legislation of a Member State other than the State in whose territory the members of his family reside, a real entitlement to the family allowances provided for by the applicable legislation. That entitlement cannot be defeated by the application of a provision of that legislation by virtue of which persons not residing in the territory of the Member State in question are not to receive family allowances.

In connection with Article 73 it is irrelevant whether the legislation to which the worker is subject was determined by application of Articles 13 to 16 of Regulation No 1408/71 or on the basis of an agreement concluded pursuant to Article 17 of that regulation.

In Case 101/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [Court of last instance in social security matters] (Netherlands), for a preliminary ruling in the action pending before that court between

RAAD VAN ARBEID [Labour Council], Amsterdam,

and

P. B. BRUSSE,

on the interpretation of Article 17 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 (First Chamber)

composed of: Lord Mackenzie Stuart, President, T. Koopmans (President of Chamber) and G. Bosco, Judge,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

Title II of Regulation No 1408/71 of the Council of 14 June 1971, in the form in force at the time of the facts with which this case is concerned, contains provisions which are intended to enable the national legislation applicable to employed persons who move within the Community to be determined. Article 13 (1) states as follows:

"A worker to whom this regulation applies shall be subject to the legislation of a single Member State only."

Article 13 (2) provides that:

"Subject to the provisions of Articles 14 to 17:

(a) a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

. . . ."

Articles 14 to 16 contain provisions intended to adapt the general rule contained in Article 13 (2) (a) to exceptional circumstances.

Article 17 then states as follows:

"Two or more Member States of the competent authorities of those States may, by common agreement, provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain workers or categories of workers."

Mr Brusse, a Netherlands national, who is the plaintiff in the main proceedings at first instance, was employed from 1 September 1964 as a foreign correspondent in the United Kingdom by De Volkskrant BV, which has its registered office in Amsterdam.

From the beginning of his employment in the United Kingdom Mr Brusse should have been subject to the British social security scheme. Article 4 (1) of the Convention on social security between the Netherlands and the United Kingdom of 11 August 1954 (Tractatenblad [Collection of treaties and conventions] 1954, No 114) and Article 13 (2) (a) of Regulation No 1408/71, which came into force in the United Kingdom on 1 April 1973, both provided to that effect.

However, Mr Brusse was never affiliated to the British social security scheme. On the contrary, he continued to pay voluntary contributions to the Netherlands old-age pension scheme. With

effect from 1 July 1967 he was authorized to pay voluntary contributions to the Netherlands scheme for insurance against unfitness for work. Finally, still on a voluntary basis and with effect from 1 January 1972, he became insured under the Netherlands scheme for pensions for widows and orphans.

It was only in 1977 that the British authorities discovered Mr Brusse's situation. Contact was immediately made with the relevant authorities in the Netherlands and an agreement was concluded by exchange of letters. According to that agreement Mr Brusse was to be regarded:

As subject to the Netherlands social security scheme from 1 September 1964 up to and including 31 December 1977;

As subject to the British scheme as from 1 January 1978.

That agreement was expressly stated to be based on Article 10 of the aforementioned Convention between the Netherlands and the United Kingdom for the period up to 1 January 1973 and on Article 17 of Regulation No 1408/71 for the period after that date.

By letter of 26 January 1978 Mr Brusse's employer, who had been informed of the agreement which had been concluded with regard to him, asked the Raad van Arbeid, Amsterdam, which is the defendant in the main proceedings at first instance, to award Mr Brusse the family allowances payable to him under Netherlands legislation up to 1 January 1978.

