OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 9 MARCH 1977 [1]

Mr President,
Members of the Court,

1. The matter to be settled in the present case is in substance as follows: when a national of a Member State has acquired the right to social security benefits from an insurance institution in another Member State in respect of employment outside the geographical limits of the Community in a territory which was then associated with the Community and which now enjoys independence, is it in accordance with Community law that payment of the benefits is made dependent on residence within the territory of the State responsible for payment? The problem is analogous to that which the Court must consider in Case 79/76, *Fossi,* on which Mr Advocate-General Warner yesterday delivered his opinion; but it must be stated from the outset that there are also important differences between the facts of the two cases.

The proceedings concerning the substance of the case which gave rise to the questions of interpretation submitted to the Court of Justice were instituted before the Tribunal du Travail, Brussels, by an Italian national who worked in the Belgian Congo from 12 July 1952 to 13 May 1960 for the undertaking Bécéka-Manganese. The ill-health which obliged him to leave his employment and return to Italy entitled him to the grant, from 18 August 1960, of an invalidity allowance under the Belgian Colonial Decree of 7 August 1952 governing the mandatory sickness and invalidity insurance of colonial employees (the scheme was financed by contributions from employees and employers). It must nevertheless be emphasized that Article 2 (2) of that decree stipulated that a recipient of the allowances provided for in the decree must have his actual and habitual residence in Belgium, the Belgian Congo, Ruanda-Urundi or in a country with which a reciprocal agreement had been concluded, unless the Fonds Colonial d'Invalidité had authorized him temporarily to leave his place of residence for reasons of health.

In view of the fact that the Congo was to attain its independence on 30 June 1960, Belgium assumed, by a Law of 16 June 1960, the responsibility of maintaining the social security institutions previously set up in the overseas territories, guaranteeing, *inter alia,* payment of the benefits provided for by the abovementioned Colonial Decree of 7 August 1952 in respect of rights acquired before 1 July 1960 on the conditions fixed in the provisions applicable to those territories when the law entered into force. Thus the said condition relating to residence was also confirmed without reservation. Since Mr Bozzone continued to reside in Italy, a country with which Belgium had not concluded any reciprocal agreement, the Fonds Colonial d'Invalidité ceased paying him the invalidity allowance after 1 February 1961.

It was only six years later, on 7 February 1967 to be precise, that the person concerned applied to the Office de Sécurité Sociale d'Outre-Mer (the Overseas Social Security Office) in Brussels, which had been substituted in the meantime for the Fonds Colonial d'Invalidité pursuant to the Belgian Law of 17 July 1963 on overseas social security, asking for the resumption of payment of his invalidity pension. He founded his claim, wrongly, as it seems,

1 — Translated from the Italian.

on the Royal Decree of 16 November 1966 which extended to the nationals of the Member States of the EEC certain of the benefits of the said Law of 17 July 1963 on overseas social security. By a decision of 21 March 1967 the Belgian institution decided in favour of Mr Bozzone's request and granted him from 8 February 1967 the advantages provided by the decrees concerning the sickness and invalidity insurance of employed persons in the Congo and Ruanda-Urundi for a six-monthly period which was subsequently extended at six-monthly intervals until 31 December 1973.

According to the declaration made by the Belgian institution in the course of these proceedings it granted the application of the worker in question in order to avoid discrimination against the latter in comparison with nationals of the Member States of the EEC who had worked in overseas territories after 1 July 1960 because the said Law of 17 July 1963 provided for a derogation in their favour from the condition concerning residence. The social security institution also based its decision on the fact that the Belgian legislature was then also considering whether it was appropriate to extend that derogation to cover in addition benefits in respect of insurance periods completed overseas before 1 July 1960, which, as has been said, were guaranteed by the Law of 16 June 1960.

Nevertheless, as a result of pressures brought to bear by the Belgian Cour des Comptes the insurance institution was obliged once more to terminate Mr Bozzone's invalidity benefit from 1 January 1974, on the ground that he continued to reside in Italy and that it was thus impossible to consider that such residence was temporary within the meaning of the abovementioned Article 2 of the Belgian Colonial Decree of 7 August 1952.

