pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them.

2. By the reference to a "worker" Article 22 (1) (c) of Regulation No 1408/71 does not purport to restrict its scope to active workers as opposed to inactive workers, the same reference being contained in Articles 25 and 26 in the same chapter, which respectively concern "unemployed persons" and "pension claimants".

3. In the case of a pensioner who is entitled to benefits in kind under the legislation of a Member State and who does not pursue a professional or trade activity, the right to be authorized by the competent institution to go to another Member State to receive there the treatment appropriate to his condition is governed by the provisions of Article 22 (1) (c) and (2) of Regulation No 1408/71.

4. When the competent institution acknowledges that the treatment appropriate to the condition of a worker constitutes a necessary and effective treatment of the sickness or disease from which he suffers the conditions for the application of the second subparagraph of Article 22 (2) of Regulation No 1408/71 are fulfilled and the competent institution may not in that case refuse the authorization referred to by that provision and required under Article 22 (1) (c).

5. The expression "benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence" in Article 22 (1) (c) (i) of Regulation No 1408/71 refers to any benefit which the institution of the Member State to which the person concerned goes after obtaining the authorization referred to in Article 22 (1) (c) has the power to grant, even if it is not required to provide them under legislation which it administers.

In Case 182/78,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [court of last instance in social security matters] for a preliminary ruling in the action pending before that court between

BESTUUR VAN HET ALGEMEEN ZIEKENFONDS [Managers of the General Sickness Fund] DRENTHE-PLATTELAND, Zwolle,

and

MRS G. PIERIK, Wapenveld,

on the interpretation of the provisions of Regulation No 1408/71 of the Council relating to the right of "pensioners" to receive treatment appropriate to their state of health in the territory of a Member State other than the one in which they reside,

THE COURT,

composed of: J. Mertens de Wilmars, President of Chamber, acting as President, Lord Mackenzie Stuart (President of Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. In Case 117/77 ([1978] ECR 825), the President of the Centrale Raad van Beroep, Utrecht, by a letter of 28 September 1977, referred to the Court of Justice certain questions concerning the interpretation of Regulation No 1408/71 of the Council which were raised in the course of a dispute between the Bestuur van het Algemeen Ziekenfonds [Managers of the General Sickness Fund] and Mrs G. Pierik, who, being in receipt of an invalidity pension in the Netherlands, had claimed repayment of the costs relating to medical treatment received in Germany.

The questions asked were in the following terms:

"(a) Do the words 'who satisfies the conditions of the legislation of the competent State for entitlement to benefits' at the beginning of Article 22 (1) solely contain a restriction to those who in principle are eligible for benefits under the appropriate national rules or do those words

contain a restriction on those benefits included in the national scheme of benefits in kind, an interpretation to which the last clause of Article 22 (1) (c) (i) may lend support?

(b) Are the words 'on behalf of the competent institution' in Article 22 (1) (c) (i) to be understood as meaning that if the competent institution has given authorization within the meaning of the first part of Article 22 (1) (c) it follows that the institution must refund the benefits in kind granted by the institution of the place of stay to the latter institution without further reservations?

(c) Are the words 'the institution of the place of stay or residence' in Article 22 (1) (c) (i) solely to be understood as meaning the institution which, in the Member State concerned, has a function corresponding to that of the competent institution or do those words include institutions which have another function in the said Member State?

(d) Are the words 'benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence' in Article 22 (1) (c) (i) to be understood as including benefits in kind to which a right exists in the Member State of the place of stay or is it sufficient that the competent institution can provide the benefits and does in fact make use of that power? In the latter case: is it sufficient that use is occasionally made of the power or does the use of the word 'provided' imply that the use of the power constitutes the rule?

(e) Do the words 'the treatment in question' in the second subparagraph of Article 22 (2) refer to a specific treatment which is only given in the territory of the Member State to which the worker has moved or at least not in the territory of the Member State in which he lives or must the words 'the treatment in question' be understood as meaning an adequate treatment of the illness or infection?

(f) Does the obligation set out in the second subparagraph of Article 22 (2) also extend to cases in which the treatment concerned is not included in the national system of benefits in kind with the result that in such cases an independent Community right to the treatment is created?"

By a judgment of 16 March 1978 the Court answered the questions as follows:

"1. The words 'who satisfies the conditions of the legislation of the competent State for entitlement to benefits' at the beginning of Article 22 (1) determine the persons who in principle are entitled to benefits in pursuance of the relevant national legislation.

2. The words 'the treatment in question' in the second subparagraph of Article 22 (2) refer to any appropriate treatment of the sickness or disease from which the person concerned suffers.