By letter of 23 November 1978 the Raad van Arbeid rejected the application made by De Volkskrant BV on behalf of Mr Brusse and, on 1 March 1979, it notified the company of its decision confirming that rejection against which an appeal might lie. The Raad van Arbeid based its refusal primarily on the fact that Mr Brusse, as a person resident in the United Kingdom during the relevant period, did not fulfil the conditions laid down by the Netherlands legislation relating to family allowances. That legislation provides that only persons resident in the territory of the Kingdom of the Netherlands or who, not being so resident, are subject to income tax on salary earned by working in the territory of the Netherlands within an employment relationship, are insured. With regard to the agreement concerning Mr Brusse concluded between the British and Netherlands authorities, the Raad van Arbeid considered that it was not possible to regard it as an agreement within the meaning of Article 17 of Regulation No 1408/71. In the Raad van Arbeid's opinion the possibility of derogating from Articles 13 to 16 provided for in that article was limited to cases where the application of those provisions "might lead to undesirable or unintended consequences". In fact that was not the case in relation to Mr Brusse since there was nothing in his situation to indicate that he should not be subject to the general rules. The Raad van Arbeid concluded that payment of the family allowances claimed by Mr Brusse "in this case would conflict both with the Netherlands legislation concerning family allowances and with the ... mandatory provisions of Community law".

Mr Brusse challenged the rejection of his claim before the Raad van Beroep, Amsterdam, which by judgment of 20 May 1981 declared the application to be well founded and consequently annulled the contested decision. By an appeal from the Raad van Arbeid the case was

brought before the Centrale Raad van Beroep. The latter court, by order of 19 October 1982, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Does Article 17 of Regulation No 1408/71 enable two Member States, in the case where a worker over a number of years was not affiliated to the social security scheme of one of those Member States which was applicable to him pursuant to Articles 13 to 16 of Regulation No 1408/71, to declare by agreement that, in respect of those years, the scheme of the other Member State (where the employee resided before moving to the first Member State) is applicable?

2. If the reply to the first question is in the affirmative (and assuming that the Court of Justice has jurisdiction to pronounce by way of a preliminary ruling upon the agreement between two Member States mentioned in the first question) is the worker concerned entitled to family allowances under the scheme of a Member State indicated in that agreement even if he does not satisfy the condition for entitlement to family allowances laid down in that scheme, namely residence in the territory of that Member State?"

The order making the reference was registered at the Court of Justice on 31 May 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice written observations were submitted by the Raad van Arbeid, Amsterdam, represented by its President, L. Opheikens; by P. B. Brusse, represented by A. F. de Savornin Lohman and J. G. F. Cath, both of the Brussels Bar; by the Government of the Netherlands, represented by J. Verkade, Secretary General at the Ministry of Foreign Affairs, acting as Agent; by the United Kingdom, represented by R. N. Ricks, Treasury Solicitor, acting as Agent; and by the Commission of the European Communities, represented by its Legal Adviser, J. Griesmar, acting as Agent, assisted by F. Herbert of the Brussels Bar.

Upon 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.

By order of 14 December 1983 the Court also decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Written observations

The Court's jurisdiction

The *Raad van Arbeid* notes first that, in respect of the second question, the court making the reference expressed doubts as to the Court's jurisdiction to rule by means of a preliminary ruling on an agreement concluded by two Member States under Article 17 of Regulation No 1408/71.

The Raad van Arbeid maintains that the Court has jurisdiction under the first paragraph of Article 177 to declare, by means of a preliminary ruling, the conditions which an agreement within the meaning of Article 17 of Regulation No 1408/71 must fulfil.

Mr Brusse considers that the Court's jurisdiction derives from the fact that the national court, which must assess the

need for the questions referred, has made a reference to the Court.

In the opinion of the *United Kingdom*, before the court making the reference may determine whether the agreement with which it is concerned may validly be relied upon, it is necessary for it to have guidance on the scope of Article 17 and on the effect of an agreement made in pursuance of that article in relation to the Community rules concerning family allowances.

The United Kingdom therefore considers that the questions referred to the Court must be understood as seeking an interpretation of Article 17 and that the Court has jurisdiction to answer them.

The *Commission* submits that whilst an agreement concluded between two Member States under Article 17 is not one of the Community acts referred to in Article 177 of the EEC Treaty, that does not prevent the Court's defining, in interpreting Article 17, the scope of any restrictions on the power given to the Member States by that provision. Nevertheless the Court may not actually determine whether the agreement concluded in this case between the United Kingdom and the Netherlands falls within the scope of Article 17. That is a question of the application of Community law which the national court alone may decide. The Commission therefore suggests that the second question referred by the national court should be rephrased as follows:

"Should Article 17 of Regulation No 1408/71 be interpreted to mean that the relevant legislation designated by an agreement between two Member States within the meaning of that article continues to govern the conditions for entitlement to an allowance, including any conditions as to residence, in an independent manner?"

