UNEMPLOYMENT BENEFIT

Contribution conditions—meaning of habitual residence—obligation to take into account contributions paid in another Member State under EEC Regulations.

The Commissioner considered jointly three appeals made by the adjudication officer against the decisions of social security appeal tribunals allowing claims to unemployment benefit under the EEC Regulations. He upheld all the appeals and the Chief Commissioner decided that two of the cases should be reported.

The claimant in the first case went with her husband, a serving member of Her Majesty's armed forces, to live in West Germany in 1975. The family came back to settle in Great Britain on 1.7.85 on the husband's return to civilian life, as had always been their intention. Apart from a short break in 1983, the claimant worked in West Germany from August 1981 until 30.6.85 and during that time she paid contributions under the West German social security system. She made a claim to British unemployment benefit from 3.7.85 which was disallowed on the ground that she did not satisfy the contribution conditions. The claimant appealed on the ground that her West German insurance contributions should be taken into account, and the appeal tribunal, accepting that she had been habitually resident in the UK whilst employed in Germany, allowed her claim on the basis that she satisfied Article 71 of the EEC Regulation 1408/71.

In the second case the claimant went to the Netherlands in May 1975 to set up an administration office for her United Kingdom employers. She then became the managing director of an associated company set up by her employers to run their operation in the Netherlands. She lived in accommodation provided by her employers but retained a home in England. She retained links with England and returned there from time to time. The Dutch company ceased trading on 30.11.84 and she worked to clear the remaining work up to 23.5.85 on which date she returned to England. As she was insured while in the Netherlands under that State's social security scheme she claimed and received Dutch unemployment benefit for the period 28.5.85 to 11.6.85. She claimed British unemployment benefit from 12.6.85 but her claim was disallowed because she did not satisfy the contribution conditions. The claimant appealed on the ground that her Dutch insurance contributions should be taken into account and the appeal tribunal, accepting that she had been habitually resident in the UK whilst employed in the Netherlands, allowed her claim on the basis that she satisfied Article 71 of the Regulation.

The Commissioner's decisions on these appeals took the form of an individual decision on the facts of each appeal to which were annexed four appendices, to be read with and form part of each decision, setting out:—

1. in Appendix I, the identification and determination of the issue common to both appeals and the effect of the application of the relevant domestic law and European Community law to that issue;

2. in Appendix II, the relevant provisions of Community law;

3. in Appendix III, citations from relevant cases before the European Court of Justice;

4. in Appendix IV, comparable decisions of the Commissioner.

Held in each case that:

1. unemployment benefit is not payable because the earnings factor in the relevant year is less than 25 times the lower earnings limit for that year;

2. the claimant is not assisted by the provisions of Article 71(1)(ii)(b) of Council Regulation (EEC) No. 1408/71 because during her last employment in another Member State neither claimant was habitually resident in the United Kingdom. As a result neither claimant could escape or satisfy the condition imposed by Article 67(3) of that Regulation to which aggregation of periods of insurance completed in another Member State is subject, namely that each should have lastly completed a period of insurance in the United Kingdom.

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 28 October 1986 which reversed a decision issued by the adjudication officer on 8 July 1985. My decision is that unemployment benefit is not payable for the inclusive period 3 July 1985 to 8 July because—

(a) the earnings factor derived from contributions of a relevant class paid by or credited to the claimant in the relevant year, which ended on 5 April 1984, is less than 25 times the lower earnings limit for that year; and

(b) the claimant is not assisted by the provisions of Council Regulation (EEC) No. 1408/71 ("the Regulation").

2. Appendices I to IV annexed hereto are to be read with and form part of this decision.

3. The claimant was born in 1948. In 1966 she married a serving member of Her Majesty's armed forces. He is—and always has been—a British National. There are children of the marriage. The claimant's husband has now—after 22 years of service with the colours—returned to civilian life. The family lives in a house in Bolton, bought by the claimant's husband.

4. In 1975 the claimant's husband was posted to West Germany. As is—I think—well known, facilities for British troops serving in Germany are of a high standard. Married quarters are provided—and the army strongly encourages its married men to avail themselves thereof. And it is not only wives who are catered for. English-speaking schools—preparing children for English public examinations—are readily on hand; as are excellent medical and welfare services. At the bigger bases, at least, the servicemen's families live in an enclave which is—in the claimant's own words—virtually a little piece of England. All servicemen are, of course, liable to be posted anywhere at any time. But it is clear from the evidence before me that there has been and is a considerable element of stability in postings to the British Army of the Rhine. I quote from a letter written by the claimant on 29 January 1986:

> "Within the last 20 years it has become prevalent for some soldiers to spend extensive periods of service overseas... Today it is not uncommon for service families to spend anything from 2 to 6 years on one posting to BAOR during one long or several consecutive tours of duty. Such was our lot from 1975 onwards."

5. In fact the claimant's husband remained stationed in Germany until 1 July 1985 (i.e. for about 10 years). The claimant and their children were with him throughout. As a serviceman, the claimant's husband paid British income tax under the PAYE Scheme and paid national insurance contributions pursuant to the British social security system. Not unnaturally, his "roots" (as he has put it) remained in Britain—and it was always his intention to settle in Britain when he had completed his army service. I need hardly add that it was always the claimant's intention to do likewise.

6. I dare say that in the earlier years the claimant's time was largely devoted to the care of the children. But by August 1981 she felt free to take employment. She obtained a job with the NAAFI (which is, of course, a British based concern) at a base in Soest. She worked there until the end of May 1983. Her husband was then posted to West Berlin. From 1 July 1983 to 31 October 1983 the claimant was employed by the British Ordnance Services in Berlin. From 1 November 1983 to 30 June 1985 (the day before

her return to England) she was employed by the NAAFI in Berlin. Throughout her employment in Germany she paid contributions under the German social security system.

7. There is in the papers a $2\frac{1}{2}$ pages document dated 18 April 1983 and headed "EEC benefits—Dependent employees in Berlin". It is signed by a Captain G. Stock "for CO". The distribution list at the end includes "All dependent employees". The claimant received a copy. Paragraph 1 reads thus:

> "1. Dependants employed in Berlin with the British Forces pay German Social Insurance contributions which makes them eligible to receive social insurance benefits elsewhere in the EEC and would apply in particular when they return to the United Kingdom. The following is mainly connected with unemployment benefits."

That is clearly a well-meant attempt at a simplified generalisation. The document goes on to deal with what are referred to as "Option 1" and "Option 2". Option 2 is obviously premised upon Article 69 of the Regulation. The advice given is clear and well founded. Stressed are the need to register in Germany as unemployed and to remain in Germany (unemployed) for at least four weeks before returning to Britain. Prospective claimants are told emphatically that they must then register in Britain within seven days of their return thereto.

8. Option 1 "is designed for an employee working up until the last *three* weeks or less" (the document's emphasis). The reader is referred to Annex A. That Annex repeats—with slight and immaterial alterations in the wording—the passage which I have quoted verbatim in paragraph 7 above. Detailed instructions are given in respect of—

(a) arming oneself with the appropriate documentation before leaving Germany; and

(b) registering in England.

