JUDGMENT OF THE COURT (First Chamber)
13 July 1995 *

In Case C-391/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Umberto Perrotta

and

Allgemeine Ortskrankenkasse München,

on the interpretation of Articles 25(1) and (4) and 69(1)(c) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, D. A. O. Edward (Rapporteur), and L. Sevón, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the applicant in the main proceedings, by J. Stahlberg, of the Munich Bar,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Italian Government, by Professor U. Leanza, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, assisted by D. Del Gaizo, Avvocato dello Stato,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and H. Kreppel, national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicant in the main proceedings, represented by J. Stahlberg, and the Commission, represented by D. Gouloussis and J. Sack, Legal Adviser, at the hearing on 30 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 11 May 1995,

gives the following

Judgment

1 By order of 15 July 1993, received at the Court on 23 August 1993, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 25(1) and (4) and 69(1)(c) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 Those questions were raised in proceedings between Mr Perrotta and the Allgemeine Orstkrankenkasse München (Local General Sickness Fund, Munich) concerning an application for the grant of cash sickness benefits.

3 Article 69(1) of Regulation No 1408/71 provides: 'An employed or self-employed person 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 following conditions: he must register as a person seeking work and make himself available to the employment services of the competent State for, in principle, at least four weeks after becoming unemployed (Article 69(1)(a)); he must register with the employment services of each of the Member States to which he goes and undergo the control procedure organized therein (Article 69(1)(b)). Once those conditions have been satisfied, he retains entitlement to benefits for a maximum period of three months from the date when he ceased to be available to the services of the State which he left, provided that the total duration of the benefits does not exceed that of the period of benefits to which he was entitled under the legislation of that State (Article 69(1)(c)).

4 Article 69(2) provides that if the person concerned returns to the competent State before the expiry of the period referred to above, he is to continue to be entitled to benefits under the legislation of that State; he is to lose all entitlement if he does not return there before the expiry of that period, save in exceptional cases where that time-limit may be extended by the competent services or institutions.

5 In addition, with regard to the grant of sickness benefits Article 25(1) of that regulation provides:

'An unemployed person who was formerly employed or self-employed, to whom the provisions of Article 69(1) ... apply, and who satisfies the conditions of the legislation of the competent State for entitlement to benefits in kind and in cash, ... shall receive for the period provided under Article 69(1)(c):

(a) benefits in kind provided on behalf of the competent institution by the institution of the Member State in which he seeks employment in accordance with

the provisions of the legislation which the latter institution administers, as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers ...'

6 Article 25(4) provides:

'Without prejudice to any provisions of the legislation of a Member State which permit an extension of the period during which sickness benefits may be granted, the period provided for in paragraph 1 may, in cases of *force majeure*, be extended by the competent institution within the limit fixed by the legislation administered by that institution.'

7 Finally, Article 26(6) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 2001/83, cited above, provides:

'In the cases defined in Article 25(4) of the regulation, the sickness insurance institution of the place to which the unemployed person has gone shall inform the competent sickness insurance institution and the competent unemployment insurance institution that it considers that the conditions justifying the extension of the period during which benefits in cash and in kind may be granted are satisfied, stating the grounds on which its opinion is based, and shall attach to the communication it sends to the competent sickness insurance institution a detailed report

from the examining doctor on the condition of the patient, indicating the probable period during which the conditions for applying Article 25(4) of the regulation will exist. The competent sickness insurance institution shall then take the decision as to the extension of the period during which benefits may be granted to the sick unemployed person.'

8 After working in Germany as a building labourer, Mr Perrotta, an Italian national, registered as unemployed on 8 January 1985 with the Arbeitsamt München (Labour Office, Munich) and received unemployment benefit under the German legislation.

9 Subsequently, he was authorized by the labour office pursuant to Article 69 of Regulation No 1408/71 to go to Italy for a period of three months ending on 19 March 1985 in order to seek employment there. During his stay in Italy he continued to receive unemployment benefit from the German insurance scheme through the institution of the place where he was staying.

10 On 15 March 1985 Mr Perrotta fell ill and he was hospitalized in Italy from 25 April to 9 May 1985. On 19 March 1985, the last day of the three-month period for which he had been authorized to stay in Italy, he applied through the Italian sickness insurance body for cash sickness benefits; the application was received by the German sickness insurance fund on 28 March 1985 on Form E115 accompanied by a medical report. The German fund granted sickness benefits for the remaining five days of the three-month period, namely from 15 March to 19 March 1985. For the rest it rejected the application by decision of 29 April 1985 on the ground that the period referred to in Article 69(1) of Regulation No 1408/71 had expired on 19 March 1985. It is common ground that Mr Perrotta's illness continued until 19 June 1985 and that after that date he returned to Germany.

11 In the objection which he lodged on 2 August 1985, Mr Perrotta claimed that he had been unable to work or to travel from 15 March 1985 and requested the sickness fund to exercise its discretion to extend the three-month period on that ground and to grant him sickness benefits for the entire duration of his incapacity for work.

