OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 14 March 1989 *

Mr President,
Members of the Court,

1. The Centrale Raad van Beroep, Utrecht, has submitted to the Court two questions for a preliminary ruling on the interpretation of certain provisions of Regulation (EEC) No 1408/71 of the Council [1] concerning entitlement to unemployment benefit for workers moving within the Community.

Facts and procedure

2. Mrs Warmerdam-Steggerda initially received unemployment benefit in the Netherlands. Subsequently, from 17 March to 8 August 1975, she worked for a firm in Scotland as a pottery maker. From 17 March to 6 April 1977 she was legally insured as an employed earner (through the payment of contributions) against the risk of industrial accident but, because of her low earnings, she was not insured against other risks covered by the British social security system. On 6 April 1975, the National Insurance (Industrial Injuries) Acts 1965-74, on which her insurance against industrial accident was based, ceased to have effect. On that date the Social Security Act 1975 came into force, which, according to a declaration set out in the *Official Journal of the European Communities*, [2] constitutes legislation for the purposes of Article 4(1) and (2) of Regulation No 1408/71 and to which that regulation is therefore applicable. [3] As from that date separate contributions for insurance against the risk of accident were no longer levied from Mrs Warmerdam in the United Kingdom, since, under the new legislation, she was no longer liable to pay any contributions because of her low income.

The reason for Mrs Warmerdam's stay in the United Kingdom was that at that time her husband was undergoing a period of training there. When the training was over, she resigned from her position and, after they had completed a hiking tour through Scotland, the couple returned to the Netherlands on 30 August 1975. On 1 September 1975 Mrs Warmerdam registered in the Netherlands as a person seeking work.

3. On 3 March 1977 the Board of the Nieuwe Algemene Bedrijfsvereniging (Board of the New General and Professional Trade Association, hereinafter referred to as 'the

* Original language: Dutch.

1 — Regulation on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416); for the latest consolidated version, see the annex to Regulation (EEC) No 2001/83 (OJ L 230, 22.8.1983, p. 8).

2 — OJ C 245, 25.10.1975, p. 1.

3 — Article 4 of Regulation No 1408/71 specifies, in particular, the branches of social security to which that regulation applies (paragraph 1) and also provides that the regulation is to apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of employers in respect of those branches.

Board') decided not to grant unemployment benefit to Mrs Warmerdam. The Board relied on the argument that, as during her period of employment in the United Kingdom Mrs Warmerdam had not been insured against the financial consequences of unemployment, she could not be regarded as a worker within the meaning of Regulation No 1408/71. Since, according to that decision, the regulation provides for the grant of unemployment benefit only in favour of workers, Mrs Warmerdam was not entitled to them.

Mrs Warmerdam appealed against that decision to the Raad van Beroep, Arnhem, which, by judgment of 8 September 1977 upheld her claim and referred the case back to the Board for the adoption of a fresh decision taking account of its judgment. The Board appealed against that judgment to the Centrale Raad van Beroep, Utrecht, requesting the latter to quash the decision of the lower court and declare the action brought by Mrs Warmerdam at first instance unfounded.

The Centrale Raad van Beroep found it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the fact that a person is only insured, within the meaning of Regulation No 1408/71 as then worded, for one or more contingencies belonging to only one branch of a social security scheme (in this case, the branch mentioned in Article 4(1)(e)) also confer on that person the status of worker which is required in order for a person to enjoy the advantages afforded by Regulation No 1408/71 with regard to another branch of social security (in this case, the branch mentioned in Article 4(1)(g))?

(2) May the competent institution of a Member State, as referred to in Article 67(1) of Regulation No 1408/71 as that regulation was then worded, only take into account, for the purposes of applying the legislation of that Member State, "periods of employment" completed under the legislation of another Member State (which satisfy the condition that they would have been counted as periods of insurance had they been completed under the first-mentioned legislation) if those periods of employment are also defined or recognized by the legislation under which they were completed as periods of insurance for the same branch of social security?'