Nothing whatever is said about the need to complete a period of insurance in Britain (cf Article 67—Appendix II hereto). Nothing is said in respect of the bearing of Article 71(1)(b)(ii). The reader is left with the impression that, provided that steps (a) and (b) immediately above are duly taken, unemployment benefit will be paid in Britain. In fairness to the author of the document I should say that he probably based his advice upon the assumption that the servicemen's dependants were "habitually resident" in Britain. The papers indicate that that was—and remains—the official army view.

9. But it is not as simple as that. Indeed, it is not simple at all. Of the three cases which were before me at the oral hearing this is unquestionably the one which I have found the most difficult. The claimant's situation commands much sympathy. As she eloquently urges, she did not choose to go to Germany to seek work. In so far as she "chose" to go to Germany at all, it was not a matter of realistic choice. The army sent her husband there. (*He*, of course, had no choice.) The army encouraged her to go with her husband. Had she done otherwise, the family unit would have been broken up for 10 years. Anyway—she continues—she was only in Germany in the narrowest geographical sense. She was effectively living in "a little piece of England" (cf paragraph 4 above). She was employed by British employers and her work was with and for British people.

10. The appeal tribunal made—if I may say so—a most careful and thorough attempt to resolve the difficulties. The relevant form AT3 contains a full note of the evidence and detailed findings of fact. I quote

two extracts from those findings:

"(iv) The British Bases upon which the claimant lived provided British medical, social, sporting, shopping and educational facilities all on the British pattern. The environment was entirely British."

(vi) "Although claimant had almost continuous employment whilst in Germany from August 1981 to January [an obvious slip for July] 1985 this was not 'stable' employment. During that time she was employed in two different NAAFI establishments and one British Army position. It was also not stable in the sense that she was obliged to follow her husband on posting and seek fresh employment in areas in which he was posted to."

11. The appeal tribunal's reasons were set out thus:

"Tribunal is of the opinion that throughout the military service of [the claimant's husband] and from the date of his marriage in 1966 to the complainant both [he] and the claimant were habitually resident in the United Kingdom. The UK was their centre of interest. They returned to UK whenever possible on leave or holiday. Their children were brought up within the British educational system and at the end of [the claimant's husband's] army service they bought a house and settled in England. The claimant has satisfied us that she and her husband are wholly committed to the British way of life. That their interests have at all times been in Britain and their habitual residence is in Britain."

12. Two comments immediately present themselves:

(a) The "centre of interest" (note the singular use of "interest") concept has been applied in the subjective sense appropriate to my hypothetical Egyptologist in paragraph 9 of Appendix I hereto. On an objective view it must be manifest that a substantial part of the interests of the claimant and her husband must have centred upon the relevant base in Germany (e.g. their living quarters, their daily work, their children, their children's education, their social life and their recreational activities). But I am not without sympathy for the appeal tribunal. The centre of interests test was highly appropriate to the facts of *Angenieux*. But I suspect that its incorporation into the "dispositif" of *Di Paolo* is likely to cause difficulties for years to come.

(b) Partly flowing from (a), the appeal tribunal's reasons seem more appropriate to the issue of domicile than to that of habitual residence.

13. Again, whilst I am inclined to the view that the claimant's employment in Germany was *not* "stable" (as was the tribunal's view), that is not a crucial consideration in a case of this type. Both her residence and her employment in Germany were ancillary to (or an adjunct of) her husband's residence and employment. In my view (and here I beg to differ from the tribunal) the claimant's husband was habitually resident in Germany. As a regular soldier, his employment was certainly stable. Moreover—despite the ever-present possibility of a posting to another country—it was, on the facts as they developed, stable in Germany. And, as I have sought to demonstrate in paragraph 12 (a) above, most of the crucial interests in his life were centred in Germany. Indeed, he cannot be said to have had any abode—let alone a fixed abode—anywhere else. From that situation the claimant's employment cannot be isolated. Even if she had never done any paid work in Germany at all, I should have held that, during the material time, she was habitually resident in Germany.

14. The "little piece of England" approach cannot, in my view, be applied literally. The Regulation makes specific provision for servicemen. So much as is presently relevant of Article 13 provides as follows:

"2. Subject to Articles 14 to 17:

...

(e) a person called up or recalled for service in the armed forces, or for civilian service, of a Member State shall be subject to the legislation of that State..."

In English usage "called up" carries strong overtones of conscription—and, of course, the claimant's husband was a volunteer. But whether it was consequent upon that provision or some other arrangement that he paid his contributions to the United Kingdom authorities, the fact is that there is no special provision in the Regulation for the wives of servicemen. And another fact is that the claimant paid *her* contributions to the German authorities. That really leaves her in a cleft stick. I cannot see how she can, at one and the same time, contend that—

(a) she fell at all material times to be treated as a British national, subject to British law; and

(b) her German contributions fall to be carried into her contributions record in England.

15. It is not in dispute that, in consequence of Article 6 of the Regulation, the reciprocal convention between the United Kingdom and the Federal Republic of Germany cannot avail the claimant.

16. I have confined my decision (as did the adjudication officer) to the brief period 3 to 8 July 1985. Whether any—and, if so, how much—unemployment benefit was paid to the claimant in consequence of the appeal tribunal's decision does not appear from the papers and I was not told at the hearing. There may well have been an overpayment—but, in the circumstances, no question of recovery can possibly arise.

17. I cannot regard the outcome as satisfactory. I consider, however, that I have no proper alternative but to allow the adjudication officer's appeal.

Commissioner's File No: CU 57/1987

(Signed) J. Mitchell
Commissioner

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 20 August 1986 which reversed a decision issued by the adjudication officer on or about 24 February 1986. My decision is that unemployment benefit is not payable for 12 June 1986 because—

(a) the earnings factor derived from contributions of a relevant class in the relevant year, which ended on 5 April 1984, is less than 25 times the lower earnings limit for that year; and

(b) the claimant is not assisted by the provisions of Council Regulation (EEC) No 1408/71 ("the Regulation").

2. Appendices I to IV annexed hereto are to be read with and form part of this decision.

3. The claimant is single and was born in 1929. She is—and always has been—a British national. Until the events narrated hereafter, she had lived and worked in England.

4. In May 1975 the claimant was asked to go to the Netherlands in order to set up there an administration office for her United Kingdom employers. It was initially expected that that operation would take about three months. In the event, it took much longer than that. And when the office had been established, matters developed in a way which the claimant had not foreseen. Her employers incorporated, under Dutch law, a subsidiary or associated company to run their operation in the Netherlands—and the claimant became the managing director thereof. (She remained a director of the United Kingdom company—but I do not think that she derived any emoluments therefrom.) She was also a director of three Dutch subsidiaries. Whilst working in the Netherlands the claimant was insured under the social security scheme of that State.

