OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 22 OCTOBER 1974 [1]

Mr President,

Members of the Court,

Mrs Mazzier, née Costa, the Plaintiff in the proceedings that have led to the reference at present before the Court was born in 1935 and is of Italian nationality. In July 1956 she commenced to reside in Belgium, where she is married to a Belgian worker employed in that country. As far as is known, Mrs Mazzier has never, either in Italy or in Belgium, been in paid employment. If I understand correctly, her only occupation is that of a housewife.

Mrs Mazzier instituted proceedings because she was denied an allowance for the handicapped, pursuant to the Belgian Law of 27 June 1969, for which she had applied in September 1971.

That Law is known to us from other cases. I shall not therefore have to give you long explanations in this respect. In relation to the present case it is important to remember:

Under the Law a claim to that allowance arises in case of Belgian citizens having their residence in Belgium provided they are at least fourteen years of age, that they have a permanent incapacity to work of at least 30 % and that their income does not exceed certain limits. This allowance — and of the three kinds of allowance we are in this case only concerned with the so-called ordinary allowance — is paid from state resources, if the beneficiaries are (in the case of men) below 65 years of age or (in the case of women) below 60 years of age. The amount of the allowance is assessed according to the degree of incapacity to work and the extent of income. Within certain limits, the allowance is also granted alongside social security benefits, with the exception however of benefits arising from insurance for accidents and sickness arising from work.

Obviously Mrs Mazzier — notwithstanding her medically established permanent incapacity to work, to an extent of 75 % — was unable to claim the allowance purely on the basis of the Belgian provisions. The competent authorities of the Belgian Ministry for Social Security believed however that even on the basis of the European Interim Agreement of 11 December 1953 on systems of social security schemes in respect of old age, invalidity and survivors, they could not award her the allowance. For according to Article 2 of this Agreement which enables the Belgian law to be applied to foreigners, it must be established that the person concerned was ordinarily resident in Belgium before the first diagnosis of the illness giving rise to the invalidity. On this point however, an expert in the proceedings before the national court established — and his findings are evidently not in dispute — that Mrs Mazzier's symptoms are the consequence of an illness which had already been found to exist in Italy in the year 1938, i.e. before the commencement of her residence in Belgium.

However, Mrs Mazzier does not consider the rejection by the Belgian Ministry for Social Security to be justified. She takes the view that in considering her case nationality is not relevant at all since under Article 7 of regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19. 10. 1968), a worker who is a national of a Member State shall within

1 — Translated from the German.

the territory of another Member State 'enjoy the same social and tax advantages as national workers'.

Having regard to the provisions of Community law in the field of social security the Liège Labour Court, to which Mrs Mazzier had appealed, adjourned the proceedings by judgment of 29 March 1974 and pursuant to Article 177 of the EEC Treaty referred the following two questions for a preliminary ruling:

'1. Is the legislation on allowances for the handicapped (Law of 27 June 1969) social assistance legislation falling, *ratione materiae,* within the ambit of Article 2 (3) of Regulation No 3?

2. If the answer to Question 1 is in the negative, does the legislation on the handicapped constitute a social advantage covered by Article 7 (2) of Regulation No 1612/68?'

1. On the first question the following remarks seem called for at this point.

By its wording the question seeks an assessment by this Court of the Belgian law on allowances for the handicapped. As has often been emphasized, this Court cannot of course in proceedings under article 177 go that far, since this would amount to an application of the law. Accordingly, it can only be a question of supplying the national court with an interpretation of Community law by emphasizing relevant criteria for judging and thereafter leaving it to the referring court — which alone applies the law — to give a definite answer to the question raised.

In the framework of this kind of interpretation it is in the first place the case law of this Court which must be referred to.

In that case law we find firstly, that the fact that the Belgian Law does not appear in Annex B to Regulation No 3 in no way obliges one to conclude that it does not fall within the area of applicability of Regulation No 3. This much was clearly underlined by the Court in Case 100/63 (Judgment of 15 July 1964, *Mrs J. Kalsbeek née J. G. van der Veen v Bestuur van de Sociale Verkeringsbank* and in nine other cases (Rec. 1964, p. 1105).

Also of importance is the Judgment in Case 187/73 (Judgment of 28 May 1974, *Callemeyn v Belgian State* ([1974] E.C.R. 553). Here it was found that a law such as the Belgian Law on allowances for the handicapped comes close to social assistance law since need on the part of the beneficiary constitutes a material factor and since it does not depend on periods of employment, of membership or of contribution. On the other hand there is an approximation to social security insofar as the benefit does not presuppose an individual assessment of all the circumstances of the case but rather amounts to a legal entitlement on the part of the person in question. Such laws have in reality a double function: they are intended to guarantee a minimum income to handicapped persons who are outside the social security system and they are intended to provide a supplement to recipients of social security payments where such payments are insufficient. Having regard to the fact that Article 4 (b) of Regulation No 1408/71 (OJ L 149, 5. 7. 1971) applies to legal provisions that provide for invalidity benefits and since the concept 'benefits' under Article 1 (t) of Regulation No 1408/71 must be understood in the widest sense, the Court finally arrives at the conclusion as regards the Belgian Law on allowances for the handicapped that such laws come within the range of social security insurance (invalidity insurance) within the meaning of the Community Regulations, insofar as those laws relate to employed persons or persons treated as such who are in receipt of an invalidity pension within the Member State, whilst in respect of other beneficiaries such a description might not apply.