12 Before taking a decision, the sickness fund consulted the labour office, requesting a ruling by it on a possible extension of the period in accordance with Article 69(2) of Regulation No 1408/71. The labour office, however, refused to take a decision to that effect, considering that what was at issue was an application for the extension of the period for payment of sickness benefits under Article 25(4) of that regulation which was a matter for the sickness fund. By decision of 29 April 1986, the sickness fund dismissed the objection on the ground that the entitlement to cash sickness benefits expired at the end of the authorized period of stay in a Member State other than the competent State and that an extension of the period could be justified only 'in cases of *force majeure*' within the meaning of Article 25(4) of Regulation No 1408/71, which could not cover the applicant's illness.

13 Mr Perrotta brought an action before the Sozialgericht (Social Court) against the sickness fund's decision. He appealed against the dismissal of that action to the Landessozialgericht (Higher Social Court) which dismissed the appeal on the ground that illness or incapacity for work owing to illness did not as such constitute a case of *force majeure* and that the illness afflicting Mr Perrotta, namely — according to the medical expert heard by that court — rheumatoid arthritis of the small joints of the hand and degenerative changes to the spinal column, was not so serious as to have prevented him from returning to Munich in due time by the usual means of transport before the three-month period had expired.

14 Mr Perrotta appealed against that decision to the Bundessozialgericht which referred the following questions to the Court for a preliminary ruling:

'(1) (a) Must the competent sickness insurance institution treat an application for cash benefits owing to incapacity for work which has been lodged with the sickness insurance institution of the place to which the unemployed person has gone on the last day of the period provided for in Article 25(1) in conjunction with Article 69(1)(c) of Regulation (EEC) No 1408/71 as being at the same time an application lodged within the prescribed period for extension of the period pursuant to Article 25(4) of Regulation (EEC) No 1408/71, even when an express application for an extension is first made after the issue of a notice declining to grant the cash benefit applied for?

(b) If not, may the abovementioned period still be extended upon an application made after the expiry of the period?

(2) Does the discretionary decision to be made by the competent institution under Article 25(4) of Regulation (EEC) No 1408/71 presuppose that the unemployed worker was prevented by *force majeure* from returning to the competent State for sickness insurance benefits within the three-month period provided for in Article 25(1) in conjunction with Article 69(1)(c) of Regulation (EEC) No 1408/71, or in the context of that discretionary decision is a finding also to be made as to whether a case of *force majeure* exists?

(3) Must a case of *force majeure* within the meaning of Article 25(4) of Regulation (EEC) No 1408/71 be assumed if the unemployed person who is unable to

work owing to his illness has not returned to the competent State within the three-month period, even though he was able to travel?'

15 The first issue which must be considered is Mr Perrotta's argument that Article 25(1) of Regulation No 1408/71 precludes sickness insurance cover only where the illness arises after the three-month period referred to in Article 69(1)(c) has expired. In his view, the competent State remains liable to cover illness which occurs before that period has expired and which extends beyond it, notwithstanding the fact that the relevant legislation provides that the grant of benefits is to be conditional on residence in the national territory.

16 Mr Perrotta therefore considers that the questions referred by the national court, in so far as they assume that Article 25(1) of Regulation No 1408/71 does not in this case entitle him to continue to receive benefits after the three-month period has expired, are based on an incorrect interpretation of that provision and are accordingly not relevant for the purposes of resolving the dispute.

17 That interpretation of Article 25(1) of Regulation No 1408/71 cannot be accepted. It suffices to note that the provision concerns the grant of sickness benefits to an unemployed person who was formerly employed and who has been authorized to go to another Member State in order to seek employment there 'for the period provided under Article 69(1)(c)'. It is precisely because Mr Perrotta applied for continued payment of sickness benefits beyond that period in the State to which

he had gone that Article 25(4), the subject-matter of the questions referred, is applicable in this case.

The first question

18 The national court's first question essentially asks whether Article 25(4) of Regulation No 1408/71 requires the competent institution to decide on a request for the extension of the period in respect of which sickness benefits are payable even though that request has not been made expressly by the unemployed person but may be inferred from an application for cash sickness benefits lodged shortly before the expiry of the period referred to in Article 25(1) of the regulation with the sickness insurance institution of the place where the unemployed person has gone. If not, the national court raises the question whether the competent institution may validly decide on an express request for extension submitted after the period has expired.

19 Neither Article 25(4) of Regulation No 1408/71 nor Article 26(6) of Regulation No 574/72 requires the unemployed person to lodge a formal application for extension of the period in respect of which sickness benefits are payable. Moreover, among the cases of illness which may justify extending the period, some may by their nature prevent the lodging of a formal application.

20 In circumstances such as those of this case, the competent institution may reasonably assume that an unemployed person who, just before the expiry of the three-month period for which he has been authorized to go to another Member State,

applies through the sickness fund of that State for cash sickness benefits, wishes to be able to continue to receive those benefits throughout his illness and consequently wishes the period in respect of which those benefits are payable, referred to in Article 25(1) of the regulation, to be extended.

