JUDGMENT OF THE COURT OF 10 JULY 1975 [1]

Gaetano Bonaffini and Others v Istituto Nazionale della Previdenza Sociale (INPS) (preliminary ruling requested by the Pretore di Enna)

Case 27/75

Summary

Social security for migrant workers — Unemployment — Benefits under the legislation of the competent State — Limited and conditional preservation — Departure of the person concerned to another Member State — Benefits under the legislation of that State — Refusal based on failure to fulfil the conditions laid down by Article 69 of Regulation (EEC) No 1408/71 — Not permissible

Article 69 of Regulation (EEC) No 1408/71 is intended solely to ensure for the migrant worker the limited and conditional preservation of the unemployment benefits of the competent State even if he goes to another Member State and this other Member State cannot, therefore, rely on mere failure to comply with the conditions prescribed under that article to deny the worker entitlement to the benefit which he may claim under the national legislation of that State.

In Case 27/75.

Reference to the Court under Article 177 of the EEC Treaty by the Pretore of Enna for a preliminary ruling in the action pending before him between

GAETANO BONAFFINI AND OTHERS

and

ISTITUTO NAZIONALE DELLA PREVIDENZA SOCIALE (INPS)

on the interpretation of Articles 69 and 71 of Regulation (EEC) 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 (OJ English Special Edition 1971 [II], p. 416).

1 — Language of the Case: Italian.

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner (Rapporteur), R. Monaco, P. Pescatore, H. Kutscher, M. Sørensen and A. O'Keeffe, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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 EEC may be summarized as follows:

I — Facts and procedure

Article 69 of Regulation (EEC) No 1408/71 reads as follows:

'1. A worker who is wholly unemployed and who satisfies 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 conditions and within the limits hereinafter indicated:

(a) before his departure, he must have been registered with the employment services of the competent State as a person seeking work and must have remained available 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 registration 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 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.'

Article 71 of the Regulation reads as follows:

'1. An unemployed person 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) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; the institution of the place of residence shall provide such benefits at its own expense;

(b) (i) a worker, 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 legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) a worker, 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 worker 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 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 paragraph 1 (a) (i) or (b) (i).'

Mr Gaetano Bonaffini and Others, Italian nationals, who had worked as employed persons in the territory of the Federal Republic of Germany and subsequently lost their employment had applied on their return to Italy to the Istituto Nazionale della Previdenza Sociale (INPS) for payment of the unemployment benefit provided for under Article 19 of Royal Decree-Law No 636 of 14 April 1939.

The INPS rejected the application on the grounds that the workers concerned had not remained available to the employment services of the Federal Republic for at least four weeks after becoming unemployed and had not been authorized to return to Italy before the expiry of this period.

Mr Bonaffini and others thereupon brought an action before the Pretore of Enna for payment of the unemployment benefit. They contended that the condition in Article 69 was imposed only to enable the employment services of the competent State to find employment for an unemployed person before that State was called upon to pay the benefit corresponding to the whole benefit period; non-fulfilment of this condition did not result in depriving the worker of the right to receive benefits from the insurance institution of the place of residence on returning to his country of origin if he retained his residence there while working abroad.

The INPS counters this argument with the statement that, under Article 69 of Regulation No 1408/71, the worker must be 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 in order to retain his entitlement to benefit in another Member State of the Community where he subsequently went in search of employment. Departure before such time has expired must be authorized by the competent services. In the event neither of these conditions was fulfilled.

The INPS adds that the applicants cannot benefit from the provisions of Article 71 of Regulation No 1408/71 because they had not retained their residence in Italy while working abroad. It therefore submitted that the applications should be dismissed.

The Pretore of Enna, believing it to be necessary first to resolve some preliminary questions of Community law, decided by order of 17 December 1974 to stay the proceedings and to request the Court of Justice under Article 177 of the EEC Treaty for 'clarification of the expression "day-labourer" ("lavoratore giornaliero") [1] in Article 71 of Regulation No 1408/71 of 14 June 1971 and for a ruling whether Article 69, which lays down a waiting period of four weeks, precludes a worker who has failed to complete this period from obtaining unemployment benefit in the Member State to which he belongs.'

The order of the Pretore of Enna was received at the Court Registry on 11 March 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of the INPS by Arturo Pittoni and Giovan Battista Rossi Doria and on behalf of the Commission of the European Communities by its Legal Adviser, Gianluigi Campogrande, acting as Agent.

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.

II — Written observations submitted to the Court

The *Istituto Nazionale della Previdenza Sociale* (INPS) takes the view

1 — *Translators' note:* the words 'lavoratore giornaliero' do not appear in Article 71, which deals with 'il lavoratore frontaliero' (frontier worker).

that the nature of the questions referred by the Pretore of Enna is not such as to justify a preliminary ruling under Article 177 of the EEC Treaty.

