2. **Where payments of the same kind are granted or awarded in different Member States on the basis of analogous national rules, without any reference to the provisions of Regulation No 1408/71, there are no grounds for applying the method of currency conversion set out in Article 107 of Regulation No 574/72.**

3. **No provision of Community law requires the periodical recalculation, by reason of a variation in the rates of conversion of currencies, of a social security benefit whose amount has been established taking into account a benefit acquired in another Member State.**

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 5 May 1983.

For the Registrar

H. A. Rühl

Principal Administrator

U. Everling

President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 10 MARCH 1983

My Lords,

This case was referred to the Court by the Centrale Raad van Beroep for preliminary rulings on the interpretation of Council Regulation No 1408/71 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) and Council Regulation No 574/72 of 21 March 1972, fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159).

Mrs Van der Bunt-Craig is a British national by birth. Her late husband was a Dutch national. He lived in the Netherlands from his birth on 31 December 1889 until 1919, when he began to reside and work in the United Kingdom. She lived in England from her birth in January 1914. The couple married in 1938.

The details of the issues in the case before the Raad van Beroep are not fully set out in the order for reference but the essential facts seem to be these. They continued to live, and he to work, in the United Kingdom until 1955. According to the Centrale Raad van Beroep Mr Van der Bunt began to receive a United Kingdom retirement pension in 1955. The Raad van Arbeid states that he began to receive that pension in 1959. The former seems more likely, since Mr Van der Bunt would have reached the age of retirement under United Kingdom law on 1 January that year. In any event, in 1955 the couple resettled in the Netherlands. In 1961, Mr Van der Bunt began to receive from the Dutch authorities an old-age pension at the full rate for married persons under the Nederlandse Algemene Ouderdomswet (AOW). In February 1974, when Mrs Van der Bunt-Craig had reached the age of 60, she became entitled to a United Kingdom retirement pension at the rate of £6 per week, exclusively on the basis of her husband's contributions in the United Kingdom. In September 1974, Mr Van der Bunt died.

From 23 September 1974 Mrs Van der Bunt received a United Kingdom retirement pension at the rate of £10 per week in place of the retirement pension of £6 per week. The new retirement pension was payable to her by reason of her husband's death and, like the old pension, it was based exclusively on her husband's contributions in the United Kingdom. In October 1974 she applied to the Dutch authorities for a widow's pension, under the Nederlandse Algemene Weduwen- en Wezenwet (AWW). By a decision dated 29 December 1975 the competent Dutch authorities, the Raad van Arbeid at The Hague, recognized her entitlement to a widow's pension, with effect from 1 September 1974 until 1 January 1979 (that is, the beginning of the month in which her husband died to the beginning of the month in which she reached the age of 65, these being the material dates under Article 8 of a Royal Decree dated 20 March 1968 implementing the AWW and made under Article 30 thereof).

The Raad van Arbeid took the view, however, that the retirement pension payable to Mrs Van der Bunt-Craig in the United Kingdom was to be treated as a survivor's pension payable under the legislation of another State, within the meaning of Article 1 of the Royal Decree; and therefore the Dutch widow's pension should be reduced in accordance with the anti-cumulation provisions of Article 30 of the AWW and the Royal Decree. For the purposes of calculating the value in Dutch guilders of the pension payable in the United Kingdom, the Raad van Arbeid used, in accordance with Article 3 of the Royal Decree, the rate of conversion specified in Article 107 of Regulation No 574/72 in the form that Article 107 took before its amendment, from 1 January 1975, by Council Regulation No 2639/74 of 15 October 1974 (Official Journal L 283, p. 1). The result was to reduce the Dutch widow's pension by 52.09 %. The sum thus calculated was then augmented by a compensatory amount, payable under Article 1 (3) of the Royal Decree, designed to ensure that the sum of the

United Kingdom retirement pension and the Dutch widow's pension should not be lower than a full Dutch widow's pension. The Dutch widow's pension was not in fact paid to Mrs Van der Bunt-Craig for any period before 1 March 1975 as she continued to receive the old-age pension, under the AOW, until 28 February 1975.

In January 1976 Mrs Van der Bunt-Craig, by her agent, appealed to the Raad van Beroep at The Hague, against the Raad van Arbeid's decision dated 29 December 1975. Thereafter she resettled in the United Kingdom, where it seems she has remained ever since. On 26 April 1977 the Raad van Beroep at The Hague annulled the decision upon the ground that the Raad van Arbeid had erred in treating the whole of the United Kingdom retirement pension as a survivor's pension. The Raad van Arbeid appealed to the Centrale Raad van Beroep.

