

security for migrant workers, especially Articles 27 and 28 and Annex G (III) (B) (b);

Having regard to Regulation No 130/63/EEC of the Council of the EEC, amending in particular certain annexes to the said Regulation No 3, and especially Article 7 (1) (B) (b);

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Centrale Raad van Beroep by a decision of that court of 16 February 1966, hereby rules:

1. **The provisions of Annex G (III) (B) (b) to Regulation No 3 are also applicable in deciding whether there is, in accordance with Article 27 of Regulation No 3, a right to benefit under the General Widows' and Orphans' Insurance Law of the Netherlands;**
2. **The decision on costs in the present proceedings is a matter for the Centrale Raad van Beroep.**

Hammes

Delvaux

Strauß

Donner

Trabucchi

Lecourt

Monaco

Delivered in open court in Luxembourg on 13 July 1966.

A. Van Houtte

Ch. L. Hammes

Registrar

President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 16 JUNE 1966¹

*Mr President,
Members of the Court,*

Among the many requests for an interpretation of Regulation No 3 brought before you by the Centrale Raad van Beroep, the case on which I must today deliver my opinion is certainly one of the most delicate. It concerns the conditions for the application of Articles 27 and 28 of this Regulation and of

Annex G thereto to the Algemene Weduwen- en Wezenwet (AWW), the Netherlands law concerning general insurance for widows and orphans. This law provides for insurance against risk, which renders neither the right to a pension nor its amount dependent on the duration of the insurance, and under which the necessary (and sufficient) condition for the widow to acquire the right is that the worker resided in the

¹ — Translated from the French.

Netherlands at the time of his death. The plaintiff relies on the judgment in Case No 100/63, *Kalsbeek (née Van der Veen)* (Rec. 1964, p. 1111) which you delivered on 15 July 1964 at the request of the Centrale Raad.

The facts behind the question submitted are as follows:

Mrs Labots (née Hagenbeek) is the widow of a Netherlands worker, who died on 23 February 1963. Since 1926 her husband had been insured, for an insurance period of 599 weeks, in the Netherlands under the Netherlands law on invalidity which also covered the risk of death. Then, from 1 July 1955 until his death in Belgium, except for a short break, he was affiliated to a Belgian insurance scheme against invalidity and death. On the other hand, he had never been insured under the AWW, a law which entered into force in 1959 that is, after he had left the Netherlands.

It was for this reason in particular that the application for a widow's pension under the AWW made by Mrs Labots was dismissed by the competent Netherlands authority, and the Raad van Beroep, Utrecht, confirmed this dismissal by a judgment for which it gave a very detailed statement of reasons. That court noted that the plaintiff's spouse was not insured under the AWW at the time of his death, and added that no provision implied a pension under the AWW in favour of his widow solely by reason of the fact of his being insured under Belgian legislation concerning retirement or survivors' pensions. This could not be concluded either from the bilateral agreements between Belgium and the Netherlands, or from Articles 27 and 28 of Regulation No 3 which—apart from rights which might arise on the aggregation of insurance periods and which otherwise would not exist—do not of themselves give rise to a right to benefit outside the national legislation relating to such rights. And in this connexion the Raad van Beroep referred to Article 28 (1) (a) of Regulation No 3. Similarly, the provisions added by Regulation No 130/63 to Annex G providing for the assimilation to the periods of the AWW of periods completed before 1 October 1959 under the Netherlands invalidity insurance, could not benefit the plaintiff, since this aggregation only makes

sense if it is first established that there is in principle a right to benefit under the AWW, or that this right may at least exist.

Following Mrs Labots's appeal, supported, moreover, by the Raad van Arbeid which had made her a payment on account of the pension to which it considered she was entitled, the Centrale Raad van Beroep brings the following question before you:

'Is the provision contained in Annex G (III) (B) (b) of Regulation No 3 of the Council of the EEC concerning social security for migrant workers, in the amended form laid down in Article 7 of Regulation No 130/63 of the Council of the EEC, only applicable when ascertaining the amount of benefit payable under the Netherlands legislation on general insurance for widows and orphans, or is it also applicable in deciding whether, under Article 27 of Regulation No 3, there exists a right to benefit payable under this Netherlands legislation?'