5. Initially, the claimant had lived in a hotel in the Netherlands. But the local authority made a flat available to the Dutch company—and the claimant was allowed (indeed, required) to live therein. After that, the claimant lived in a flat in a show house which was owned by the Dutch company. Still later (in 1981) the claimant moved to a flat above a bar and restaurant which were operated by her employers. The management of that bar and restaurant formed part of the claimant's duties—and she was required to live in the said flat. She told me that, in fact, had she not "lived on top of the job", it would have been impossible to do the job effectively. The work was exacting. She had few free weekends. Social life outside the business was minimal. With one or two exceptions, her friends in the Netherlands were restricted to the members of her staff.

6. Before she left England the claimant lived in a house which she owned. After she had been working in the Netherlands for about two years she sold that house and bought a flat in England. She retained that flat for the rest of her time in the Netherlands—and went to live there when she came back to England. She never let that flat to others. She herself used it on her visits to England. She told me that it was kept in readiness. All mains services remained connected throughout.

7. The claimant's visits to England were, by her own account, erratic. In the later years of her time in the Netherlands she had more staff—and it was easier for her to get away. In about 1980 she was in England for six weeks. The United Kingdom company had asked her to come back in order to "sort out affairs". She usually came home for Christmas, around her birthday (25 May) and in the summer holiday. At other times she would come home "on a whim".

8. Naturally the claimant had a bank account in the Netherlands. But, throughout, she maintained her bank account in England—and accounts with two building societies. She maintained her television rental in England. She retained her AA membership. (She also joined a Dutch motoring organisation.)

9. The claimant told me that, whilst in the Netherlands, she could have been recalled to England at any time. The fact remains, however, that she worked at her post in the Netherlands until 30 November 1984—when the Dutch company ceased trading. The claimant then remained in the Netherlands until 23 May 1985, when she returned to England. (There was, apparently, "mopping-up" work to be done in the Netherlands.)

10. The claimant claimed and was awarded Dutch unemployment benefit in respect of the period 3 December 1984 to 17 May 1985. Pursuant to Article 69 of the Regulations she received further Dutch unemployment benefit in respect of the period 28 May 1985 to 11 June 1985. She then

claimed unemployment benefit from the United Kingdom authorities—and it is to that claim that this appeal is directed.

11. The adjudication officer gave a decision to the like effect of my own decision set out in paragraph 1 above. But that was reversed by the appeal tribunal. I have to confess that I find the appeal tribunal's decision most surprising. It seems to fly in the face of both the letter and the spirit of the relevant European legislation, of the relevant judgments of the European Court and of the relevant decisions of the Commissioner. In a sentence: It replaces the concept of "habitual residence" with the concept of "domicile" (as that latter term is understood in English law). I quote from the reasons as recorded on the relevant form AT3:

> "The Tribunal considered that under paragraphs 11 and 12 of R(U) 7/85 [see Appendix IV], the Appellant fulfilled the criteria of habitual residence. Question of length of time which was the major issue was a question for the Tribunal to decide, and they felt that on the probabilities and the information supplied by the Appellant, it was always her intention to return and she was therefore habitually resident."

12. In paragraph 3 of the formal ruling in *Di Paolo* "the intention of the person concerned as it appears from all the circumstances" [see Appendix III] *cannot* be read as meaning that a bare intention to return to one's native Member State is sufficient to keep one "habitually resident" in that State. Such an interpretation would, in many cases, wholly nullify—

(a) the strict interpretation of Article 71(1)(b)(ii) which is enjoined in paragraph 13 of the judgment in *Di Paolo*; and

(b) the presumption that "whenever a worker has a stable employment in a Member State . . . he resides there, even if he has left his family in another State" (paragraph 19 of that judgment).

13. I hardly need to say that the employment in the appeal before me was just about as "stable" as one could look for. Although the claimant said that she could have been recalled to England at any time (cf paragraph 9 above), there was no evidence to suggest that such recall was ever seriously in contemplation for so long as the Dutch activities were being pursued. There is virtually *no* employment that is 100% guaranteed. The employee's health or the employer's finances may fail. Hostilities may break out. Other catastrophes may supervene. But those are not considerations which normally affect the application of the terms "stable" or "steady" to a job. The claimant was clearly prepared to stay in the Netherlands for so long as her employers wished her to stay. And that, in my view, is the type of "intention" to which the ruling in *Di Paolo* refers.

14. And it is here that, in my view, the members of the appeal tribunal went astray in their purported application of R(U) 7/85. At the end of paragraph 13 the Commissioner said;

> ". . . and I do not think that a series of relatively short term contracts should be expected to carry such weight." (The full context appears from Appendix IV.)

He clearly did not consider the relevant employment to be "stable". No doubt he might have put it another way, namely that the pattern of employment did not reveal any intention of staying in Germany for a substantial period.

15. It is not in dispute that the reciprocal convention between the United Kingdom and the Netherlands cannot, in consequence of Article 6 of the Regulation, avail the claimant.

16. The claimant states that, when she was first asked to go and work in the Netherlands, she was advised by the Department of Health and Social Security that, provided that she remained "ordinarily resident" in the United Kingdom, her rights here would not be affected and any contributions paid by her under the Dutch social security scheme "could be used for possible future UK benefit claims". If the phrase "ordinarily resident" was actually used, that was a solecism. It is a phrase which features prominently in revenue law. I quote from paragraph 10 of R(U) 4/86:

> "Secondly the claimant complains that the social security authorities should have followed the Inland Revenue ruling that the claimant was 'ordinarily resident' in the United Kingdom. However, whether or not the claimant is 'ordinarily resident' in the United Kingdom for tax purposes has no relevance whatsoever as to whether or not the claimant was at the relevant time 'habitually resident' in the United Kingdom for the purposes of Article 71(1)(b)(ii) of (EEC) Regulation No 1408/71."

If, on the other hand, the relevant officer of the Department used the phrase "habitually resident", then the advice was sound enough. The claimant's problem is that, as I find, she did *not* remain habitually resident in the United Kingdom.

17. I have confined my decision (as did the adjudication officer) to the one day, 12 June 1986. Whether any—and, if so, how much—unemployment benefit was paid to the claimant in consequence of the appeal tribunal's decision does not appear from the papers and I was not told at the hearing. There may well have been an overpayment—but, in the circumstances, no question of recovery can possibly arise.

18. The adjudication officer's appeal is allowed.

Commissioner's File No: CU 19/87

(Signed) J. Mitchell
Commissioner

APPENDIX I

1. Before me are three appeals by the adjudication officer. I heard all three on the same day. The respective claimants are wholly unconnected one with another—and the relevant facts are particular to each individual case. But there is a common thread. In each case—

(a) the claimant completed a period of employment in a Member State of the European Economic Community which was not the United Kingdom;

(b) the claimant claimed unemployment benefit in England;

(c) the claimant's contributions record in England was inadequate to ground entitlement to unemployment benefit;

(d) the claimant's sole prospect of establishing such entitlement lies in showing that he or she falls within the ambit of Article 71(1)(b)(ii) of Council Regulation (EEC) No. 1408/71 ("the Regulation"); and

(e) that, in turn, entails demonstrating that he or she was *not* habitually resident in the Member State in which he or she was—immediately prior to the said claim—last employed. (It is, in fact, the contention of each claimant that he or she never ceased to be habitually resident in the United Kingdom.)