The insured person objected to this decision before the Tribunal du Travail, Brussels, maintaining that that provision gives rise to discrimination contrary to the EEC Treaty. He relied in particular upon the first subparagraph of Article 10 (1) of Regulation No 1408/71 of the Council of 14 June 1971 which lays down that invalidity cash benefits acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

The defendant social security institution objected that the Community provisions apply exclusively to the metropolitan territories of the Member States and observed that when the EEC Treaty entered into force the Belgian Congo formed part of the associated territories and retained that status during the time that the plaintiff continued to work there. It then added that no convention relating to freedom of movement for workers between that territory and the Community within the meaning of Article 135 of the EEC Treaty had been concluded. According to the defendant, all this leads to the conclusion that, since the relevant Belgian social security scheme relates exclusively to workers employed in an overseas territory it cannot come within the scope of the Community rules relating to social security for workers.

In its decision making the reference, the Tribunal du Travail, Brussels, criticized certain of the defendant's statements and noted that the said Article 135 refers to freedom of movement for workers from associated territories within the territory of the Member States and vice versa, whilst the present case relates to an Italian national residing in a Member State. The Belgian court also wonders whether, in the absence of a specific reciprocal agreement between Belgium and Italy, the EEC Treaty might not constitute an agreement of this nature for

the purposes of Article 2 (2) of the said Colonial Decree of 7 August 1952.

At any rate, the said Tribunal complied with the request of the Ministère Public and submitted, pursuant to Article 177 of the EEC Treaty, the following preliminary questions to the Court of Justice:

'1. Is the first subparagraph of Article 10 (1) of Regulation No 1408/71, concerning the waiving of residence clauses, applicable to a recipient of benefits acquired in respect of employment exclusively in an associated territory when such recipient, who is a national of a Member State, resides in the territory of a Member State other than that which is responsible for payment of the social security benefits in respect of employment in the said associated territory? In other words, is Article 2 (2) of the Colonial Decree of 7 August 1952, as amended by the Colonial Decree of 2 July 1956, contrary to the provisions of Regulation No 1408/71 in that it requires actual and habitual residence in Belgium, the Belgian Congo, Ruanda-Urundi or in a State with which a reciprocal agreement has been concluded?

2. Is it necessary to consider a worker employed in an associated territory and at the same time subject to specific legislation enacted by one of the Member States with regard to that territory and the persons employed in it, in this case the Colonial Decree of 7 August 1952, as a worker who is or has been subject to the legislation of one or more Member States within the meaning of Article 2 (1) of Regulation No 1408/71?'

2. I consider that the second question logically takes precedence, in that it relates to the interpretation of a rule prescribing one of the general conditions for the application of Regulation No 1408/71. Article 2 of that regulation is indeed entitled 'Persons covered' and paragraph (1) provides that the regulation shall apply to 'workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States ...'.

The provision of Article 10 to which the first question refers presupposes that the regulation is applicable and on that assumption residence cannot be taken as a condition for the enjoyment of the benefits acquired. On the other hand, the concept of 'benefits ... acquired *under the legislation of one or more Member States*' contained in Article 10 (1) is inseparably linked to the concept of 'workers ... subject to the legislation of one or more Member States' referred to in Article 2 (1).

The essential question of interpretation thus consists in establishing the scope of the concept of 'legislation of a Member State' employed by both of the said provisions. According to the form given by the Belgian court to its second question the point to be established is whether an essentially legislative measure, enacted by the competent authority of a Member State at a time when the latter held an overseas territory as a colony (in this case the Colonial Decree of 7 August 1952) falls within the framework of 'legislation of a Member State'. However, this approach seems to me too narrow: it must be broadened, in view of the fact that, even before the emergence of a new independent State on the territory of the former colony of the Congo, Belgium provided by a 'metropolitan' law, the said Law of 16 June 1960, that one of its own institutions should undertake the duties relating to social security under the Colonial Decree of 7 August 1952. Whilst it is true that this important circumstance cannot be disregarded, the scope of the problem is rather wider: when the entitlement of an insured person to an insurance benefit is governed by a measure of colonial legislation and has subsequently been

confirmed by a measure of metropolitan legislation placing the corresponding obligation on a former colonial institution which has been maintained within the metropolitan system, does this fall within the scope of the legislation of a Member State?