The issue in the main dispute concerns the scope of Article 71(1)(b)(ii)

4. It is apparent from the order for reference that Mrs Warmerdam based her claim against the Board on Article 71(1)(b)(ii) of Regulation No 1408/71.

That provision forms part of Chapter 6 of Regulation No 1408/71, which is entitled 'Unemployment' and consists of a number of rules which workers moving within the Community may rely upon in order to acquire entitlement to unemployment benefit. Sections 1 and 2 of that chapter

contain a number of general rules on the aggregation of periods of insurance or employment completed in different Member States (Article 67), the calculation of benefits (Article 68), and the grant of benefits to unemployed persons moving to another Member State (Articles 69 and 70). Section 3 of that chapter consists of a single provision, Article 71, and guarantees to frontier workers (Article 71(1)(a)) and other workers (Article 71(1)(b)) who, before becoming unemployed, were last employed within the territory of a Member State other than the 'competent' [4] State, entitlement to unemployment benefit on certain conditions in accordance with the legislation of either the Member State in which the worker was last employed ((b)(i)) or the Member State in which the worker resides ((b)(ii)). Article 71(1)(b)(ii) reads as follows:

'(1) An unemployed person who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

...

(b) ...

(ii) a worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there;'

The established case-law of the Court concerning Article 71(1)(b)(ii)

5. The judgment of the Court must enable the national court to apply Article 71(1)(b)(ii) correctly. That is why it seems appropriate to me, before dealing with the questions raised in this case, to recall the Court's case-law concerning that provision. That case-law strikes me as particularly enlightening with regard to the purpose and scope of Article 71 which, in my view, are crucial to the answer to be given by the Court to the questions submitted by the national court.

In the first place, reference must be made to the judgment of 15 December 1976 in Case 39/76 *Mouthaan* [1976] ECR 1901, in which the Court made it clear that 'according to the ninth recital of Regulation No 1408/71, Article 71(1)(b)(ii) serves to ensure that a worker placed in one of the situations therein set out may receive unemployment benefits in conditions most

4 — Article 1(q) of Regulation No 1408/71 defines that term as the Member State in whose territory the competent institution is situated. Article 1(o) defines the 'competent institution' amongst others as the institution with which the person concerned is insured at the time of the application for benefit, or the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated.

favourable to the search for new employment' (paragraph 13). That ruling was recently reaffirmed by the Court in its judgment of 12 June 1986 in Case 1/85 *Miethe* [1986] ECR 1837, paragraph 16 and in its judgment of 22 September 1988 in Case 236/87 *Bergemann* [1988] ECR 5125, paragraph 18.

The second judgment which I wish to refer to here is that of 27 May 1982 in Case 227/81 *Aubin* [1982] ECR 1991, in which the Court stated that Article 71(1)(b)(ii) essentially offers a choice to unemployed persons who, during their last employment, were residing in a Member State other than the competent State. They may opt for the benefit scheme of the State in which they were last employed or for the benefit scheme of the State in which they reside (paragraphs 13 and 19); see also the judgment in *Miethe*, cited above, paragraphs 9 and 10).

Finally, I wish to refer to the Court's judgment of 17 February 1977 in Case 76/76 *Di Paolo* [1977] ECR 315. That case was referred to the Court of Justice by the Belgian Court of Cassation, which had to adjudicate on a claim to unemployment benefit on the part of a Belgian resident who had most recently been employed in the United Kingdom and had subsequently rejoined her family in Belgium where she applied for the grant of unemployment benefit. One of the conditions for the grant of unemployment benefit in Belgium is proof that the claimant has worked a given number of days. The plaintiff had sought the application of Article 67, with a view to furnishing such proof. Article 67(3) provides that the application of the 'rules on aggregation' set out in paragraphs 1 and 2 of that article is subject only to the condition that the person concerned should have completed lastly periods of insurance or periods of employment in accordance with the provisions of the legislation under which the benefits are claimed. According to that same paragraph, however, that condition is not applicable in the cases referred to *inter alia* in Article 71(1)(b)(ii).