If, however, this is so under Regulation

No 1408/71 which as from 1 October 1972 replaced Regulation No 3, then this must also apply under Regulation No 3, since its area of application and its definition of the concept of benefit, as contained in Articles 2 (1) (b) and Article 1 (s) corresponds to those of Article 4 (1) (b) and Article 1 (t) of Regulation No 1408/71.

The arguments put forward by the Belgian Government in the course of the proceedings, i.e. the reference to the definition of social security insurance and of invalidity benefits in Conventions 102 and 128 of the International Labour Organization, as well as the fact that within the framework of the Law granting the allowances the relevant incapacity to work is not established in relation to a particular occupation, cannot lead to a different finding. This kind of objection was already made in earlier proceedings without however resulting in the Court finding, as was urged by the Belgian Government, that the provisions of the Law on allowances for the handicapped amounts throughout purely to social assistance law.

Accordingly, the Court ought to find, in line with the Judgment in Case 1/72 (Judgment of 22 June 1972, *Frilli v Belgian State*, (Rec. 1972, p. 457), which points in the same direction and which relates to guaranteed old-age pension, that Mrs Mazzier's claim — assuming she is a worker — must be judged pursuant to the Community Regulations and that in contrast to the Belgian Law and to the European Interim Agreement her nationality must be disregarded.

2. As regards the second question, where the Labour Court of Liège asks whether the provisions on allowances for the handicapped constitute 'social advantages' within the meaning of the aforementioned Regulation No 1612/68 on freedom of movement for workers within the Community, here too we can in the first place refer to the earlier case law, that is to say the Judgment in Case 1/72. This makes it clear that an examination of national provisions in the light of Article 7 of Regulation No 1612/68 can only arise 'if it were established that the benefit in question is not a social security benefit within the meaning of Regulation No 3'. Accordingly — and contrary to the Italian Government's view — Regulation No 3 (or Regulation No 1408/71) and Regulation No 1612/68 are alternatives.

Again assuming that the plaintiff in the national proceedings is a worker who pursuant to the social security law of the Community has an established claim under the Belgian Law on allowances for the handicapped, then in relation to the second question and in conformity with the case law referred to, it must be said that Regulation No 1612/68 does not operate in such a case.

3. However, as the Commission has rightly emphasized, this reply would not amount to either an exhaustive or a satisfactory answer to the request for a preliminary ruling, since it is clear that the plaintiff in the national proceedings is not a worker within the meaning of the social security regulations of the Community and that she has never been gainfully employed. Accordingly, she will have to go into the further question whether, in the case of members of workers' families claiming benefits under the Belgian Law on allowances for the handicapped, nationality may be relevant, or whether Regulation No 3 and Regulation No 1612/68 exclude this factor even for members of the family.

If in this connexion one first looks at the relevant case law of the Court then it cannot be denied that to the extent that it applies the Community Regulations to provisions of the kind involved in the Belgian Law on allowances for the handicapped, it looks at whether the beneficiaries are workers or former workers. As regards the concept 'worker', Article 1 (a) of Regulation No 1408/71 contains a definition. Of this definition, the only part relevant to the present case concerning the Belgian Law

on allowances for the handicapped is the part of sub-paragraph (ii) whereby the test is whether the beneficiary 'is insured for some contingency specified in Annex V under a scheme for employed persons, either compulsorily or on an optional continued basis'. This obviously does not apply to members of the worker's family since they only possess rights derived from the worker's insurance. If, therefore, one might regard the Belgian allowances for the handicapped as belonging to the field of social security and affected by the Community Regulations only to the extent that they grant benefits to workers or former workers, then the plaintiff in her capacity as a member of the family cannot derive any conditions as to equal treatment from the Regulations on social security.

However, one still has to examine — since this has also been a point of discussion — whether in respect of members of the family as such, rights might not be derived from the Community Regulations on social security that are relevant to the present case.

In this respect it is in the first place Article 4 of Regulation No 3 which is of importance, since it provides that 'this Regulation shall apply to employed persons and persons treated as such who are or have been subject to the legislation of one or more of the Member States and are nationals of a Member State ... as well as to members of their families and their survivors'. The concept 'members of their families' is defined in Article 1 (n) as follows: 'Persons defined or recognized as such or designated as members of the household under the legislation of their country of permanent residence ...'. Pursuant to Article 1 (b) the term 'legislation' shall mean 'all laws, regulations and other enforceable provisions, present and future, of each member State relating to the social security schemes and branches of social security set out in Article 2 (1) and (2) of this Regulation'.