3. The words 'benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence' do not refer solely to benefits in kind provided in the Member State of residence but also to benefits which the competent institution is empowered to provide.

4. The duty laid down in the second subparagraph of Article 22 (2) to grant the authorization required under Article 22 (1) (c) covers both cases where the treatment provided in another Member State is more effective than that which the person concerned can receive in the Member State where he resides and those in which the treatment in question cannot be provided on the territory of the latter State.

5. The costs relating to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence are to be fully refunded.

6. The words 'institution of the place of stay or residence' in Article 22 (1) (c) (i) of Regulation No 1408/71 mean the institution empowered to provide the benefits in the State of residence or stay as listed in Annex 3 to Regulation No 574/72 of the Council, as amended by Regulation No 878/73 of the Council."

The Centrale Raad van Beroep resumed the proceedings in the main action, but found at its hearing on 13 June 1978 that it could not regard all the issues in the main action as being settled by that judgment.

In particular it held that, in so far as Regulation No 1408/71 was concerned, the decision in the case was still dependent upon the answer to the following questions:

"(a) Is the concept of worker in Article 22 of Regulation No 1408/71 more restricted than the concept of worker within the meaning of Article 1 (a) of the regulation inasmuch as Article 22 relates solely to active workers, so that, with regard to persons who are not, or are no longer, at work and are entitled to a benefit on the grounds of invalidity, due by virtue of the legislation of a Member State, and who by virtue of the legislation of that Member State to which the regulation is applicable in the matter of medical treatment and special sickness expenses are entitled to benefits in kind, only the provisions of Article 31 are applicable?

(b) Does the obligation referred to in the second subparagraph of Article 22 (2) of Regulation No 1408/71 to grant the authorization required under Article 22 (1) (c) extend so far that the said authorization cannot be refused by the competent institution on the basis of the fact that the treatment in question is deliberately not included in the scheme of benefits in kind under the sickness and maternity legislation administered by that institution, for example on medical, medical-ethical or financial grounds or because the value of the treatment in question in the Member State in which the competent institution has its seat is in general not regarded as positive or because the treatment is not regarded as falling within the field of health treatment and furthermore is deliberately not provided by virtue of any other legislation of that Member State to which the regulation is applicable?

(c) Do the words 'benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence' in Article 22 (1) (c) (i)

relate directly to the case in which the institution of the Member State to which the person concerned wishes to go in order to undergo treatment is competent to provide that treatment as a benefit in kind but is normally not obliged to make use of such competence, or must the competent institution in such a situation, before providing the authorization requested, inquire whether the institution of the Member State to which the person concerned wishes to go in order to undergo the treatment would provide such treatment as a benefit in kind for the person concerned if he were insured in pursuance of the legislation administered by that institution?"

Therefore the Centrale Raad decided in its order of 18 July 1978 that these questions should be referred to the Court of Justice under Article 177 of the EEC Treaty.

2. The Acting President of the Centrale Raad sent the said order to the Court of Justice with a covering letter of 8 September 1978 in which he gives the following explanation of the considerations underlying the three questions raised:

(a) As to the *first question,* the issue is whether the situation of pensioners must be assessed, as in the judgment in Case 117/77, under Article 22 or under Article 31 of Regulation No 1408/71. On the one hand it could be thought that, as far as pensioners are concerned, Article 31 is "complementary" to Article 22 since those persons are also workers within the meaning of Article 1 (a) (i) of Regulation No 1408/71. On the other hand the view may be taken that Article 34, which, like Article 31, appears in Section 5 of Chapter 1 of Title III, regards a person entitled to a pension as a worker for the application of that chapter only when he has a right to benefit as a result of the pursuit of a professional or trade activity: hence it may be concluded that it was the intention of the regulation to lay down different rules for pensioners not going so far as the rules for active workers (or unemployed persons).

(b) As to the *second question,* it is intended essentially to ascertain whether the obligation on the competent social security institution to grant the authorization referred to in Article 22 (1) (c) also covers cases in which the treatment requested is excluded from the scheme of benefits in kind under the legislation of the competent State on medical, medical-ethical or financial grounds.

(c) Finally, the *third question* seeks definition of the situations in which the applicable legislation gives no *right* to a particular benefit in kind but gives the competent institution a *discretion* to provide such benefit.

3. The letter from the Acting President of the Centrale Raad van Beroep, Utrecht, was received at the Court Registry on 11 September 1978.

