OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 April 1986 *

Mr President,
Members of the Court,

1. Father van Roosmalen is a Dutch priest attached to a monastery at Postel in Belgium who was sent to Zaire as a missionary in 1955. In 1977, he took out voluntary insurance, provided for under Article 77 of the *Arbeidsongeschiktheidswet* [Law on Incapacity for Work], (*Staatsblad* 1975, p. 674), for persons pursuing activities in a developing country.

In 1981, he became incapacitated in Zaire as a result of illness and in October of the same year applied for the benefits provided for in such a case by the Law on Incapacity for Work. He was initially granted those benefits with effect from 12 January 1982 but they were definitively withdrawn, with effect from 1 December 1982, by a decision of 8 December taken by the competent social security institution, which is the defendant in the main proceedings.

That decision was based on the provisions of Article 10 of the Royal Decree of 19 November 1976 implementing Article 77 of the Law on Incapacity for Work (*Staatsblad*, p. 622), which provides, *inter alia*, that:

'A person who is regarded as insured shall become entitled to invalidity benefits provided that he has been incapacitated for work in the Netherlands for a continuous period of 52 weeks and if the incapacity for work continues at the end of that period.'

However, as may be seen from the order of the Raad van Beroep, Utrecht, referring the case to the Court, the defendant institution considered that Father van Roosmalen did not fulfil that condition since he had taken up permanent residence at Postel on 2 July 1982, having made regular visits there since March 1981.

2. The Netherlands court is unsure whether the abovementioned residence requirement is in conformity with Community law.

Its *first question* is therefore whether such a requirement constitutes an obstacle to the free movement of persons, as laid down both by Articles 52 and 53 of the Treaty and by other provisions of Community law, inasmuch as, after the risk has materialized, it requires the person covered by voluntary insurance and returning from a developing country to take up residence in the Netherlands and to remain there continuously for 52 weeks without being able to stay in or move to another Member State.

In its *second, third and fourth questions*, the Netherlands court also seeks guidance as to the meaning of the expression 'self-employed person' in order to determine whether the plaintiff in the main proceedings may, having regard to the nature of his activities and the scope *ratione personae* of the Law on Incapacity for Work, rely on the provisions of Article 1 (a) (ii) or (iv) of Regulation No 1408/71 of the Council of 14 July 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416), as

* Translated from the French.

amended by Council Regulation No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 (Official Journal, L 143, p. 1).

In its *fifth question*, the Netherlands court, noting that Article 77 of the Law on Incapacity for Work, which applies to the plaintiff, takes into account for the purpose of the grant of invalidity benefits activities pursued outside the territory of the Community, asks the Court whether the Law on Incapacity for Work may for that reason be regarded as 'legislation' within the meaning of Article 2 of Regulation No 1408/71 and, if so, whether an employed or self-employed person

'who has been exclusively subject to that legislation in respect of activities pursued outside the territory of the European Economic Community may claim the protection afforded by [that] regulation . . . '.

The *last question* is essentially whether the requirement that the claimant must have resided in the Netherlands for a one-year period preceding the decision to award benefits is covered by the provisions of Article 2 (4) of Regulation No 1390/81 which deals in particular with the waiving of residence requirements during the transitional period following the entry into force of the regulation on 1 July 1982 (Article 4).

3. Those six questions raise the following point: May a Community citizen defeat a residence requirement which must be fulfilled in order to qualify for the invalidity benefits provided for under the legislation of a Member State concerning incapacity for work by relying on the provisions of Regulation No 1408/71, as extended since 1 July 1982 by Regulation No 1390/81 to self-employed persons? Summed up in that way, the questions referred to the Court require an explanation and make a particular approach necessary.

Like the Commission, I believe that the reply to the first question necessarily follows from the reply to the last question. Regulation No 1408/71, as amended by Regulation No 1390/81, was adopted in order to implement the provisions of Articles 51 *et seq.* of the EEC Treaty so that the question whether the residence requirement may be relied upon as against the plaintiff must be assessed in the light of all of those provisions.

However, given the special circumstances of the case, consideration should first be given to the question whether Father van Roosmalen is entitled to rely on the abovementioned regulation. Although the Netherlands legislation comes within the scope *ratione materiae* of Regulation No 1408/71 as a branch of social security concerning invalidity benefits (Article 4 (1) (b) and Annex VI, Part I. *Netherlands*, section 4), it is clear from the grounds of the order for reference that the national court is not sure whether Father van Roosmalen is a person covered by the regulation, as defined in Article 2 (1), which states that:

'This Regulation shall apply to employed or self-employed persons 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 . . . '.