As for the detailed meaning of these provisions, this is a point of dispute between the Commission of the European Communities and the plaintiff in the national proceedings. The plaintiff considers that it is sufficient for someone to be recognised as a member of the family by the social security provisions of a Member State as a whole, and that it does not matter whether such members of the family are entitled to rights that can be derived from the rights of a worker. The Commission on the other hand takes the view that what is crucial is that the rights should be derived from workers, i.e. that they should not be personal claims on the part of a member of the family, and that in the law in question in the individual case this derivation shall clearly be capable of being seen as having a social security character.

I tend towards the Commission's view. Thus firstly, it certainly does not make sense to have regard to whether a person appears as a member of the family in some social security provision of the legislation of the Member State in question. For the rights of members of the family in the different branches of social security are possibly quite different and it is therefore doubtless necessary to examine whether there is a recognition as a member of the family in the particular field that is being examined. Furthermore it also seems appropriate to ask oneself the question whether it is a case of rights derived from workers, or of purely personal claims. As I see it, the very wording of Article 1 (n) of Regulation 3 points to this, since this provides that members of the family shall mean persons recognized as such, i.e. their entitlement to rights only arises on account of their being a member of the family, and thus their relationship to another person. In this context it is also interesting to note what has been said by the Commission in relation to events that resulted from the accession of the new Member States to the Community. The principle just outlined evidently at that time

underwent a change with a view to taking into account the special systems of the new Member States. As has been demonstrated before the Court, the change was however limited to benefits which in the original Member States are the subject of derived rights. This is probably of importance not only for interpreting Regulation No 1408/71 but likewise for interpreting Regulation No 3, where such a change is lacking. Finally, one also ought not to overlook the fact that in relation to cases such as the present one, the court's case law has emphasized that such laws have a double function, that they also have social assistance characteristics. If, in an interpretation on this point that may to many have appeared somewhat daring, the Court nevertheless decided to class them with social security, insofar as they affect workers, then one can deduce from this that the last-mentioned concept provides the decisive factor. This too forces one in the present context to regard membership of the family as relevant only to the extent that rights derived from workers are involved.

Since the Belgian Law on allowances for the handicapped obviously is the basis for purely personal claims on the part of the individual in relation to which residence is relevant, where derivation from the worker therefore plays no part, this leads one to conclude that for members of the family as such, no rights can be derived from the social security provisions of the Community, and thus no claim to be treated in the same manners as citizens of the relevant Member State.

If under Regulations No 3 and No 1408/71 this is an appropriate view on the plaintiff's claim, it still remains for me, bearing in mind Regulation No 1612/68 on freedom of movement for workers within the Community, to add the following remarks.

According to its recitals and its general Regulation No 1612/68 is designed for workers of one Member State who are employed in another Member State or who seek employment in that State. As regards members of their families — to the extent that they are relevant here — Article 10 of the Regulation refers to the spouse of a worker who possesses the nationality of a Member State and who is employed within the territory of another Member State. This in itself leads one to conclude that the plaintiff, who is not herself a worker and whose husband likewise does not fulfil the aforementioned conditions, cannot benefit from this Regulation.

As regards the concept in article 7 of social advantages, there is the added fact that it was previously emphasized in the case law (Case 76/72, *Michel S. v Fonds national de réclassement social des handicapés,* Judgment of 11 April 1973, [1973] E.C.R. 473 that only those advantages are to be treated as social advantages which are connected with employment and which are granted to the workers themselves and not to members of their families. In support of this view one can point to the wording and the tenor of Regulation No 1612/68 as well as the position of Article 7 in Part I, Title II, which is headed 'Employment and equality of treatment'. Besides, a further argument in favour is the first recital to the Regulation.

Finally, one must admittedly concede that Regulation No 1612/68 also contains provisions as to members of the family. However, all that can be derived from these is a right to instal oneself (Article 10) and a right to work (Article 11), not however any more far-reaching claims on the part of the spouse.

All this shows clearly that Regulation No 1612/68, too, cannot form the basis of a claim by spouses of workers to equal treatment in connexion with the grant of the Belgian allowances for the handicapped.

4. I will therefore suggest the following answers to the requests for a preliminary ruling on the part of the Tribunal du Travail of Liège:

(a) Benefits within the meaning of Article 2 (1) (b) of Regulation No 3 also include allowances for the handicapped of the kind provided under the Belgian Law for the handicapped, provided they are granted to employed persons or persons treated as such within the meaning of Regulation No 3 and provided they have a legal entitlement thereto.

(b) If benefits amount to social security benefits within the meaning of Regulation No 3 then Regulation No 1612/68 does not apply in the matter.

(c) Regulations No 3 and No 1612/68 do not ensure for the members of the family of an employed person who works in a Member State a right to equal treatment in relation to laws that make an entitlement to allowances for the handicapped dependent on nationality, if the claim is not derived from the employed person's insurance or from his employment but is based on the residence of the person involved.