The Vereniging van Nederlandse Ziekenfondsen [Association of Netherlands Sickness Funds], represented by N. de Jong, the Nieuwe Algemene Bedrijfsvereniging [New General Trade Association], represented by I. C. van Alderwegen, the Government of the Kingdom of Belgium, represented by the Minister of Social Security, A. Califice, the Government of the Netherlands, represented by the Secretary-General of the Foreign Affairs Ministry, F. Italianer, the Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor's

Office, assisted by Henry Knorpel, Solicitor to the Department of Health and Social Security, and the Commission of the European Communities, represented by H. Bronkhorst, a member of its Legal Department, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Having heard 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.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — The *Vereniging van Nederlandse Ziekenfondsen* states that as regards the scope of the concept of "worker" within the meaning of Article 22 of Regulation No 1408/71, it has nothing to add to the observations submitted both before the Court of Justice in Case 117/77 ([1978] ECR 825) and at the hearing before the Centrale Raad van Beroep on 13 June 1978. It persists in its argument that Article 22 of the regulation could be applied to the present case.

As to the scope of the obligation to grant the authorization (second subparagraph of Article 22 (2) of Regulation No 1408/71), the Vereniging considers that the question asked by the national court is justified by the need to remove any doubt on this point. For this purpose it mentions the examples given at the aforesaid hearing in order to describe the consequences which might result from a broad interpretation of the judgment of the Court of 16 March 1978 in the case cited above. In order better to illustrate the problem, the Vereniging produces a decision of the Raad van Beroep [Court of Appeal] Groningen, against which moreover the person concerned has appealed to the Centrale Raad van Beroep.

Finally, referring to Question (d) in the letter of 28 September 1977 from the Centrale Raad van Beroep concerning a problem related to the one raised in these proceedings, the Vereniging states that it has no need to comment on the third question.

B — Dealing with the *first question*, the *Nieuwe Algemene Bedrijfsvereniging* points out that Article 1 (a) of Regulation No 1408/71 gives a definition of the concept of "worker" from which it follows that the decisive factor in the present case is that the person concerned should be "insured", and it is immaterial whether or not he actually pursues an activity.

Title III, Chapter 1, Section 2, concerning workers' rights to sickness and maternity benefits does not indicate that any concept of "worker" other than that defined in Article 1 (a) is applicable for the purposes of the provisions laid down in it. That section applies to any person who is to be regarded as a "worker" within the meaning of the aforesaid article, regardless of whether he is an active worker or a passive worker.

Section 2 contains *inter alia* provisions similar to those in Sections 3, 4 and 5 of

the same chapter; it differs from them in that Article 22, which it contains, creates exceptional rights in a certain number of specific situations — which include the situation of a person going to another Member State to receive treatment there - which are not mentioned in the other sections. This implies that the provisions of Article 22 are supplementary to those of Sections 3, 4 and 5, and that hence they apply to workers who are at the same time pensioners.

This interpretation is not contrary to Article 34 of the Regulation: the purpose of that article is precisely to make it clear that where a pensioner also pursues a professional or trade activity, only the provisions of Section 2 are applicable to him.

Next dealing with the *second question,* the Bedrijfsvereniging takes the view that the Court has already answered it in its judgment of 16 March 1978 in Case 117/77.

It emerges from that judgment that, with regard to the obligation under Article 22 (1) (c) and (2), the relevant point is not whether and on what grounds the treatment in question is included in the competent institution's scheme of benefits in kind, but whether the treatment provided in another Member State is more effective than that which the person concerned can receive in the Member State where he resides and whether that treatment cannot be provided in the territory of the latter State.

Moreover, the fact that, according to the aforementioned judgment, "the treatment in question" mentioned in the second subparagraph of Article 22 (2) of the regulation refers to "any appropriate treatment of the sickness or disease from which the person concerned suffers" leaves the competent institution a certain margin of discretion, since it remains for that institution to decide whether or not the treatment in question is appropriate and therefore capable of justifying the grant of the authorization. Any medical objections to the treatment claimed may be taken into account when this decision is being reached.

Finally, as regards the *third question,* the Bedrijfsvereniging takes the view that the provisions of Article 22 (1) (c) (i) are to be interpreted as meaning that there is entitlement to the benefits in kind referred to in those provisions if and in so far as persons insured with the institution called upon to provide those benefits are entitled to receive them. Thus the benefits which the person concerned can claim are only those which the institution of the place of stay provides for its own members in the manner and under the conditions stipulated by the legislation which that institution administers. Since the authorization mentioned in Article 22 (1) (c) applies to such benefits, it follows that it can be granted only if it is established that a person in the same situation as the person concerned and insured with the said institution would be entitled to those benefits. Therefore the Bedrijfsvereniging concludes that the last part of the third question, not the first, should be answered in the affirmative.

C — The *Government of the Kingdom of Belgium* deals with the second and third questions.