For the purposes of interpreting the term 'legislation' account must be taken of Article 1 (j) of Regulation No 1408/71: it states that this term '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)'. The provision proceeds to explain that in principle the provisions of industrial agreements remain excluded. This rule cannot throw a great deal of light on the problem in question: it is obvious that all measures of a substantially legislative nature, that is, capable of regulating in general social security matters and not arising from union agreements must be embraced by the term 'legislation', and it cannot be doubted that the nature of the Colonial Decree of 7 August 1952 is substantially legislative.

The fourth recital of the preamble to Regulation No 1408/71 is more relevant to this matter: there it is stated that 'the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the regulation applies to all nationals of Member States insured *under social security schemes for employed persons*'. This recital stresses the social security schemes of the various Member States and thus emphasizes by implication the fact that in this matter an institution of a Member State charged with the supervision of a social security scheme (or any part of such scheme) has obligations whatever the nature of the legislative measure which brought those obligations into being or ensures their continuance.

In view of these factors I consider that the question, whose terms I have explained above, must be answered in the affirmative. At the time when the Colonial Decree of 7 August 1952 was enacted it did not come within the legal system of the Congolese State, which indeed did not exist, but within the framework of the Belgian colonial system; that is, a legal system based on the Belgian system and controlled by Belgian authorities. The institution to which the social security contributions were paid was set up within the framework of that system at the instance of the authorities of the Belgian State. However, at the date when the invalidity pension was awarded to Mr Bozzone the obligation to pay that pension had already been taken over by a Belgian institution which, although originating as a colonial institution, continued to operate within the legal system of metropolitan Belgium on the basis of an ordinary law of that State.

I must now add some considerations on the purpose of that law in the context of the events which took place on the termination of the colonial legal system in the Congo. In general terms, it must be stated that two kinds of effect are produced on the termination of any colonial legal system through the attainment of independence by the territory in which that system operated: within the system of the new State, which, because it is newly created, has a discretion regarding the recognition of previously established relationships, with the exception of certain disputed international obligations, and within the system of the State which headed the colonial administration of the territory. In the case of the Belgian Congo the new State, today known as Zaïre, rescinded the Belgian colonial social security system as from 1 July 1960. It would be interesting to consider whether under international law the Belgian State was obliged, in this situation, to undertake the obligations entered into with regard to foreign citizens by social

security institutions under public law which it had itself set up and operated in the former colony when the authorities of the new State failed to assume those obligations, in particular in view of the compulsory nature of the insurance system, based on contributions, established and controlled by legislative measures of the Belgian colonial authorities.

Consideration of this problem is however rendered unnecessary by the fact, which I have already noted several times, that the Belgian State of its own volition enacted the Law of 16 June 1960, a law promulgated, and I emphasize this again, even before the Congo attained its independence. The fact that, when by that law Belgium undertook social security obligations, this undertaking was said to be in the nature of a guarantee does not alter the real nature of its legal scope with regard to insured persons. In fact the law in question was intended to provide insured persons with a guarantee that the transformation of the territory in which they had worked from the status of a colony to that of a sovereign State would not entail any modification to their disadvantage in the application of the social security system set up by the said Colonial Decree. The social security institutions established for the colonies were to continue to operate on behalf of the Belgian State even after the former colonial territories had attained their independence. In this way the national legislature ensured, at any rate with regard to the settlement of situations prior to 1 July 1960, that the social security legislation adopted by Belgian authorities in respect of a territory then subject to Belgian rule would continue to have effect with regard to recipients of social security benefits.