More precisely, the national court, having regard to the plaintiff's particular occupation, is unsure whether he is a 'self-employed person' within the meaning of Article 1 (a) of Regulation No 1408/71 (Questions 2, 3 and 4). It is also unsure whether he may be regarded as subject to the legislation of a Member State, within the meaning of the aforementioned provision and Article 1 (j) of the regulation

when the Law on Incapacity for Work takes account of activities pursued outside the geographical territory of the Community.

Thus it is only after those points have been resolved that it might still be necessary to consider whether the contested residence requirement is compatible with secondary Community law.

The expression 'self-employed person'

4. As the Commission has observed, the Law on Incapacity for Work makes the right to benefits conditional upon the claimant's having pursued during the year preceding the occurrence of the event insured against 'an activity or profession' in respect of which he received 'income'. In Netherlands revenue law, 'income' is not strictly limited to earnings from employment, a business or the exercise of an independent profession, but covers more generally — to cite the national court's words in the third question — income from

'work performed in economic life which is intended to provide, or, according to the rules prevailing in society, can reasonably be expected to provide, some pecuniary advantage'.

The effect of that definition is to extend the benefit of the Law on Incapacity for Work from employed and 'genuinely' self-employed persons to a residual category of 'quasi-' self-employed persons. The national court is unsure whether the latter category of persons may be regarded as 'self-employed persons' within the meaning of Regulation No 1408/71.

That is the context in which Questions 2 to 4, concerning the expression 'self-employed person', must be read. Before analysing, as the Commission has done, the meaning and structure of the relevant provisions of Regulation No 1408/71, it is necessary to recall that the regulation must be interpreted in the light of the spirit in which it was drafted and of the objectives of the Treaty which it was intended to attain (Case 17/76 *Brack* v *Insurance Officer* [1976] ECR 1429, paragraph 19).

In this regard the Court has consistently taken the view that the Community rules on social security

'follow a general tendency of the social law of Member States to extend the benefits of social security in favour of new categories of persons by reason of identical risks' (Case 17/76, cited above, paragraph 20).

Accordingly, as Mr Advocate General Mayras stated in his Opinion in the *Brack* case (at p. 1462), the social-cum-occupational criteria on the basis of which the distinction is made between employed and self-employed persons must not, having regard to the objective which Article 51 of the EEC Treaty seeks to achieve, namely 'the establishment of as complete a freedom of movement for workers as possible' (Case 75/63 *Hoekstra* v *Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, at p. 184) be understood only in 'a narrow sense'. Mr Advocate General Gand likewise stated with regard to Regulation No 3, which applied before the adoption of Regulation No 1408/71, that

'the sphere of application of the regulation is determined by a criterion of social security and not of labour legislation . . .' (Case 19/68 *De Cicco* v *Landesversicherungsanstalt Schwaben* [1968] ECR 473, at p. 484).

That is why, in conformity with the Community meaning required by the Treaty itself, the concept of 'employed or self-employed person' must cover, according to the definition given in *Hoekstra*, the leading case,

'all those who, as such and under whatever description, are covered by the different national systems of social security' [(1964] ECR, at p. 185).

It is therefore by being covered by the social security system of a Member State and not because of how the occupation in question is classified under national law that a Community citizen becomes 'moored' to Regulation No 1408/71.

However, it is common ground in this case that the claimant was insured under the Law on Incapacity for Work which, as I have pointed out, falls within the scope *ratione materiae* of Regulation No 1408/71.

5. Consequently, the interpretation of the expression 'self-employed person' is not decisive for the application of the Community protection. None the less, if that expression, which the national court asks this Court to interpret, is to be of some value to it in resolving the dispute before it, the following observations should be made.

In my view, the expression should be given a wide meaning. This follows from both the Court's previous decisions, referred to above, and the actual provisions of Regulation No 1408/71. In the present case, where a person

'who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents'

Article 1 (a) (iv) of the regulation provides that:

'"employed person" and "self-employed person" mean respectively:

...

[any] person [who] carries out an activity as an employed or self-employed person ...'.

As far as self-employed persons are concerned, that definition, which the Commission described as 'tautological' refers generally, as it has shown, to persons carrying on an independent activity. Like the national court, the Netherlands and the Commission, one is therefore prompted to seek more precise criteria in the other provisions of Article 1 (a) of Regulation No 1408/71. The need for a uniform interpretation justifies such a step.

In actual fact, only Article 1 (a) (ii), concerning compulsory insurance, provides more serviceable criteria. It refers to the manner in which the applicable social security scheme is administered or financed in so far as it makes it possible to identify the claimant as an employed or self-employed person, and, 'failing such criteria', to the definition given in Annex I, in which the Community legislature, according to the final recital in the preamble to Regulation No 1390/81, considered it 'necessary to stipulate ... what the terms "employed person" and "self-employed person", introduced in Regulation (EEC) No 1408/71, mean when the person concerned is insured under a social security scheme which applies to all residents or to certain categories of resident or to the entire working population of a Member State ...'.