The first question

The *Raad van Arbeid* recalls that in the Court's judgment of 23 September 1982 in Case 276/81 *Kuijpers* ([1982] ECR 3027) it stated that the aim of the provisions contained in Title II of Regulation No 3 and Regulation No 1408/71 was to ensure that the person concerned was subject, on the basis of the criteria laid down in the provisions contained in the title, to the social security scheme of only one Member State, in order to prevent more than one national system from being applicable simultaneously. Consequently it is not open to the Member States to determine themselves to what extent their own legal rules or those of another Member State are to be applied.

The Raad van Arbeid, repeating the arguments already set out in the decision challenged by Mr Brusse, submits that the words "in the interest of" in Article 17 cannot be regarded as anything other than a means of permitting an adjustment to be made in cases where the application of Articles 13 to 16 might lead to undesirable or unintended consequences. Such consequences do not exist in the case of an employed person who establishes himself in another Member State for an indefinite period. In such a case, by virtue of Article 13 (2) (a) the legislation of the State in whose territory he is employed is to apply. The effects of the employed person's failure to affiliate himself through the relevant authority in the new country cannot be regarded as undesirable consequences

of the determination of the relevant legislation according to Articles 13 to 16.

The Raad van Arbeid also considers the question whether Article 17empowers the Member States to set aside, *with retroactive effect,* the application of mandatory Community rules such as Articles 13 to 16. The Raad van Arbeid considers such retroactive effect to be contrary to the general principle of legal certainty since it may enable the person concerned to claim benefits which should have been paid a long time previously, and the relevant authorities to seek contributions in respect of periods which have likewise long since elapsed.

From the aforementioned considerations the Raad van Arbeid concludes that an agreement between two or more Member States according to which the legislation of the Member State where the employee in question was originally resident is declared applicable on the ground that that person had failed to affiliate himself in the other Member State where he is employed, is not an agreement for the purposes of Article 17 of Regulation No 1408/71. It therefore submits that the first question referred by the national court should be answered in the negative.

Mr Brusse, after recalling the broad outline of the Netherlands social security system, notes as a preliminary point that the agreement concluded between the United Kingdom and the Netherlands was intended to remove uncertainty regarding the application of the United Kingdom social security scheme to him, in view of the fact that he was employed and resident in the United Kingdom. The effect of the agreement was to "normalize" his situation.

According to Mr Brusse it follows clearly from the wording of Article 17 and the position of that provision in the scheme of Regulation No 1408/71 that the power given to the Member States to provide for exceptions to the provisions of Articles 13 to 16 need not necessarily be limited to the adoption of supplementary rules within the framework laid down by Articles 13 to 16. On the contrary, in applying Article 17 it is also possible to depart from the general rule and from the special rules laid down in Articles 13 to 16. In that respect the Member States have a discretionary power subject to the duty to respect the interests of the employed person.

In Mr Brusse's opinion there is nothing to prevent an agreement under Article 17 from governing pre-existing situations since a general prohibition of any retroactive effect cannot be deduced either from the wording of the provision or from its position in the scheme of the regulation. On the contrary, in view of the time inevitably necessary for the conclusion of such agreements Article 17 would lose much of its significance if an agreement could not relate to a period which had already elapsed. In addition, in this case the retroactive effect of the agreement is undeniably in the interests of the employed person.

The *Government of the Netherlands* notes that the sole criterion on which the Member States may, be means of an agreement, have recourse to Article 17 of Regulation No 1408/71 in order to provide for exceptions to the provisions of Articles 13 to 16 of that regulation is the interest of the employed person. The Netherlands Government considers that Article 17 should be used sparingly since it constitutes an exception to the general rules applicable, and such use is only

justified if it is clearly established that it is in the interest of the employed person.