As far as unemployment benefit is concerned, the question referred for a preliminary ruling was whether or not the benefits can be granted under national legislation. Only if the answer were in the affirmative could the restrictive condition laid down in Article 69 of Regulation No 1408/71, the application of which is contested in this case, be applicable. If the answer were in the negative, then the question whether Article 71 of the regulation is applicable or not could be important.

As for the meaning of the expression 'frontier worker' (the expression 'day-labourer' being clearly a substantial error on the part of the Pretore) the INPS takes the view that the definition given in Article 1 (b) of the regulation concerned is sufficiently clear and was in any case satisfactorily interpreted by the Administrative Commission on Social Security for Migrant Workers in its Decision No 94 of 24 January 1974.

Moreover, the status of migrant workers who came from Sicily to work in the Federal Republic of Germany cannot constitute the legal status of 'frontier workers'.

Nor, in view of the long periods of work completed by the applicants in the Federal Republic of Germany, is it possible to apply Article 71 (1) (b) (ii) of the regulation concerned which refers to 'a worker, other than a frontier worker'. On this point, the principle to be applied is the one in Decision No 94 of the Administrative Commission, quoted above, that 'workers who have fairly stable employment in one Member State must be presumed to be resident in that State'.

In its second question, by 'belonging to a Member State', the court hearing the main action clearly means the status of a national, a status which, under general Community principles, in no way affects nationals of the Member States where Community legislation applies. Article 69 of Regulation No 1408/71 does not govern the *grant of the right* to social security benefits but the *retention of this right* even when the worker is seeking fresh employment in different Member States.

In consequence, the provision cannot affect the grant of social security benefit by a Member State other than that in which the worker was last employed.

It appears that, to the extent to which Community regulations manage to coordinate national laws, the regulation on social security is intended to benefit the migrant worker as compared with the situation which would result for him from the exclusive application of national law (Judgment of 5 July 1967 in Case 1/67 *Ciechelski*, [1967] ECR 181).

However, this does not mean that national rules under which there is an independent right to benefit must not be applied if the Community rule cannot be applied. This principle is laid down in the decisions of the Court on this subject (Judgment of 5 July 1967 in Case 2/67 *De Moor*, [1967] ECR 197, Judgment of 30 November 1967 in Case 22/67 *Goffart*, [1967] ECR 321) and is, moreover, borne out by the preamble to Regulation No 1408/71.

The INPS concludes that the questions from the court in the main action

(a) must be declared inadmissible;

(b) even though, incidentally, the interpretation of the rules in dispute is capable of upholding the principle that the Community rule must not stand in the way of application of the national law when the migrant worker, having been deprived of the benefits which he could receive in the Member State to the legislation of which he was last subject,

nevertheless enjoys the right, under national law, to receive social security benefits.

The *Commission* submits that the questions to be resolved should read:

1. What is to be understood by 'the Member State in whose territory he [a worker] resides' for the purposes of Article 71 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971?
2. What is to be understood by 'frontier worker' for the purposes of Article 71 of Regulation No 1408/71?
3. Does Article 69 of Regulation No 1408/71 deprive an unemployed worker, who has not retained his right to benefit in the competent State, of the right to be paid unemployment benefit by the insurance institution of another Member State by virtue of the provisions in force in the latter State which in the absence of Community regulations are applicable to him?

First question

Under Article 1 (h) of Regulation No 1408/71 'residence' must be taken to mean the 'habitual residence' of the worker. The meaning of the expression 'habitual residence' remains to be established in the context of the regulation concerned.

Under the judgment of the Court of 12 July 1973 in Case 13/73 *Angénieux* v *Hakenberg* ([1973] ECR 935) which was concerned with a situation arising under Regulation (EEC) No 3/58, the permanent residence of the worker must be understood as being the place where he 'has established the permanent centre of his interests and to which he returns in the intervals between his tours'. It should, however, be noted that this solution was adopted for the case of a business representative working in two different Member States and continually on the move from one place to another.

That judgment appears to allow of two answers. In the first place, the conclusion can be drawn that what constitutes 'habitual residence' is a question of fact which must be resolved in each individual case on the basis of principles of interpretation which must be taken into account by the court which rules on the substance.

It could equally well be concluded that the criterion laid down by the Court in that particular case is only an alternative one for use when other factors, including the kind of work involved, makes it impossible for a particular country to be designated as the country of habitual residence.