In its judgment the Court made it clear that Article 71(1) derogates from the rule in Article 67(3), subject to certain conditions, in favour of frontier workers and other workers. The decisive factor is the residence of the person concerned in a Member State other than the State to whose legislation he was subject during his last employment (paragraphs 10 and 11). The Court pointed out that the aim of that provision is to transfer liability for payment of unemployment benefit to the State of residence (instead of the State of last employment) for certain categories of workers who retain close ties with the country where they have settled and habitually reside. However, that rule would no longer be justified 'if, by an excessively wide interpretation of the concept of residence, the point were to be reached at which all migrant workers who pursue an activity in one Member State while their families continue habitually to reside in another Member State were given the benefit of the exception contained in Article 71 of Regulation No 1408/71'. It is for those reasons that Article 71(1)(b)(ii) must be strictly interpreted (paragraphs 12 and 13).

With regard to the condition of residence, the Court subsequently investigated the meaning of the phrase 'the Member State in which he resides' in Article 71(1)(b)(ii). That phrase is to be understood as covering the Member State where the worker, although employed in another Member State, continues habitually to reside and in which the habitual centre of his interests is

also situated. The addition of the words 'or who returns to that territory' implies merely that the concept of residence does not necessarily exclude non-habitual residence in another Member State. Account must therefore be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances (paragraphs 17 to 22). The Court therefore made it clear that the words 'was residing' in Article 71(1) refer to non-habitual residence by the worker in the Member State in which he was last employed. On the other hand, the word 'resides' in Article 71(1)(b)(ii) refers to the habitual residence of the worker concerned when he was last employed abroad and where the habitual centre of his interests is also situated. [5]

It is unclear from the order for reference whether Mrs Warmerdam actually retained her residence in the Netherlands while she was employed in the United Kingdom. Henceforth I shall proceed on the assumption that the residence requirement is not contested in this case (although this must be verified by the national court), and that consequently Mrs Warmerdam may be regarded during her stay in the United Kingdom as having retained her Netherlands residence. [6] I shall therefore focus on the condition for the application of Article 71(1)(b)(ii) raised by the national court, namely the status of worker.

The first question: the concept of 'worker' in Article 71

6. Against that background, I now turn to the first question raised by the Centrale Raad van Beroep. In my view, that question must be understood as seeking to ascertain whether a person who, during his last employment, was insured exclusively for the contingencies covered by only one branch of social security (in this case industrial accident) thereby acquires the status of worker, which is required in order to qualify for the advantages conferred by Article 71(1)(b)(ii) (namely, entitlement to benefits under the branch concerned with unemployment).

For the purposes of the answer to this question, the observations submitted to the Court generally take as their point of departure the definition of 'worker' in Article 1(a) of Regulation No 1408/71. Subparagraph (a) contains a number of alternative definitions of the concepts of 'employed person' and 'self-employed person'. The length and complexity of that

5 — The terminology used in Article 71 has apparently misled the Netherlands Government. In its observations, the Netherlands Government points out that Article 71(1)(b)(ii) does not apply to Mrs Warmerdam because, during her last employment, she was not residing within the territory of a Member State other than the competent State, the Netherlands Government evidently interpreting the words 'was residing' (in Dutch 'woonde') as 'having his residence' (in Dutch 'woonplaats hebbend').

6 — If that is not the case, Mrs Warmerdam will not be able to rely on the application of Article 71 or, therefore, to exercise the option provided for therein. In that case, she will fall within the scope of the 'ordinary' rules of aggregation in Article 67. Article 67(3) (see section 12 below) imposes, however, a restrictive condition on the application of those rules on aggregation: the worker must have completed 'lastly' periods of insurance or employment in accordance with the legislation under which the benefits are claimed.

article derive from the need, for the purposes of the application of Regulation No 1408/71, to use a single concept of 'worker' for a large number of social security systems.