In this case Mr Brusse's interests would have been prejudiced to a considerable extent if the British social security legislation had been applied to him retroactively without recourse having been made to Article 17. Any retroactive application to him of the British legislation would have resulted in Mr Brusse's having to make the contributions payable under the British scheme in relation to certain risks in respect of which he was already insured on a voluntary basis under the Netherlands scheme. In the light of those considerations the relevant Netherlands authorities concludes that to subject him to the British legislation relating to social security could not be in the interest of Mr Brusse unless it was to take place at some time in the future.

The Netherlands Government therefore submits that the first question referred by the national court should be answered in the affirmative.

After recalling the facts of the case the *United Kingdom* observes that Article 17 is framed in general terms and does not place restrictions on the period which may be covered by an agreement. The sole important criterion contained in that provision is that such an agreement must be in the interest of certain workers or categories of workers.

Yet it would be contrary to the spirit of Article 17 to try to circumscribe too narrowly the cases where an agreement may be concluded. The making of such agreements should, in the final analysis, be left to the good sense of the relevant national authorities.

According to the United Kingdom there is no reason why an agreement under Article 17 should not relate to an individual employed person. On the contrary, it would be anomalous if an agreement could cover two or more employed persons but not a single employee.

Referring to the view expressed in the Raad van Arbeid's decision, the United Kingdom states that the question whether it is appropriate for an exception to be made to the general rules must be judged in the light of all the circumstances obtaining at the time the agreement is being considered. In this case the relevant circumstances were that:

(i) Mr Brusse had contributed to the Netherlands scheme for 13 years;

(ii) There was no evidence that Mr Brusse or his employer was attempting to frustrate the aims of the Treaty or to circumvent the Community rules;

(iii) To make Mr Brusse subject to the British scheme from 1964 onwards would have involved a considerably complicated administrative procedure to no particular purpose;

(iv) The conclusion of an agreement was clearly in the interest of Mr Brusse.

With regard to the last circumstance the United Kingdom submits that to make Mr Brusse subject to the British legislation from 1964 would have made him liable to pay contributions to the

British scheme with little advantage accruing to him as a result of so doing.

In those circumstances the United Kingdom takes the view that the agreement concerning Mr Brusse is a proper and fair application of Article 17. It recalls that approximately 1 000 agreements are made each year between the British authorities and those of other Member States under that article and emphasizes that, in its opinion, such agreements provide a means of ensuring that the most appropriate legislation is made to apply in the interests of the employee.

The United Kingdom maintains that if the Court were to adopt too narrow an interpretation of Article 17 the validity of many agreements might be put in doubt.

The *Commission* considers that, in view of the absence of case-law on Article 17, it should be interpreted on the basis of an examination of its wording and context and in particular in the light of Article 51 of the EEC Treaty. In that respect the Commission maintains that since the provision at issue derogates from the general and special rules contained in Articles 13 to 16 and the purpose of those rules was defined in the Court's judgment of 23 November 1982 in Case 276/81 *Kuijpers,* cited above, it is necessary to commence with the nature of those general and special rules. They are not substantive provisions but rather rules governing cases of conflict and as such should be simple to use in practice and should always assist in the attainment of the general purpose.

The presence of a provision such as Article 17 accurately reflects the need to be able to set aside the rules in cases where they are no longer appropriate provided that that is in the interest of certain workers or categories of workers.

Nevertheless, any rule which derogates from general rules must, in Community law, be interpreted narrowly. According to the Commission that means that the case of a worker or category of workers which is governed by an agreement made under Article 17 must be examined on its own merits, and is not capable of operating as a precedent. The Commission emphasizes the crucial role to be played by the interest of the worker in deciding to conclude an agreement for the purposes of Article 17. The interest must be in the *determination* of the legislation applicable, and not in its *application.* In other words the Commission takes the view that a comparison of the number and amount of the benefits or the level of the contribution which would be involved in the application of one body of legislation rather than another should not be taken into account in such cases.

According to the Commission the employee's interest should be:

(i) Of the same type as is taken into account in interpreting and applying Articles 13 to 16, and

(ii) Sufficiently great to justify a derogation from the general rules applicable.

