they occur in the national territory, constitute a ground for the loss or suspension of the right to cash benefits; the decision on this matter is for the national authorities, provided that it applies without regard to nationality and that those facts are not described in such a way that they lead in fact to discrimination against nationals of the other Member States.

In Case 1/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the National Insurance Commissioner for a preliminary ruling in the action pending before him between

PATRICK CHRISTOPHER KENNY

and

INSURANCE OFFICER

on the interpretation of Article 7 of the Treaty and of certain provisions 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),

THE COURT,

composed of: H. Kutscher (President), M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and Issues

The order for reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Mr Kenny, the plaintiff in the main action, a national of the Republic of Ireland who is however resident in Great Britain, was subject in Great Britain to the National Insurance Act and entitled *inter alia* to receive cash benefits for sickness or incapacity for work. In June 1973 he went to Ireland and was imprisoned there for breach of a bond given to an Irish court on the occasion of a previous conviction in respect of which he had received a suspended sentence. While serving this term he became ill and received treatment in a hospital which did not belong to the prison. On his return to Great Britain he claimed cash sickness benefits under the National Insurance Act 1965 for the period while he was in hospital. The Insurance Officer, the defendant in the main action, refused to grant that request, relying upon section 49 (1) (b) of the National Insurance Act 1965 which, in the version then in force, provided that:

"Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit ... for any period during which that person —

(a) ...

(b) is undergoing imprisonment or detention in legal custody".

Mr Kenny appealed from that decision to the National Insurance Commissioner, who, taking the view that the dispute raised questions of the interpretation of Community law, requested the Court of Justice to give a preliminary ruling on the following questions:

1. Whether within the scope of application of Regulation (EEC) No 1408/71 Article 7 of the Treaty of Rome is directly applicable in Member States.
2. Whether the competent institution of a Member State which is required by either Article 19 (1) (b) of Article 22 (1) (a) (ii) of Regulation (EEC) No 1408/71 to pay cash benefits to a worker who is not a national of that Member State in accordance with the legislation which it administers is entitled
   (1) to treat facts occurring in the territory of another Member State as equivalent to corresponding facts occurring in its own State being facts which had they occurred in its own State would have disqualified the worker concerned in part or in whole for receiving the benefits and
   (2) to withhold benefit accordingly.
3. Whether the answer to the preceding question would be different if the worker concerned were a national of the Member State of the competent institution.

The order for reference was entered in the Court Register on 3 January 1978. The defendant in the main action and the Commission submitted written obser-

vations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing 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 under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Observations of the defendant in the main action (Insurance Officer)

According to the Insurance Officer, under national law and in particular under section 49 (1) (b) of the National Insurance Act 1965 a reference to "imprisonment" can mean imprisonment outside Great Britain. Disqualification in respect of imprisonment can therefore apply even if the event occurs in another Member State. It is implicit in such a statement however that there is nothing in Community legislation which precludes the above-mentioned rule of national law from being applied; this leads the defendant in the main action to examine whether Regulation No 1408/71 contains such a prohibition.

The Insurance Officer maintains that where benefit is payable to a worker residing in the territory of a Member State other than the competent State only by virtue of the provisions of Regulation No 1408/71, that regulation should not be construed so as to allow him, because he is outside the competent State, to be able to escape a disqualification imposed by the legislation of that State which would apply to him if he were present in the territory of that State. Thus the provisions of Article 19 (1) (b) and Article 22 (1) whereby a worker is to receive "cash benefits provided by the competent institution in accordance with the legislation which it administers" should be construed to mean that the benefit is to be payable in accordance with that legislation as if all the facts found in relation to the worker had occurred in the territory of the competent Member State.

In support of these arguments, the defendant in the main action relies upon a passage from the opinion of Mr Trabucchi in Case 20/75 *(D'Amico* v *Landesversicherungsanstalt Rheinland-Pfalz,* judgment of 9 July 1975 [1975] ECR 891) in which the Advocate General states that:

"... there is no doubt that the Community legislation, the objective of which is to co-ordinate the social legislation of the Member States in order to abolish any inequality of treatment amongst workers on the basis of their nationality so as to provide freedom of movement for workers within the Community, tends in many respects to prevail over the principle of territoriality which characterizes the individual legislative systems ...".

"The case-law of the Court shows us how facts occurring outside the territory of a specific Member State must be treated, even in the absence of specific provisions to this effect, as equivalent to corresponding facts which the national legislation considers as relevant only if they occur in the national territory" ([1975] ECR 902-3).

While the Court did not in the *D'Amico* case follow the opinion of the Advocate General, the Insurance Officer considers that the principle which he expressed, based *inter alia* on Case 15/69 *(Württembergische Milchverwertung-Südmilch-AG* v *Ugliola,* judgment of 15 October 1969 [1969] ECR 363) is nevertheless one capable of application in a case such as the present.