21 The answer to the first part of the first question must accordingly be that Article 25(4) of Regulation No 1408/71 requires the competent institution to decide on a request for the extension of the period in respect of which sickness benefits are payable even though that request has not been made expressly by the unemployed person but may be inferred from an application for cash sickness benefits lodged shortly before the expiry of the period referred to in Article 25(1) of the regulation with the sickness insurance institution of the place where the unemployed person has gone.

22 In the light of that reply, there is no need to answer the second part of the first question.

The second and third questions

23 In its second question the national court asks whether the competent institution has discretion under Article 25(4) of Regulation No 1408/71 as to whether a case of *force majeure* exists. In its third question, it essentially asks whether a case of *force majeure* within the meaning of that provision may be found where the unemployed person, although unable to work on account of his illness, is able to travel.

24 These questions may for the sake of convenience be examined together.

25 The Court has consistently held that, since the concept of *force majeure* does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate (see Case C-124/92 *An Bord Bainne Cooperative and Compagnie Inter-Agra* v *Intervention Board for Agricultural Produce* [1993] ECR I-5061, paragraph 10).

26 In this case, the reference in Article 25(4) of the regulation to the concept of *force majeure* is intended to limit the cases in which sickness benefits continue to be payable after the expiry of the period referred to in Article 25(1) to an unemployed person who has gone to a Member State other than the competent State.

27 The consideration to be given to the unemployed person's state of health means that the concept of *force majeure* referred to in Article 25(4) should not be limited to the absolute impossibility of returning to the competent State. That concept must be understood more broadly as designating abnormal and unforeseeable circumstances, outside the control of the unemployed person, the consequences of which, in spite of the exercise of all due care, could not be avoided except at the cost of excessive sacrifice.

28 In ascertaining whether there is a case of *force majeure* within the meaning of Article 25(4), the competent institution must accordingly conduct an appraisal of the circumstances of the case in order to determine in particular whether return to the

competent State is likely to cause a significant deterioration in the unemployed person's state of health, jeopardize his chances of recovery or subject him to an ordeal which he should not reasonably be required to endure.

29 Consequently, ability to travel as such cannot *a priori* preclude an extension of the period in question under Article 25(4).

30 According to Mr Perrotta, an unemployed worker who is unable to work owing to illness satisfies the condition of *force majeure* within the meaning of Article 25(4), whether or not he is able to travel, provided that the occurrence or length of the illness is not attributable to gross negligence on his part.

31 That argument cannot be accepted. The grant of cash sickness benefits under Article 25(1) to a worker who has gone to another Member State in order to seek work there presupposes by definition that the recipient is unable to work owing to illness. By making it possible in cases of *force majeure* to derogate from the obligation to return to the competent State before the expiry of the period referred to in that provision so as to be entitled to continued receipt of sickness benefits from that State, the Community legislature must have intended the concept of *force majeure* to differ in scope from the mere concept of illness or incapacity for work owing to illness. That requirement would otherwise mean no more than the event which, when it occurs, triggers the grant of sickness benefits in cash or in kind.

32 It follows from the foregoing that the answer to the second and third questions must be that, in ascertaining whether there is a case of *force majeure* within the meaning of Article 25(4) of Regulation No 1408/71, the competent institution must conduct an appraisal of the circumstances of the case in order to determine whether the unemployed person may reasonably be required to return to the competent State, regard being had not only to the risks that his state of health may significantly deteriorate or his chances of recovery diminish as a result of the return

journey, but also to the severity of the ordeal which he would thereby be forced to endure, given, first, that the concept of *force majeure* cannot be limited to the absolute impossibility of returning to the competent State and, second, that physical ability to travel cannot as such preclude a finding of *force majeure*.

Costs

33 The costs incurred by the German and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Bundessozialgericht by order of 15 July 1993, hereby rules:

1. Article 25(4) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to

self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, requires the competent institution to decide on a request for the extension of the period in respect of which sickness benefits are payable even though that request has not been made expressly by the unemployed person but may be inferred from an application for cash sickness benefits lodged shortly before the expiry of the period referred to in Article 25(1) of the regulation with the sickness insurance institution of the place where the unemployed person has gone.

2. In ascertaining whether there is a case of *force majeure* within the meaning of Article 25(4) of Regulation No 1408/71, the competent institution must conduct an appraisal of the circumstances of the case in order to determine whether the unemployed person may reasonably be required to return to the competent State, regard being had not only to the risks that his state of health may significantly deteriorate or his chances of recovery diminish as a result of the return journey, but also to the severity of the ordeal which he would thereby be forced to endure, given, first, that the concept of *force majeure* cannot be limited to the absolute impossibility of returning to the competent State and, second, that physical ability to travel cannot as such preclude a finding of *force majeure*.

Jann Edward Sevón

Delivered in open court in Luxembourg on 13 July 1995.

R. Grass
Registrar

P. Jann
President of the First Chamber