Regulation No 1408/71 in order to become entitled to the benefit, that benefit cannot be deemed to be due in pursuance of Article 73, and the first sentence of Article 10 (1) (a) of Regulation No 574/72 does not apply.

REPORT FOR THE HEARING
delivered in Case 377/85 *

I — Facts and written procedure

Mrs Burchell, the appellant in the main proceedings, was born on 6 September 1943. From 1960 to 1963 she was compulsorily insured in the United Kingdom. She was married in 1964, and since then she has not worked or paid voluntary or compulsory contributions to the United Kingdom social security scheme. She has, however, paid sufficient contributions to enable her estate to be paid a death grant on her death. She has two children, born in 1966 and 1971.

In 1977 Mrs Burchell and her children went to live in the Netherlands, where her husband was employed. In 1979 she and her husband separated. Mrs Burchell returned to the United Kingdom with her children but without her husband on 7 September 1979. Her husband was and still is employed in the Netherlands, where he resides.

The marriage was dissolved in April 1983. Mrs Burchell resides in the United Kingdom with her two children. Her former husband receives family benefits in the Netherlands for the two children, and contributes to their maintenance. Child benefit was paid to him in the Netherlands from 1 August 1975 until at least the second quarter of 1984. Under Netherlands law, the children for whom benefits are paid need not be resident in the Netherlands, a rule which exists in no other Member State.

Mrs Burchell submitted a claim for United Kingdom child benefit for her children. Under the British system, it is a condition of entitlement to benefits that the child should reside in the United Kingdom on the date to which the claim refers. Mrs Burchell's claim was rejected by the Insurance Officer (now called the 'Adjudication Officer'), the competent British authority in social security matters, on the basis of the rules against overlapping benefits laid down in Article 10 of Regulation No 574/72. Article 10 provides as follows:

'(1) Entitlement to family benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment, or self-employment, shall be suspended when, during the same period and for the same member of the family:

* Language of the Case: English.

(a) benefits are due in pursuance of Article 73 or 74 of the Regulation. If, however, the spouse of the employed person referred to in those Articles exercises a professional or trade activity in the territory of the said Member State, the right to family benefits or family allowances due in pursuance of the said Articles shall be suspended; and only those family benefits or family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State.'

Article 73 of Regulation No 1408/71 provides that:

'(1) An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

The competent authority considered that Mrs Burchell's former husband was entitled to Netherlands family benefit (child benefit) with regard to Mrs Burchell's two children as if they were resident in the Netherlands (notwithstanding the fact that under Netherlands law he was so entitled irrespective of their place of residence) pursuant to Article 73 (1) of Regulation No 1408/71 and that Mrs Burchell's right to child benefit in the United Kingdom (which is not subject to conditions of insurance or employment) was suspended under Article 10 (1) (a) of Regulation No 574/72, since Mrs Burchell, not being engaged in any professional or trade activity, could not rely on the exception set out in the latter part of Article 10 (1) (a).

Mrs Burchell submitted an appeal to the Social Security Commissioner.

On 25 November 1985 the Social Security Commissioner decided to stay the proceedings until such time as the Court of Justice should have given a preliminary ruling pursuant to Article 177 of the EEC Treaty on the following questions:

'(1) (a) Is a person who has been compulsorily insured for a number of contingencies covered by the branches of a social security scheme for (among others) employed persons, but who has ceased to pay contributions under such scheme either compulsorily or on an optional continued basis to be treated as an employed person for the purposes of Regulations 1408/71 and 574/72, if the contributions paid by such person while so compulsorily insured continue to be sufficient by themselves to entitle his or her estate in the event of his or her death to be paid a death grant under such scheme but are insufficient either alone or in conjunction with other matters to entitle him or her to any other contributory benefit under such scheme?

(b) If the answer to question (a) is negative, can the right of a person who is not either an employed person or a self-employed person for the purposes of Regulations 1408/71 and 574/72 to any benefit under such a scheme (not being a benefit derived through such person's status as a member of the

family or survivor of an employed person or a self-employed person) be adversely affected by any of the provisions of either of the above Regulations?

(2) If the answer to either question 1 (a) or question 1 (b) is affirmative, is the provision for suspension contained in the first sentence of Article 10 (1) (a) of Regulation 574/72 to be interpreted as meaning that it applies whenever the institution of another Member State has granted family benefits to an employed earner in respect of the same child under the provisions of its domestic law without invoking Article 73 of Regulation 1408/71, if apart from those provisions of its domestic law it should have awarded like benefits in pursuance of that Article?

(3) If the answer to question 2 is affirmative, is Article 10 (1) (a) of Regulation 574/72 incompatible with Article 51 of the EEC Treaty in so far as it deprives a person of a right conferred on him or her by a Member State independently of Community law or does so without compensatory advantage to that person?"

The reference for a preliminary ruling was received at the Court Registry on 28 November 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Mrs Burchell, represented by E. Laing, Barrister, the Adjudication Officer, the respondent in the main proceedings, represented by Kathleen F. Lee, Senior Legal Assistant, Department of Health and Social Security, the Netherlands Government, represented by E. F. Jacobs, acting Secretary-General of the Ministry of Foreign Affairs, for the Minister for Foreign Affairs, and the Commission of the European Communities, represented by Julian Currall, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

On 3 October 1986 the Court assigned the case to the Sixth Chamber, pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Observations submitted to the Court

Mrs Burchell argues in the first place that she is not an employed person or a self-employed person within the meaning of Article 2 (1) of Regulation No 1408/71. Although her past contributions are sufficient to entitle her to the payment of a death grant, she paid so few contributions that they should not have the effect of bringing her within the scope of the Community regulation if the only effect of that would be to deprive her of a benefit to which she would normally be entitled under United Kingdom legislation, whatever her employment status.

