OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 12 December 1990 *

Mr President,
Members of the Court,

1. Mr Martínez Vidal, a Spanish national, worked from 1963 until 1979 as a seaman in the service of Netherlands employers.

2. On 29 April 1979 he had to cease work owing to back trouble and he has not resumed work since then. Shortly after the onset of his illness he returned to Spain. At first he received sickness benefit and then, from 25 April 1980, he has been receiving benefit, under Netherlands legislation, for incapacity for work, calculated on a degree of incapacity of 80 to 100%.

3. According to a report of the Instituto Nacional de Seguridad Social (National Social Security Institute, hereinafter 'INSS'), in January 1980 Mr Martínez Vidal was operated on in Spain for a slipped disc. That body kept Mr Martínez Vidal under medical observation and subsequently provided additional reports.

4. By letter of 17 April 1989, the Gemeenschappelijke Medische Dienst (Joint Medical Service, hereinafter 'GMD') summoned Mr Martínez Vidal to the Netherlands to undergo a medical examination.

5. Mr Martínez Vidal did not claim that the state of his health prevented him from travelling to the Netherlands, but he refused to comply with the notice summoning him and instituted proceedings in the competent Netherlands court, asking it to rule that he was not required to return to the Netherlands to undergo a medical examination there.

6. It was in those circumstances that the Arrondissementsrechtbank (District Court), Amsterdam, referred to the Court two preliminary questions, the first of which reads as follows:

'May the institution responsible for payment of invalidity benefits, or the body responsible for carrying out medical examinations, in exercising the power conferred on it by Article 51(1) of Regulation (EEC) No 574/72 to have a person in receipt of an invalidity benefit examined by a doctor of its own choice, summon the recipient from the Member State in which he is staying or residing in order to make him undergo a medical examination in the Member State in which that institution is situated and is the recipient required to comply with the notice summoning him?'

7. The provision referred to is worded as follows:

'When a recipient of benefits, in particular:

(a) invalidity benefits;

* Original language: French.

...

...

...

is staying or residing in the territory of a Member State other than the State in which the institution responsible for payment is situated, administrative checks and medical examinations shall be carried out, at the request of that institution, by the institution of the place of stay or residence of the recipient in accordance with the procedures laid down by the legislation administered by the latter institution. The institution responsible for payment shall, however, reserve the right to have the recipient examined by a doctor of its own choice.'

8. In its judgment of 12 March 1987 in Case 22/86 *Rindone* [1987] ECR 1339, the Court had to answer a question which was essentially identical. It had to be ascertained whether a worker who had *fallen ill* while he was staying in a country other than that of the competent institution responsible for payment could be required to return to the country in which that institution was situated in order to undergo a medical examination there. The provision which fell to be interpreted was Article 18 of the same Regulation, paragraphs 4 and 5 of which provide as follows:

'4. The institution of the place of residence shall subsequently carry out any necessary administrative checks or medical examinations of the person concerned as if he were insured with that institution. As soon as it establishes that the person concerned is fit to resume work, it shall forthwith notify him and the competent institution accordingly, stating the date on which his incapacity for work ceased. Without prejudice to the provisions of paragraph 6, the notification to the person concerned shall be treated as a decision taken on behalf of the competent institution.

5. In all cases the competent institution shall reserve the right to have the person concerned examined by a doctor of its own choice.'

9. In *Rindone* the Court ruled, in respect of paragraph 5, that

'that provision may not be interpreted as meaning that the worker may be required to return to the Member State in which the competent institution is situated in order to undergo there a medical examination when he is unable to work owing to illness. Such an obligation would be incompatible with due concern for the health of the worker. The examination in question can be carried out by the competent institution either by sending a doctor to examine the worker in the Member State in which he resides or by availing itself of the services of a doctor in the latter State' (paragraph 21, pp. 1365 and 1366).

10. I consider that that reasoning is equally valid with regard to the recipient of an invalidity benefit where the journey must be regarded as incompatible with the state of his health.

11. Since, however, in its judgment in *Rindone* the Court based its decision solely on 'due concern for the health of the worker', and not on the objective of Article 18 or the system set up by Regulations (EEC) Nos 1408/71 and 574/72,[1] that

1 — Regulation (EEC) No 1408/71 of the Council 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, and Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the amended version contained in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

judgment does not provide a basis for resolving the problem which arises in a situation where the state of health of a former worker allows him to make a long journey.