2. Although the appeals were, in essence, separate cases, with the parties' consent I heard all three together. That had the merit of—

(a) shortening and simplifying the task of Miss K. Lee (of the Solicitor's Office of the Department of Health and Social Security) who, in each case, represented the adjudication officer—and was, as ever, most helpful; and

(b) allowing each of the claimants (all of whom presented their own cases) to hear and—to the extent seen fit—adopt the submissions on the law which were made by the other two.

3. In consequence, it has seemed to me that the most convenient way of giving my decisions in these cases is for me to deal in Appendices with so much of the law as is common to all three appeals—and then to preface those Appendices with a short, individual decision which seeks to apply that law to the particular facts of the case to which it is directed. So each claimant will receive—

(a) the decision relevant to his or her particular appeal, and

(b) a copy of the four Appendices.

4. It was common ground that the issue of residence is the only live issue before me. I need not, accordingly, here spell out precisely how that issue comes in point. That exercise is most clearly performed in the written submissions of the adjudication officers who have been involved in these appeals. The texts upon which those submissions are based are set out in Appendix II ("Provisions of Community Law") and Appendix III ("Citations from cases before the European Court"). In this Appendix I confine myself to certain comments upon the situation presented by those texts.

5. In the first place, it is manifest that Community law is still some distance away from the ideal propounded in Article 51 of the Treaty of Rome and reflected in the preamble to the Regulation. As that preamble itself recognised, enormous difficulties are presented by the substantial

differences between the various national social security schemes of the Member States. Indeed, the wonder is not that so much by way of harmonisation remains to be done, but rather that so much has already been achieved. That, however, affords little comfort to claimants who find that there are still substantial limits imposed upon the "aggregation, for the purpose of acquiring and retaining the right to benefit... of all periods taken into account under the laws of the several countries" (see Article 51 of the Treaty).

6. The concept of "habitual residence" must be kept clearly distinct from the concept of domicile as understood in *English* law (see paragraph 11 of CU 285/1985, quoted by me in Appendix IV "Comparable decisions of the Commissioner"). I have stressed "English" because in civil law systems "domicile" means precisely "habitual residence"—see, for example, "Cheshire's Private International Law", 9th edition, page 161. But in English law it does not mean habitual residence. What it *does* mean is not so easily expressed. Cheshire, op cit, devotes 7 pages to the definition of domicile. In Dicey & Morris' "The Conflict of Laws", 9th edition, Rule 4 (at page 85) reads thus:

> "(1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.
>
> (2) A person may sometimes be domiciled in a country although he does not have his permanent home in it."

So that superficially concise definition begs more questions than it answers! (Those questions are in fact, answered over the next 44 pages.) In *Wicker v Hume* (1858) 7 HL Cas 124, at page 160, Lord Cranworth said:

> "By domicil we mean home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations drawn from foreign writers will very much help you to it."

A domicile of origin can, of course, be displaced by a domicile of choice. But an element of permanence is of the essence:

> "A domicil of choice is acquired only if it be affirmatively shown that the *propositus* is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely." (Per Scarman J., as he then was, *In the Estate of Fuld (No. 3)* [1968] P 675, at page 684.)

(It will be noticed that the spelling of "domicile" varies from writer to writer. I myself have adopted the spelling in the relatively recent Domicile and Matrimonial Proceedings Act 1973.)

7. I have brought domicile into the picture because it seems to me that in many cases of the type now before me facts are adduced and relied upon which appear to have more relevance to domicile than to residence—even habitual residence. British history in the last two centuries has been replete with persons—of all social ranks and attainments—who went overseas to earn a living. The genuine emigrants apart, those people intended, in due course, to return to the United Kingdom. Their domicile remained unchanged. But it would be an abuse of the English language to say that they remained throughout "permanently resident" in the United Kingdom. Nothing in the EEC legislation or in the European Court's pronouncements seems to me to undermine that view. One of the claimants before me attached particular importance to the phrase "centre of interests" and—in deference to his express request—I shall dwell upon it for a moment.

8. So far as I can determine, "centre of interests" first saw the light of day in *Angenieux* (see Appendix III). The language of that case was

French—and my own knowledge of that language is too limited for me to be able to say whether the original carries overtones which are lost in translation into English. But it is of some relevance to note that—

(a) the facts of *Angenieux* were somewhat special in that the claimant conducted the bulk of his working activities whilst living in a caravan which he towed round a Member State of which he was not a national and in which State he had no permanent abode: and

(b) the Court spoke of "the place in which he has established the permanent centre of his interests and to which he returns in the intervals between his tours".

So it is clear that it would not have been appropriate in *Angenieux* to rest upon the presumption arising from the concept of "stable employment in a Member State" (cf paragraph 19 of the judgment in *Di Paolo*). And it was clearly appropriate to see whether a permanent "centre of interests" had been established in another State.

9. But—I repeat—*Angenieux* was a somewhat special case. In my view, the "centre of interests" criterion must be applied with circumspection. In the first place, it must be kept in mind that "interests" is plural. An Egyptologist, in his college rooms at Cambridge, might well say that his "centre of interest" lay in Egypt—although he might only spend a few weeks in Egypt in occasional years. But, of course, other important interests in his life (work, salary, living quarters and so on) would undoubtedly be centred in England. In the second place, the "centre of interests" test must, surely, be applied with a substantial measure of objectivity. A person may say—and truthfully say—that his heart and his thoughts turn constantly to England. But if, in the meanwhile, he has a steady job and a fixed abode in another country, it seems to me to be very difficult to hold that he is not "habitually resident" in that other country. We have it on the highest authority that "the provisions of Article 171(1)(b)(ii) must be interpreted strictly"—see paragraph 13 of the judgment in *Di Paolo* (Appendix III). I respectfully agree with the conclusion reached in R(U) 7/85 (Appendix IV)—but that case was, surely, very close to the limit. In CU 285/1985 (Appendix IV) the claimant—throughout most of the time when he was working in Greece—owned and maintained a house in England, to which he returned from time to time. He always intended to return to work in England. But neither of those factors—nor both together—outweighed the other factors in the case.

10. In the papers is a copy of the decision in R(U) 4/84. Much therein is relevant by way of showing how the issue of "habitual residence" arises as crucial. But I have not referred to that decision in Appendix IV, for it takes for granted (very properly, in my respectful view) the fact that the claimant was residing in West Germany while he was working there.