Secondly, even if the Community regulations are capable of applying to Mrs Burchell, her former husband's entitlement to child benefit does not arise under Article 73 (1) of Regulation No 1408/71. Article 10 (1) (a) cannot therefore have the effect of depriving Mrs Burchell of her entitlement to United Kingdom child benefit. In retaining

that entitlement Mrs Burchell would not, under the Community regulations, receive a double or overlapping benefit, but would receive a single benefit under United Kingdom law, while her former spouse receives a single benefit under Netherlands law. Neither the Netherlands benefit received by her former husband nor the British benefit received by Mrs Burchell derives from Community law; neither benefit, therefore, may be suspended by virtue of that law.

Thirdly, Mrs Burchell argues that the overlapping of benefits may be prevented only in so far as that does not have the result of depriving the persons concerned, without due cause, of the benefit of the provisions of national law to which they are subject. The fact that her former husband is entitled to Netherlands child benefit entails no advantage for Mrs Burchell which would compensate for the fact that she is deprived of her rights under British law.

The *Adjudication Officer*, the respondent in the main proceedings, referring to the Court's case-law, states that Mrs Burchell may still be considered a member of her husband's family notwithstanding the dissolution of their marriage, where benefits are granted for her and her children as such under national legislation. The reply to the first part of the first question should therefore be in the affirmative. Should a reply to the second part of that question none the less become necessary, the Adjudication Officer refers to the judgment of the Court of 4 July 1985 (Case 104/84 *Kromhout* v *Raad van Arbeid* [1985] ECR 2205) in which the Court held that Article 10 (1) (a) applies where a child in respect of whom family benefits or family allowances are due is, as a member of the family of one of the recipients of such benefits or allowances, a person covered by the Community legislation, without there being any need to ascertain whether the other recipient is also covered by that legislation.

With regard to the issue raised by the second question, namely whether the rule against overlapping benefits laid down in Article 10 (1) (a) may be applied where the family allowances payable by the other Member State would be payable without reliance on Article 73 (1) of Regulation No 1408/71, the Adjudication Officer argues in essence that Article 73 applies to any employed person, being a national of a Member State, who takes up employment in another Member State but leaves his family in another Member State, whichever Member State he is employed in and whatever the content of the legislation of that State, if any, on family benefits, in order to ensure the uniformity of protection which is in line with the declared objectives of the Treaty. In support of his argument the Adjudication Officer refers to the judgment of the Court of 19 February 1981 in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503.

With regard to the third question the Adjudication Officer confines himself to contending that the application of Article 10 of Regulation No 574/72 is subject to the condition that the payment of the higher allowance is guaranteed, which it is in this case.

The *Netherlands Government* states that where a person who is not himself covered by Regulations No 1408/71 and No 574/72 is entitled to benefits under national legislation falling within the scope *ratione materiae* of those regulations, that entitlement may be affected by a provision of those regulations if the person concerned is

not materially disadvantaged thereby and the exercise of the entitlement would constitute an unreasonable advantage for that person. In view of the fact that the person concerned is thus not placed at a disadvantage, there is no question of any conflict with Article 51 of the EEC Treaty.

With regard to the second question, the Netherlands Government considers that Article 73 is directly applicable whether or not the person concerned already enjoys such an entitlement on the basis of the national law of the Member State whose legislation is applicable. Consequently, the rules against overlapping benefits laid down in Article 10 (1) (a) is also applicable. The Netherlands Government also refers to the judgment of the Court of 19 February 1981 in *Beeck* v *Bundesanstalt für Arbeit.*

The *Commission* considers that the essential question is whether or not Mrs Burchell's former husband receives benefits in the Netherlands 'in pursuance of Article 73' of Regulation No 1408/71, for the purposes of the first sentence of Article 10 (1) (a) of Regulation No 574/72. Since under Netherlands law benefits are granted irrespective of the residence of the children, it is prima facie impossible to say that the benefit is nevertheless granted 'in pursuance of Article 73'. The Court's reasoning in the *Kromhout* judgment does not apply, for in that case the claim submitted to the State in which the plaintiff's former husband was employed was based on Article 73 (1) of Regulation No 1408/71. The fact that in this case the conditions for benefit are met simultaneously in two Member States in respect of the same children does not result from the application of the Community rules but is a coincidence independent of those rules. Since the possibility of overlapping benefits arises independently of the Community rules, there is no reason to apply those rules for the sole purpose of limiting a right to benefit.

The Commission admits that the situation to which its analysis leads is anomalous and gives rise to unjustified duplication of benefits. The fact that that result is unreasonable does not however mean that Community law must automatically apply in order to resolve a problem that it did not create; the solution to the problem is primarily a matter for national law, although that law cannot prevail over the Community rules in case of conflict.

The Commission proposes that the Court should reply to the first and second questions of the Social Security Commissioner in the following manner:

'The provision for suspension contained in the first sentence of Article 10 (1) (a) of Regulation No 574/72 is to be interpreted as meaning that it applies whenever the institution of another Member State has actually granted family benefits in pursuance of Article 73 or 74 of Regulation No 1408/71 to one recipient; it is not then necessary to inquire whether the other recipient or putative recipient is also covered by the Community legislation. However, the first sentence of Article 10 (1) (a) does not apply where that benefit was granted under national law alone, and not in pursuance of Article 73 or 74 of Regulation No 1408/71.'

The Commission submits that in view of the proposed reply there is no need to reply to the third question.

T. F. O'Higgins
Judge-Rapporteur