Mrs Warmerdam, whose point of view is shared by the Netherlands Government, considers that her status as a worker is apparent from the wording of Article 1(a). She and the Netherlands Government point out that Article 1(a) makes the status of worker conditional on insurance for one or more of the contingencies covered by the branches of a social security scheme, without that status being assessed according to each branch of social security. In their reasoning, they emphasize that the concept of 'worker' is a concept of Community law which must, admittedly, be supplemented by national law, but on condition that this is done in accordance with Community law. In her observations Mrs Warmerdam also refers on that point to the Court's judgment of 19 March 1964 in Case 75/63 *Hoekstra* [1964] ECR 177, which dealt with the definition of a worker in Regulation No 3[7] which preceded Regulation No 1408/71. In that judgment, the Court confirmed that the concept of 'worker' had a Community meaning and referred to all those who, as such and under whatever description, were covered by the different national systems of social security.[8] Mrs Warmerdam and the Netherlands Government therefore conclude that for the application of Article 71(1)(b)(ii) only the status of worker in general is required and not the status of a worker insured against unemployment.

7. The Board takes a different view, which is shared by the Commission in its observations. In general, the Board maintains that the two questions formulated by the Centrale Raad van Beroep raise the same problem, namely whether a worker who was insured in one Member State against only one risk can rely on that limited insurance cover in another State in order to claim entitlement to insurance against other risks. The Board maintains that that question should be answered in the negative: to take a different view would constitute an encouragement to take out insurance in one Member State against only one risk and subsequently lay claim, on the basis of that insurance, to the advantages resulting from the application of all the other branches of social security.[9]

More specifically, with regard to the first question submitted by the Centrale Raad

7 — Regulation No 3 of the Council concerning social security for migrant workers, OJ 30, 16.12.1958, p. 561 *et seq.*

8 — At p. 185. It must be emphasized that Regulation No 3 did not contain any separate definition of the concept of worker.

9 — On the whole, that point of view strikes me as being incorrect. The acquisition of the status of worker in a given Member State does not *ipso facto* confer entitlement to the advantages of all the branches of social security in another Member State. Regulation No 1408/71 is designed primarily to coordinate and not to harmonize the social security systems of the Member States. In that connection, the basic principle of Regulation No 1408/71 is that migrant workers are entitled to social security benefits regardless of their place of employment or residence, so that the exercise of the rights which they have acquired is facilitated to the greatest possible extent throughout the territory of the Community, without however affecting the manner in which social security rights are acquired in the Member States. That principle has been implemented by the introduction of 'rules on aggregation' and by the grant of benefits regardless of such workers' place of residence (see the preamble to Regulation No 1408/71, OJ L 149, 5.7.1971, p. 2), but in accordance with the legislation of the Member State which must provide the benefits. Article 71 is in keeping with that principle, as I intend to show (in section 9).

van Beroep, the Board does not deny that the definition of a worker in Article 1(a) of Regulation No 1408/71 is also valid for the purposes of applying Article 71, but argues that the wording of Article 1(a) should not be viewed in isolation. The Board points out that the purpose of that provision is to distinguish the category of workers from the category of self-employed persons and that it was missing from the previous regulation, Regulation No 3. That regulation did not contain any definition of the concept of worker and it was necessary, according to the Board, to deduce the status of worker from the application of the provisions relating to the separate branches of social security. That approach, according to the Board, was adopted by the Court in particular in its judgments of 19 December 1968 in Case 19/68 *De Cicco* [1968] ECR 473 and of 27 October 1971 in Case 23/71 *Janssen* [1971] ECR 859.

Finally, the Board refers to the Court's judgment of 29 September 1976 in Case 17/76 *Brack* [1976] ECR 1429 from which it infers that it is necessary, even in the context of Regulation No 1408/71 which is now in force, to assess the status of worker according to each branch of social security. In that judgment the question which arose was whether a British accountant who had been insured for 17 years under a social security scheme as a self-employed person — admittedly after having previously been insured for nine years as an employed person — could be regarded as a worker within the meaning of Article 22(1) of Regulation No 1408/71, which contains *inter alia* a rule on the reimbursement of the cost of medical services provided in another Member State. The Board refers to paragraph 30 of the judgment, in which the Court held that persons (such as Mr Brack) in the situation described by the British court were, *for the purposes of the application of the first sentence of Article 22(1)(a)(ii) of Regulation No 1408/71*, 'workers' within the meaning of that regulation.[10] The Commission also considers that the inference to be drawn from the judgment in *Brack* is that, for the purposes of the application of Regulation No 1408/71, the status of worker must be considered according to each risk.

