OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 June 1994 *

My Lords,

1. Where, under national legislation, the amount of invalidity benefit depends upon the final salary of the claimant, is the competent institution of the Member State concerned obliged to take into account a final salary earned in another Member State? That, in substance, is the issue raised in the present case, which comes to the Court by way of a reference for a preliminary ruling from the Tribunal du Travail, Neufchâteau.

2. The plaintiff in the main proceedings, Mr Reichling, is a Belgian national who worked successively in Belgium (for a total of 7 569 days) and Luxembourg, where he worked for 734 days before being obliged, on 11 November 1989, to give up work on account of illness. Following an application made on 8 November 1990, Mr Reichling was awarded an invalidity pension by the defendant in the main proceedings, the Belgian Institut National d'Assurance Maladie-Invalidité (INAMI), with effect from 11 November 1990.

3. Belgium and Luxembourg have different types of legislation on invalidity benefits. The Belgian legislation is of a kind known as 'Type A legislation', under which the amount of invalidity benefit does not depend on the length of insurance periods completed in Belgium; it depends instead upon the final salary earned by the claimant before becoming unfit for work. Under the Luxembourg legislation ('Type B legislation'), on the other hand, the amount of invalidity benefit depends upon the length of the insurance periods completed. Council Regulation (EEC) No 1408/71 contains provisions coordinating the award of invalidity benefits where a migrant worker has been subject to schemes of both Type A and Type B. [1] Article 40(1) of the regulation provides that, where an employed person has been succes-

* Original language: English.

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community: see the amended and updated version established by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). Although Articles 40, 45 and 46 of the regulation, referred to below, were subsequently amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), those amendments are not material to the present case.

sively or alternately subject to the legislation of two or more Member States, of which at least one is not of Type A, he is to receive benefits under the provisions of Chapter 3 of the regulation (old-age and death pensions), applied by analogy. In Chapter 3 Article 45(1) provides:

'The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence shall take into account, to the extent necessary, periods of insurance or residence completed under the legislation of any Member State as if they were periods completed under the legislation which it administers.'

The INAMI accepts that by virtue of that provision Mr Reichling was entitled to Belgian invalidity benefit notwithstanding the fact that he was not insured in Belgium, but was affiliated to a scheme in another Member State, at the moment when he became unfit for work.

4. Article 46(2) lays down the rules for the calculation of benefits where, as in this case, the conditions for entitlement to benefits are satisfied only by virtue of the provisions of Article 45. Those rules are based on the principle of aggregation of periods of residence and insurance completed in different Member States and apportionment of the resultant benefit between the competent institutions. The competent institution in each State must first calculate the theoretical amount of benefit, i. e. the amount to which the claimant would be entitled if he had completed all his periods of insurance or residence in the Member State in question. It then calculates the actual amount of benefit by applying to the theoretical amount a fraction representing the ratio between the periods of insurance or residence completed under the legislation which it administers and the total periods of insurance or residence completed under the legislation of all the Member States. Reference should be made to the Court's judgment in Joined Cases C-90/91 and C-91/91 [2] for a fuller explanation of the rules on calculation of benefits in Article 46.

5. The present case concerns the first step in that calculation, namely calculation of the theoretical amount of benefit under Article 46(2)(a). That provision reads as follows:

'The institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to which the employed or self-employed person has been subject had been completed in the Member State in question and under the legislation administered

2 — Joined Cases C-90/91 and C-91/91 *Office National des Pensions* v *Di Crescenzo and Casagrande* [1992] ECR I-3851.

by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount referred to in this subparagraph.'

an invalidity allowance which is wholly or partly payable by that scheme under an international convention or regulation on social security shall be that referred to in Article 27(2).'

Since under the Belgian legislation the amount of the benefit does not depend on the length of the periods completed, the second sentence of Article 46(2)(a) applies. The theoretical amount is therefore equal to the amount of the invalidity benefit provided for by the Belgian rules.

Article 27(2), which is in fact intended to cover cases in which the claimant has no earned income, provides that the 'remuneration lost shall be equal to the minimum remuneration laid down for a category I employee by the Commission Paritaire Nationale Auxiliaire pour Employés, having regard to the age of the person entitled at the date on which he becomes incapacitated for work'.

