OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 27 February 1986

My Lords,

This case has much in common with Case 302/84 *Ten Holder* ([1986] ECR 1821), both cases having been referred for a preliminary ruling by the same Dutch court.

The plaintiff in the main case is a Dutch national residing in the Netherlands with her husband, who is apparently also a Dutch national. From July 1982 to 1 November 1983 he ran a restaurant on a self-employed basis in Belgium, but he continued to reside in the Netherlands during that time. In February 1983 the couple had a son. In June of the same year, the plaintiff applied for Dutch family allowances which were granted to her not long afterwards. As a general rule all persons resident in the Netherlands are entitled to family allowances. The plaintiff's husband was insured in Belgium and was entitled to Belgian family allowances. When this was discovered by the defendant Dutch social security institution, it sought repayment of the family allowances paid for the second quarter of 1983.

The plaintiff thereupon commenced proceedings which came before the Raad van Beroep at 's-Hertogenbosch. That court found that by virtue of Article 13(2)(b) of Council Regulation No 1408/71 the plaintiff's husband was at the relevant time subject to the Belgian social security system, since he was working in Belgium in a self-employed capacity. That provision reads as follows:

'Subject to Articles 14 to 17:

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;'

This provision was inserted into Regulation No 1408/71 by Council Regulation No 1390/81 (Official Journal 1981, L 143, p. 1) which extended it to the self-employed.

On this basis the national court referred the following question:

'Does the determination of the legislation of a given Member State as the legislation applicable to a given self-employed worker pursuant to the opening words and some of paragraph (b) of Article 13 (2) of Regulation No 1408/71 mean that the self-employed worker cannot simultaneously be regarded, by virtue of another Member State's national law alone, as insured under the legislation of that Member State concerning family allowances, with the result that the operation of Community law deprives him or his spouse of family allowances to which she or he is entitled under the national legislation of that other Member State alone?'

This is essentially the same as the second question in *Ten Holder.*

Only the Commission and the Dutch Government have put in written observations, on the same lines as those put in by them in *Ten Holder.*

For the reasons set out in my Opinion in that case I take the view that a person to whom Article 13(2)(b) applies is to be compulsorily insured in the Member State designated by that provision and may not be compulsorily insured in another Member State. The designated Member State (in this case Belgium) is therefore required to grant him those social security benefits to which one of its nationals resident on its territory would be entitled. Another Member State (in this case the Netherlands) may grant him benefits if it so wishes, but it is not bound to do so.

That exhausts the question posed by the Dutch court. In the result, however, according to that court, it seems that Dutch family allowances are payable regardless of whether Belgian family allowances are due.

Nevertheless, this case does point to a gap which exists as the regulation stands at the moment. It does not require either the Netherlands or Belgium to pay family allowances in a case such as that of Mr and Mrs Luijten. This is apparently because, when Regulation No 1390/81 was adopted, the Council was unable to agree to extend Article 73 to self-employed persons. Article 73 requires the designated Member State to pay family allowances to a worker in respect of his children residing in the territory of another Member State, as if they were resident in the territory of the designated State. There is no comparable provision for a self-employed person. In the result by virtue of Article 13(2)(b) Mr Luijten was at the relevant time subject to Belgian legislation but Belgium was not bound to pay family allowances for a child not resident in Belgium. Since Dutch family allowances might have been unavailable on the grounds that Mr and Mrs Luijten were subject to Belgian legislation, they might have been worse off than if Regulation No 1390/81 had never been passed. The effect of this position, however, does not have to be considered in this case.

In the light of these considerations I take the view that the question referred should be answered as follows:

A self-employed person to whom Article 13(2)(b) of Council Regulation No 1408/71 applies may be compulsorily insured only in the Member State designated by that regulation. However, there is nothing to preclude another Member State from granting him social security benefits if it so wishes.

The Dutch Government and the Commission should bear their own costs.