OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 3 JULY 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour d'Appel of Douai.

The question at issue before that Court is whether Signora Diamente Palermo (née Toia) is entitled to a non-contributory allowance instituted by French legislation in favour of elderly women who have brought up at least five children, the "allocation aux mères de famille". Signora Palermo, who was born in Italy in 1913, is of Italian nationality. She and her husband reside in France, at Escaudain, in the Département of the Nord. He is retired, having formerly worked as a miner in France.

The allowance in question has its origin in Statute No 46-1146 of 22 May 1946 (JORF 23. 5. 1946, p. 4475), which was described in its title as being for generalizing social security ("Portant généralisation de la sécurité sociale"). That statute did not itself institute the allowance. It created (by Articles 14 to 17) an allowance for elderly employed persons ("allocation aux vieux travailleurs salariés") and provided (by Article 33) that the benefit of such an allowance could be extended by decree to wives and widows of employed men who had brought up five children to the age of sixteen. That extension was effected by Decree No 46-1862 of 19 July 1946 (JORF 21. 7. 1946, p. 6540).

Article 33 of the Statute of 22 May 1946 was repealed and re-enacted in wider form by Statute No 49-1095 of 2 August 1949 (JORF 6. 8. 1949, p. 7716). The latter Statute was implemented by Decree No 50-76 of 16 January 1950 (JORF 17. 1. 1950, p. 641). This Decree was amended by Decree No 56-839 of 16 August 1956 (JORF 21. 8. 1956, p. 8028) which made it a condition of the grant of the allowance that the children in question should be of French nationality. But that condition was not novel. It had already been imposed by an "Arrêté" of 1 March 1950 (JORF 5. 3. 1950, p. 2524) implementing the Decree of 16 January 1950.

The main features of that legislation are now embodied in Articles L 640 to L 642 in Book VII of the Code de la Sécurité Sociale. The requirement that the children should be of French nationality is not however mentioned there. It appears still to spring from the Decree of 16 January 1950 as amended by that of 16 August 1956.

The conditions that, as a result of that legislation, a woman must satisfy in order to qualify for the allowance may be summarized as follows:

(i) She must be at least 65 (or 60 if incapacitated from work).

(ii) She must be of French nationality, but, in accordance with administrative instructions issued by the Minister of Labour and Social Security ("Ministre du Travail et de la Sécurité Sociale"), that condition is waived in the case of nationals of certain countries, including Italy, with which France has bilateral conventions. The nationality of her husband is irrelevant.

(iii) She must reside in metropolitan France.

(iv) She must be the wife or the former wife of a man who last worked for at least three months as an employed person. As appears from decisions of the French Cour de Cassation to which we were referred, it does not matter where he worked; it may have been outside France. Nor does it matter whether he is or was subject to any social security legislation.

(v) She must have brought up, for nine years before their sixteenth birthdays, at least five children.

(vi) Those children must be of French nationality at the time when she becomes 65 (or when she claims the allowance if, being incapacitated, she does so between 60 and 65).

(vii) She must show that her means are below a certain specified maximum.

(viii) She must not be entitled to any pension under social security legislation.

Signora Palermo satisfies all those conditions except condition (ii) as to her own nationality, but that has been waived in her case, and condition (vi) as to the nationality of her children. Of her seven children, two are French nationals but the other five are Italian nationals. It appears that the two French nationals and two of the Italians reside in France, that two of the Italians reside in Australia and that the remaining Italian resides in Canada.

It was on the ground that only two of her children were French that the responsible social security institution, the Caisse Régionale d'Assurance Maladie du Nord de la France, rejected Signora Palermo's claim to the allowance.

On appeal by Signora Palermo to the local Commission de Première Instance du Contentieux de la Sécurité Sociale, that tribunal reversed the decision of the Caisse Régionale and allowed her claim. It did so on the strength of Articles 2, 3 and 4 of Council Regulation (EEC) No 1408/71.

The Caisse Régionale now appeals to the Cour d'Appel of Douai.

Such are the circumstances in which that Court has referred the case to this Court for a preliminary ruling "on the interpretation of the provisions of Articles 2 (1), 3 (1) and (3), and 4 (1) (c) and (2) of Regulation (EEC) No 1408/71 of 14 June 1971 with regard to the grant of an old-age benefit which, being of a non-contributory nature, is in principle reserved to French nationals".