6. The problem arising in this case is that, while under the Belgian legislation invalidity benefit is normally based on the claimant's final salary before he becomes unfit for work, the INAMI calculated the theoretical amount not by reference to Mr Reichling's final salary in Luxembourg but on the basis of the minimum wage laid down by a Belgian collective agreement. The INAMI's decision was based on Article 28(1) of the Belgian Royal Decree of 31 December 1963, which provides:

7. Mr Reichling appealed against the INAMI's decision to the Tribunal du Travail de Neufchâteau, contending that the INAMI ought to have calculated his invalidity benefit on the basis of his Luxembourg salary. The Tribunal du Travail put the following question to the Court:

'If at the moment when the person entitled became incapacitated for work he had ceased for more than 14 days to be covered by the Belgian compulsory sickness and invalidity insurance scheme, the remuneration which shall be used for the purpose of calculating

'Must the last sentence of Article 46(2)(a) of Regulation No 1408/71 of 14 June 1971 be interpreted as meaning that the amount of the benefit is necessarily and exclusively that to which the person concerned could lay claim if all the periods of insurance had been completed in the Member State in question

under the legislation applicable at the time when the benefit was awarded, so that the competent institution could not rely on any period during which the person concerned was not subject to the social security system of the Member State in question in determining the amount of the benefit without taking account of the pay last received by the worker, that is to say in a different manner from that applicable to workers having ceased work on grounds of illness in the Member State in question?'

8. It may be noted that the Belgian legislation was amended with effect from 1 June 1992 following the adoption of Council Regulation (EEC) No 1248/92. [3] Point 9 of Annex VI A of Regulation No 1408/71, as amended by Regulation No 1248/92, provides:

'In the calculation of the theoretical amount of an invalidity pension, as referred to in Article 46(2) of the regulation, the competent Belgian institution shall take as its basis the income received in the profession last exercised by the person concerned.'

Mr Reichling's pension was accordingly recalculated by the INAMI on the basis of his Luxembourg salary with effect from 1 June 1992. The dispute before the national court is therefore limited to the period from 11 November 1990 to 31 May 1992.

9. In his written observations to the Court Mr Reichling contends primarily that the INAMI ought to have calculated his benefit on the basis of his Luxembourg salary. He is supported in that contention by the Commission, and their arguments are largely identical. They maintain that Articles 45, 46(2) and 47 of Regulation No 1408/71 merely give effect to the principles laid down in Article 51 of the Treaty and point out that under that article the principle of aggregation applies not only to acquisition and retention of entitlement to benefits but also to calculation thereof. The migrant worker's benefit must, they argue, be calculated by fictitiously transposing into Belgium the insurance position of the worker in another Member State; the theoretical amount is thus the benefit which the worker would receive if he had spent his entire working life in Belgium.

Mr Reichling argues, in the alternative, that the INAMI ought to have based his benefit on his average Belgian earnings pursuant to Article 47 of the regulation, applying the rules on revalorization of benefits pursuant to Article 47(2). He is not supported in this contention by the Commission.

3 — Cited in note above.

10. The INAMI argues that the second sentence of Article 46(2)(a) contains an unequivocal reference to the national legislation. The INAMI calculated Mr Reichling's benefit in accordance with the national rules which apply where no actual salary figure is available. This was not discriminatory since the same method is used for workers who have been subject solely to the Belgian legislation. The principle of aggregation of insurance periods does not apply to the calculation of benefits in the case of Type A legislation.

11. In my view, where under the legislation of a Member State the amount of invalidity benefit does not depend on the length of insurance periods completed, the second sentence of Article 46(2)(a) requires the competent institution of the Member State to calculate the theoretical amount of invalidity benefit on the same basis as it calculates such a benefit in a purely domestic situation. That is suggested first of all by the wording of the provision, which states that the theoretical amount is the invalidity benefit payable under the legislation of the Member State concerned. That provision does not, as the INAMI seems to suggest, simply state that the theoretical amount is to be determined by national law but links the theoretical amount to the *amount of the invalidity benefit* provided for by national law. If it had been the intention to allow a Member State applying Type A legislation to calculate the theoretical amount of a migrant worker's benefit in a manner which led to a substantially different result from the benefit normally payable under its legislation to a person in the migrant worker's situation, different wording might have been expected.

12. That view is supported by the aims and scheme of the regulation. As is apparent from Article 51 of the Treaty, Regulation No 1408/71 is intended to play a part in ensuring freedom of movement for workers by securing for migrant workers and their families 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'. That aim is similarly expressed in the preamble to the regulation: see the sixth recital. The regulation thus seeks to ensure that migrant workers suffer neither a loss of entitlement to social security benefits, nor a reduction in the amount of such benefits, as a result of working in more than one Member State.

13. In the case of invalidity benefits the regulation in fact lays down separate rules for two different types of situation:

(a) where the claimant has worked only in Member States with Type A legislation (Articles 37 to 39);

(b) where the claimant has worked only in Member States with Type B legislation or has been subject to both Type A and Type B legislation (Articles 40(1) and 44 to 51).