The Commission notes that the rules contained in Articles 13 to 16 reflect to major considerations, namely an intention to determine a single body of

legislation applicable to each employed person and the desire for practicability, that is to say, in social security matters the determination of the legislation applicable should not amount to an obstacle to the existence or the exercise of the right of free movement of workers envisaged in Article 51 of the EEC Treaty. Consequently, the interest of the worker referred to in Article 17 should be assessed in the light of, on the one hand, the practical aspects of affiliation to the social security scheme of one Member State rather than that of another and, on the other hand, the effect of the provisions of Articles 13 to 16 on the right to freedom of movement of the employee concerned.

The question whether or not the agreement with which the national court is concerned in this instance was justified in the interest of the employee as so defined is for the national court to decide, according to the Commission.

The Commission therefore submits that the following answer be given to the first question referred by the Centrale Raad van Beroep:

"Article 17 of Regulation No 1408/71 enables two Member States, in the case where a worker over a number of years was not affiliated to the social security scheme of one of those Member States which was applicable to him pursuant to Articles 13 to 16 of Regulation No 1408/71, to declare by agreement that, in respect of those years, the scheme of the other Member State (where the employee resided before moving to the first Member State) is applicable, if the declaration is in the interest of the employee concerned. The determination of that interest rests on the one hand on the uniform application of a single body of legislation, the purpose of which is to avoid any unnecessary plurality or confusion of contributions and liabilities, and on the other hand on the existence and exercise of the right to freedom of movement workers."

The second question

If the reply given to the first question by the Court is in the affirmative, the *Raad van Arbeid* observes that, if the legislation of one Member State is declared applicable, that Member State may naturally fix the general conditions to wich the right and duty to be affiliated are subject, but far from having an absolute discretion in fixing those conditions, the Member State must remain within the limits laid down by Regulation No 1408/71.

The residence requirement, as a condition in respect of the duty to be insured, cannot be regarded as being within those limits. It is also necessary to take into account the fact that Article 13 (2) (a) and (b) states that the legislation of the Member State of employment is to apply even if the employee resides in another Member State.

In conclusion the Raad van Arbeid submits that the reply to the second question referred by the national court should be in the affirmative.

Mr Brusse recalls first that the effect of the agreement made between the British and Netherlands authorities was to exclude him entirely from the application of the British legislation concerning social security for the period to the end of 1977 and to make him wholly subject to the Netherlands social security scheme for the same period.

With regard to the requirement of residence as a condition for recognition of entitlement to famliy benefits, Mr Brusse maintains that it is not relevant to know, in the context of Article 73 of Regulation No 1408/71, on what grounds national legislation has become

applicable to a particular employee. Entitlement to family benefits arises exclusively from the combined effect of Article 73, according to which residence is irrelevant, and the national family benefits scheme, which in this case is the Netherlands one.

Consequently, Mr Brusse submits that the reply to the second question referred by the national court should be in the affirmative.

The *Netherlands Government* recalls that the general rule in Article 13 (2) (a) provides that the legislation applicable in social security matters is that of the Member State in whose territory the worker is employed even if he resides elsewhere or the registered office or place of business of his employer is situated elswhere. If certain Member States decide, pursuant to Article 17, to make an exception to the general rule by subjecting the employee to a body of legislation other than that determined on the basis of Article 13 (2) (a) there is still no need to take into account criteria such as residence and the situation of the registered office or place of business. If it were otherwise the interest of the migrant worker concerned would be prejudiced by the fact that he might be required to satisfy conditions of residence in order to obtain the benefits to which he is entitled under the legislation declared to be applicable to him by Article 17. In the opinion of the Netherlands Government such a result would be contrary to the spirit and purpose of the regulation. Consequently the Netherlands Government submits that the second question referred by the national court should also be answered in the affirmative.

The United Kingdom takes the view that where the legislation of a Member State is made to apply in derogation of Articles 13 and 14, that Member State becomes the competent one for the purposes of Article 73 (1) of Regulation No 1408/71 and the conditions of residence laid down in the national legislation of that Member State become irrelevant. Consequently it is of the opinion that since Mr Brusse was made subject to the Netherlands legislation he is entitled to the family benefits provided for by that legislation as though he and his family were resident in the Netherlands. Finally, the United Kingdom states that no claim for family benefits was submitted to the British authorities in respect of the period from 1 April 1973 to 31 December 1977.