In this Court the Caisse Régionale has put forward three main contentions.

First it has contended that the "allocation aux mères de famille" is not within the scope of Regualtion No 1408/71, or indeed within that of the EEC Treaty. In support of that contention the Caisse put forward elaborate and interesting arguments, but I do not think I need deal with them in detail, because there is a short answer to the contention.

Article 4 of Regulation No 1408/71 describes, Your Lordships remember, the benefits, contributory or non-contributory, legislation or schemes concerning which the Regulation is to apply to. Article 5 provides, in conjunction with Article 96, for the Member States to specify the legislation and schemes referred to in Article 4 in declarations to be notified to the President of the Council and published in the Official Journal of the European Communities. In Case 35/77 *Beerens v Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249 the Court (taking a stricter view than that which I had expressed in my Opinion) held that:

"The fact that a Member State has specified a law in its declaration under Article 5 of Regulation No 1408/71 must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of the said regulation."

The declarations made by the original Member States under Articles 5 and 96 of the Regulation were consolidated in March 1973 and, as so consolidated, are published in OJ C 12 of 24. 3. 1973, p. 11. One there finds, under Heading C(A) (I) (c), that the French Republic declared as being within the scope of the Regulation the "allowance for elderly employed persons and allowance for women with children (mères de famille) (Volume VII of the Social Security Code)".

That being so the Caisse Régionale cannot, in my opinion, be heard to say that the allowance here in question is not within the scope of the Regulation.

Secondly, and in the alternative, the Caisse contended that there was nothing incompatible with the Treaty or with the Regulation in the condition that a woman's children should be French in order for her to be entitled to the allowance. This is the nub of the case.

As to that, the provision of the Treaty that is obviously in point is Article 7, providing that "Within the scope of application of this Treaty, and without prejudice to any special provisons contained therein, any discrimination on grounds of nationality shall be prohibited". The Caisse did not rely on any "special provisions" contained in the Treaty as excluding the application of Article 7 in the present context.

The provision of the Regulation that is in point is Article 3 (1), which, Your Lordships remember, is in these terms:

"Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State."

There again the Caisse did not rely on any "special provisions" of the Regulation.

As the Commission pointed out, where Community law forbids discrimination on the ground of nationality it forbids

not only overt discrimination which, by the application of other criteria of differentiation, lead in fact to the same result" — see Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153 (paragraph 11 of the Judgment) and Case 61/77 *Commission* v *Ireland* [1978] ECR 417 (paragraphs 78 to 80 of the Judgment). In the *Sotgiu* case the Court gave as examples of criteria that might, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the ground of nationality, the place of origin or residence of a person.

It seems to me manifest that, as was submitted by the Commission, a requirement that her children should be of French nationality is much more likely, in practice, to be satisfied by a woman who is herself French than by one who is not. The imposition of such a requirement therefore amounts, in my opinion, to covert discrimination on grounds of nationality.

The Court however held in the *Sotgiu* case that such differentiation might be justified if it were made because of objective differences between the situations of those as between whom it was made.

The Caisse submitted that the requirement here in question was justifiable for two reasons.

First, the Caisse said that the "allocation aux mères de famille" was an instrument of demographic policy.

That seems at first sight a surprising submission, because it is difficult to imagine a woman being encouraged to bear children by the thought that when she reaches the age of 65 (or of 60 if she is then incapacitated) she will, if enough of her children have then retained or acquired French nationality, and if the other conditions in the relevant legislation are fulfilled, be entitled to a modest allowance. Nor does the Cour d'Appel of Douai, before which also the submission was advanced, appear to have been impressed by it. The Order for Reference, after mentioning the submission, goes on to give as the reason why the allowance is "in principle reserved to French nationals" the fact that it is non-contributory.

It would probably be right for Your Lordships to leave the question whether the allowance is an instrument of demographic policy to be decided by the French Courts, were it not for the circumstance that Regulation No 1408/71 deals specifically with what its preamble calls "benefits aimed largely at encouraging an increase in population". It does so in the context of family benefits. Annex I to the Regulation (as replaced by the Act of Accession and further amended by Council Regulation (EEC) No 1209/76) lists the "Special maternity benefits excluded from the scope of the Regulation in pursuance of Article 1 (u)", which is the provision defining "family benefits" and "family allowances". Under that heading, Annex I lists "childbirth allowances" payable in Belgium and Luxembourg, and "prenatal allowances" and "postnatal allowances" payable in France. It does not list the allowance here in question.