Before that tribunal the Raad van Arbeid appears to have argued that the retirement pension payable to Mrs Van der Bunt-Craig in the United Kingdom was to be regarded as a survivor's pension, for the purposes of Article 1 of the Royal Decree; but that there was no scope for the application of the Community's anti-cumulation provisions, contained in Article 46 of Regulation No 1408/71, since a Dutch widow's pension and a United Kingdom retirement pension are not benefits "of the same kind" within the meaning of Article 12 (2) of that Regulation. In any event, the application of Article 46 of that Regulation to the present case would not, according to the Raad van Arbeid, produce a higher rate of pension than one calculated in accordance with national law, including national anti-cumulation provisions. In this context the Raad van Arbeid observed that for the purpose of converting the United Kingdom pension into Dutch currency, it had used the rate of exchange set out in Article 107 of Regulation No 574/72, in the form that that Article took at the time the calculation was made (that is, after its amendment by Council Regulation No 2639/74). Finally, the Raad van Arbeid drew the attention of the Centrale Raad van Beroep to complications arising out of periodic changes in the rate of exchange used in calculating pensions; and Mrs Van der Bunt-Craig's representative complained of the consequences of the Raad van Arbeid's method of calculation, given the fall in the value of sterling relative to the Dutch guilder at the time of calculation.

The Centrale Raad van Beroep then put a series of questions to the competent authorities in the United Kingdom, the Department of Health and Social Security. The latter confirmed that the benefits paid to Mrs Van der Bunt-Craig under United Kingdom legislation were paid to her under the National Insurance Act 1965 and Regulations made thereunder as a retirement pension to which she was entitled in her own right although it was based on her husband's contributions and should not, in the opinion of the Department, be regarded as a survivor's pension.

The Centrale Raad van Beroep found it necessary to refer to the Court three questions. By the first it asks:

"If a pension which is received solely by virtue of national legislation also overlaps with a benefit of a different kind of another Member State, should the application of a national provision against overlapping benefits be restricted in such a way that where the application of national legislation is less favourable than that of the rules contained in Article 46 of Regulation No 1408/71, that Article must be applied?"

The question thus presupposes that the national tribunal is presented with a case of overlapping benefits "of a different kind". The first question clearly only arises on that basis. Article 12 (2) of Regulation No 1408/71 states that national provisions for the reduction of a benefit, in the case of overlapping with another social security benefit, may be invoked even though the last-mentioned benefit arises in another Member State. It adds:

"However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with Articles 46, 50, 51 or Article 60 (1) (b)".

That provision is implemented *inter alia* by Article 7 (1) (c) of Regulation No 574/72, which provides in part that for the purpose of calculating the reduction or suspension of benefits in respect of invalidity, old age or death (pensions) in accordance with the rules against overlapping contained in Article 46 (3) of Regulation No 1408/71, the competent institution shall take into account "benefits of a different kind". As the Court ruled in Joined Cases 116, 117, 119, 120 and 121/80, *Rijksdienst vor Werknemerspensioenen* v *Celestre and Others* [1981] ECR 1737 at 1756, "where a worker is in receipt of benefits of the same kind in respect of invalidity or old age which are awarded by the institutions of two of more Member States in accordance with the provisions of Article 46 of Regulation (EEC) No 1408/71, the national legislative provisions for reduction, suspension or withdrawal do not apply".

The question whether two benefits are of "the same kind" is to be answered by an examination and comparison of the national legislative provisions giving rise to each benefit. It is, however, in accordance with the general objectives of Regulation No 1408/71 and particularly those objectives set out in the seventh and eighth recitals of the preamble, not to interpret that phrase restrictively, for otherwise national provisions against overlapping might be applied with such rigidity or frequency as to discourage migration for employment between Member States (see the Opinion of Mr Advocate General Capotorti in Case 180/78, *Brouwer-Kaune*, [1979] ECR 2111). Similarly the Court ruled, in Case 4/80, *Remo D'Amico* v *Office National des Pensions pour Travailleurs Salariés* [1980] ECR 2951 at 2965, that where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind. Consequently, the application of national rules against overlapping was precluded and the provisions of Chapter 3 of Regulation No 1408/71 were applicable.