In line with the opinion of the Advocate-General in *Hakenberg* (Case 13/73), cited above, the Commission takes the view that the main considerations of fact for the purpose of establishing habitual residence should not be confined solely to the actual length of stay but should also include a degree of permanence and continuity and the extent to which the stay is intentional. These considerations should be assessed from time to time 'in order to determine the extent to which the territorial connexion is the rule, due attention being paid to the kind of work performed by the person concerned' (Opinion in Case 13/73, quoted above).

Second question

In view of the definition of the expression 'frontier worker' given in Regulation No 1408/71 and of the circumstances of the present case, separate comment on this question would be superfluous.

Third question

Article 51 of the EEC Treaty, which is the legal basis of Regulation No 1408/71, is intended to accord the migrant worker the benefits provided for him under the Community regulations without thereby reducing the rights which he would have been accorded if Community regulations had not been applied.

This principle, upheld on several occasions by the Court of Justice in its decisions on Regulation No 3/58, remains valid for the interpretation of Regulation No 1408/71, which replaces the previous regulation without changing its tenor or the guidelines which it provides.

Quoting the judgment of 28 May 1974 in Case 191/73 *Niemann* v *Bundesversicherungsanstalt* ([1974] ECR 571), the Commission states that any failure to comply with the conditions laid down in Article 69 of Regulation No 1408/71 would result in the worker losing the right to the benefits due to him by virtue of the regulation but would not affect any rights to which he would have been independently entitled under the national law of a Member State. Consequently, if the workers involved have the right to receive unemployment benefit solely by reason of the Italian law concerned this right is not compromised by the fact that, because they have not complied with the conditions laid down by Article 69 of Regulation No 1408/71, they have lost their right to the benefits which, under the Community regulation, they are entitled to receive from the insurance institution in the Federal Republic of Germany.

III — Oral procedure

The oral observations of the Commission of the European Communities, represented by its Legal Adviser, Gianluigi Campogrande, acting as Agent, were submitted at the hearing on 25 June 1975.

The Advocate-General delivered his opinion on 9 July 1975.

Law

1 By order of 17 December 1974, received at the Court Registry on 11 March 1975, the Pretore of Enna referred to the Court of Justice under Article 177 of the EEC Treaty questions on the interpretation of Articles 69 and 71 of Regulation (EEC) No 1408/71 (OJ English Special Edition 1971 [II], p. 416).

2 The questions are concerned with workers of Italian nationality who, after having worked in the territory of the Federal Republic of Germany and lost their employment, returned to Italy and, being without work, applied for unemployment benefit under the Italian legislation in force.

3 Their application was rejected on the ground that they had not complied with the provisions of Article 69 of Regulation No 1408/71, in that *inter alia* they returned to Italy before the expiry of the period of four weeks therein prescribed, and the question is asked whether this failure is such as to prevent the Italian legislation from being applied to them.

4 If the answer is in the affirmative, it is asked whether or not the provisions of Article 71 of Regulation No 1408/71 govern the situation of the workers concerned.

5 Article 69 of Regulation No 1408/71 covers the case of an unemployed migrant worker who is in receipt of unemployment benefit in the competent State and goes to one or more of the other Member States in order to seek employment there.

6 This provision is designed to ensure that the worker retains the right to the benefits of the competent State under the conditions and within the limits set out under that article.

7 It follows that the provision does not affect any rights which the worker may possibly claim under the legislation of the Member State to which he has gone.

8 Notwithstanding that in administering the benefits to which the worker is entitled under their legislation, there is nothing to prevent the authorities of that Member State from taking account of the fact that, by virtue of Article 69, the worker is also in receipt of unemployment benefit from the competent State, these authorities cannot claim that the worker has lost the benefit of Article 69 because of failure to fulfil the conditions which it prescribes and, on that account, refuse to apply to him their national legislation in the proper and normal way.

9 The answer must, therefore, be that Article 69 is intended only to ensure for the migrant worker the limited and conditional preservation of the unemployment benefits of the competent State, even if he goes to another Member State, and, consequently, that that other Member State cannot rely on mere failure to comply with the conditions prescribed by that article in order to deny the worker entitlement to the benefits which he may claim under the national legislation of that State.

10 It follows both from the wording of the order making the reference and from the file on the case that the answer to be given to the question concerning Article 69 makes it unnecessary to answer the one concerning Article 71 of Regulation No 1408/71.

Costs

11 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

12 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Pretore of Enna, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Pretore of Enna by order of 17 December 1974, hereby rules:

Article 69 of Regulation (EEC) No 1408/71 is intended solely to ensure for the migrant worker the limited and conditional preservation of the unemployment benefits of the competent State even if he goes to another Member State and this other Member State cannot, therefore, rely on mere failure to comply with the conditions prescribed under that article to deny the worker entitlement to the benefit which he may claim under the national legislation of that State.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 10 July 1975.

A. Van Houtte — Registrar

R. Lecourt — President