12. The Spanish Government and the Commission take the view that it is apparent at once, merely from the wording of Article 51, that the medical examination at issue must be carried out in the State of residence of the worker. For my part, however, I do not think, that the wording of the final sentence of Article 51(1) allows a conclusion to be drawn either way. Moreover, if it was as simple as that, the Court would not have based its decision on a consideration not expressed in that text, namely 'due concern for the health' of the person concerned, when it had to interpret the identical sentence in Article 18 in *Rindone*.

13. For its part, the Arrondissementsrechtbank, Amsterdam, takes the view that the judgment in *Rindone* does not provide an answer to the question raised, because

'the provisions on checks and examinations in Article 51 are less detailed than the rules on medical examinations contained in Articles 18 and 61.[2] Furthermore, Article 51 also departs from Articles 18 and 61 inasmuch as it provides that the examination by the foreign institution is to be carried out *at the request of*[3] the competent institution'.

14. As for the more detailed nature of the provisions of Article 18, I do not consider that that implies that the contrary inference may be drawn in respect of Article 51. I share the view of the Commission that this difference is explained by the fact that the situation referred to in Article 18 and the purpose of the procedure laid down by that provision are completely different. With regard to a person who falls sick while staying in a Member State other than that in which he is insured, it is obvious that a major role must be played by the institution of the country where he is staying, since it is important to have the commencement of the sickness certified as quickly as possible. As the sickness might be of only short duration, it is also necessary that the institution of the country of stay '[should] subsequently carry out any necessary administrative checks or medical examinations of the person concerned', so as not to fail to note the point at which the latter has recovered.

15. Article 51, on the other hand, refers to the case where a person has already been granted an invalidity benefit and it is simply a matter of verifying whether the degree of invalidity has changed one way or the other.

16. Secondly, the court making the reference considers that it is appropriate to attach some significance to the fact that, within the framework of Article 51, the institution of the place of residence of the person concerned carries out administrative checks or medical examinations *only at the request* of the institution responsible for payment of the benefit. Perhaps the Netherlands court takes the view that, if the institution responsible for payment does not request the institution of the country of residence to involve itself, it remains completely free to carry out the checks and examinations as it sees fit, which includes making the person concerned travel to the country where it is situated. On that assumption, the regulation would simply have created an option of which the

2 — Article 61, which relates to accidents at work and occupational diseases, is identical to Article 18.

3 — Emphasized in the original.

institution responsible for payment would be free to avail itself or not.

17. The Commission raises the objection that the inclusion in Article 51 of the words 'at the request' is explained by the occasional nature of the medical examination, which takes place only if the competent institution considers it necessary, taking account of the application of its own legislation, unlike the procedure in Article 18, which calls for the automatic involvement of the institution of the place of residence.

18. That explanation seems to me to be plausible, and I consider, accordingly, that the inclusion of the expression 'at the request' is not capable of settling the dispute.

19. The Commission also argues that

'if the expression "doctor of its own choice" was intended also to refer to a doctor who, on behalf of the competent institution, carried out medical examinations in the State where that institution was situated, Article 51 would doubtless have been drafted differently. It would, no doubt, have indicated that the competent institution may either carry out the examination in its own country, or entrust that examination to the institution of the place of residence. Since Article 51 is not so drafted and does not contain even the slightest indication to that effect, it must be considered that the "doctor of its own choice" cannot mean the competent institution's "own doctor" carrying out the examination in its own country, to which the recipient would thus be required to travel'.

20. In my view, that observation is not convincing. The fact that the text is not drafted as the Commission indicates, but states, on the one hand, that: 'the administrative checks and medical examinations *shall be* carried out . . . by the institution of the place of stay or residence', and, on the other hand: 'the institution responsible for payment shall, however, *reserve the right*' proves, to my mind, that the Council did not intend to establish a set of alternatives, but rather a general rule together with a further option. The general rule (or principle) is that the examination is to be carried out, first of all, by the institution of the country of residence or stay. The further option is that the institution responsible for payment may nevertheless arrange for an examination to be carried out by a doctor of its own choice if, in the light of the report of the first institution, it harbours doubts concerning the degree of invalidity applicable thenceforth. The text leaves open the question of the place in which that examination must take place.

21. Again in connection with the wording of Article 51, another passage in that provision seems to me to be of some significance, namely the fact that the institution of the place of stay or of residence of the recipient is to have the examination carried out 'in accordance with the procedures laid down by the legislation administered by the latter institution.'

22. It is no doubt a result of the fact that the institution of the place of stay or of residence does not necessarily apply quite the same criteria as the institution responsible for payment that the possibility of an examination by the latter was envisaged.

23. The differences in the legislation of the Member States are particularly marked in the area of invalidity. It is sufficient, in that respect, to cite Article 40(4) of Regulation No 1408/71 (the basic regulation), according to which

'a decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislations of these States on conditions relating to the degree of invalidity is acknowledged in Annex V'.