As to the *second question,* it states first that, for the purposes of Article 22 (1) (c) of Regulation No 1408/71, the criteria governing the grant of the authorization required are medical, administrative and legislative ones.

First of all it is for the doctor to decide upon the grant of the authorization

required. By examining the suitableness of the treatment for this purpose, the doctor performs a medical act in respect of which he is obliged to obey the laws governing medical practice in his country. Regulation No 1408/71 has never had the purpose of regulating that sector or of making a doctor in one Member State subject to the rules and medical ethics of another Member State.

Secondly, after the doctor has found that the medical treatment provided in another Member State is appropriate to the state of health of the person concerned, it is for the competent institution to decide whether to grant the authorization by examining whether on administrative and legislative grounds it can give the person concerned a right to repayment of the cost of the benefits in kind which will be provided for him in the Member State to which he has chosen to go to receive treatment. For this purpose the competent institution will have to check *inter alia* whether treatment in that State has not "patently" been chosen with the aim of evading the provisions of the legislation of the competent Member State. It would be improper to authorize a worker to go to another Member State, there to receive treatment the cost of which, for reasons of insurance administration or political expediency, is not repaid within the framework of the social insurance provisions in the competent country.

Likewise, it appears equally clear that regardless of the doctor's authorization, the competent institution can refuse to reimburse the cost of treatment which, in the competent Member State, is contrary to public policy and regarded as an offence in criminal law.

In these circumstances, the only rule imposed on the competent institution by Article 22 (1) (c) of Regulation No 1408/71 is the prohibition on refusing the authorization required where the treatment cannot be provided for the person concerned within the territory of the Member State of residence, in so far as that impossibility does not result directly from the rules of medical ethics and the criminal legislation of the competent State.

As to the *third question*, the Belgian Government takes the view that Regulation No 1408/71 does not impose a duty on the competent institution to inquire whether or not the cost of the treatment provided in the Member State of stay is refunded in that State. However, it is always open to the competent institution, with the aim of informing workers clearly, to make inquiries of the institution of the country of stay in order to ascertain the conditions governing the repayment of the cost of treatment provided in that country.

Moreover, where a form E 112 is submitted and the worker has complied with all the provisions of the legislation of the country of stay, the competent institution of that country is obliged to grant the treatment as a benefit in kind and cannot refuse to repay the cost thereof.

D — On the *first question*, the *Government of the Netherlands* states that one of the essential objectives of the EEC Treaty is to promote freedom of movement in particular for "active" workers. The purpose of Article 22 (1) (c) of Regulation No 1408/71 is precisely to assure the active worker that, as regards himself and the members of

his family, his moving will affect his entitlement to medical treatment as little as possible. A provision of this kind, favouring migration, was patently not considered necessary for "pensioners" within the framework of the objectives of the Treaty, having regard also to the provisions of Article 31 of the Regulation.

For this reason, in the opinion of the Netherlands Government, Regulation No 1408/71 does not contain a scheme for such pensioners corresponding to that which Article 22 (1) (c) lays down for active workers.

Likewise, in order to answer the *second question,* it is necessary to start from the premise that freedom of movement for workers is one of the primary objectives of the Treaty. In order to achieve it, Regulation No 1408/71 lays down *inter alia* a prohibition on any discrimination based on a worker's nationality.

By virtue of that principle, a Netherlands worker who resides or stays in the Federal Republic of Germany must in the latter country have the same rights to medical treatment as German workers residing or staying there. However, those benefits in kind can comprise only those included in the scheme of benefits in kind under German legislation.

In these circumstances, the judgment of the Court of 16 March 1978 in Case 117/77 holding that a worker is entitled, without regard to the national institution to which he is affiliated or the place of his residence, to receive benefits in kind provided in any other Member State (paragraph 14 of the Decision, [1978] ECR at p. 836) must be read as implicitly referring to the case of such workers as reside or stay in that other Member State.

In the absence of such a restriction, the result would be that in principle a worker who was a national of one of the Member States would be entitled not only to the benefits in kind under the legislation of the Member State in which he resides or stays, but also to the benefits in kind under the legislation of any other Member State within whose territory he neither resides nor stays. This would doubtless result in unification of the various Member States' schemes of benefits in kind, but such unification is in no way included among the objectives of Regulation No 1408/71.

In the light of these considerations, Article 22 (2) together with Article 22 (1) (c) should be interpreted as follows:

— Active workers and the members of their families *must* be authorized to go to another Member State to receive medical treatment there, where the treatment is included in the scheme of benefits in kind under the legislation of the Member State within whose territory they reside or stay but cannot be provided in that State for some reason (for example lack of equipment);

— Active workers and the members of their families *may* be authorized by the competent institution to go to another Member State for certain

medical treatment if that treatment is not included in the scheme of benefits in kind of the competent State. In view of the wide extent of such a condition, the competent institution can clearly not be denied discretion in the matter. The competent institution can refuse the authorization where equivalent medical treatment can be provided in the country of residence or stay or if the treatment in question is not included in that country's scheme of benefits in kind, for instance because medical practitioners in that country still disagree about its effectiveness or because its inclusion in the aforesaid scheme is contrary to the rules of positive law.