In the present case, the Centrale Raad van Beroep expresses the view that the Dutch and United Kingdom benefits to which Mrs Van der Bunt-Craig is entitled are to be treated as survivor's benefits, for the purposes of the Dutch rule against overlapping and for the purposes of Article 46 of Regulation No 1408/71. The Italian Government and the Commission express the view that the two benefits are of the same kind, within the meaning of Article 46 of that Regu-

lation. On the material presented to the Court, I take the same view. In the light of section 32 of the National Insurance Act 1965, the United Kingdom benefit payable to Mrs Van der Bunt-Craig can be regarded as a retirement pension to which she is entitled in her own right; for it is a benefit that cannot be paid to a woman until she reaches the age of retirement; but it is based exclusively on her husband's contributions and is only payable after the husband's death. In the language used by the Court in Case 184/73, *Bedrijfsvereniging* v *Kaufmann* [1974], ECR 517 at 525, the benefit is "genuinely comparable" with a widow's pension. This view is confirmed by paragraph 9 of Part J of Annex V to Regulation No 1408/71 (formerly paragraph 11 of Part I of that Annex) which states that "for the purpose of applying Article 12 (2) of the Regulation to the legislation of the United Kingdom, invalidity, old-age and widow's pensions shall be regarded as benefits of the same kind".

For this reason it seems to me that the first question put by the Centrale Raad van Beroep does not arise. If, however, the right conclusion were that the two benefits to which Mrs Van der Bunt-Craig is entitled are not benefits "of the same kind", the first question would arise and would, in my view, call for an affirmative answer. The Court held in Case 236/78, *Fonds National de Retraite des Ouvriers Mineurs* v *Giovanni Mura* [1979] ECR 1819 that where the provisions of Article 46 of Regulation No 1408/71 are more favourable to the worker than the provisions of national legislation alone, by virtue of which the worker receives a pension, the provisions of that article must be applied in their entirety. As Mr Advocate General Warner observed, at p. 1832, the claimant in such cases is entitled to whichever is the greater of, on the one hand, the pension that he can claim under the legislation of the Member State, in its entirety, including any anti-duplication provisions, and the pension that he can claim under the provisions of Regulation No 1408/71 in their entirety; and consequently the provisions of national legislation cannot operate to reduce the claimant's total entitlement below the "highest theoretical amount of benefits" calculated in accordance with Article 46. It follows that national provisions against overlapping cannot be applied, in any case subject to Article 46 of Regulation No 1408/71, so as to produce a result less favourable to the claimant than the result produced by Article 46 itself.

By its second question the Centrale Raad van Beroep asks:

"Must Article 107 of Regulation No 574/72 be construed to mean that the method for converting currencies laid down by that article also applies to the conversion pursuant to a national provision against overlapping benefits which is saved by Article 12 (2) of Regulation No 1408/71 of benefits of another Member State?"

Article 107 of Regulation No 574/72 provides, in terms, that the rate of conversion specified therein shall be used for the purposes of implementing Articles 12 (2) and 46 (3) of Regulation No 1408/71, among other provisions. Clearly, therefore, that rate of conversion is to be used by the competent authorities in a Member State for the purpose of calculating the amount of benefits payable to the claimant in accordance with Article 46 (3); but Article 107 of Regulation No 574/72 does not state expressly that the same method of calculation shall be used

in cases governed by national rules, such as the rules contained in Article 30 of the AWW and the Royal Decree of 20 March 1968, which are preserved by Article 12 (2) of Regulation No 1408/71.

It was argued on behalf of the Dutch Government, and on behalf of the Raad van Arbeid, that the rate of conversion specified in Article 107 of Regulation No 574/72 is to be used only for the purpose of making the calculation described in Article 46 of Regulation No 1408/71 (and the other provisions set out in Article 107 of the 1972 Regulation) and is not to be used where the point at issue is solely a national rule against accumulation or duplication of benefits.

On the other hand the Commission, supported by the Italian Government, argues that the rate of conversion specified therein is to be applied for the purpose of making calculations in accordance with national rules preserved by the provisions mentioned therein — including Article 12 (2) of Regulation No 1408/71.