Furthermore, the Board also claims to find support for its contention in the scheme of Regulation No 1408/71, and more particularly in the 'rules on aggregation'. Regulation No 1408/71 contains a number of rules which permit the aggregation, for the purposes of determining the rights conferred by the regulation, of periods of employment or insurance which have been completed in different Member States. The Board points out that, in the regulation, those rules on aggregation are set out separately according to each branch of insurance (and, as I understand its argument, in a different manner).[11]

For its part, the Commission also points out that, *viewed as a whole*, the definition in Article 1(a)(ii) is incompatible with the argument that the concept of worker in

10 — Emphasis added by the Board. I wish to state here and now that that interpretation of the Court's judgment strikes me as incorrect. Admittedly, it is apparent from paragraph 17 of the judgment that the Court had not taken into consideration the national court's question except in relation to the contingency of 'sickness'. None the less, there is nothing in the grounds of that judgment to suggest that the Court intended to consider the status of 'worker' according to each branch of social security. In that judgment the Court deduced that status only from the existence of insurance cover against a given risk, namely the sole risk which was at issue in the proceedings.

11 — The Board refers to Article 18 as regards sickness benefits and to Article 38 as regards invalidity benefits.

Regulation No 1408/71 is a uniform concept which should not be assessed according to each branch of social security. For further details of the Commission's argument on this point, I refer to the Report for the Hearing (see section 4).

8. That brings me to my own assessment of the first question. The most striking feature of the observations submitted to the Court, as outlined above, is that although the parties take as their point of departure the definition of the concept of worker in Article 1(a) they appear to make no distinction between the four alternative definitions set out in that provision. In its observations the Netherlands Government seems to acknowledge that the definition in Article 1(a)(i) (which would appear to be the one that accords with the Netherlands system) is applicable. Mrs Warmerdam also seems to start from that premise. The Commission, on the other hand, focuses in its observations on both the definition in subparagraph (a)(i) and that in subparagraph (a)(ii) (which is, it would appear, the definition specifically orientated towards the United Kingdom). Finally, the Board refers to the wording of Article 1(a) only in general terms.

Although the two definitions are virtually identical and their application (at least in this case) does not lead to different results, the existing duality clearly indicates that the status of 'worker' in Regulation No 1408/71 is determined primarily, if not exclusively, by reference to the (applicable) national scheme rather than by reference to the branch of insurance.

9. Without denying that the concept of worker in Article 71 must be defined by reference to Article 1(a), I consider that the answer to the first question submitted by the Centrale Raad van Beroep must instead be sought in Article 71(1)(b)(ii) itself (on which, as I pointed out earlier, Mrs Warmerdam has based her claim to benefits). It is possible to infer from the aforesaid case-law (see the judgments in *Mouthaan*, *Aubin* and *Di Paolo*) that this rule constitutes an exception (to the general rule contained in Article 67) which is designed to offer migrant workers, on certain conditions, a choice between two different Member States as regards the grant of unemployment benefit with a view to facilitating their search for new employment. Those judgments clearly indicate that that provision, which must be interpreted strictly, does not confer entitlement to unemployment benefit. Instead, it permits migrant workers who become unemployed in a Member State other than the State in which they reside to exercise the rights to benefits which they have acquired, in keeping with their choice, either in the Member State in which they were last employed or in the Member State in which they reside, in accordance with the legislation of the country of their choice. [12]