Finally, as regards the *third question*, the Netherlands Government is of the opinion that where the competent institution has granted a worker the authorization to go to another Member State, there to receive medical treatment which in that State is granted at the discretion of the competent authorities, the authorization granted gives the person concerned a contingent right to receive the said treatment in the Member State in question.

The vesting of this right is obviously subject to the decision of the institution called upon to provide the treatment in question. Thus the authorization granted by the competent institution gives the person concerned the right to submit his claim to the discretion of the institution called upon to provide that treatment.

If the authorization of the competent institution were to have the effect of compelling the institution called upon to provide the benefit in kind actually to provide it, this would result in a legally unacceptable situation inasmuch as an institution of one Member State (in this case, the competent institution) would in fact exercise the discretion as to the grant of the benefit in question which belongs to an institution of another Member State (in the event, the institution called upon to provide the benefit in kind).

E — On the *first question* the *Government of the United Kingdom* observes that the whole structure of Chapter 1 of Title III of Regulation No 1408/71 is based upon the assumption that "workers" and "pensioners" are two separate categories of persons, even if some pensioners have formerly been, and in some cases may again become, "workers" in the narrower sense. This emerges from the very wording of Article 31 as well as of Article 34, read in particular with Article 2 (1) of the Regulation, according to which the Regulation "shall apply to workers . . . as also to the members of their families and their survivors".

It is therefore submitted that those pensioners to whom Articles 27 to 33 do apply are to be considered for the purposes of Chapter 1 as pensioners and not as workers.

The Government of the United Kingdom submits moreover that during a period of stay in a Member State a pensioner's rights to benefits in kind can derive only from Article 31 and not at all from Article 22. Those articles provide in different ways for circumstances which are essentially different, so that cumulative application of both of them in the same case would result in an inextricable confusion. Article 22 is concerned with a period of stay outside the territory of the

competent State which, in the case of an active worker, may not be the State of residence, whereas Article 31 is concerned with any case where the pensioner's stay is outside the territory of the State of his residence. The rights to benefits in kind conferred by Article 22 during a stay in a Member State other than the competent State are limited to those benefits in kind which are immediately necessary, whereas the rights conferred by Article 31 are not subject to this restriction. Finally, benefits in kind provided under Article 22 are provided on behalf of (and at the expense of) the competent institution: those provided under Article 31 are provided (at least initially) at the expense of the institution of the place of residence.

Next, stating its views on the *second question*, the Government of the United Kingdom submits that where a treatment is not included in the scheme of benefits under the legislation administered by the competent institution, so that that treatment is one which that institution is not empowered to provide, the obligation to authorize it cannot apply. It is not one of the "benefits which the competent institution is empowered to provide" within the meaning of paragraph 21 of the Decision in Case 117/77 ([1978] ECR at p. 837). The purpose of the regulation is to co-ordinate, not to harmonize, the several national legislations.

If, however, the legislation gives the competent institution the power to provide the treatment in question, but does not require it to do so, the obligation to grant authorization applies in principle. In such a case it must be determined whether that treatment is appropriate to the person's condition and, if so, whether a treatment no less appropriate and equally or more effective can be provided for the person in the territory of the Member State in which he is resident. In a case, for example, in which the treatment is in fact no longer provided by the competent institution because it is medically regarded as outdated, the authorization could be refused only on the grounds that that treatment was not appropriate to the person's condition or that an alternative and equally or more effective treatment could be provided for him in the Member State in which he was resident.

Finally, going onto the *third question*, the Government of the United Kingdom submits that the first part of that question should be answered in the affirmative. It observes, however, that the institution in question will have the discretion to grant or withhold the treatment in question, so long as it acts on the same basis as it would in deciding whether or not to grant such treatment to a national of its own Member State insured with that institution.

As to the second part of the question raised, the Government of the United Kingdom submits that there is nothing in Regulation No 1408/71 or the implementing Regulation No 574/72 which requires the competent institution, before providing the authorization requested, to make the inquiry mentioned by the national court. However, it is a proper and desirable practice. Only the competent institution has access to the full medical record of the person concerned, which will normally be required for the decision

whether a discretionary treatment should be granted or not, and it is therefore desirable that the necessary information should be made available to the institution which must make that decision. In addition the practice guards against the possibility that the person concerned may be authorized to go to another Member State for treatment and may do so, only to find that the institution there is not obliged to provide the treatment in question and is unwilling to do so.