Thus the Regulation deals with benefits that are instruments of demographic

policy by excluding them *nominatim* from its scope. The allowance here in question, far from being so excluded, is expressly placed within the scope of the Regulation by the Declaration made by the French Republic under Article 5. It must follow, in my opinion, that Article 3 (1) applies in relation to that allowance; and, on the authority of the cases to which I referred earlier, Article 3 (1) must clearly be interpreted as forbidding not only overt discrimination but also covert discrimination on the ground of nationality.

I would therefore reject the first reason put forward by the Caisse in justification of the requirement that the children of a woman claiming the allowance should be French nationals.

The second reason given by the Caisse is that only by requiring the claimant's children to be French nationals can duplication of benefits be avoided. The Caisse points out that Article 10 of Regulation No 1408/71 precludes the enforcement of the condition that she should be resident in France. Thus, unless the condition as to the nationality of her children is insisted upon, there is nothing to prevent a woman from claiming an allowance of the kind in question in as many Member States as there are that grant such allowances.

To meet that point the Commission put forward a number of arguments which did not seem to me really to do so. They included an argument founded on Articles 2, 13 and 14 of Regulation No 1408/71, another founded on Article 12 of that Regulation and the principle of proportionality, and one founded on the conditions in the relevant French legislation to the effect that a woman may receive the allowance in question only if she is of small means and entitled to no social security pension.

We were however also told on behalf of the Commission that in fact the legislation of no other Member State provides for an allowance similar to the French "allocation aux mères de famille", so that in practice no duplication of the kind envisaged by the Caisse can arise. In the light of what was said by the agent of the Commission at the hearing in answer to a question of mine, I infer that the true position is this. Because the problem is not a practical one, no-one has thought it necessary to legislate for its solution. Should it become a live problem, some amendment of Regulation No 1408/71 will be necessary. As to that the Court has held that Article 51 (b) of the Treaty does not preclude the Council from making residence in a particular Member State a criterion for the receipt of particular benefits, where such a provision is objectively justified — see Case 19/76 *Triches* v *Caisse Liégeoise pour Allocations Familiales* [1976] ECR 1243. So a possible solution would be for the Council to make the residence of the claimant a relevant criterion. But it would not in my opinion be permissible for the Council to make the nationality of her children a relevant criterion.

It follows, in my opinion, that the risk of duplication of benefits may not be invoked as justifying the condition in

the French legislation relating to the nationality of the claimant's children.

The third main contention of the Caisse, which was advanced in case the Court should reject the first two, was to the effect that, if children having the nationality of any Member State must be taken into account because of the provisions of Article 3 of Regulation No 1408/71, then only those resident in the Community should be taken into account. No real argument was put forward in support of that contention, but it seems that here again the Caisse was concerned with the risk of duplication of benefits.

As to that contention I think it enough to say that, in the absence of any mention in the French legislation of the residence of the claimant's children, and of any provision of Community law rendering it relevant, I can see no possible basis on which the Court could hold it to be relevant.

No point was taken by the Caisse on Article 2 of the Regulation. This provides that the Regulation "shall apply to workers who are or have been subject to the legislation of one or more Member States ... as also to the members of their families and their survivors". The present French legislation applies, however, to a person who need not be or have been either (i) herself a worker or (ii) a member of the family of a worker who is or has been subject to any social security legislation. The Commission suggested that none the less she could not invoke Regulation No 1408/71 unless she satisfied one of the conditions in Article 2. That may be so, but as the point was not argued, and as it may not be material in the present case, I think it better to leave it open.

The formulation of the answer that Your Lordships should give to the question referred to the Court by the Cour d'Appel of Douai presents some difficulty because of the general way in which that question is expressed. I think however that that Court will be enabled to deal appropriately with the case if, in answer to the question, Your Lordships rule that:

(1) The circumstance that a Member State has specified in its declaration under Article 5 of Regulation No 1408/71 the legislation applicable in its territory concerning a particular kind of benefit, whether contributory or non-contributory, must be taken to establish that benefits granted under that legislation are within the scope of the Regulation as defined by Article 4 (1) and (2) thereof.

(2) Article 3 (1) of the Regulation is to be interpreted as meaning that such a benefit may not be denied to a person to whom that Article applies on the ground either of his or her own nationality or of the nationality of his or her children.