OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 7 May 1987 *

Mr President,
Members of the Court,

1 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has requested the Court for a preliminary ruling following an appeal lodged by the Bestuur van de Sociale Verzekeringsbank (Board of the Social Insurance Bank, hereinafter referred to as 'the Board') in a dispute between the Board and Mr and Mrs de Rijke. The question concerns the interpretation of Annex VI, Part I (since 1 January 1986, Part J), Point 2 (c) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. [1]

2. In accordance with Article 89 of the regulation, Annex VI contains special procedures for applying the laws of certain Member States, including, in Point 2 of Part I, the Netherlands Algemene Ouderdomswet (Law on general old-age insurance, hereinafter referred to as 'the old-age law').

3. The Hoge Raad wishes to know whether the fact that certain periods are, by virtue of Point 2 (c) of the Annex, to be regarded as periods of insurance in respect of a married woman whose husband is entitled to a pension under the old-age law confers upon that woman a right, enforceable against the competent Netherlands institutions, to be regarded and treated as having been insured under the old-age law during those periods, even if they do not constitute periods of insurance for the purposes of the old-age law and the national provisions implementing it.

4. Since Point 2 of Part I of Annex VI was recently the subject of two judgments of the Court dated 25 February 1986 (Case 254/84 *de Jong* v *Bestuur van de Sociale Verzekeringsbank* [1986] ECR 671, at p. 676, and Case 284/84 *Spruyt* v *Bestuur van de Sociale Verzekeringsbank* [1986] ECR 685, at p. 693), I do not propose to set out in detail either the Netherlands legislation at issue or the relevant Community provisions.

5. Nevertheless, in order to make my opinion understandable, I need to summarize the way in which those provisions were applied to Mr and Mrs de Rijke.

6. Mr and Mrs de Rijke are both Netherlands nationals who lived in the Netherlands continuously until 2 July 1978, when they moved to France.

7. When he reached the age of 65 on 14 July 1981, the Board granted Mr de Rijke pursuant to the old-age law a full married man's old-age pension. He therefore enjoyed on his own and his wife's behalf the transitional benefits introduced to take account of the fact that the old-age law did not enter into force until 1 January 1957 and the fact that consequently persons having reached the age of 15 years before that date would theoretically have had the maximum rate reduced, as provided for in Article 10 of the old-age law.

* Translated from the French.

1 — In the original version of the regulation (Official Journal, English Special Edition 1971 (II), p. 46), the provision in question was Point 2 (c) of Part F of Annex V.

8. Since Mr de Rijke, as the recipient of a benefit awarded to him before his departure for France under the Netherlands law on insurance against incapacity for work (Wet op de Arbeidsongeschiktheidsverzerkering), remained compulsorily affiliated to the scheme established by the old-age law, he himself was covered by the provisions of the Royal Decree of 20 December 1956, adopted on the basis of Article 45 of the old-age law, which treats certain periods of residence spent outside the Netherlands as periods of residence completed in that country.

9. As far as his wife was concerned, the Board considered that her insurance under the old-age law ceased on her departure for France, but it took into account the period from 2 July 1978 (when she left the Netherlands) to 14 July 1981 (the 65th birthday of her husband) pursuant to Annex VI, Part I, Point 2 (c) of Regulation (EEC) No 1408/71.

10. On 25 May 1981 Mrs de Rijke applied to remain insured on a voluntary basis under the old-age law for the period from 14 July 1981 to 6 July 1984 (the date of her 65th birthday). If that application were approved, Mrs de Rijke would, in the event of her husband's death, be entitled to take advantage of the same provisions of the Royal Decree of 1956. It would also eliminate the unfavourable consequences for Mr and Mrs de Rijke which seem to be the necessary result of their moving to Monaco on 15 October 1982. In this reference for a preliminary ruling it is not necessary to take a view on the reasons which may have prompted Mrs de Rijke to submit her application, or on the problems which may arise from the fact that Mr and Mrs de Rijke ultimately settled in a territory to which the Treaty provisions on freedom of movement for workers probably do not apply. I merely note that the application was submitted prior to their departure.

11. Pursuant to Article 1 of the Royal Decree of 22 December 1971 on voluntary affiliation under the old-age law and the law on general insurance for widows and orphans (Algemene Weduwen- en Wezenwet), an application for voluntary affiliation must be submitted within one year of the date on which the compulsory insurance of the person concerned came to an end.

12. The essential question which arises in this case is whether that period began to run:

(i) on 2 July 1978, the date of Mrs de Rijke's departure for France, whereafter she ceased to be insured under Article 6 of the old-age law (as the Board maintains), or

(ii) on 14 July 1981, the date of Mr de Rijke's 65th birthday, whereafter she could no longer rely on Point 2 (c) of Part I of Annex VI to Regulation No 1408/71 (as the Centrale Raad Van Beroep held in its decision against which the Board has appealed).