14. Case (a) is relatively straightforward. The primary rule is that the worker receives benefits solely from the State whose legislation was applicable at the moment when the incapacity, followed by invalidity, occurred (Article 39(1) and (2)). Pursuant to Article 38 periods of insurance or residence in other Member States are aggregated where necessary, but only for the purposes of acquisition, retention or recovery of entitlement. Detailed provisions on calculation of the amount of benefit are unnecessary since the worker simply receives the appropriate amount of benefit for a person in his situation under the applicable national legislation.

15. The position is more complicated in case (b). Aggregation of periods of insurance and residence is necessary not only for the purpose of acquisition, retention or recovery of entitlement to benefit but also, in some cases, for the purpose of calculating the amount of benefit. As regards entitlement, Article 45(1) requires Member States — whether their legislation is of Type A or Type B — which confer entitlement to benefit only on persons who are insured or resident within their territory to take account of periods of insurance and residence in other Member States for the purposes of acquisition, retention or recovery of entitlement.

16. As regards calculation of the benefit, it is true that, as the INAMI points out, calculation of the amount of benefit is not based on aggregation of insurance periods in the case of a Member State with Type A legislation. The underlying aims and principle are nevertheless the same for both types of legislation. Under Article 46 each State calculates the full amount of benefit due under its legislation for a person in the migrant worker's position (the theoretical amount) and then reduces it in proportion to the period of insurance or residence in its territory (the actual amount). The different calculations of the theoretical amount in Article 46(2)(a) simply reflect the different characteristics of Type A and Type B legislation. A State applying Type B legislation calculates benefits by reference to periods of insurance or residence and must necessarily therefore undertake a Community-wide calculation. A State applying Type A legislation does not need to do this. The theoretical amount is

the invalidity benefit payable under its normal rules.

17. The foregoing outline of the relevant rules indicates that the scheme of the regulation is, as Mr Reichling and the Commission contend, to require each Member State to transpose the insurance position of the migrant worker into its territory for the purposes of both entitlement and calculation of the benefit. In case (a) the worker is entitled by virtue of the regulation to the appropriate invalidity benefit for a person in his situation from a single Member State. In case (b) the theoretical amount of benefit is similarly intended to represent the amount to which the worker would be entitled if he had spent his entire working life in the Member State concerned. The amount is then reduced in proportion to the periods of insurance or residence in the Member State to produce the actual benefit due. The aims and scheme of the regulation would be seriously undermined if, in the case of a migrant worker, a Member State applying Type A legislation were permitted to replace the normal calculation by a wholly artificial one which led to a much lower theoretical amount than the amount of benefit payable to a worker in an equivalent situation who had been subject to the legislation of that State alone. That is precisely the case here. Instead of calculating Mr Reichling's benefit on the basis of his final salary as it would do in the case of a worker still subject to the Belgian legislation, the INAMI equated Mr Reichling with a person who had no earned income and calculated his benefit by reference to a collectively agreed minimum wage.

18. Moreover, as the Commission points out, the above interpretation is supported by the amendment made to Annex VI of the regulation by Regulation No 1248/92. That the amendment merely clarifies the existing position is suggested by the fact that, in contrast to other amendments made to Regulation No 1408/71, including Annex VI, no explanation is given for it in the preamble to the amending regulation.

19. In support of its view the Commission refers to a number of cases in which the Court has held that facts or events in other Member States are to be assimilated to domestic facts or events: see for example the judgment in *Galati*, [4] in which the Court held that, where for the purposes of invalidity benefits an insurance period of less than one month completed in Germany had to be rounded up to one month under German law, the same applied to insurance periods completed under the legislation of other Member States; see also the judgments in *Bronzino* and *Gatto* [5] where the Court held that a condition of entitlement to family benefits whereby a worker's child had to be registered as unemployed with the employment office of the Member State providing the benefits had to be considered to be fulfilled where the child was registered as

4 — Case 33/75 *Galati* v *Landesversicherungsanstalt Schwaben* [1975] ECR 1323.

5 — Case C-228/88 *Bronzino* v *Kindergeldkasse* [1990] ECR I-531 and Case C-12/89 *Gatto* v *Bundesanstalt für Arbeit* [1990] ECR I-557.

unemployed with the employment office of the Member State where he resided.