12 — If, in that connection, the person concerned opts for the Member State in which he resides, the regulation establishes the fiction that he was last employed in that State (on that point, see further in this section and, in connection with the second question, section 13). On the other hand, the competent institution of the Member State in which a migrant worker resides may, for the purpose of determining his entitlement to benefits, also take account of the factual circumstances in which his last employment was terminated. Thus, it is apparent from the order for reference, and confirmed by Mrs Warmerdam's observations, that she herself resigned from her position in the United Kingdom. If the legislation of the Member State chosen by the person concerned does not provide for entitlement to benefits in a situation of that kind, no such right can be derived from Article 71(1)(b)(ii) either. The Board made it clear at the hearing, however, that the court of first instance (the Raad van Beroep, Arnhem) had taken the view that Mrs Warmerdam's resignation had to be regarded as involuntary and that no appeal had been lodged against the decision on that point.

It is also possible to infer from the wording of Article 71 and the aforesaid case-law that the freedom to choose the place at which unemployment benefits are to be granted is enjoyed by migrant workers only. In those circumstances there are two possibilities: either those concerned already had the status of worker within the meaning of Regulation No 1408/71 at the time when they moved to another Member State (the State in which they were last employed before becoming unemployed) [13] or those concerned acquired the status of worker during and by virtue of their last employment. [14] The rationale behind Article 71, namely to encourage the mobility of labour by facilitating the search for new employment, justifies in my view the grant of freedom of choice in both of those situations.

10. I therefore assume that persons who, on taking up their last employment, already had the status of worker (to be determined on the basis of the definition in Article 1(a) which is orientated towards the scheme of the Member State in which they reside) and retained that status during their last employment in the other Member State (the concept of worker to be assessed therefore in the light of the definition in Article 1(a) which is orientated towards the scheme of the Member State in which they were last employed), as well as persons who acquired the status of worker (to be determined on the basis of the definition orientated towards the scheme of the Member State in which they were last employed) during their last employment, can rely on the system established by Article 71.

Specifically, the Centrale Raad van Beroep has to consider whether Mrs Warmerdam enjoyed in the Netherlands (on the assumption that she retained her residence there — see section 5 above) the status of worker within the meaning of Article 1(a)(i) at the time of her departure from the Netherlands to the United Kingdom in March 1975 or whether, by virtue of her employment in the United Kingdom, she could be treated as having acquired in that country the status of worker within the meaning of Article 1(a)(ii). That 'test' is to be carried out for each Member State (which, moreover, as stated earlier, derives from the structure of Regulation No 1408/71 which refers to national schemes for the purpose of supplementing the concept of worker). In connection with that investigation, however, there are two reasons why it is unnecessary to consider, as the national court suggests in its question, whether the worker was insured against the risk of unemployment in the Member State in which he was last employed. In the first place, a worker acquires entitlement pursuant to Article 71 only to unemployment benefit in accordance with the legislation of the Member State for which he opts, in this case the Netherlands. The statutory scheme of the State in which he last resided is not relevant in that regard. Secondly, Article 71 introduces the fiction that the worker is to be regarded as having been last 'employed' [15] in the Member State in which he resides (in this case, presumably, the Netherlands once again). It is also apparent from that provision that the criteria and the scope of the insurance scheme of the Member State in which the

13 — This was so, for instance, in the main proceedings in Cases 39/76 (*Mouthaan*, see section 5 above) and in Case 227/81 (*Aubin*, see section 5 above).

14 — That situation may have arisen in the main proceedings in Case 76/76 (*Di Paolo*) where the person concerned had, after completing his studies in Belgium, accepted a temporary position in the United Kingdom.

15 — It should be pointed out that the technical expressions 'periods of employment' or 'periods of insurance' in Article 67 are not used in Article 71.

worker was last employed (in this case the United Kingdom) are not relevant and it is therefore unnecessary to raise the question whether the worker was insured against unemployment in that country.