The *Commission* considers that the fact that the legislation applicable to a particular worker in relation to social security has been determined by means of an agreement under Article 17 obviously means that that person's entitlement to family benefits is governed by the legislation declared to be applicable, which in this case is the Netherlands legislation. Nevertheless, in the Commission's opinion, it goes without saying that the national rules concerning the acquisition and recognition of that entitlement must not be incompatible with the relevant rules of Community law. It is well established that in Community law conditions relating to nationality and residence governing the recognition of an entitlement are incompatible with the principle of free movement itself. Moreover, the application of a condition of residence is also contrary to the purpose of the provisions of Title II of Regulation No 1408/71. In conclusion the Commission submits that the second question referred by the Centrale Raad van Beroep should be answered in the following manner:

"Article 17 of Regulation No 1408/71 is a rule governing cases of conflict and

only enables it to be determined which legislation is to be applicable.

The question whether and in what circumstances a worker acquires an entitlement under the legislation so determined is to be settled by that legislation subject to the provisions of Article 51 of the EEC Treaty and the regulations giving effect to it. A condition of residence is incompatible in that connection with the very principle of the free movement of workers."

III — Oral procedure

At the sitting on 9 February 1984, oral argument was presented by the Raad van Arbeid, Amsterdam, represented by S. Van der Zee, acting as Agent, by P. B. Brusse, represented by A. F. de Savornin Lohman, and by the Commission of the European Communities, represented by F. Herbert.

The Advocate General delivered his opinion at the sitting on 15 March 1984.

Decision

1 By order of 19 October 1982, which was received at the Court on 31 May 1983, the Centrale Raad van Beroep [Court of last instance in social security matters] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions relating to the interpretation of Article 17 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 The questions were raised in proceedings brought by P. Brusse against the Raad van Arbeid [Labour Council], Amsterdam.

3 Having previously worked in the Netherlands, Mr Brusse, a Netherlands national, has lived and worked in the United Kingdom since 1 September 1964. According to Article 13 (2) (a) of Regulation No 1408/71 he should have been subject to the social security legislation of the Member State in which he was employed, that is to say, in relation to the period commencing on 1 September 1964, the United Kingdom. However, he was never affiliated to the United Kingdom social security scheme and continued to pay voluntary contributions to the Netherlands scheme.

4 When the irregularity of Mr Brusse's situation was discovered in 1977 the relevant United Kingdom and Netherlands authorities decided, in view of

the fact that the irregularity had existed for several years, to conclude an agreement pursuant to Article 17 of Regulation No 1408/71.

5 Article 17 is worded as follows:

"Two or more Member States or the competent authorities of those States may, by common agreement, provide for exceptions to the provisions of Articles 13 and 16 in the interest of certain workers or categories of workers."

6 According to the agreement relating to Mr Brusse concluded by those authorities he was to be regarded as subject to the Netherlands social security scheme for the period ending on 31 December 1977. However, as from that date the United Kingdom legislation was to be applicable to him.

7 On the basis of that agreement Mr Brusse's employer asked the Raad van Arbeid, Amsterdam, to award Mr Brusse the family allowances payable to him under Netherlands legislation for the period in respect of which it had been agreed that that legislation would apply to him.

8 The Raad van Arbeid rejected that request, contending that the Netherlands legislation provides for payment of family allowances only to workers residing in the Netherlands and that Mr Brusse did not fulfil that condition during the relevant period. In addition the Raad van Arbeid denied that the agreement concerning Mr Brusse was an agreement within the meaning of Article 17 of Regulation No 1408/71.

9 Mr Brusse challenged that decision before the Raad van Beroep [Social Security Court], Amsterdam, which upheld his right to the family allowances in question. The Raad van Arbeid appealed against that decision to the Centrale Raad van Beroep. That court decided to stay the proceedings and to refer the following questions to the Court:

"1. Does Article 17 of Regulation No 1408/71 enable two Member States, in the case where a worker over a number of years was not affiliated to the social security scheme of one of those Member States which was applicable to him pursuant to Articles 13 and 16 of Regulation No

1408/71, to declare by agreement that, in respect of those years, the scheme of the other Member State (where the employee resided before moving to the first Member State) is applicable?