13. Set in that factual context, the question which the Hoge Raad has referred to the Court is, in effect, whether the period between those two dates, which is to be (and was) taken into account as a period of insurance under Annex VI to Regulation (EEC) No 1408/71 for the purpose of calculating Mr de Rijke's pension must consequently also be regarded as a true insurance period under the old-age law.

14. The Board, the Netherlands Government and the Commission, which are the only parties to have submitted written observations in the present

proceedings before the Court, all consider that the Court has already answered that question by implication in the aforesaid judgment of 25 February 1986 in Case 254/84 *de Jong* v *Bestuur van de Sociale Verzekeringsbank.*

15. For my part, however, I am not wholly convinced that in *de Jong* the Court truly defined its position on the legal nature of the period referred to in Point 2 (c) of Annex VI. My view is rather that the Court was solely concerned to prevent the combined effect of the national transitional rules and Point 2 (c) from enabling an individual to benefit from those national transitional rules in respect of periods for which neither the conditions governing the national scheme nor those laid down by Community legislation (in this case, Point 2 (c)) are fulfilled (see paragraphs 10 and 16 of the *de Jong* judgment).

16. However, I consider that the essence of the Court's reasoning in the *de Jong* case is also applicable in this case.

17. The Court first recalled that it had previously ruled that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme, provided always that in this connection there is no discrimination between nationals of the host State and nationals of the other Member States. [2]

18. The conditions of affiliation include questions relating to its termination. [3]

19. The Hoge Raad is quite familiar with that case-law of the Court and asks in its second question whether that principle also applies in a case such as Mrs de Rijke's.

20. In my opinion, the answer to that question must be in the affirmative. Reference should therefore be had to the Netherlands legislation in order to determine whether, after moving to another Member State, Mrs de Rijke remained compulsorily affiliated to the scheme created by the old-age law, whether she ceased to be so affiliated, or the conditions under which she could have remained affiliated on a voluntary basis.

21. Regulation (EEC) No 1408/71 could not therefore be relevant in this regard unless it could be regarded as having supplemented the provisions of Netherlands legislation governing the termination of compulsory affiliation.

22. The idea that a Community regulation might have such an effect is, of course, a startling one. However, it has to be considered because the situation in this case is quite special. Annex VI is an integral part of a directly applicable Community regulation and is entitled 'Special procedures for applying the legislations of certain Member States'. Annex VI therefore has a somewhat hybrid character. Thus, it requires in particular executive officers of the Sociale Verzekeringsbank, when calculating exclusively Netherlands pensions, to take into consideration periods of residence abroad which are not to be taken into account under the old-age law itself and which do not constitute periods completed under the legislation of another Member State, capable of 'aggregation' on the basis of the relevant provisions of Regulation No 1408/71. The question therefore arises

2 — Judgment of 24 April 1980 in Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445.

3 — Judgment of 12 July 1979 in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, paragraph 6.

whether the periods to be taken into consideration pursuant to Annex VI might not possibly constitute periods of affiliation under the old-age law.

23. In considering that question it is most important to bear in mind that, as the Court ruled in the *Spruyt* and *de Jong* cases, 'the provisions of Regulation (EEC) No 1408/71 and in particular those of Annex VI thereto were adopted to implement Article 51 of the EEC Treaty and must be interpreted in the light of the objective of Article 51, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers . . . '. That objective 'would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'.

24. However, since under the scheme of the old-age law the main qualifying criterion is residence in the Netherlands and since Article 10 (1) of Regulation (EEC) No 1408/71 introduced the principle of abolishing national residence clauses, it is precisely in order to take account of that aim that Annex VI, Part I, Point 2 of Regulation (EEC) No 1408/71 provides that certain transitional advantages are to be granted to a worker and his wife even if they do not satisfy the residence conditions laid down by the old-age law for the grant of those advantages. I refer here to the Court's reasoning set out in paragraphs 20 and 21 of the *Spruyt* judgment mentioned above.

25. In the same judgment the Court stated that '. . . the purpose of subparagraph (a) is to prevent the obstacles which might arise from Article 43 of the old-age law from impeding the freedom of movement of those persons who, having resided or worked in the Netherlands, wish to move to another Member State' (paragraph 22) and '. . . the purpose of [Point] 2 (c) . . . is . . . to facilitate the free movement of workers from other Member States who move to the Netherlands whilst their wives remain in the country of origin, by enabling the periods during which the wives are resident in another Member State to be taken into account' (paragraph 23).

26. Because of its quite general wording Point 2 (c) may be considered to cover the case of women born in the Netherlands who move to another Member State.

27. We are concerned here with provisions which, like all of Regulation (EEC) No 1408/71, are intended to prevent workers from losing, on account of their moving, 'the advantages in the field of social security guaranteed to them by the laws of a single Member State'. [4]

28. The purpose of Annex VI and in particular of Point 2 (c) thereof is not therefore to ensure that wives of Netherlands workers who move to another country may continue automatically to accumulate new rights under Netherlands legislation. That aim may be achieved through continued voluntary insurance.