24. That provision does not, of course, apply in the case in point, for two reasons. It is located in Section 2 (of Chapter 2, on invalidity), which deals with the case where workers have been subject either only to legislation under which the amount of invalidity benefit depends on the duration of periods of insurance or residence, or to legislation of that type and of the type referred to in Section 1, that is to say, legislation under which the amount of invalidity benefits is independent of the duration of periods of insurance. The Netherlands Government indicates that its legislation is of the latter type. Furthermore, it appears that, in the case of Mr Martínez Vidal, a pension was granted exclusively on the basis of Netherlands legislation. Secondly, Article 40(4) refers only to an initial finding of invalidity,[4] whereas we are concerned here with the case of subsequent checks and examinations. It is interesting to note, however, that the system established by Regulation No 1408/71 does not provide in all cases for automatic recognition of decisions recognizing the initial state of invalidity taken in another Member State.

25. Incidentally, Article 40(4) of the basic regulation also shows that the judgment in Case 28/85 *Deghillage* [1986] ECR 999, to which reference has been made in this case, is not relevant. That judgment interpreted Article 57(2) of the basic regulation, relating to occupational diseases, which specifically provides for automatic recognition.

26. Let us return, however, to the problem of ascertaining whether the examination may be carried out in the country of the institution responsible for payment.

27. In their observations, the Netherlands Government and the GMD explained the particular features of the Netherlands system for assessing incapacity for work, which includes a comparison between the income earned beforehand and the income which the person concerned could still earn from suitable activities. That income is determined on the basis not only of the health of the person concerned but also of his abilities. The Government of the Netherlands has pointed out that that assessment involves the participation not only of a doctor but also of an employment expert and legal expert in that Member State.

28. The focus of the Court's decision is not, however, the Netherlands situation. It is, in any event, clear that for the institution responsible for payment, which must assess the situation of the person concerned on the basis of its own legislation, the most practical solution consists in summoning the person to make the journey so that it may proceed in the usual way, with the participation of all its experts and with all its equipment at hand.

29. That is not possible in the case of other solutions, namely the delegation of powers

4 — See the judgment in Case 232/82 *Baccini* [1983] ECR 583.

to a doctor established in the country of stay or residence of the person concerned, or the sending of a doctor from the institution to that country. The latter would, moreover, prove very expensive, since the hours spent travelling would have to be added to the expense of the journey.

30. It remains to be ascertained whether the person concerned may derive from Community law a right not to comply with a summons to go to the country where the institution responsible for payment is situated.

31. As the Court has ruled on many occasions, regulations adopted for the implementation of Article 51 of the EEC Treaty must be interpreted in the light of the objective pursued by that article, which is the establishment of the greatest possible freedom of movement for migrant workers within the common market. [5]

32. I do not see why that objective specifically prevents the recipient of an invalidity benefit from 'moving' in order to undergo administrative checks and medical examinations, *provided that his health is not likely to suffer as a result and that he does not have to bear the costs of that journey.*

33. If the Court were to accept the principle that such a duty exists, I do not believe that it would be likely to discourage a person from going to take up employment in another Member State, or to discourage him, should he one day be certified as an invalid in his country of employment, from returning to live in his country of origin. Once it is established that the requirement to undergo an examination at the institution responsible for payment cannot be imposed on an ex-worker in conditions which would be intolerable from a physical or financial point of view, the mere possibility of such an examination could not have a restrictive effect on freedom of movement for workers.

34. However, for the sake of completeness, I propose to proceed to examine whether the principle would fall foul of one of the objectives of the basic regulation, as expressed in its provisions and in the fifth, sixth and seventh recitals. These are worded as follows:

'Whereas the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly social security benefits for workers and their dependants regardless of their place of employment or of residence;

Whereas these objectives must be attained in particular by aggregation of all the periods taken into account under the various national legislations for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits,

5 — See, most recently, the judgment in Case C-105/89 *Ibrahim Buhari Haji* [1990] ECR I-4211, at paragraph 20.

and by the provision of benefits for the various categories of persons covered by the Regulation regardless of place of residence within the Community;

Whereas the provisions for coordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits'.

35. In this case, the principle of the aggregation of insurance periods and that of the payment of benefits in the territory of any Member State other than that in which the institution responsible for payment is situated are not at issue. At the very most, we must ask ourselves whether a question of equality of treatment arises.