2. If the reply to the first question is in the affirmative (and assuming that the Court of Justice has jurisdiction to pronounce by way of a preliminary ruling upon the agreement between two Member States mentioned in the first question) is the worker concerned entitled to family allowances under the scheme of a Member State indicated in that agreement even if he does not satisfy the condition for entitlement to family allowances laid down in that scheme, namely residence in the territory of that Member States?"

The Court's jurisdiction

10 In the second question the Centrale Raad van Beroep expresses doubts, parenthetically, as to the Court's jurisdiction to pronounce by way of a preliminary ruling under Article 177 of the Treaty upon an agreement made between two Member States under Article 17 of Regulation No 1408/71.

11 There is no need to consider whether the Court may, under Article 177 of the Treaty, pronounce on the validity or interpretation of such an agreement since it has jurisdiction, in any event, to define the scope of Article 17 of Regulation No 1408/71 so as to enable the national court to give judgment in the case before it in accordance with the Community rules.

The first question

12 The Centrale Raad van Beroep's first question seeks, essentially, to ascertain whether two Member States may, by means of an agreement concluded under Article 17 of Regulation No 1408/71, decide, with retroactive effect, that the legislation of one of those Member States, which is applicable to a worker pursuant to Articles 13 to 16, does not apply to him and that the legislation of the other State is applicable to him in respect of a given period.

13 Before a reply is given to that question, Article 17 must be placed in its legal context.

14 As the Court has recently pointed out (judgment of 23 September 1982 in Case 276/81 *Board of the Sociale Verzekeringsbank* v *Heirs or assigns of G. T. Kuijpers* [1982] ECR 3027) the aim of the provisions of Title II of Regulation No 1408/71, which determine the legislation applicable to workers moving within the Community, "is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislation from being applicable and the complications which may result from that situation".

15 In order to achieve that aim Article 13 (2) (a) lays down the general principle that a worker is to be subject, with regard to social security matters, to the legislation of the Member State in whose territory he is employed.

16 Nevertheless that general principle is stated to be "subject to the provisions of Articles 14 to 17". In fact, in certain specific situations the unreserved application of the rule set out in Article 13 (2) (a) might create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would entail delays in the forwarding of employees' files and, therefore, place obstacles in the way of their freedom of movement. Special rules governing such situations are set out in Articles 14 to 16.

17 In addition, Article 17 allows exceptions to be made in order to cover other situations which, although they are not specifically provided for in Title II of Regulation No 1408/71, call for a solution which differs from those adopted in Articles 13 to 16. The task of identifying those situations and determining the legislation to be applied is entrusted by Article 17 to the Member States concerned, which may, by common agreement, derogate from Articles 13 to 16 provided the agreement is concluded "in the interest of certain workers".

18 Consequently, it is wholly consistent with the scheme of Regulation No 1408/71, and in particular with Article 17 thereof, for two Member States to

conclude an agreement with a view to subjecting a worker to legislation other than that designated in Articles 13 to 16, provided that the agreement is in the interests of that worker.

19 The national court has expressed doubts as to whether such a derogation might be given retroactive effect, that is to say whether the legislation designated by the Member States in derogation from Articles 13 to 16 may be regarded as applicable in respect of past periods.

20 There is nothing in the wording of Article 17 to indicate that recourse to the derogation made available to the Member States by that provision is possible only as regards the future.

21 On the contrary, it follows from the spirit and scheme of Article 17 that an agreement within the meaning of that provision must also be capable, in the interests of the worker or workers concerned, of covering past periods. Since Article 17 provides for an exception intended to mitigate the difficulties resulting from the application of Articles 13 to 16 to special situations not specifically envisaged in Regulation No 1408/71, it may be used not only to ensure that a certain situation does not arise but also to remedy an existing situation the injustice of which appears only after it has arisen.

22 It must also be emphasized that, in view of the time needed for two or more Member States to reach agreement as to whether it is appropriate to derogate from Articles 13 to 16, Article 17 would be deprived of much of its meaning if the agreement could have only prospective effect.