At the financial level, all the funds of the pre-existing colonial social security institutions which Belgium was able to save from confiscation by Zaïre (amounting to approximately 40 % of the total colonial funds) were paid into the Office de Sécurité Sociale d'Outre-Mer. This indicates the economic continuity, in addition to the legal and political continuity, marking the relationship between Belgium and recipients of social security under the colonial system.

3. Another aspect of the problem nevertheless calls for careful consideration. The social security system based on the Colonial Decree of 7 August 1952 and on the Law of 16 June 1960 concerns employment in overseas territories (the former Belgian colonies of the Congo and Ruanda-Urundi). Is this sufficient to modify the conclusions which we reached through analysis of Article 2 (1) of Regulation No 1408/71?

Indeed the Belgian social security institution maintains that entitlement to social security benefits acquired in respect of employment outside the territory of the Community cannot come within the scope of that regulation. The institution recognizes that this limitation is not expressly stipulated in the Community provisions but maintains that it is inherent in the system and objectives of the Community rules.

The first argument adduced in support of this view is that, as is shown by Article 227, the EEC Treaty does not apply in its entirety to the Belgian Congo, only Part four on the Association of the Overseas Countries and Territories (Articles 131 to 136). In connexion with freedom of movement for workers of the Member States in such countries and territories, Article 135 refers to subsequent agreements which, in the case of the territory which constituted the Belgian Congo, have never been concluded.

It is easy to reply to this finding that the matter submitted for interpretation by the Court of Justice does not concern the right of freedom of movement for Community workers in the overseas countries and territories but is of a more restricted nature. It simply concerns the position of those who, having worked in

one of those territories, have been granted under the legislation of a Member State a right to benefits from a social security institution forming part of the legal order of that State. In connexion with that right there arises the question which I asked at the beginning of my opinion, namely whether the State may render such a right conditional upon residence in its territory.

I consider that the reply is not affected by the fact that Articles 48 to 51 of the Treaty of Rome on freedom of movement for workers are inapplicable to relations between the Community and the Belgian Congo. I think it is possible to disregard this fact when considering whether the Community rules on social security (and in particular the abovementioned provision contained in the first subparagraph of Article 10 (1) of Regulation No 1408/71) are applicable to the case where national legislation renders a Member State responsible for payment of social security benefits in respect of employment in a colonial territory under a social security system established by that State in that territory.

Nevertheless, the Belgian social security institution takes a different view and endeavours to relate the matter under discussion to the problem of the scope of the rules on freedom of movement for workers, adopting as its basis the objectives of the Community rules on social security for workers. The Belgian institution emphasizes that those rules were introduced in order to promote the free movement of workers between Member States and to ensure that persons moving within the Community are not placed at a disadvantage with regard to social security matters in comparison with workers employed exclusively in the territory of a single Member State. Thus, since the provisions on freedom of movement for workers apply exclusively to the metropolitan territories of the Member States it would be in accordance with the said objectives of the rules on social security to maintain that the worker can claim the benefit of those rules only in respect of employment in the said territories. The same train of thought forms the essential basis both of the argument advanced by Mr Advocate-General Warner in his aforementioned opinion of yesterday in the *Fossi* case and of that put forward by the Commission in that case, in contrast to the attitude which it has adopted in the present case.

4. In the past there have been no clear decisions on this particular point.

The Commission refers to the judgment of 22 March 1972 in Case 80/71, *Merluzzi* ([1972] ECR 175 *et seq.*), which it cites in this case in support of the view that the Community rules are applicable to rights in respect of social security benefits acquired on the basis of employment outside the Community. In the case cited the question was raised, *inter alia*, whether a worker, through his employment in Morocco when it was a French protectorate, might consider himself to have been subject during that period to French legislation (for the purposes of Section IV B of Annex G to Regulation No 3, as amended by Regulation No 419/68 of the Council, laying down the conditions for the application to nationals of the other Member States of the French Law of 10 July 1965 granting to French nationals who are or were employed abroad the option of joining a voluntary old-age insurance scheme). The Court of Justice held that in that case this constituted a point of interpretation of national law which was accordingly outside its jurisdiction. Nevertheless, it may be maintained on the basis of the *Merluzzi* judgment that the Court of Justice did not consider incompatible with Articles 48 to 51 of the EEC Treaty the view that the Community rules on social security should be applied to the laws of Member States which confer social security benefits in respect of employment outside the Community.