F — On the *first question*, the *Commission* observes that the system of Regulation No 1408/71, in particular the different Sections of Title III, Chapter I, entitled "Sickness and Maternity", particularly Sections 2 to 5, clearly shows that Article 22 (in Section 2) and Article 31 (in Section 5) of the Regulation each have a specific area of application, in particular as regards the persons who can derive rights from them.

Sections 3, 4 and 5 of the aforementioned chapter concern persons who no longer participate in active life (or will no longer participate in it) and the members of their families: on the other hand, Section 2 concerns workers still participating in active life and the members of their families. This analysis is not contrary to the wording of Article 34 in Section 5.

Thus Regulation No 1408/71 uses two definitions of "worker":

— a broader definition, appearing in Article 1 (a) (i) of the regulation, and

— a more restricted definition, deriving from Title III, Chapter 1, which is confined to persons "participating in active life".

The different rights deriving from the provisions of Articles 22 and 31 is another problem. At first sight, Article 22 imposes more restrictions on the worker and the members of his family than Article 31 imposes on pensioners. However, since this issue was not raised by the national court, there is no need to deal with it.

Next, examining the *second question*, the Commission takes the view that a distinction must be drawn between cases where a particular treatment is not included in the scheme of benefits in kind under national law

— on medical grounds, or

— on financial grounds, or

— on medical-ethical grounds.

It follows that, with regard to treatment which is deliberately not included in the said scheme on the grounds stated by the national court, if the grounds for this are medical and if the competent institution is right, the authorization can be refused because the view can be taken that the criterion in Article 22 (1) (c), according to which the treatment must be appropriate to the state of health of the person concerned, is not fulfilled. In the second case, the authorization may possibly be refused on the ground that the criterion in the second subparagraph of Article 22 (2) is not fulfilled because the treatment in question can be provided for the person concerned within the territory of the Member State in which he resides.

Finally, in the third case, by virtue of the general principles of the Treaty, the

Member States retain certain powers in areas concerning morality. These powers could possibly be based on the reservations of sovereignty made by the Treaty in areas concerning public policy (Articles 36, 48 (3), 56 and 155). Thus it can be accepted, on the basis of this principle, that a competent institution can refuse the authorization where it concerns a treatment which is seriously contrary to the ethical rules prevailing in the Member State in question. However, since it is an exception to the Treaty, this principle must be very strictly construed, as meaning that the treatment in question must also be prohibited in the Member State in question. Thus a competent institution can refuse the authorization to undergo an abortion in another Member State only if abortion is prohibited in the competent institutions's own country.

Finally, as to the *third question,* the Commission is of the opinion that the competent institution must also grant the authorization in the case of "optional" benefits in kind. Although under Article 22 (1) (c) (i) the benefits in kind must be provided by the institution of the place of stay or residence in accordance with the legislation which it administers, as though the worker were insured with it, the view can equally well be taken that the question of obtaining authorization where "optional" benefits in kind are concerned is already settled, possibly in derogation of that rule, by the first subparagraph of Article 22 (1) (c), according to which the authorization must be granted by the competent institution.

A double authorization would be meaningless, because the treatment provided by the institution of the place of stay or residence is provided on behalf of the competent institution (which also determines the duration of the benefits in kind). Thus, as the financial aspect no longer arises for the institution of the place of stay or residence, a second authorization is superfluous, because the institution of the place of stay or residence is obliged to provide the treatment. In so doing, it must apply the same criteria to workers and members of their families coming from another Member State as to workers insured with it (for example, the criteria of the urgency or place on a waiting list of the request for treatment).

On the basis of these observations, the Commission proposes that the Court should answer the questions raised as follows:

"1. Article 22 of Regulation No 1408/71 applies to active workers and the members of their families. The situation of unemployed persons, claimants to a pension and pensioners, as also of the members of their families, is governed by the provisions of Sections 3, 4 and 5 of Title III.

2. The authorization, mentioned in Article 22 (1) (c), to go to the territory of another Member State to receive treatment there can be refused only if it is established that that treatment is not appropriate to the state of health of the person concerned, that the treatment can be provided within the territory of the Member State in which he resides, or that the treatment is seriously contrary to the moral concepts prevailing in the Member State in which he resides.

3. The authorization mentioned in Article 22 (1) (c) must also be granted in the case of benefits in kind which the institution of the place of stay or residence is not under any obligation to provide."