As far as concerns the Netherlands, it is stated in Part I of that Annex that:

'Any person pursuing an activity or occupation without a contract of employment shall be considered a self-employed person within the meaning of Article 1 (a) (ii) of the Regulation.'

In that regard, the comparative analysis carried out by the Commission of the various language versions of that provision leads to a broad interpretation. That definition therefore covers not only *occupational* activities (the literal meaning of the Dutch language version) but, more generally, *any activity* pursued without a contract of employment, provided that it is remunerated. Employed and self-employed persons have in common the fact that they receive an income in return for the work performed. Consequently, there is no reason why persons who, without any contract of employment, have pursued an activity in return for which they have received income within the meaning of Netherlands revenue law, other than income from the exercise of an independent profession or from running a private business, should not be regarded as 'self-employed persons'.

The term 'legislation'

6. Article 77 of the Law on Incapacity for Work extends the right to insure oneself to those who have pursued or are pursuing 'activities in a country which ... may be regarded as a developing country'. Do persons so insured under legislation which takes account of activities pursued in States forming no part of the territory of the Community, as defined in Article 227 of the EEC Treaty, come within the scope *ratione personae* of Regulation No 1408/71, as defined in Article 2 (1) and Article 1 (j) of that regulation, which states that:

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

The reply to that question must be in the affirmative. I agree with Mr Advocate General Capotorti 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.'

The Advocate General also stated:

'[That view] 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' (Case 87/76 *Bozzone* v *Office de securité sociale d'outre-mer* [1977] ECR 687, at p. 706).

In *Bozzone*, the Court followed the Opinion of its Advocate General whilst in Case 150/79 *Commission* v *Belgium* [1980] ECR 2621, the Court confirmed that judgment. It held, with regard to Belgian legislation

'placing under the control and guarantee of the Belgian State the institutions administering social security for workers from the Belgian Congo and Ruanda Urundi ...' (paragraph 2),

that such a scheme

'introduced by a Belgian law and administered under the control of the Belgian State by a public body subject to Belgian law the effects of which are produced, in

general, not in the former Belgian colonies but principally in the Belgian metropolitan territory . . . is capable of affecting the movement of workers within the Community, the freedom of which is ensured by Articles 48 to 51 of the Treaty and by Community regulations'.

The Court concluded that:

'in the circumstances, the mere fact that all the payments are based on periods of insurance completed prior to 1 July 1960 outside Community territory does not prevent the Community regulations on social security from applying' (paragraph 7).

Consequently it is necessary to take the view that the Netherlands legislation on incapacity for work, which in Article 77 is stated to be applicable to persons having pursued an activity in a developing country, constitutes 'legislation' within the meaning of Articles 1 (j) and 2 (1); moreover, the social security scheme established thereunder is administered under the control of the State by a body subject to Netherlands law.

That institutional connecting factor constitutes the decisive criterion for the application of Regulation No 1408/71 so that it is of little importance whether or not the insured person pursued his activities exclusively in a non-member country. From that point of view, the special links between that country and the Member State itself, characteristic of the relationship between Belgium and its former colonies in the two cases cited above, does not affect that conclusion. Although the Court referred to the existence of those links in its decision in *Bozzone*, neither in that decision nor, more especially, in the judgment in Case 150/79 declaring Belgium in breach of its obligations, was it the special nature of the links between the two States concerned which led to the Belgian Law being regarded as 'legislation' within the meaning of Regulation No 1408/71.

I therefore consider that the Netherlands provision at issue must be regarded as 'legislation' within the meaning of Article 2 (1) of Regulation No 1408/71.

The residence requirement

7. It therefore remains to consider whether the contested residence requirement — a claimant must have been 'incapacitated for work in the Netherlands for an uninterrupted period of 52 weeks' — is compatible with Article 2 (4) of Regulation No 1390/81, which provides that:

'Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, on the application of the person concerned, be awarded or resumed with effect from the entry into force of this Regulation . . . ',

that is to say, from 1 July 1982 (Article 4).

The purpose of that provision was to permit persons covered by the Community regulations at issue to obtain, from that date, social security benefits the award of which they had been refused or, after they were awarded, were suspended 'by reason of the nationality or place of residence of the person concerned'.

In that regard, the Netherlands court raises the question whether the aforementioned residence requirement, to which the very *existence* of the right to invalidity benefit is subject, is deprived of effect by Article 2 (4) even though that provision appears to apply only to the case in which the insured person's pension is not *awarded* or *payment* of the benefits related thereto is refused

after he has transferred his residence to a Member State other than that in which the institution paying the benefit is located.