The second question: the application of the 'rules on aggregation'

11. I now turn to the second question submitted by the Centrale Raad van Beroep.

This question, which is based on the assumption that the status of Mrs Warmerdam is that of a worker within the meaning of Regulation No 1408/71, was raised as a result of a discussion which took place between the parties only when proceedings were instituted before the Centrale Raad van Beroep. The Raad van Beroep, Arnhem (the court of first instance in the main proceedings) had found that Mrs Warmerdam fulfilled the 'requirement that a given number of days must be worked' for recognition of unemployment under the Netherlands legislation. The Board contested that finding before the national court on the following ground: since Article 71(1)(b)(ii) renders the legislation of the Member State of residence (in this case the Netherlands) applicable for the purposes of entitlement to benefits, Mrs Warmerdam must *inter alia* have completed a minimum number of periods of insurance. In her case, proof of completion of the requisite number of periods of insurance could be furnished only if account were taken of the number of days worked in the United Kingdom. According to the Board, that is possible only through the application of the rules on aggregation in Article 67 of Regulation No 1408/71. The Board considers that the latter provision permits the aggregation of periods of employment completed in another Member State only in so far as those periods are counted as periods of insurance in that other State, that is to say as periods of insurance for the same branch of social security as that which provides the benefits that are claimed. Since during her employment in the United Kingdom Mrs Warmerdam had not been insured against the risk of unemployment, the work she did there cannot be taken into account as a 'period of insurance' for the purposes of aggregation.

Following that discussion, therefore, the national court raised a second question concerning the interpretation of Article 67(1) of Regulation No 1408/71. That question seeks to ascertain whether that provision makes the aggregation of periods of employment completed in another Member State dependent on fulfilment of the condition that those periods are also regarded as periods of insurance for the same branch of social security under the legislation under which they were completed.

12. In connection with that question it is necessary to begin by referring to an ambiguity regarding the subject-matter of the interpretation sought. Although Article 67(1) contains rules on aggregation which must be applied by the competent institutions of a Member State 'whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of insurance periods', the rules on aggregation in Article 67(2) must be applied in Member States 'whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment'. The Netherlands Government and Mrs Warmerdam maintain that this case involves

the aggregation of periods of employment since at the time of the contested events entitlement to unemployment benefits in the Netherlands was conditional on completion of a number of periods of employment. In order to dispel any uncertainty, I shall deal with both of those provisions below.

13. I shall consider first of all the situation in which the national court would apply paragraph 2 of Article 67 (and, in the first stage of my reasoning, without reference to Article 67(3)). As stated earlier, that provision must be applied in Member States 'whose legislation makes the ... right to benefits subject to the completion of periods of employment'. In such Member States the competent institution must take into account

Secondly, when Article 67 is interpreted it is necessary to take account of the third paragraph of that article. A further condition has been incorporated in that paragraph for the application of the rules on aggregation in the first and second paragraphs: those two paragraphs may be relied upon only by workers who have completed 'lastly' (that is to say just before they became unemployed) periods of insurance or employment in accordance with the legislation under which the benefits are claimed. According to the facts established by the Centrale Raad van Beroep, that is not the case here since, after her return from the United Kingdom, Mrs Warmerdam immediately registered as a person seeking employment in the Netherlands.

'periods of insurance or employment completed under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers'.

If that wording is examined, the question (raised by the Board) whether the periods of employment completed in another Member State are regarded in that State as periods of insurance for the same branch of social security would not appear to be relevant: pursuant to Article 67(2), those periods are regarded 'as though they were periods of employment completed under the legislation which it [the competent institution] administers' with the result that the question of the classification of such periods in the other Member State simply does not arise.

However, Article 67(3) also provides that that further condition has not been laid down in 'the cases referred to in Article 71(1)(a)(ii) and (b)(ii)'. It follows that the Centrale Raad van Beroep must first determine whether Mrs Warmerdam can rely on the rule in Article 71(1)(b)(ii) (in that regard, see above, in connection with the first question, sections 5, 8 and 9), before a decision can be reached on the application of Article 67.

In its observations, however, the Board refers to the wording of Article 67(2) which provides that the competent institution must take account of 'periods of ... employment completed under the legislation of any other Member State ...'. The Board infers from those words that, under Article 67, the question whether a given period can be

regarded as a period of employment must be assessed primarily on the basis of the legislation under which it has been completed. In other words it must be a period of employment 'defined or recognized as such in a Member State other than that in which the competent institution is established'.[16] According to the Board, periods completed in another Member State can be taken into account for the purposes of the rule on aggregation in Article 67 only if, pursuant to the legislation of that other Member State, they are relevant with regard to the branch of social security concerned with unemployment.