36. In the words of Article 3 of Regulation No 1408/71,

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

37. Thus, the principle is that migrant workers must be treated in the same way as the workers of the country of employment, with regard both to advantages and obligations. A migrant worker does *not* therefore have a *right* not to attend for examination to be carried out by the institution responsible for payment in the Member State where it has its seat. However, in order that he should not be penalised by the fact that he has returned to his country of origin, which he may not be prevented from doing, he should not have to bear travelling expenses higher than those which would fall to be paid by an ex-worker living in the country of the institution responsible for payment.

38. In addition, Article 51 of Regulation No 574/72 is intended to avoid where possible the need for him to travel, by providing, essentially, that, in the absence of an express decision to the contrary on the part of the institution responsible for payment, the administrative checks and medical examinations carried out by the institution of the country of residence are to be considered sufficient. Article 51 thus remains highly effective, even if the principle that the person concerned may be summoned to the institution responsible for payment is accepted.

39. It can, moreover, reasonably be expected that such a summons will remain the exception. Thus, it is unlikely that the institution responsible for payment will summon the person concerned if the institution of the place of residence informs it that the 'probable date of [the] end of [a] temporary invalidity' is fairly imminent (Point C.11 of Form E 213) or, on the other hand, when it concludes 'that the person concerned is permanently . . . unfit for work' (Point 5.1 of Part III 'Conclusions' of Form E 213).

As the statements of the Netherlands Government and the GMD have shown, the major problem consists in determining the 'degree of invalidity for any other work with reference to the aptitudes of the person concerned', in respect of which the corre-

sponding space in Form E 213 (Point 3 of Part III 'Conclusions') should not even be completed by the institution of the place of stay if the institution responsible for payment is situated in the Federal Republic of Germany, Ireland, the Netherlands or the United Kingdom.

40. Mr Martínez Vidal has further invoked the right of every invalid to be questioned in his own language. Even if a doctor from the country of the institution responsible for payment went to examine the person concerned in his country of stay, however, the interview with him would have to be conducted through an interpreter if the doctor was not familiar with the language of the person concerned.

41. For all the reasons set out above, I suggest that the Court should answer the first question as follows:

'After it has obtained the report of the institution of the country of stay or residence of the person concerned, the institution responsible for payment of an invalidity benefit — or the authority responsible for having the medical examination carried out — may, when availing itself of the right provided for in Article 51(1) of Regulation (EEC) No 574/72 to have the recipient of an invalidity benefit examined by a doctor of its own choice, summon the recipient of an invalidity benefit to the Member State of the institution responsible for payment in order to undergo there a medical examination. The recipient is required to comply with that summons, provided that it is established that he is fit to make the journey without impairment of his health and that he does not have to bear the travel and accommodation expenses.'

The second question

42. The second question is drafted as follows:

(2) (a) Does it make any difference for the purposes of the answer to Question 1 whether it appears that the recipient is capable of travelling without damaging his health to the Member State in which the institution responsible for payment of the benefit, or the body responsible for carrying out medical examinations, is situated?

(b) Does it matter for the purposes of the answer to Question 2(a) whether ability to travel is established by the institution of the place of stay or residence or by the institution responsible for payment of the benefit or body responsible for carrying out medical examinations?

43. The answer to part (a) of the second question may be found in the proposed reply to the first question.

44. With regard to the answer to be given to part (b) of the second question, it should be noted that the Governments of Germany and the Netherlands, the Commission and the GMD accept what is dictated by common sense, namely that the fitness of the person concerned to make the journey must be established without his having to travel to the country of the competent institution. I should add that Form E 231 in any event includes a heading C.7 under which the doctor must indicate whether the person concerned is 'completely unfit to travel'.

45. However, if the institution responsible for payment wished to send a doctor to verify the accuracy of the determination made in that respect by the institution of the country of stay or residence, it should not be denied that right. In order to cover that eventuality as well, I suggest that the Court should give the following answer:

'The fitness of the person concerned to make the journey must be established in his country of stay or residence.'

Conclusion

46. The suggested replies are thus as follows:

'(1) After it has obtained the report of the institution of the country of stay or residence of the person concerned, the institution responsible for payment of an invalidity benefit — or the authority responsible for having the medical examination carried out — may, when availing itself of the right provided for in Article 51(1) of Regulation (EEC) No 574/72 to have the recipient of an invalidity benefit examined by a doctor of its own choice, summon the recipient of an invalidity benefit to the Member State of the institution responsible for payment in order to undergo there a medical examination. The recipient is required to comply with that summons, provided that it is established that he is fit to make the journey without impairment of his health and that he does not have to bear the travel and accommodation expenses.

(2) The fitness of the person concerned to make the journey must be established in his country of stay or residence.'