23 It must therefore be concluded that an agreement entered into between two or more Member States pursuant to Article 17 of Regulation No 1408/71 may declare legislation other than that designated in Articles 13 to 16 applicable in respect of past periods provided, of course, that the agreement is in the interests of the worker or workers in question.

24 In its observations submitted to the Court the Raad van Arbeid maintains that Member States may not avail themselves of their right to derogate from Articles 13 to 16 in a case such as this where the worker in question has failed to affiliate himself to the social security scheme designated in Article 13 (2) (a).

25 No such restriction on the power conferred upon the Member States appears anywhere in Article 17. On the contrary, that provision makes no reference to the reasons or circumstances which might lead the Member States to derogate from Articles 13 to 16. It follows that, in that respect, the Member States enjoy a wide discretion to which the only limitation is regard for the interests of the worker.

26 Consequently the reply to the first question must be that Article 17 of Regulation No 1408/71 makes it possible for two Member States, in the case of a worker who for a large number of years has not been affiliated to the scheme of one of those Member States which was applicable to him pursuant to Articles 13 to 16 inclusive of the said regulation, by agreement to declare applicable, in respect of those years, the legislation of the other Member State provided that such agreement corresponds to the interests of the worker concerned.

The second question

27 The Centrale Raad van Beroep's second question seeks to ascertain whether a worker, to whom the legislation of a Member State other than the State in which he and his family reside has been made applicable by means of an agreement concluded under Article 17 of Regulation No 1408/71, is entitled to be granted the family allowances provided for by that legislation even if that legislation limits the grant of such allowances to persons residing in the territory of the Member State in question.

28 In the first place it should be stated that the reply to be given to that question does not depend on Articles 13 to 17 of Regulation No 1408/71, whose sole purpose is to enable the legislation applicable to various workers moving within the Community to be determined, but rather on the provisions

of national law applicable by virtue of Articles 13 to 17, provided, however, that those provisions are consistent with the relevant rules of Community law.

29 With regard to entitlement to family allowances, therefore, it is necessary to take account of Article 73 (1) of Regulation No 1408/71 which states that:

"A worker subject to the legislation of a Member State other than France shall be entitled to family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State."

30 That article creates, in favour of a worker who, as in the case envisaged in the order making the reference, is subject to the legislation of a Member State other than the State in whose territory the members of his family reside, a real entitlement to the family allowances provided for by the applicable legislation. That entitlement cannot be defeated by the application of a provision of that legislation by virtue of which persons not residing in the territory of the Member State in question are not to receive family allowances.

31 It must also be added in connection with Article 73 that it is irrelevant whether the legislation to which the worker is subject was determined by application of Articles 13 to 16 of Regulation No 1408/71 or on the basis of an agreement concluded pursuant to Article 17 of that regulation.

32 Consequently the reply to the second question must be that a worker who has been subject, on the basis of an agreement concluded under the terms of Article 17 of Regulation No 1408/71, to the legislation of a Member State other than the one in which the members of his family reside is entitled, under Article 73 of the said regulation, to family benefits provided for by the legislation designated by that agreement notwithstanding the fact that he does not satisfy the terms of a provision as to residence contained in that legislation.

Costs

33 The costs incurred by the Government of the Netherlands, by the United Kingdom and by the Commission of the European Communities, which have

submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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 (First Chamber)

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 19 October 1982, hereby rules:

1. **Article 17 of Regulation No 1408/71 makes it possible for two Member States, in the case of a worker who for a large number of years has not been affiliated to the scheme of one of those Member States which was applicable to him pursuant to Articles 13 to 16 inclusive of the said regulation, by agreement to declare applicable, in respect of those years, the legislation of the other Member State provided that such agreement corresponds to the interests of the worker concerned;**

2. **A worker who has been subject, on the basis of an agreement concluded under the terms of Article 17 of Regulation No 1408/71, to the legislation of a Member State other than the one in which the members of his family reside is entitled, by virtue of Article 73 of the said regulation, to family benefits provided for by the legislation designated by that agreement notwithstanding the fact that he does not satisfy the terms of a provision as to residence contained in that legislation.**

Mackenzie Stuart Koopmans Bosco

Delivered in open court in Luxembourg on 17 May 1984.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the First Chamber