I am not swayed by that reasoning since, as Mrs Warmerdam rightly emphasizes in her observations, it would impose a further condition for the aggregation of periods of employment, namely that periods of employment completed in another Member State should, pursuant to the legislation of that State, be regarded as periods in which the worker was insured for the same branch of social security. No such condition is to be found either in the wording of Article 67(2) or in the relevant case-law.

In any event, it must be emphasized in connection with the proceedings pending before the national court (and I now draw attention to Article 67(3)) that the condition for the application of Article 67 advocated by the Board is not applicable where Article 71(1)(b)(ii) applies. That article provides (as the Commission has rightly pointed out) for a different, more favourable system of aggregation than that laid down by Article 67. According to Article 71(1)(b)(ii), a worker is entitled to receive benefits in accordance with the legislation of the State in which he resides 'as if he had last been employed there'. That rule on aggregation makes it quite clear that only the legislation of the competent Member State is to be taken into account,[17] and that for the purpose of determining entitlement to benefits account must be taken of employment in the other Member State (in other words the 'last employment') as though the worker had been employed in the Member State in which he resides.[18]

14. I now turn to the situation in which the national court would apply paragraph 1 of Article 67. That provision must be applied in Member States 'whose legislation makes the . . . right to benefits subject to the completion of insurance periods'. In those States the competent institution must take into account

'periods of insurance or employment completed under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation'.

16 — This phrase comes from paragraph 6 of the judgment of 15 March 1978 in Case 126/77 *Frangiamore* [1978] ECR 725, which is referred to by the Board.

17 — This implies, as I pointed out earlier (section 10) that the characteristics and the scope of the insurance system of the Member State in which the worker was last employed are irrelevant.

18 — For the application of that rule see, *inter alia*, the judgment in *Mouthaan*, cited above, paragraphs 12 to 15.

It is apparent from the second question submitted by the Centrale Raad van Beroep that it regards the condition laid down at the end of that provision ('provided, however, ...') as fulfilled. That is why the situation which arose in connection with the application of Article 67(2) would appear to arise here: the periods of employment completed in the other Member State must be regarded as periods of insurance which have been completed under the legislation administered by the competent institution. The wording of Article 67 and the rule in Article 71 do not leave any scope, in this case either, for the requirement that the periods of employment must be regarded under the legislation of that other Member State as periods of insurance for the branch of social security concerned with unemployment.

Conclusion

15. In the light of the foregoing arguments I suggest that the questions submitted by the Centrale Raad van Beroep, Utrecht, should be answered as follows:

'(1) Article 71(1)(b)(ii) of Regulation No 1408/71 must be interpreted as offering a choice between benefit schemes both to persons who, on taking up their last employment, already have the status of worker under the social security scheme of the Member State in which they reside (such status to be determined on the basis of the rule in Article 1(a) of that regulation, which is applicable to the Member State of residence), and who during their last employment retained the status of worker (such status to be determined on the basis of the rule in Article 1(a) of that regulation, which is applicable to the Member State in which they were last employed), and to persons who acquire the status of worker by virtue of their last employment (such status to be determined on the basis of the rule in Article 1(a) of that regulation, which is applicable to the Member State in which they were last employed); in that connection the worker is not required, when opting for the legislation of the Member State in which he resides, to have been insured against the risk of unemployment in the Member State in which he was last employed.

(2) Article 71(1)(b)(ii) of Regulation No 1408/71 must be interpreted as meaning that the competent institution of the Member State in which the worker resides acts, for the purpose of determining his entitlement to benefits, as though he was last employed within the territory of the Member State of residence; in that connection there is no requirement that such employment should be regarded as a period of insurance for the same branch of social security by the legislation of the Member State in which the worker was actually employed.'