III — Oral procedure

The Government of the United Kingdom, represented by Henri Knorpel, Solicitor to the Department of Health and Social Securities and the Commission of the European Communities, represented by its Legal Adviser, H. Bronkhorst, acting as Agent, presented oral argument at the hearing on 15 March 1979.

The Advocate General delivered his opinion at the hearing on 3 May 1979.

Decision

1 By an order of 18 July 1978 sent to the Court with a covering letter of 8 September 1978 from the Acting President of the Centrale Raad van Beroep and received at the Registry on 11 September 1978, the Centrale Raad submitted certain questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Regulation No 1408/71 of the Council of 14 June 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). These questions were submitted in a case in connexion with which the same national court had referred certain questions to the Court on the interpretation of the aforesaid regulation by a letter from its President lodged at the Registry on 30 September 1977.

2 The Court answered those questions in its judgment of 16 March 1978 (Case 117/77 [1978] ECR 825), but the national court found that it could not regard all the issues in the main action as being settled by that judgment. Thus continuing the proceedings in the main action, the said court held *inter alia* that, in so far as Regulation No 1408/71 was concerned, the decision in the case was still dependent upon the answer to the following questions:

"(a) Is the concept of worker in Article 22 of Regulation No 1408/71 more restricted than the concept of worker within the meaning of Article 1

(a) of the regulation inasmuch as Article 22 relates solely to active workers, so that, with regard to persons who are not, or are no longer, at work and are entitled to a benefit on the grounds of invalidity, due by virtue of the legislation of a Member State, and who by virtue of the legislation of that Member State to which the regulation is applicable in the matter of medical treatment and special sickness expenses are entitled to benefits in kind, only the provisions of Article 31 are applicable?

(b) Does the obligation referred to in the second subparagraph of Article 22 (2) of Regulation No 1408/71 to grant the authorization required under Article 22 (1) (c) extend so far that the said authorization cannot be refused by the competent institution on the basis of the fact that the treatment in question is deliberately not included in the scheme of benefits in kind under the sickness and maternity legislation administered by that institution, for example on medical, medical-ethical or financial grounds or because the value of the treatment in question in the Member State in which the competent institution has its seat is in general not regarded as positive or because the treatment is not regarded as falling within the field of health treatment and furthermore is deliberately not provided by virtue of any other legislation of that Member State to which the regulation is applicable?

(c) Do the words 'benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence' in Article 22 (1) (c) (i) relate directly to the case in which the institution of the Member State to which the person concerned wishes to go in order to undergo treatment is competent to provide that treatment as a benefit in kind but is normally not obliged to make use of such competence, or must the competent institution in such a situation, before providing the authorization requested, inquire whether the institution of the Member State to which the person concerned wishes to go in order to undergo the treatment would provide such treatment as a benefit in kind for the person concerned if he were insured in pursuance of the legislation administered by that institution?"

3 In the first question the national court seeks essentially to ascertain whether the provisions of Article 22 of Regulation No 1408/71, governing the right of a "worker" to benefits in kind, also cover a pensioner "who is not, or is no longer, at work" and who asks the competent institution for authori-

zation to go to a Member State other than the one where he resides to receive there the treatment appropriate to his state of health.

4 Article 1 (a) of Regulation No 1408/71 defines the concept of "worker" as any person who is compulsorily or voluntarily insured under one of the social security schemes referred to in subparagraphs (i), (ii) or (iii) of that provision. Laid down "for the purpose of this regulation", such a definition has a general scope, and in the light of that consideration covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them.

5 Articles 27 to 33 in Title III, Chapter 1, Section 5 of Regulation No 1408/71 lay down special provisions concerning "pensioners and members of their families". By virtue of Article 34, these provisions apply exclusively to pensioners who are entitled to benefits in kind otherwise than as a result of pursuing a professional or trade activity, thus covering inactive pensioners.

6 However, Article 31 of these provisions governs the entitlement of such insured persons to benefits in kind where those benefits become necessary during a stay in a Member State other than the one in which they reside. On the other hand, the entitlement to benefits in kind of an insured person who resides in one Member State and asks the competent institution for authorization to go to the territory of another Member State to receive there the treatment appropriate to his condition is governed by Article 22 (1) (c) in the same chapter.

7 By the reference to a "worker" in the latter provision, Regulation No 1408/71 does not purport to restrict the scope of that provision to active workers as opposed to inactive workers, the same reference being contained

in Articles 25 and 26 in the same chapter, which respectively concern "unemployed persons" and "pension claimants".

8 For these reasons the answer to the first question should therefore be that, in the case of a pensioner who is entitled to benefits in kind under the legislation of a Member State and who does not pursue a professional or trade activity, the right to be authorized by the competent institution to go to another Member State to receive there the treatment appropriate to his condition is governed by the provisions of Article 22 (1) (c) and (2) of Regulation No 1408/71.