In conclusion, the defendant in the main action considers that neither

Article 7 of the Treaty of Rome nor any other provisions in the Treaty or in Regulation No 1408/71 preclude the application of rules for disqualifying a person for the receipt of benefit during periods of imprisonment. Moreover, the interpretation contended for by the Insurance Officer would apply equally to nationals or non-nationals of the competent State. For those reasons the Court should reply to the questions put by the National Insurance Commissioner as follows:

That the competent institution of a Member State which is required by either Article 19 (1) (b) or Article 22 (1) (a) (ii) of Regulation (EEC) No 1408/71 to pay cash benefits to a worker, whether or not he is a national of that Member State, in accordance with the legislation which it administers is entitled to treat facts occurring in the territory of another Member State as equivalent to corresponding facts occurring in its own State, being facts which had they occurred in its own State would have disqualified the worker concerned for receiving benefits, and to withhold benefit accordingly.

Observations submitted by the Commission

The Commission considers that the principal issue raised by this reference is contained in Question 2, namely whether Community law entitles one Member State to take account of certain events which have occurred in another Member State when determining whether the conditions imposed by its own legislation have been satisfied. Accordingly the Commission treats the other questions after the second question.

The second question

According to the Commission, in addition to Article 51 (a) of the Treaty which *obliges* the Member States to take account of *periods* spend outside the national territory in relation to acquiring and retaining the right to and calculating the amount of benefit, the Treaty and, in particular, Article 51, *permits* the Member States to take into account extra-territorial *events*. The Commission quotes as examples Article 86 of Regulation No 1408/71 and Articles 36 (1) and 83 (1) of Regulation No 574/72 (OJ L 74 of 27 March 1972, p. 1). On the other hand, Community legislation may also impose certain limitations on, or conditions governing, the enjoyment of the rights of workers, as for example in Article 69 of Regulation No 1408/71. According to the Commission, the Court of Justice accepted in certain judgments this limitation on the enjoyment of social security benefits and in particular the judgment of 13 July 1976 in Case 19/76 (*Triches* v *Caisse Liégeoise pour Allocations Familiales* [1976] ECR 1252) may be interpreted to this effect.

The Commission then observes that Regulation No 1408/71 does not contain a provision disqualifying a person from the receipt of a benefit because of imprisonment. However, according to Articles 19 (1) (b) and 22 (1) (a) (ii) of that regulation cash sickness benefit is only to be paid where the claimant "satisfies the conditions of the legislation of the competent State for entitlement to those benefits". This expression used in Articles 19, 22, 46 and 69 of Regulation No 1408/71 means, in the view of the Commission, compliance, without as well as within the jurisdiction of a Member State, with all national conditions for receipt of benefit. With regard to the system of unemployment benefits, concrete expression has been given to this principle by Form E 303, with regard to Article 69 of Regulation No 1408/71. At paragraph 5 of that form there appears a list of circumstances which entail suspension of benefit. Although imprisonment does not figure among them, it would seem that, in view of the

expository nature of the list, such eventuality might well be covered by paragraph 5.8, which provides for the case in which an unemployed person is no longer available to the employment services. By applying this principle to Articles 19 and 22 of Regulation No 1408/71 concerning the system of sickness benefits, a claimant could therefore for instance be refused sickness benefit if he were outside the jurisdiction of a Member State but was not incapable of work within the meaning of the competent State's legislation. If the position were otherwise Community law would lift, by implication at least, the need to comply with any national conditions once the worker had left the competent State's frontiers. Thus the migrant worker in the claimant's position would have an advantage not only over the non-migrant but also over the migrant worker who, instead of returning, say, to Ireland, decided to stay in the United Kingdom where imprisonment took place.

However, the question then arises whether facts occurring outside the jurisdiction of the competent State but within the Community are to have the same impact or effect with regard to the benefit claimed in the competent State as if they had occurred in that State. The Commission takes the view that to permit a Member State to investigate the type of foreign imprisonment would have the merit of ensuring the uniform and equal attribution of that Member State's benefit and avoid the otherwise disparate results arising from recognizing a period of imprisonment *per se*. Then again, for example, if the disqualification rules of the Member State where the imprisonment took place were to constitute the determining factor this might well result in nine variants for nine migrant workers insured in, say, the United Kingdom. The power to investigate the nature of an extra-territorial event is not without precedent. Under Article 67 (1) of Regulation No 1408/71 where periods of employment are being transmitted for aggregation purposes to a Member State whose insurance system is based on the concept of periods of insurance, that State has the power to inspect or examine the periods of employment so transmitted in order to establish whether or not they would have constituted periods of insurance had they been completed under that State's legislation.