20. A closer analogy is perhaps to be found in the *Fellinger* case, [6] in which the Court required the State of residence of a frontier worker to base the calculation of his unemployment benefit on his final salary earned in another Member State. By virtue of Article 71(1)(a)(ii) of the regulation the frontier worker's State of residence was responsible for payment of the benefit. The first sentence of Article 68(1) of the regulation required the State of residence, where its legislation provided that the calculation of benefits should be based on the amount of the previous wage or salary, to 'take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State'. However, by virtue of the second sentence, where the claimant had been in his last employment for less than four weeks, the benefits were to be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person was residing or staying, to an equivalent employment in the territory of another Member State.

21. Notwithstanding the wording of the provision, the Court held that the first sentence of Article 68(1) was to be interpreted as requiring the State of residence to calculate the benefit taking account of the final salary received by the frontier worker in the Member State in which he was last employed. It reasoned that the provisions of Article 68(1) did not contemplate the case of frontier workers, who by reason of being resident and employed in different Member States would always fall within the exception under the second sentence of Article 68(1) and would never be able to receive unemployment benefit on the basis of the salary earned in their last employment. The Court concluded that a literal interpretation of the provisions would conflict with the requirements of the free movement of workers and that the provision should therefore be interpreted in the light of Article 51 of the Treaty and the general principle underlying the regulation.

22. It seems to me that similar considerations apply here. Prior to its amendment the Belgian legislation constituted no less an impediment to the free movement of workers. Indeed its effect in this case would be to deprive Mr Reichling of the right which he would otherwise have to invalidity benefit based on his final salary solely because he spent the last few years of his working life in another Member State. Moreover, whereas in *Fellinger* the Court was obliged to go beyond the literal wording of the provision in order to supply a lacuna in the Community legislation, in this case the interpretation which I have proposed is, as already stated, entirely consistent with the wording of the provision itself.

6 — Case 67/79 *Fellinger* v *Bundesanstalt für Arbeit* [1980] ECR 535.

23. Finally, I shall deal briefly with Mr Reichling's alternative submission based on Article 47 of the regulation. Article 47(1) provides:

'For the calculation of the theoretical amount referred to in Article 46(2)(a), the following rules shall apply:

(a) where, under the legislation of a Member State, benefits are calculated on the basis of average earnings, an average contribution, an average increase or on the ratio which existed, during the periods of insurance, between the claimant's gross earnings and the average gross earnings of all insured persons other than apprentices, such average figures or ratios shall be determined by the competent institution of that State solely on the basis of the periods of insurance completed under the legislation of the said State, or the gross earnings received by the person concerned during those periods only ... .'

Mr Reichling argues that that provision requires the INAMI to calculate the theoretical amount on the basis of his average remuneration in Belgium, given that there is provision for such a method under Belgian law.

24. In my view the Court's judgment in *Weber* [7] clearly indicates that Article 47 of the regulation is inapplicable in a case such as the present. The *Weber* case concerned the Netherlands legislation on invalidity benefits which, like the Belgian legislation at issue here, was of Type A. Invalidity benefit was based on the daily wage which the claimant could have earned in the year following the date of his invalidity, which in the case of a single occupation meant in practice his average wage during the year preceding his invalidity. Mr Weber, who had previously worked in the Netherlands, moved to work in Germany before becoming unfit for work. Unlike the Belgian INAMI in this case, the Netherlands institution calculated the theoretical amount of Mr Weber's benefit on the basis of his salary in the other Member State, i. e. his German salary. Mr Weber contended however that it should have calculated the theoretical amount on the basis of his average earnings in the Netherlands under Article 47(1). The Court held that the cases envisaged by Article 47(1) did not include a system of disability benefits under which the amount of benefit did not depend on the length of insurance periods completed and which, for the calculation of the loss of earnings, took into account the last fixed wage received by the person concerned in his usual occupation before becoming incapacitated for work or the average wage received by him for a specific period of not more than two years. In my view that ruling is equally applicable to the Belgian legislation, which calculates invalidity benefit by reference to the claimant's final salary.

7 — Case 181/83 *Weber* v *Nieuwe Algemene Bedrijfsvereniging* [1984] ECR 4007.

Conclusion

25. Accordingly, I am of the opinion that the question referred to the Court by the Tribunal du travail de Neufchâteau should be answered as follows:

The last sentence of Article 46(2)(a) of Council Regulation (EEC) No 1408/71 must be interpreted as meaning that, where under its legislation a Member State bases invalidity benefit on the claimant's final salary before he became unfit for work, it must calculate the theoretical amount of the benefit of a migrant worker who, at the time when he became unfit for work, was not subject to the social security system of that State but was working in another Member State by reference to his final salary in the latter Member State.