11. A somewhat disturbing aspect of these cases is the apparent ignorance of the respective claimants as to their rights (and, perhaps more importantly, lack of rights) consequent upon their employment out of the United Kingdom. The initial information given to them by the Department of Health and Social Security misled at least two of them. In one case that was unavoidable. The information, correct at the time when it was given, became inappropriate when the United Kingdom became a member of the EEC. Be that as it may, however, it does seem clear that for years each of these claimants worked overseas in the sincerely held belief that the contributions which they were paying under the legislation of the countries in which they were, respectively, working would avail them in England exactly as if those contributions had been paid in England. I do not know

what is being—or can be—done to prevent such misapprehension in future. The Department publishes a leaflet (SA 29, "Your social security, health care and pension rights in the European Community")—and, on a brief perusal, I find it to be accurate and reasonably intelligible to a non-lawyer. (I intend no sarcasm. Reducing the relevant provisions to ready intelligibility is no mean challenge.) But I have no information as to what publicity—if any—is given to that leaflet in the context of people who are already working in an overseas Member State; nor have I any ready suggestions as to how that could be achieved.

12. An equally disturbing—and more fundamental—aspect of these cases is the overall unfairness of the present European legislation. It is ironical that a British national should be worse off—in consequence of the United Kingdom's entry into the EEC—than he would have been under the old reciprocal conventions. In a passage (with which I have not burdened Appendix III) in his opinion in *Guyot*, Mr. Advocate General Mancini pointed out that—

> "...Chapter 6 of Regulation No. 1408 was adopted at a time of great prosperity in which it was easy to find work in a short time."

But those times have changed. It would appear (from the said opinion) that proposals for ameliorating the relevant provisions of the Regulation were made by the Commission in 1980—but, so far as I can ascertain, nothing effective came of them. In my view—for what it is worth—amelioration is long overdue. I suppose, however, that one cannot be too censorious of the European authorities. After all—on our own doorstep—the "full extent normal" and the seasonal workers legislation has for years been glaringly inappropriate to times of high unemployment—and the Union Parliament has done nothing about either.

APPENDIX II

Provisions of Community Law

Treaty of Rome (In effect from 1 January 1958)

Article 51

The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers: to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) 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;

(b) payment of benefits to persons resident in the territories of Member States.

Council Regulation (EEC) No. 1408/71

Preamble

Whereas the need for a general revision of Council Regulation No. 3 on social security for migrant workers has become progressively more apparent, both in the light of the practical experience of its implementation since 1959 and as a result of amendments made to national legislations;

Whereas the existing provisions for co-ordination can, as a whole, be developed, improved and to some extent simplified at the same time, taking into account the considerable differences existing between national social security legislations;

...

Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons;

Whereas the provisions for co-ordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly social security benefits for workers and their dependants regardless of their place of employment or of residence;

Whereas these objectives must be obtained in particular by aggregation of all the periods taken into account under the various national legislations for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by the provision of benefits for the various categories of persons covered by the Regulation regardless of their place of residence within the Community;

Whereas the provisions for co-ordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits;

...

Whereas, in order to secure mobility of labour under improved conditions, it is necessary henceforth to ensure closer co-ordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States; whereas it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject;

...

Whereas, taking into account the problems relating to unemployment, it is appropriate to extend entitlement to family benefits to members of the families of unemployed workers residing in a Member State other than the one which is responsible for payment of the unemployment benefit;

Note: The preamble does not appear in the version of the Regulation which appears as Annex I to Council Regulation (EEC) No. 2001/83.

Article 1

Definitions

For the purpose of this Regulation:

...

(h) 'residence' means habitual residence;

(i) ...

(j) 'legislation' means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) [which paragraphs set out the matters covered by the Regulation].

The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. However, in so far as such provisions:

(i) serve to put into effect compulsory insurance imposed by the laws and regulations referred to in the preceding subparagraph; or

(ii) set up a scheme administered by the same institution as that which administers the schemes set up by the laws and regulations referred to in the preceding subparagraph,

the limitation on the term may at any time be lifted by a declaration of the Member State concerned specifying the schemes of such a kind to which this Regulation applies. Such a declaration shall be notified and published in accordance with the provisions of Article 97.

The provisions of the preceding subparagraph shall not have the effect of exempting from the application of this Regulation the Scheme to which Regulation No. 3 applied.

The term 'legislation' also excludes provisions governing special schemes for self-employed persons the creation of which is left to the initiatives of those concerned or which apply only to a part of the territory of the Member State concerned, irrespective of whether or not the authorities decided to make them compulsory or extend their scope. The special schemes in question are specified in Annex II;

(o) 'competent institution' means:

(i) the institution with which the person concerned is insured at the time of the application for benefit; or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated: or

(iii) the institution designated by the competent authority of the Member State concerned: or

(iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1) [which lists the branches of social security to which the Regulation applies], either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned;

...

(q) 'competent State' means the Member State in whose territory the competent institution is situated;

(r) 'periods of insurance' means periods of contribution or periods of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;

TITLE II
DETERMINATION OF THE LEGISLATION APPLICABLE
Article 13

General rules

1. Subject to Article 14(c) [special rules applicable to persons employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State], persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person 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;

...

CHAPTER 6
UNEMPLOYMENT BENEFITS
Section 1
Common provisions
Article 67

Aggregation of periods of insurance or employment

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

—in the case of paragraph 1, periods of insurance,
—in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.

Section 2
Unemployed persons going to a Member State other than competent State
Article 69

Conditions and limits for the retention of the right to benefits.

1. An unemployed or self-employed person who is wholly unemployed and who satisfied the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

(a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorize his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organized therein. This condition

shall be considered satisfied for the period before if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under provisions of paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time limit may be extended by the competent services or institutions.

3. The provisions of paragraph 1 may be invoked only once between two periods of employment.

4. Where the competent State is Belgium, an unemployed person who returns there after the expiry of the three month period laid down in paragraph 1(c), shall not requalify for benefits in that country until he has been employed there for at least three months.

Section 3
Unemployed persons who, during their last employment, were residing in a Member State other than the competent State.
Article 71

1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) ...[confined to frontier workers]

(b) (i) an employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to

whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

2. An unemployed person may not claim benefits under the legislation of the Member State in whose territory he resides while he is entitled to benefits under the provisions of paragraph 1(a)(i) or (b)(i).

Council Regulation (EEC) No 574/72 (The "implementing Regulation")
CHAPTER 6
UNEMPLOYMENT BENEFITS

...

Implementation of Article 71 of the Regulation
Article 84

Unemployed persons who were formerly employed and who, during their last employment, were residing in a Member State other than the competent State

1. In the cases referred to in Article 71(1)(a)(ii) and in the first sentence of Article 71(1)(b)(ii) of the Regulation, the institution of the place of residence shall be considered to be the competent institution, for the purposes of implementing the provisions of Article 80 of the implementing Regulation.

2. In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the Regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the implementing Regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the Regulation.

3. For the purposes of implementing the provisions of Article 71(2) of the Regulation, the institution of the place of residence shall ask the competent institution for any information relating to the entitlements, from the latter institution, of the unemployed person who was formerly an employed person.