Annex G, to which the Centrale Raad refers and which forms an integral part of the regulation by virtue of Article 50 thereof, establishes special rules for the implementation of the legislation of certain Member States. Part III (B) states that:

'For the purpose of applying Articles 27 and 28 of the regulation, the Netherlands institutions shall take account of the following provisions:

- (b) For the purpose of ascertaining the amount of benefit payable under the Netherlands legislation concerning general insurance for widows and orphans, those contribution periods or periods of payment of premiums completed before 1 October 1959, under the Netherlands legislation on invalidity, old-age and survivors' insurance shall be assimilated to insurance periods completed in pursuance of the legislation first aforementioned.'

It is therefore the scope of this provision which you are asked to interpret. Is it applicable only for calculating the amount of benefit under the AWW, or may it also be employed for the purpose of considering whether there is a right to this benefit?

You have already had occasion to make the acquaintance of this text in the Case 100/63, *Kalsbeek (née Van der Veen)*, which also posed the question of the application of

Articles 27 and 28 of the regulation to the AWW—although in different, and indeed converse conditions. You considered that the purpose of the provision written into Annex G by Regulation No 130/63 was to fill a hiatus in Regulation No 3 and on the basis of this Annex you ruled that Article 28 might be applied to a legislative enactment which does not make the amount of benefit dependent on the duration of the insurance. Mr Advocate-General Lagrange considered in his opinion that Regulation No 130 notionally regarded the AWW *as though it were* a system based on insurance periods. But you noted at the same time that Articles 27 (aggregation of periods) and 28 (apportionment) must be applied simultaneously. It is thus impossible for Article 28 to be employed unless Article 27 is also employed, that is to say, when it is necessary to take account of periods of affiliation to another system for the acquisition or retention of a right. When can this happen in the case of 'risks' insurance? This gives the right to benefit only when the event insured against occurs while the victim is affiliated; it is therefore unnecessary to take account of a previous affiliation to another system of legislation or to have recourse to Article 27. As there is no initial qualifying period, Article 28 can only be applied with reference to a situation in which account must necessarily be taken of affiliation under another legislation, which can only happen if the event insured against, that is to say, death, occurs while the insured is no longer affiliated under the Netherlands legislation, but under that of another country. This affiliation is equivalent to the notional retention of affiliation to that system, so far as the acquisition of the right to benefit is concerned.

You will recall the penetrating observations on this point which the Commission's representative made at the oral proceedings. In reply to a question which you put to him, he emphasized that it did not appear to him that the solution could be different depending on whether the person concerned was affiliated in the Netherlands under the

AWW, or only under the Invaliditeitswet which preceded it, precisely because Regulation No 130 assimilates the periods of the second law to those of the first, without restricting the assimilation to cases of successive affiliation to one or the other. The assimilation, which moreover concerns only migrant workers, is as necessary for those who were affiliated to the former legislation as for those who have only 'migrated' after the entry into force of the AWW.

Finally, it is evident that in all cases the application of Article 27 involves that of Article 28 and the benefit under the AWW must be apportioned.

This argument, the force of which has been demonstrated, the Commission wishes to deduce from the principles laid down by the judgment in the case of *Kalsbeek (née Van der Veen)*. One cannot fail to observe however that the situations of fact and of law are very different: in Case No 100/63, the plaintiff's right under the AWW was not disputed, and what was contested was the power of the Netherlands institutions to 'apportion' the benefit—here the right is at issue, but, once recognized, it entails apportionment.

Nor will it be denied that the system described by the Commission, which appears to me to correspond to the letter and the spirit of the regulation, involves a fiction to a certain extent but this arises above all from Annex G and may be explained by the difficulty presented by the application of this text to legislation like the AWW.

In short, it is certain that this interpretation leads to a profound modification, at least as regards migrant workers and their families, of the scope of Netherlands legislation which has the twofold aspect of having a territorial basis and of applying not only to wage-earners but to the population as a whole. But there is nothing surprising that, owing to a Community regulation, certain provisions of domestic law, which otherwise retains its entire validity, should in some respects not be 'applicable against' those protected by this regulation.

Finally, I am of the opinion that the reply to be given to the Centrale Raad van Beroep should be that the provisions contained in Annex G (III) (b) of Regulation

No 3, in the form laid down in Regulation No 130/63, must also be applied to decide whether, taking account of Article 27 of Regulation No 3, there exists a right to benefit under the Netherlands law concerning general insurance for widows and orphans.

I am of the opinion that the decision on costs is a matter for the Centrale Raad.