9 As to the second question, in its aforesaid judgment of 16 March 1978 in Case 117/77 the Court held that, "the duty laid down in the second subparagraph of Article 22 (2) to grant the authorization required under Article 22 (1) (c) covers both cases where the treatment provided in another Member State is more effective than that which the person concerned can receive in the Member State where he resides and those in which the treatment in question cannot be provided on the territory of the latter State".

10 In paragraph 15 of the decision in that case it was also held that benefits in kind for which the worker is authorized to go to another Member State "cover all treatment calculated to be effective for the sickness or disease from which the person concerned suffers", and in paragraph 16 it was held to follow that, "in those circumstances it is of little importance whether the benefit in kind which the worker requires can be provided on the territory of the Member State where he resides since the mere fact that that benefit corresponds to treatment more appropriate to the state of health of the person concerned is decisive for the purpose of issuing the authorization referred to in the above-mentioned paragraph (1) (c)". In setting a limit to the competent institution's power of decision in this area, paragraph 17 of the said decision implicitly acknowledges that it is for that institution objectively to assess the medical grounds for granting or refusing the authorization required under Article 22 (1) (c), having regard *inter alia* to the state of health of the person concerned, the seriousness of his sickness or disease and the effectiveness of the treatment in question.

11 When the competent institution, having made use of such power, acknowledges that the treatment in question constitutes an effective treatment of the sickness or disease from which the person concerned suffers, its power of decision is thus bound by the obligation clearly and unequivocally imposed upon it by the second subparagraph of Article 22 (2) of the regulation not to refuse in that case the authorization required under Article 22 (1) (c).

12 In fact it emerges from the provisions and the essential aims of Article 22 that it was the intention of the regulation to give medical requirements a decisive rôle in the decision of the competent institution to grant or refuse the aforesaid authorization by providing generally and unreservedly in the second subparagraph of Article 22 (2) that authorization may not be refused "where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides".

13 Thus the answer to the second question should be that, when the competent institution acknowledges that the treatment in question constitutes a necessary and effective treatment of the sickness or disease from which the person concerned suffers, the conditions for the application of the second subparagraph of Article 22 (2) of Regulation No 1408/71 are fulfilled and the competent institution may not in that case refuse the authorization referred to by that provision and required under Article 22 (1) (c).

14 Finally as to the third question, it is established — as the Court held in its aforesaid judgment of 16 March 1978 in Case 117/77 — that by virtue of the provisions of Articles 93 (1) and 96 of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159) the amount of benefits provided under Article 22 of Regulation No 1408/71 "shall be refunded by the competent institution to the institution which provided the said benefits as shown in the accounts of that institution", and moreover that it is to be "fully" refunded.

15 It follows that, since the costs relating to the treatment in question are chargeable to the competent institution which granted the authorization, the

institution of the Member State to which the person concerned goes to receive the treatment is required to provide it upon presentation of such an authorization even if, under the legislation which it administers, it does not have a duty but only has a power to grant it.

16 For these reasons the answer to the third question should be that the expression "benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence" in Article 22 (1) (c) (i) of Regulation No 1408/71 refers to any benefit which the institution of the Member State to which the person concerned goes after obtaining the authorization referred to in Article 22 (1) (c) has the power to grant, even if it is not required to provide them under the legislation which it administers.

Costs

17 The costs incurred by the Governments of the Kingdom of Belgium, the Kingdom of the Netherlands and the United Kingdom, as well as by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by an order of the Centrale Raad van Beroep of 18 July 1978, sent to the Court with a covering letter of 8 September 1978 by the Acting President of that court, hereby rules:

1. **In the case of a pensioner who is entitled to benefits in kind under the legislation of a Member State and who does not pursue a professional or trade activity, the right to be authorized by the competent institution to go to another Member State to receive there the**

treatment appropriate to his condition is governed by the provisions of Article 22 (1) (c) and (2) of Regulation No 1408/71.

2. When the institution acknowledges that the treatment in question constitutes a necessary and effective treatment of the sickness or disease from which the person concerned suffers the conditions for the application of the second subparagraph of Article 22 (2) of Regulation No 1408/71 are fulfilled and the competent institution may not in that case refuse the authorization referred to by that provision and required under Article 22 (1) (c).

3. The expression "benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence" in Article 22 (1) (c) (i) of Regulation No 1408/71 refers to any benefit which the institution of the Member State to which the person concerned goes after obtaining the authorization referred to in Article 22 (1) (c) has the power to grant, even if it is not required to provide them under legislation which it administers.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
Acting as President