APPENDIX III

Citations from cases before the European Court

Case 13/73 *Angenieux v Hakenberg* [1973] ECR 935

Article 1(h) of Council Regulation No. 3 defined "permanent residence" as "the place where a person habitually resides" (compare the definition of "residence" in Article 1(h) of Regulation No. 1408/71—see Appendix II). One of the questions before the Court was the meaning to be given to that definition. The third of the Court's rulings was set out thus:

> "3. By 'permanent residence' in the sense in which that term is used in Article 13(1)(c) (first section) of Regulation No. 3, as amended by Regulation No. 24/64, and defined by Article 1(h) of the same Regulation, there must be understood, in the case of a business representative pursuing the kind of working activities above described, the place in which he has established the permanent centre of his interests and to which he returns in the intervals between his tours." (At pages 952–3)

The "working activities above described" are summarised at the beginning of the judgment (pages 936–937):

> "Since 24 October 1950 Mr. Willy Hakenberg, a French national resident in France, has been acting in the German Federal Republic as a representative for several French industrial undertakings which have their registered offices in France, the last of which was 'Anciens Établissements D. Angenieux fils aîné' at St. Etienne.
>
> Mr. Hakenberg's activities consist, in particular, in visiting customers among German manufacturers and wholesalers in order to sell them mechanical and metal parts for cycles and motor-cycles. For this purpose he tours Germany canvassing business for almost nine months in the year during which time he has no fixed abode.
>
> He lives in a caravan towed by a motor vehicle registered in France.
>
> In Germany Mr. Hakenberg has at his disposal a post box as well as a business reception service in Wuppertal-Barmen.
>
> He returns periodically to France for about three months in the year, outside the time he spends canvassing business, in order to make contact with the undertakings he represents.
>
> Mr. Hakenberg is paid entirely by commission and does not carry out any commercial transactions on his own behalf.
>
> He is not registered either in France or in Germany at a 'Registre du commerce' or a registry of commercial agents."

Case 20/75 *d'Amico v Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891

The "Summary of the written observations" opens thus:

> "*Mr. d'Amico* observes that the refusal to grant him early retirement benefit on the ground that he was not living in Germany at the time when he acquired the right but in another Member State of the EEC is incompatible with Article 48 et seq of the EEC Treaty.
>
> He claims that freedom of movement for workers within the Community, which is guaranteed by Article 51, is not ensured when some benefits are subject to the person entitled being resident in a specific Member State. All periods which might in some way come into consideration for the acquisition or retention of the right to benefits must in fact be taken into account." (At page 893)

The Grounds of Judgment contain this passage:

> "Article 69 of this regulation [i.e. No. 1408/71] lays down the conditions which the person seeking work must satisfy in order to be able to retain the right to these benefits for a maximum of three months, in particular by requiring that he register within seven days with the employment services of the Member States to which he goes and that he be subject to the control procedure organized therein.
>
> The link with the State where the worker became unemployed is retained by these provisions by the fact that the competent institution of that State must still reimburse the amount of unemployment benefits provided by the competent institution of another Member State. Therefore, with certain exceptions, Community law does not provide for the right of an unemployed worker to claim unemployment benefits under the legislation of a Member State other than the State in which he became unemployed." (At page 898—my emphasis)

Case 76/76 *Di Paolo v Office National de l'Emploi* [1977] ECR 315

Miss Di Paolo, an Italian national born in Italy, entered Belgium to live with her parents in 1965. In September 1972, having completed her education, she went to the United Kingdom. Her stay lasted until the end of July 1973. During that stay she worked in a hospital. Upon returning to her parent's home in Belgium she claimed unemployment benefits from the Belgian authorities. The question referred to the European Court was this:

> "What meaning and scope are to be given the words 'in which he resides or who returns to that territory' contained in Article 71(1)(b)(ii) of Regulation (EEC) No. 1408/71 of the Council of the European Communities and in particular as regards the concepts of residence and return to the territory; what are the criteria applicable and at what point of time must the conditions of residence and return to the territory be fulfilled?"

The European Court ruled as follows:

> "1. The concept of the Member State where the worker resides, appearing in Article 71(1)(b)(ii) of Regulation No. 1408/71, must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated;
>
> 2. The addition to that provision of the words 'or who returns to that territory' implies merely that the concept of residence in one State does not necessarily exclude non-habitual residence in another Member State;
>
> 3. For the purpose of applying Article 71(1)(b)(ii), account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances." (At page 326)

The following paragraphs from the judgment demonstrate the reasoning which underlies those conclusions:

> "11. The decisive element in applying Article 71, as a whole, is the residence of the person concerned in a Member State other than the State to whose legislation he was subject during his last employment.

12. The transfer of liability for payment of unemployment benefits from the Member State of last employment to the Member State of residence is justified for certain categories of workers who retain close ties with the country where they have settled and habitually reside, but it would no longer be justified if, by an excessively wide interpretation of the concept of residence, the point were to be reached at which all migrant workers who pursue an activity in one Member State while their families continue habitually to reside in another Member State were given the benefit of the exception contained in Article 71 of Regulation No. 1408/71.

13. It follows from these considerations that the provisions of Article 71(1)(b)(ii) must be interpreted strictly."

"17. The concept of 'Member State in which he resides' must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated.

18. In this respect, the fact that the worker has left his family in the said State constitutes evidence that he has retained his residence there, but is not of itself sufficient to allow him the benefit of the exception laid down in Article 71(1)(b)(ii).

19. In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State. (My emphasis)

20. Accordingly it is not only the family situation of the worker that should be taken into account, but also the reasons which have led him to move, and the nature of the work." (Pages 324–325—my emphasis in each instance)

Case 128/83 *Caisse Primaire d'Assurance Maladie de Rouen v Guyot* [1984] ECR 3507

Although this case stemmed from a claim (made in France) for certain medical expenses and for daily allowances in respect of incapacity for work, entitlement turned upon Mme Guyot's entitlement to unemployment benefits as conferred by Articles 69 or 71 of the Regulation. In his opinion, Mr. Advocate General Mancini wrote:

"Article 71(1)(a)(ii) and (b)(ii) provide an exception to the rule that benefits are to be paid by the country in which the person was last employed. It applied only to an unemployed person who, during the period when he was last employed, resided in a Member State other than that in which he worked and, once the employment relationship had ceased to exist, had registered with the employment authorities of his country of residence. In that case, benefits are paid by the social security authorities of that country on the same basis as if the worker had last been employed there.

