benefits, insurance periods completed under past legislation. Something of that sort may well be the general effect of Regulation No 1408/71 read as whole, but I do not think that, if so, it stems from Article 1 (j), the succinct wording of which makes no such distinction.

Lastly, I have in mind what was said by the Court of Appeal of England and Wales in *Jobbins* v *Middlesex County Council* [1949] 1 KB 142 to the effect that, in a context such as that of pensions legislation, a definition provision should not, in the absence of compelling language, be interpreted as taking away rights conferred by operative provisions (see in particular per Cohen L. J. at pp. 157/158, per Scott L. J. at pp. 160/161, and per Wrottesley L. J. at p. 163).

Leaving aside for the moment any further consideration of the significance of Article 94 (2), I turn to paragraph 4 of Annex V (H). This is roughly similar to Annex G (III) (B) of Regulation No 3, paragraph (b) of which (relating to benefits for widows and orphans) was the provision mainly in question in the *Labots* case. It is tempting to suggest that the two provisions should be interpreted in the same way, and indeed the Commission does suggest it.

But I do not think that that is possible. Their wording is different, particularly in that Annex G (III) (B) was expressed to apply for the purposes of Articles 27 and 28 of Regulation No 3, corresponding to Articles 45 and 46 of Regulation No 1408/71. To imply in Annex V (H) (4) a reference to Article 45 would I think be doing too much violence to its wording, even having regard to the nexus between Article 45 and Article 46 (2). I therefore think that Annex V (H) (4) applies only for the purposes of Article 46 (2). That is

not however to say that there can be inferred from its terms an intention on the part of the authors of Regulation No 1408/71 to exclude from the benefit of Article 45 (3), and hence of Article 46 (2), a worker who has been subject to the IW but never to the WAO. Annex V (H) (4) seems to me in that respect neutral. Its effect is, in short, that insurance periods completed under the IW by a worker to which Article 46 (2) applies are to be treated as if completed under the WAO. One consequence is that those periods are to be so treated in the computations to be made under Article 46 (2) by the competent institution of a Member State whose own legislation is of Type B: that is what appears to be provided for by subparagraph (a). A second consequence is that those periods are, by virtue of subparagraph (b), to be so treated in the ascertainment under Article 46 (2) (a) of the 'theoretical amount of benefit' by the competent institution of a Member State whose own legislation is of Type A: in particular the 'theoretical amount of benefit' available to the worker concerned in the Netherlands is not to be increased beyond what it is under the WAO by reference to periods completed by him under the IW. There may, as the Commission suggests, be other consequences. But, as I have indicated, none of this, in my opinion, affects the question: when does Article 45 (3) make Article 46 (2) applicable?

In my opinion the answer to that question is essentially one of interpretation of Article 45 (3) itself. The respondent and the Commission are at one in saying that consistency with the principle on which this Court founded its decision in the *Labots* case requires the conclusion that a migrant worker who has been subject only to the IW is as much entitled to the benefit of Article 45 (3) as one who has been subject both to the IW and to the WAO or as one who has been subject only to the WAO. I agree, and I think that Article 94 (2), so far that it goes, also points to that conclusion. Nor do I think that it is a conclusion that strains the words of Article 45 (3). The reference to 'the legislation of a Member State' at the beginning of that provision is, so far at all events as this case is concerned, a reference to the legislation of the Netherlands. The words that follow ('which makes the granting of benefits conditional, etc.') are descriptive of the way that legislation currently operates, but they do not, either expressly or by necessary implication, exclude the possibility that it may formerly have operated differently. The later reference to 'that legislation', in the key phrase 'no longer subject to that legislation', is again, in my opinion, a reference simply to the legislation of the Netherlands: it is not a reference only to that legislation as it operates at present.

I would accordingly answer the questions referred to the Court by the Raad van Beroep as follows:

1. In a case where the legislation of a Member State currently makes the granting of benefits conditional upon a worker being subject to that legislation at the time when the risk materializes and has no requirement as to the length of insurance periods either for entitlement to or for calculation of benefits, a worker who was subject to that legislation only at a time when the conditions for the grant of benefits under it were different is not thereby debarred from acquiring a right to benefit under it on the basis of Articles 40 and 45 (3) of Regulation (EEC) No 1408/71, whether

the change in those conditions was enacted before or after the regulation entered into force;

2. Paragraph 4 of Annex V (H) of Regulation No 1408/71 applies only for the purposes of Article 46 (2) of that regulation and has no bearing on the question whether, in a particular case, that provision itself applies by virtue of Article 45 (3).