As the Netherlands and the Commission observe, that question raises the question of the scope of the principle concerning the 'waiving of residence clauses'; that principle is set out in Article 10 (1) of Regulation No 1408/71 and Article 2 (4) of Regulation No 1390/81 merely applies it to a transitional period. More precisely, the question is whether that provision concerns a condition for the acquisition of the right or merely for its implementation or its maintenance.

In this regard, Article 10 (1) of Regulation No 1408/71, which essentially contains the previous provisions of Regulation No 3, provides as follows:

'Save as otherwise provided in this Regulation, invalidity . . . pensions . . . *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' (my italics).

The Court has already ruled on the meaning of the word 'acquired' in that article. In its judgment in *Sociale Verzekeringsbank* v *Smieja*, the Court stated that the purpose of that provision is

'to promote the free movement of workers, by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another' (Case 51/73 [1973] ECR 1213 paragraph 20 at p. 1222).

Consequently, the Court decided in its judgment in *Caracciolo* v *INAMI* that:

'It is clear from that principle not only that the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, *but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated*' (my italics). (Case 92/81 [1982] ECR 2213 paragraph 14 at p. 2224).

That result is determined by the provisions of Article 51 of the EEC Treaty, the purpose of which, according to the Court's recent judgment in *Spruyt* v *Bestuur van de Sociale Verzekeringsbank*, is

'to contribute to the establishment of the greatest possible freedom of movement for migrant workers, which is one of the foundations of the Community'.

The Court added that:

'The aim of Articles 48 to 51 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' (judgment of 28 February 1986 in Case 284/84 *Spruyt* v *Bestuur van de Sociale Verzekeringsbank*, paragraphs 18 and 19).

Thus, the Court's decisions require in principle the waiving of all residence clauses on which depend not only the maintenance of benefits already acquired but also whether entitlement to those benefits arises at all.

That is the context in which Article 2 (4) of Regulation No 1390/81 must be read: it makes it impossible to rely on the provisions of Article 2 (1), according to which

'no right shall be acquired under this Regulation in respect of a period prior to the date of its entry into force',

as against self-employed persons whose right to benefit arose before 1 July 1982 if they satisfied the residence requirement and permits them to take advantage, from that date, of the provisions of Article 10 of Regulation No 1408/71, as interpreted by the Court.

However, let me make two observations.

So construed, that principle, as Article 10 (1) itself expressly provides, may be modified in certain respects. For example, Annex VI to Regulation No 1408/71 on 'special procedures for applying the legislation of certain Member States' provides, with regard to Germany (Section C 1), that:

'The provisions of Article 10 of the regulation shall not affect the provisions under which accidents (and occupational diseases) occurring outside the territory of the Federal Republic of Germany, and periods completed outside that territory, do not give rise to payment of benefits, or only give rise to payment of benefits under certain conditions, when those entitled to them reside outside the territory of the Federal Republic of Germany.'

On the other hand, with regard to the 'Application of the Netherlands legislation on insurance against incapacity for work', referred to in Annex VI, Part I, *Netherlands*, section 4, no exception of that type is provided for. In the absence of such an exception, the general principle laid down in Article 10 (1) must be applied.

The solution which I propose does not appear to be at odds with that proposed by Advocate General Sir Gordon Slynn in his Opinion in Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821 concerning a residence requirement of the same type provided for in a transitional provision of the Law on Incapacity for Work. In that case, the plaintiff was already compulsorily insured in the Federal Republic of Germany when she joined the voluntary insurance scheme provided for by the Law on Incapacity for Work. In such a situation, the voluntary insurance is merely additional and is therefore excluded from the scope of Regulation No 1408/71 by Article 13 thereof which provides that

'. . . persons to whom this Regulation applies shall be subject to the legislation of a *single Member State only*. . . ' (my italics).

8. In the light of all the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the *Raad van Beroep, Utrecht*:

(1) Regulation No 1408/71 applies to nationals of Member States receiving invalidity benefits provided for under the Netherlands legislation on incapacity for work.

In accordance with the provisions of Article 1 (a) (ii) and (iv) and Annex I, Part I, *Netherlands*, of Regulation No 1408/71 the expression 'self-employed persons' must be interpreted as including any person who has pursued, without a contract of employment, an activity or occupation in respect of which he has received income, within the meaning of the Netherlands legislation, other than income obtained from running a private business or from the exercise of an independent profession within the meaning of the same legislation.

(2) Legislation of a Member State which, for the award of social security benefits to be paid by the competent national institution, also takes account of activities which insured persons covered by that legislation have pursued, either wholly or in part, in a non-member country must be regarded as 'legislation' within the meaning of Regulation No 1408/71.

(3) Article 2 (4) of Regulation No 1390/81 applies to the refusal by the institution responsible for providing benefits to award an invalidity benefit on the ground that the claimant has not resided in the Member State concerned for a continuous period of 52 weeks.