The reason for that exception is clear. It is intended to deal with marginal cases: it safeguards the rights of workers such as frontier workers, seasonal workers, workers employed in international transport and those who work in undertakings located on frontiers, that is, persons who normally live and work in the territory of several Member States." (At page 3516—my emphasis)

The Court expressed its decision relatively briefly—but it appears to have accepted as valid the substance of that passage from the opinion of the Advocate General. The meat of its decision is in paragraphs 6 to 9:

> "6. The provision which the Court is asked to interpret [i.e. Article 71(1)(b)(ii)] must be placed in its context. It is contained in Chapter 6 of Regulation No. 1408/71, which deals with unemployment. According to the system established by that chapter, the unemployed person must apply to the competent institution in the Member State in which he was last employed in order to obtain the unemployment benefits provided for. If the unemployed person leaves that Member State for the purpose of seeking employment, he continues to be entitled to those benefits, to be paid by the competent institution of the Member State in which he was last employed, for a period of three months. At the end of that period of three months, the unemployed person must return to that State if he is to continue to be entitled to the benefits.
>
> 7. Article 71(1) provides for an exception to that rule in the case of 'an unemployed person who, during his last employment, was residing in the territory of a Member State other than the competent State'. In such a case, the person concerned may make himself available for work to the employment services of the Member State in which he resides or of the competent State, as the case may be, and thus receive unemployment benefits after the expiry of the three month period. That exception is intended to protect frontier workers and other persons who reside in a Member State other than that in which they are employed.
>
> 8. By 'competent State', within the meaning of that provision, the Community legislature is referring to the Member State in whose territory the competent institution is situated, that is, the Member State in which the person was last employed. The provision therefore concerns only workers who were residing in a Member State other than that in which they were last employed.
>
> 9. The reply to the question submitted by the national court must therefore be that Article 71 of Regulation No. 1408/71 does not apply to an unemployed person who, during his last employment, was residing in the Member State in which he was employed." (Pages 3513–3514—my emphasis)

APPENDIX IV

Comparable decisions of the Commissioner

R(U)7/85

The claimant, being unable to find employment in the United Kingdom, went to West Germany in the spring of 1981. Through a succession of employment agencies he there obtained about 2 years work with the same company. When that ended, he was paid about 2½ months of unemployment benefit by the German authorities and, on his return to England, that continued to be paid pursuant to Article 69 of the Regulation. Three months after his return to England that, of course, stopped. The claimant claimed unemployment benefit pursuant to the domestic United Kingdom scheme. But he did not satisfy the domestic contribution conditions. The social security appeal tribunal allowed his appeal on the basis of Article 71(1)(b)(ii) of the Regulation, holding that he had been, whilst working in Germany, habitually resident in the United Kingdom.

The Commissioner disallowed the adjudication officer's appeal. He gave close attention to paragraphs 18 and 19 of the judgment in *Di Paolo* (set out by me in Appendix III). I quote from his decision:

> "8. Seeking to apply the foregoing [i.e. the aforesaid paragraphs] the adjudication officer fastened on the proposition that the claimant had had what he submitted was stable employment in West Germany and maintained [that he] had not rebutted the presumption that he accordingly was resident there while working there. In this connection he stressed that the claimant had arranged his initial employment before he went there and that he remained there drawing unemployment benefit for 2½ months before returning to this country. The appeal tribunal found as a fact that the employment was not stable and that the whole picture was against Germany being the claimant's habitual residence.
>
> 9. It has to be noted that the reference to the habitual centre of a person's interest (unlike that to stable employment) is in the paragraph 1 of the formal decision (or dispositif) of the Court; and indeed found a place also in the formal decision in the *Angenieux case* [see Appendix III to this decision]. Paragraph 3 of the formal decision of the Court in the *Di Paolo case* includes among the matters to be taken into account in applying Article 71(1)(b)(ii) 'the nature of the occupation found in the other Member State' [my emphasis]. And it must be that if that occupation represented 'stable' employment that is a very important consideration. No guidance has been given as to what is meant by 'stable'.
>
> 10. The employment in question in this case lasted altogether (albeit with technically different employers) for 2 years. The claimant was employed, not from week to week, but in a succession of fixed term contracts, each for a period of months, the employers being three different though associated employment agencies who hired to the same company throughout. After initially living in a hotel the claimant shared a furnished flat while so working. And he continued in West Germany after the employment came to an end, drawing unemployment benefit in West Germany for 2½ months after his employment came to an end. In fact he continued to draw West German unemployment benefit after his return to this country under Article 69 of Regulation 1408/71. However, Article 71(1)(b)(ii) specifically contemplates the possibility that a person to whom the

Article applies may have drawn benefit under Article 69. And as the last mentioned Article entitles a person who goes to another Member State to look for work to draw unemployment benefit in the Member State from which he goes only after he has offered himself to the employment services in the first Member State for at least one month; I do not think that I need attach much importance to the consideration that the claimant stretched it to $2\frac{1}{2}$ months.

11. I think that, in concluding that the whole picture was against Germany being the claimant's habitual residence, the tribunal must have taken account of the following facts (which were in uncontradicted evidence before them whether or not included in their formal findings) viz.

(1) that the claimant was a British national;

(2) that he had qualified in England in technical graphics (he was a technical illustrator in three dimensions) in the summer of 1981, when he was 20;

(3) that before so qualifying he had in April 1981 commenced employment in Germany on an 8-month engagement;

(4) that he returned to this country to take his qualifications examination but subject to this he remained employed in West Germany for a succession of fixed periods for a total of two years;

(5) that the employers were three successive (though associated) employment agencies and the actual work was done for a single employer;

(6) that while in Germany he lived first in a hotel and then in a furnished flat;

(7) that when his employment came to an end he returned to this country after drawing unemployment benefit in West Germany for $2\frac{1}{2}$ months;

(8) that while working in Germany he returned home only for holidays (the distance being too great to warrant the expense of the return for short periods like weekends) in all he returned for 9 days in May 1981 (to take his examinations) for 2 to 3 weeks in December 1981/January 1982 and 2 to 3 weeks in September 1982;

(9) that he left possessions in his parents' home where there was a room jointly used by him and his brother and that it was there that he went when he returned home;

(10) that his parents were continually on the look-out for employment for him in England; and he used his parents' home as his address;

(11) that he originally intended to be in Germany only for the eight month period of his initial employment.

12. The appeal tribunal were enjoined by paragraph 3 of the Court's formal ruling in the *Di Paolo* case to have regard to four matters in deciding where a person is habitually resident (i.e. has the habitual centre of his interests). These are

(1) the length and continuity of residence before the person concerned moved to the other Member State

(2) the length and purpose of his absence

(3) the nature of the occupation found in that other Member State and

(4) the intention of the person concerned as it appears from all the circumstances.

As to (1) the claimant had been all his life in England until he went to Germany; as to (2) he was absent for just over two years and his purpose was to obtain employment which he could not secure in this country; as to (3) the claimant was employed by a succession of employment agencies, the work done being for a single employer; as to (4) the claimant says that he originally went for a period of about 8 months, which was in fact the length of his first contract. He arranged for his parents to keep an eye out for employment in England, and he used their address as his address. In my judgment the tribunal were fully justified on balance in reaching the conclusion that the claimant retained the United Kingdom as the centre of his interest.

13. The real difficulty arises in the passage in the [*Di Paolo*] judgment to the effect that where the worker has stable employment in a Member State there is a presumption that he resides there even if he has left his family (which I take to mean a wife and children rather than parents) in another Member State. What is meant by 'stable' in this context? The language of the case was French and I venture to think that the word 'stable' in the English text is an infelicitous translation of the word 'stable' in the French text. In English 'stable' though a perfectly intelligible word is unfamiliar as an epithet qualifying employment. In the well-known French dictionary 'Petit Larousse' the word 'stable' is defined first in its literal meaning as applied to words like 'edifice' and then in its figurative meaning as applied to words like 'paix' as 'assure', 'durable', 'permanent'. In my judgment in the present context it has much the same import as the English word permanent as used to qualify 'employment', where in general it connotes indefinite duration. [My emphasis] (*See McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 564 at pages 601 and 609).