More positive information may be derived from the judgment of the Court

of Justice of 8 April 1976 in Case 11/75, *Sécurité Sociale de Nancy* v *Hirardin* ([1976] ECR 553): in that judgment the Court held on the basis of Articles 48 to 51 of the EEC Treaty that in France nationals of other Member States may not be denied an advantage consisting in taking account of insurance periods completed in Algeria in calculating old-age pensions.

As the Court is aware, Algeria, before attaining its independence, was much more closely linked to metropolitan France than the Belgian Congo was to Belgium. Accordingly, Annex A to Regulation No 3 of the Council concerning social security for migrant workers provided that for the purposes of the regulation Algeria formed part of French territory, despite the fact that Article 227 (2) of the Treaty, which provided for the application to Algeria of a great many of the rules of the common market, did not include those relating to freedom of movement for workers.

It is interesting to note that in the reasoning adopted by the Court in *Hirardin* it was not Annex A which played a decisive part (the Court of Justice refers to it at the end of its judgment to supplement its reasoning), but the more general principle of equal treatment for workers, stemming from Articles 48 to 51 of the Treaty, which is applicable to all nationals of Member States in relation to the enjoyment of insurance benefits conferred upon them under their national legislation.

In *Hirardin* this principle ensured the absence of discrimination on the basis of nationality. In the present case could it bring about the prohibition of the discriminatory condition regarding residence, even though there is no provision for the Congo such as that in the said annex in relation to Algeria? It seems to me that it may have this effect, without thereby extending the territorial scope of Regulation No 1408/71, merely by conceding that the said principle of equal treatment for workers is applicable, regardless of the State where the worker resided within the Community, to all workers upon whom the legislation of a Member State confers rights to social security benefits arising within the framework of a social security scheme established by that State.

It should further be noted that the judgment in *Hirardin* extended the enjoyment of the advantages provided for by a national law to persons to whom they would have been completely denied because of a restriction established by that law. In the present proceedings the plaintiff in the main action, who has acquired the right to an invalidity allowance in accordance with Belgian law, merely has in view the removal of a hindrance, which is by its nature variable (the condition of residence), set up by that law to the enjoyment of his right. Even though the discrimination constituted by this hindrance is formally based on residence, in practice it affects first and foremost non-Belgian workers and thereby in addition represents what is in substance discrimination based on nationality.

5. It is indeed true that the Community system of social security was envisaged in terms of freedom of movement for workers within the Community and not between the Community and non-member countries. The promotion of freedom of movement within the Community is undoubtedly the objective in view of which Regulation No 1408/71 is concerned to protect persons changing their place of work from one Member State to another, by ensuring that they do not lose the rights to social security benefits which they have already acquired in relation to one Member State. However, from this it is possible to infer only that it would not be in accordance with either the letter or the spirit of that system to extend it to cover social security benefits which a worker has acquired in relation to a non-member country.

Precisely in view of the objectives of the Community rules on social security I

have recently had occasion to recall in my Opinion in Case 75/76, *Kaucic*, the view taken by the Court of Justice (expressed in its judgment of 16 November 1972 in Case 16/72, *Ortskrankenkasse Hamburg* [1972] ECR 1141) that Community law does not require Member States to take into account insurance periods completed in third countries, although it does not prevent such periods from being recognized in a Member State (for example under a bilateral convention concluded by that State with the third country).