The Commission concludes that the reply to the first part of the second question should be that for the purpose of determining, in accordance with the provisions of Regulation No 1408/71, whether a migrant worker has satisfied the national conditions of a competent State for entitlement to cash sickness benefit, that State is only able to take account of a period of imprisonment occurring within another Member State to the extent that had such imprisonment occurred within the competent State it would have entailed disqualification for the receipt of that benefit. The second part of the question therefore calls for a reply in the affirmative.

The first question

Article 3 (1) of Regulation No 1408/71, which provides that persons to whom that regulation applies are subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State, may be regarded as the *lex specialis* which gives effect, as regards social security, to the *lex generalis* contained in Article 7 of the Treaty. To argue otherwise would be incompatible with the task given the Council by the second paragraph of Article 7 to adopt rules to prohibit discrimination. The reply to the first question must therefore be that in the field of social security for migrant workers effect has been given to Article 7 of the Treaty by Article 3

(1) of Regulation No 1408/71, the regulation being directly applicable in all Member States.

The third question

In the light of Article 7 of the Treaty and of Article 3 (1) of Regulation No 1408/71, the reply to this question must be in the negative.

At the hearing on 3 May 1978 the defendant in the main action, represented by J. St. L. Brockman, and the Commission of the European Communities, represented by its Agent, J. Forman, presented oral argument.

The Commission provided information on the system in the Member States with regard to prisoners in so far as concerns cash benefits payable by the sickness insurance scheme for employed persons to which they were previously affiliated.

The Advocate General delivered his opinion at the hearing on 23 May 1978.

Decision

1 By decision of 29 December 1977, received at the Court of Justice on 3 January 1978, the National Insurance Commissioner referred to the Court under Article 177 of the EEC Treaty three questions on the interpretation of Article 7 of the Treaty and of Articles 19 (1) (b) and 22 (1) (a) (ii) 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).

2 These questions have been referred to the Court within the context of a dispute between the Insurance Officer and the plaintiff in the main action over the right of the latter to receive the cash benefits for incapacity for work because of sickness, as provided for in the National Insurance Act 1965.

3 The plaintiff in the main action, a national of the Republic of Ireland who is however resident in Great Britain, is, as a worker, subject to the National Insurance Act and therefore entitled to receive the above-mentioned benefits if he fulfils the conditions for the acquisition of that right.

4 He went to Ireland and was imprisoned there, for the reasons mentioned in the decision making the reference, from 28 June 1973 to 28 March 1974 during which period he became ill and had to receive treatment, first in the prison in which he was serving his sentence and then, for a short period, in a hospital outside the prison.

5 Under section 49 (1) of the National Insurance Act 1965, in the version then in force, a person "undergoing imprisonment or detention in legal custody" loses the right to receive a benefit for the period of imprisonment or detention, except where regulations otherwise provide.

6 The questions referred to the Court ask in substance whether the national court may or must, under Community law, treat, as a ground for the loss or suspension of the right to benefits laid down by the National Insurance Act, imprisonment or detention in legal custody in another Member State as equivalent to imprisonment or detention in legal custody in Great Britain.

The first question

7 The first question asks whether within the scope of application of Regulation No 1408/71 Article 7 of the EEC Treaty is directly applicable in Member States.

8 Under the first paragraph of Article 7, within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited.

9 As regards workers, this rule has been implemented by Articles 48 to 51 of the EEC Treaty and by measures of the Community institutions adopted on the basis of those articles, in particular, Regulation No 1408/71.

10 Article 3 (1) of Regulation No 1408/71 provides that persons who are resident in the territory of one of the Member States and to whom the regulation applies shall be subject to the same obligations and enjoy the same benefits under the social security legislation of any Member State as the nationals of that state.

11 This provision is designed to ensure for workers covered by the regulation, in accordance with Article 48 of the Treaty, equality in the area of social security without distinction as to nationality, by prohibiting any discrimination in such matters arising from the national legislation of Member States.

12 It is therefore necessary to reply to the first question to the effect that within the scope of application of Regulation No 1408/71 the first paragraph of Article 7 of the Treaty, as implemented by Article 48 of the Treaty and Article 3 (1) of that regulation, is directly applicable in Member States.

The second and third questions

13 These questions ask on the one hand whether the competent institution of a Member State which is required by either Article 19 (1) (b) or Article 22 (1) (a) (ii) of Regulation No 1408/71 to pay cash benefits to a worker of another Member State in accordance with the legislation which it administers is entitled to treat facts occurring in the territory of another Member State as equivalent to corresponding facts occurring in its own State being facts which, had they occurred in its own State, would have disqualified the worker concerned in part or in whole from receiving the benefits and whether it may withold benefit accordingly (the second question) and, on the other, whether the answer to the preceding question would be different if the worker concerned were a national of the Member State of the competent institution (the third question).