29. In other words, the fact that a Netherlands national residing in another Member State can no longer acquire new rights to benefits under the Netherlands social security scheme does not amount to

4 — See paragraph 19 of the *Spruyt* judgment and paragraph 15 of the *de Jong* judgment.

an obstacle to freedom of movement, provided that the person concerned, after establishing his residence in another Member State, neither forfeits the rights previously acquired on Netherlands territory nor is prevented from acquiring such rights in respect of periods already completed in that territory, merely because he no longer resides there. However, neither of those eventualities has materialized under the old-age law in the case of Mrs de Rijke, who retains the rights which she has acquired. She does not acquire any new rights once she ceases to fulfil the residence condition, unless she continues her insurance voluntarily.

30. A misunderstanding might arise from a superficial reading of the judgments in *Caracciolo*[5] and *Giletti*[6] in which the Court used the expressions 'acquiring a right' and 'acquiring entitlement'. In my opinion, there is no doubt that the Court was referring in those judgments to rights deriving from periods of affiliation completed in another Member State prior to the change of residence and not to the 'acquisition' of new rights on the basis of periods which have not been completed in accordance with the legislation of that State.

31. It may therefore be concluded that it would not be in keeping with the purpose of Annex VI for Mrs de Rijke to have been able, merely by the operation of the provisions of that Annex, to remain affiliated to the general Netherlands old-age insurance scheme.

32. Lastly, the very wording of Annex VI tends to confirm that the Community legislature had no intention — even on the assumption that it was empowered to do so — to confer such an effect on the provisions in question.

33. In Point 2 of Part I the following expressions are used:

'Periods of insurance ... shall also be considered as periods of insurance completed in application of Netherlands legislation for general old-age insurance' (Point 2 (a));

'... periods ... shall also be taken into account as insurance periods' (Point 2 (c)).

I consider the two expressions to be equivalent.

Point 2 (e) is worded as follows:

'As regards a woman who has been married and whose husband has been subject to Netherlands legislation on old-age insurance, or is deemed to have completed periods of insurance in pursuance of subparagraph (a) ...'.

34. In my view, that wording shows clearly enough that the legislature wished to draw a distinction between periods during which a person was actually subject to Netherlands legislation, that is to say, affiliated to the scheme established by the old-age law, and periods which must simply be taken into account when the pension rights are calculated.

35. Logically, the expression 'is deemed to have completed periods of insurance' used in Point 2 (e) solely with reference to the periods envisaged in Point 2 (a) must also

5 — Judgment of 10 June 1982 in Case 92/81 *Caracciolo (née Camera)* v *Inami* [1982] ECR 2213, at paragraph 14.

6 — Judgment of 24 February 1987 in Joined Cases 379 to 381/85 and 93/86 *Caisse régionale and Others* v *Giletti and Others* [1987] ECR 955, at paragraphs 15 and 17.

be applied to the periods envisaged in Point 2 (c), since it, too, refers to periods taken into account 'as insurance periods'.

36. It is therefore possible to conclude that the Community provision submitted for the interpretation of the Court does not oblige the Netherlands authorities (even on the assumption that it could do so) to regard the periods referred to in Point 2 (c) as periods of affiliation, or, consequently, to take account of those periods in determining the expiry date of the period permitted for the submission of an application for affiliation on a voluntary basis.

37. That reasoning is also borne out by the wording of Point 2 (f), which provides that the periods referred to in Points 2 (a) and 2 (c) are to be taken into account for the calculation of the old-age pension only if the person concerned has resided for six years in the territory of one or more Member States after the age of 59 years and for as long as that person is residing in the territory of one of those Member States. I find it difficult to believe that the Council, with the participation of representatives from the Netherlands, wished, or was able, through Point 2 (f), to deprive a person insured under a social insurance scheme of the benefits deriving from an actual period of affiliation merely because that person had moved to a non-member country. On the other hand, I do not rule out the possibility that such benefits might be forfeited in the case of periods whose inclusion had been provided for solely in order to facilitate freedom of movement for workers within the Community.

38. For all the above reasons I propose that the Court should give the following answer to the question referred to it by the Hoge Raad der Nederlanden:

'Neither Article 51 of the EEC Treaty nor the provisions of Regulation (EEC) No 1408/71, and in particular Point 2 (c) of Part I of Annex VI thereto, confer upon a married woman, in respect of whom certain periods after 1 January 1957 are regarded under that subparagraph as periods of insurance for the calculation of the pension to which her husband is entitled under the Netherlands legislation on general old-age insurance, a right, enforceable against the competent Netherlands institutions, to be regarded and treated as having been insured under that legislation during those same periods.'