However, in the present case the right to social security benefits upon which the plaintiff relies in the main action arose with regard to a Belgian institution established and governed by Belgian law. It seems to me that this clearly distinguishes the problem of interpretation which we must solve from that with which the Court of Justice was concerned in the said Case 16/72.

If, despite this close connexion, which has existed from the outset, between the right to social security benefits and the Member State responsible for payment, we refuse to accept that Regulation No 1408/71 applies for the sole reason that the employment upon which that right is based was exercised outside the territory of the Community, the same conclusion must be reached with regard to a worker who is a national of a Member State and who was employed partly outside the Community for an undertaking having its head office within the Community whilst maintaining his affiliation to the social security system of the country in which the undertaking has its head office. Such a consequence would, however, clearly be at odds with modern requirements inherent in the operations of the undertaking and in the protection of the rights of the worker.

I therefore maintain that in order to define the scope of Regulation No 1408/71 decisive weight should be conferred, not upon the criterion of the locality where the person was employed, but on the criterion of the relationship between the worker, wherever he was or is still employed, and the social security organization of a Member State.

I must however emphasize that the view which I have put forward does not imply that the Community provisions on social security are to be regarded as applicable to the case of workers moving from the Community to non-member countries. In fact, it does not mean that the benefit of the Community rules is extended to insurance periods completed under the social security system of a non-member country but merely that decisive weight is given to the fact that the insurance periods were completed within the framework of a social security scheme established by a Member State.

6. It remains to say a few words about Article 10 (1) of Regulation No 1408/71. That provision is intended to ensure that the worker, by moving his residence from one Member State to another, does not risk losing the rights to social security benefits which he can claim under the social security system of a specific Member State.

If we disregard the present case, in which the insured person has suffered 100 % invalidity, and bear in mind the fact that a question of principle is to be solved on the basis of a single criterion which is intended to have effect with regard to all types of social security benefit (including, indeed, those in respect of workers who are still capable of working), it must be recognized that the restrictive condition regarding residence in relation to enjoyment of a social security benefit paid by a Member State is capable of hampering the mobility of workers within the common market. This is the explanation for the prohibition of that condition, laid down in the said Article 10 (1).

In this connexion it may be noted that when the Community legislature wished to make provision for a condition regarding residence, within the

framework of internal legislation guaranteeing social security benefits to insured persons who work in a territory outside the Community, it adopted appropriate provisions. This is so in the case of the German legislation referred to in Annex G I A (2) to Regulation No 3 of the Council, as amended by Regulation No 130/63 of the Council of 18 December 1963, and Annex V B (1) (b) to Regulation No 1408/71. I should like to add that no provision of this nature would have been necessary if the Community authorities had considered that the sole fact of having worked outside the Community was a sufficient reason for excluding the application of the Community provisions on social security.

The correct view, then, is that if the State responsible for payment renders the award or payment of social security benefits conditional upon the permanent residence of the recipient on its territory it thereby imposes an unduly restrictive and in substance discriminatory condition, incompatible with the Community system which permits workers to 'export' to other Member States specific rights, including the right to an invalidity pension. Such a restrictive condition is also unlawful, for the reasons set out regarding the scope of Regulation No 1408/71, when the right to the benefit was acquired under the legislation of a Member State on the basis of an occupation pursued in a territory outside the Community.

7. I accordingly conclude by suggesting that the Court of Justice should reply to the questions submitted by the Tribunal du Travail, Brussels, to the effect that a national of a Member State who was employed in a territory outside the Community when that territory was covered by the colonial legislation of another Member State and who was, as a result, subject to a social security scheme pursuant to which a public institution of the latter State is now responsible for payments to insured persons, should be considered as a worker who has been subject to the legislation of a Member State, within the meaning of Article 2 (1) of Regulation No 1408/71; accordingly, the effects referred to in Article 10 (1) of Regulation No 1408/71 obtain, in particular with regard to the absolute nature of the prohibition upon the rendering of social security benefits conditional upon residence within the Member State responsible for payment.