14 Article 19 (1) (b), which governs the right to cash sickness and maternity benefits where the worker in question resides in a Member State other than the competent State, provides that:

> "1. A worker residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:
>
> (a) ...
>
> (b) cash benefits provided by the competent institution in accordance with the legislation which it administers ...".

15 Similarly, Article 22 (1) (a) (ii), which covers cases in which a worker falls ill during a stay in a Member State other than the State of the competent institution, provides that, taking account where appropriate of the provisions of Article 18, that worker is entitled "to cash benefits provided by the competent institution in accordance with the legislation which it administers".

16 It follows clearly from these provisions that, subject to the application of Article 18 on the aggregation, for the purposes of the acquisition, retention or recovery of the right to benefits, of insurance periods completed under the legislation of other Member States, it is for the national legislation to lay down the conditions for the acquisition, retention, loss or suspension of the right to social security benefits so long as those conditions apply without discrimination to the nationals of the Member State concerned and to those of other Member States.

17 It would only be otherwise if the conditions for the acquisition or retention of the right were defined in such a way that they could in fact be fulfilled only by nationals or if the conditions for loss or suspension of the right were defined in such a way that they would in fact more easily be satisfied by nationals of other Member States than by those of the State of the competent institution.

18 By prohibiting every Member State from applying its law differently on the ground of nationality, within the field of application of the Treaty, Articles 7 and 48 are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality.

19 Therefore, by referring each institution to "the legislation which it administers" Articles 19 (1) (b) and 22 (1) (a) (ii) of Regulation No 1408/71 comply with the principle of non-discrimination laid down in Articles 7 and 48 of the Treaty and in Article 3 (1) of that regulation.

20 It is therefore appropriate to reply that Articles 7 and 48 of the Treaty and Article 3 (1) of Regulation No 1408/71 do not prohibit — though they do not require — the treatment by the institutions of Member States of corresponding facts occurring in another Member State as equivalent to facts which, if they occur on the national territory, constitute a ground for the loss or suspension of the right to cash benefits; the decision on this matter is for the national authorities, provided that it applies without regard to nationality and that those facts are not described in such a way that they lead in fact to discrimination against nationals of the other Member States.

21 The reply given above applies also and to the same extent to cases in which the worker concerned is a national of the Member State to which the competent institution belongs.

Costs

22 The costs incurred by the Commission, which has submitted observations to the court, are not recoverable.

23 As these proceedings are, in so far as the parties to the main action are concerned, 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 referred to it by the National Insurance Commissioner by decision of 29 December 1977 hereby rules:

1. **Within the scope of application of Regulation No 1408/71 Article 7 of the Treaty, as implemented by Article 48 of the Treaty and Article 3 (1) of that regulation, is directly applicable in Member States.**

2. **Articles 7 and 48 of the Treaty and Article 3 (1) of Regulation No 1408/71 do not prohibit — though they do not require — the treatment by the institutions of Member States of corresponding facts occurring in another Member State as equivalent to facts which, if they occur on the national territory, constitute a ground for the loss or suspension of the right to cash benefits; the decision on this matter is for the national authorities, provided that it applies without regard to nationality and that those facts are not described in such a way that they lead in fact to discrimination against nationals of the other Member States.**

3. The reply given to the second question applies also and to the same extent to cases in which the worker concerned is a national of the Member State to which the competent institution belongs.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 28 June 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 23 MAY 1978 [1]

Mr President,
Members of the Court,

I — The present case has been referred to this Court by the National Insurance Commissioner, who has jurisdiction in the United Kingdom to give a decision on appeal on certain social security disputes. The Court will once more be led to deal with the situation relating to cash sickness insurance benefits of workers "absent from Great Britain" within the meaning of Regulation No 1408/71.

In contrast to the *Brack* case on which this Court gave a decision by judgment of 29 September 1976 ([1976] ECR 1430), the present case concerns a stay or residence of rather a special nature since the person concerned was imprisoned in another Member State.

I shall therefore have to make a foray into the field of social security of prisoners which, if I am not mistaken, has never given rise to a decision by this Court. The *Welchner* case (judgment of 5 December 1967 [1967] ECR 331) in fact concerned a period of captivity as a prisoner of war.

The main action is between a national of the Republic of Ireland, who is at present resident in England, and the Insurance Officer who represents the British Minister of Health and Social Security.

On 9 January 1973, the Central Criminal Court in Dublin found Mr Kenny guilty of assault on his wife and sentenced him on that account to 12 months' imprisonment with a suspended sentence on condition that he complied

1 — Translated from the French