I accept that Article 107 is capable of being construed either way. In my view, however, the construction advocated by the Commission is the right one. There is no other provision in the Community Regulations which could be applied for the purpose of making calculations in accordance with those national rules and it seems to me that Article 107 was intended to and is properly to be read as covering them. If that were not so, I should be prepared to infer such a provision by analogy as a necessary consequence of the legislation. Otherwise distortions would arise by reason of differences between the rates of conversion used in the several Member States for the purpose of applying their own anti-cumulation provisions. Such distortions would be liable to lead to disturbances in the labour market of the kind that were sought to be avoided in Article 51 of the Treaty and in the Regulations made thereunder.

For these reasons I am of the opinion that the second question put by the Raad van Beroep should be answered in the affirmative. It would follow that the method of calculation to be used is the method specified in Article 107 of Regulation No 574/72 in the form taken by that Article at the material date (and not in its earlier version, adopted by unamended national provisions). The parties before the Raad van Beroep appear to agree that as Mrs Van der Bunt-Craig's pension was determined after 1 January 1975, regard shall be had to the amended version of Article 107, following the entry into force of Regulation No 2639/74. This appears to be correct, a view confirmed by Article 5 of Decision 101 of 29 May 1975 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, concerning the date to be taken into consideration when determining the rates of conversion to be applied when calculating certain benefits (Official Journal C 44, p. 3) namely 1 January 1975.

By its third question the Raad van Beroep asks:

"Do the objectives underlying Articles 48 to 51 of the Treaty establishing the European Economic Community require that current benefits (calculated solely on the basis of national law or under the rules contained in Article 46 of Regulation No 1408/71) whose amount is dependent at the time when they are awarded *inter alia* on the amount of one or more benefits due under the

legislation of one or more Member States should be calculated periodically in accordance or by analogy with the provisions contained in Article 107 of Regulation No 574/72 in view of changes in exchange rates?"

In the event of an affirmative answer to that question, the Centrale Raad van Beroep poses further but subsidiary questions.

Nothing contained in Article 107 of Regulation No 574/72, or in Articles 48 to 51 of the EEC Treaty, provides expressly for the periodic recalculation of benefits, so as to take account of currency fluctuations. It does not seem to me possible to construe these provisions, or any of the other provisions drawn to the Court's attention, in such a way as to require periodic recalculation, even by implication. In particular, there is no such implication in Article 51 of Regulation No 1408/71, which provides for revalorization of benefits (such as occurs when a Member State increases its rate of benefits in accordance with changes in the cost of living). Even where there is to be a recalculation of a benefit payable in one Member State, by reason of a revalorization of a benefit in another, Article 51 (2) of Regulation No 1408/71 merely provides, in effect, that the recalculation shall be made in accordance with the current rate of conversion applicable under Article 107 of Regulation No 574/72.

It is, moreover, very difficult to infer such a requirement since there are many possible ways of providing for such a recalculation, none of which is necessarily compelling. I do not consider that Community law either expressly or impliedly does require periodic recalculation of benefits. Only the agent for the Italian Government argued before the Court that periodical recalculation was necessary; and he was unable to state at what intervals the recalculation was, as a matter of Comunity law, to be effected.

Such a position can work to the disadvantage of a claimant but it appears from the observations of the Raad van Arbeid that on the basis of a report given by the Commission in 1977, currency fluctuations have favourable consequences for the majority of pensioners and unfavourable consequences for a relatively small minority. This conclusion is consistent with, though independent of, Article 1 of Decision 99 of 13 March 1975 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (Official Journal C 150, p. 2) which states that Article 107 (1) involves no obligation to recalculate current benefits.

Accordingly the subsidiary questions do not in my view arise.

For these reasons I am of the opinion that the questions posed by the Centrale Raad van Beroep should be answered as follows:

1. On the materials presented to the Court, the first question does not arise. If, however, such a question were to arise, the answer would be that where a pension is received solely by virtue of national legislation, and it

overlaps with a benefit of a different kind of another Member State, the application of a national provision against overlapping benefits must be restricted in such a way that where the application of the national legislation is less favourable than that of the rules contained in Article 46 of Regulation No 1408/71, that article must be applied.

2. Article 107 of Regulation No 574/72 must be construed to mean that the method for converting currencies laid down by that article also applies to the conversion pursuant to a national provision against overlapping benefits which is saved by Article 12 (2) of Regulation No 1408/71 of benefits of another Member State.

3. Current benefits, whose amount is dependent at the time when they are awarded, *inter alia*, on the amount of one or more benefits due under the legislation of one or more Member States are not required to be recalculated periodically in view of changes in exchange rates.