I consider 'stable' must be interpreted in the *Di Paolo* judgment that as meaning the same as permanent in this sense or as meaning steady. [My emphasis] The degree of permanence has to be such as to be capable of outweighing the consideration that the person concerned may have left his wife and family in another State; and I do not think that a series of relatively short term contracts should be expected to carry such weight. In my judgment there is nothing in the passage about 'stable' employment inconsistent with the conclusion of the appeal tribunal on this issue and I confirm it."

R(U) 4/86

The claimant, having resided in the United Kingdom for 25 years, took employment in West Germany on 1 January 1980 under a contract providing for three years employment. His wife joined him in September 1980. He retained some links with the United Kingdom but lived and worked in West Germany throughout the period of his contract, which was extended for a further year to 31 January 1984. He returned to the United Kingdom on 1 February 1984, his wife having preceded him in August 1983. He had been insured under the West German insurance scheme but the West German authorities did not authorise the export of their unemployment benefit under Article 69 of the Regulation. On 2 February 1984 the claimant claimed unemployment benefit in the United Kingdom. Entitlement hinged upon the applicability of Article 71(1)(b)(ii)—and that, in turn, hinged upon whether the claimant had been, throughout the relevant period, habitually

resident in the United Kingdom. The Commissioner dealt succinctly with that issue:

> "10...It is for the adjudicating authorities, however, to determine whether the claimant was habitually resident, as distinct from temporarily resident, in Great Britain during the relevant period.
>
> 11. Although the claimant retained some links with the United Kingdom, e.g. he kept open a bank and building society account to which he made regular payments, and he retained his membership of the AA, the YHA and a directorship of a company, nevertheless he went together with his wife to live and work in West Germany for a 3 year period which was subsequently extended for a further year. He had stable employment in Germany and he was not sent there on secondment from Great Britain. Furthermore for a period of 4 years he had no other home than that in Germany. I am, of course, aware that his wife did not actually go to Germany until September 1980 and that she returned ahead of him in August 1983. However, these factors do not outweigh the other considerations. I have no doubt, on the facts, that the claimant could properly be regarded as habitually resident in West Germany throughout the relevant period. It follows from this that he cannot bring himself within Article 71, and accordingly he cannot satisfy the contribution conditions for entitlement to British unemployment benefit."

Case on Commissioner's file CU 285/1985

The claimant was a British national born in 1948. He was educated in the United Kingdom. From 1965 to 1970 he was employed by a company in the United Kingdom. He then started training to qualify as a civil engineer. After four years of such training he was employed in this country for a further period of one year. Then he worked in Nigeria for 18 months. In 1980, having married, he set off from the United Kingdom in a yacht. His wife was with him. They called at Italy, where his elder child was born. They then sailed on to Athens (the Piraeus). The claimant there applied for a clerical job with a firm of consulting civil engineers. In view of his training, however, he was offered—and accepted—an engineering job with the same firm. On 1 January 1981 Greece became a Member State of the European Economic Community—and the claimant entered the Greek social security insurance scheme. He did not require a knowledge of Greek for his work—and he acquired none. He remained in that employment until 1983, when he was made redundant. Throughout that employment he could have been dismissed on short notice. At the end of the employment he went to Dubai for approximately 6 months and there worked in employment which had been arranged in Greece with a Greek based company. In the early summer of 1984 he returned to Athens. From there he sailed home to England. In August 1984, having failed to obtain employment in England, he claimed unemployment benefit. He could not, of course, satisfy the United Kingdom contribution conditions. The case came down to Article 71(1)(b)(ii) of the Regulation and, accordingly, to the question of the claimant's "habitual residence" during the material period.

In paragraph 5 of his decision, the Commissioner amplified the facts:

> "5. Before the claimant set off in his yacht he had owned a house in this country which he sold in order to purchase the yacht. After he had been in Greece for some months he purchased another house in this country which he furnished and maintained as somewhere to reside in this country while he was here. [My emphasis] He did not however come to this country very frequently during that time, but lived in

rented furnished accommodation in Greece with his wife and first one, and then two, children. A second child was born during that period but his wife returned to this country for her confinement. During his time in Greece he completed his qualification as a civil engineer travelling to Cyprus for the examination. The Institute of Civil Engineers required aspiring civil engineers to do a period of employment with a firm of contracting engineers and with a firm of consulting engineers, the duration of such employment being to some extent a matter of discretion. The claimant had been able to obtain employment with contracting engineers in this country but had seized on the opportunity of employment with consulting engineers in Greece, having had difficulty in securing such employment in this country. He always intended eventually to return to work in this country (as he now has); [my emphasis] indeed his qualification would not (unless under provisions of EEC law not applicable in Greece during the transitional period) be recognised in Greece. He maintained a bank account in this country throughout into which his salary as far as not required for current expenses was paid by his employers, and out of which the mortgage payments on his house in this country were made."

The Commissioner then reviewed the relevant provisions of the Regulation and the relevant judgments of the European Court. On the issue of habitual residence he said this:

"Habitual residence is not the same thing as 'domicile' in the sense in which that word is used in English law. I have no doubt that the claimant's domicile of origin is England and that he has never acquired a domicile of choice elsewhere. He has at all times intended to return to this country. But that is not the test, as emerges from two decisions of the European Court of Justice on the point." (Paragraph 11)

The two cases referred to are *Angenieux* and *Di Paolo*—see Appendix III to this decision. In paragraph 12 the Commissioner summed up the residence issue thus:

"12. The leaving of a person's family in another Member State is evidence of that person's intention to return to that Member State. But even so it is not of itself sufficient to enable that person to establish habitual residence in that other State. *A fortiori* an intention to return to another Member State where the family has not been left is not of itself sufficient. This claimant had employment (as well as his family) in Greece. In Decision R(U) 7/85 [see above in this Appendix] I considered the interpretation of the word 'stable' as applied to employment. In amplification of what was said there I point to the phrase 'the centre of his interests' used in the operative part of the decision itself. Steady employment as pointed out by Lord Denning MR in Regina v National Insurance Commissioner, Ex parte Stratton [1979] QB 369 at page 370 is something in which a person has an acquired right; it is something which one would not put at risk by moving away. And where a person has such employment there he probably has the centre of his interest. [My emphasis] And where the person concerned also has his family there with him the case for saying that the centre of his interest lies there is overwhelmingly strong. I appreciate that this claimant's employment in Greece though of indefinite duration was liable to termination at any time, but it was employment that was important to him for the securing of his qualification, at least down to the date that he became a qualified civil engineer. And I hold that Greece was, in the context, the centre of the claimant's interest and thus the place of his habitual residence at the time; and that even after he had attained

his United Kingdom qualification there was no change of that centre down to the termination of his employment in Greece, even if he put out feelers for employment in England once he qualified. Accordingly in my judgment during his employment in Greece the claimant was resident there in the sense in which that term is used in Regulation 1408/71."
