OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 27 June 1995 *

Introduction

1. The question referred for a preliminary ruling seeks to ascertain whether the principles of Community law and the provisions of Council Regulation (EEC) No 1408/71 preclude the application to migrant workers of risk-selection rules laid down by Netherlands legislation in relation to sickness benefits. Those rules do not take into account a migrant worker's insurance record. In the present case, this meant that the worker concerned was refused benefits to which she would otherwise be entitled.

2. In several respects, this case is remarkably similar to Case C-481/93 *Moscato* [1995] ECR I-3525. Where appropriate, I shall therefore refer to my Opinion in that case.

Mrs Klaus, a Netherlands national, worked from December 1985 until July 1987 in the Netherlands, on which basis she was insured under the Ziektewet (Sickness Law, hereinafter 'the ZW'). In December 1986 she suffered severe back pain, which led her to stop work in June 1987. During the following eight months, the applicant attended a course in tourism management. In June 1988 she moved to Spain, where she worked until December 1988, when she returned to take up a job in the Netherlands. In May 1989 she went back to Spain, where she again worked, until October 1989. On returning once more to the Netherlands, she started work on 20 October 1989 with a Netherlands company. On 7 November 1989 she was forced to give up that job, since her back pain had become acute.

3. The national court presumes that in October 1989, when she was returning from Spain to the Netherlands, the applicant was out of work. It also notes that during that period Mrs Klaus did not apply for, or at any rate did not receive, unemployment benefits under the relevant Netherlands legislation.

The order for reference also states that, according to a medical opinion contained in

* Original language: Italian.

a report dated 16 September 1991, on 20 October 1989 — that is, on the date when she last took up work in the Netherlands — Mrs Klaus was unfit for the type of work in which she was last engaged, owing to an abnormality in her spinal column.

4. By letter of 24 April 1990 the defendant informed Mrs Klaus of its decision to refuse her sickness benefit under the ZW with effect from 7 November 1989. That decision was also based on Article 44(1), opening words, and subparagraph (a)(1), of the ZW and refers, for present purposes, to the fact that at the time when the applicant became insured under the ZW — on 20 October 1989 — she was already unfit for work. Mrs Klaus brought an action contesting that decision.

5. Article 44(1), opening words, and subparagraph (a)(1), of the ZW allows the competent insurance institution to refuse sickness benefit, in whole or in part, if the claimant is already unfit for work at the time of becoming insured.

In that connection, it should be noted that Netherlands legislation on unfitness for work makes no provision for an initial medical check enabling pre-existing risks to be excluded from the insurance cover. The risk-selection provisions therefore come into play only when the person insured declares that he is unfit to work.

6. The national court therefore referred the following questions for a preliminary ruling:

'1. Having regard *inter alia* to Article 48 of the EEC Treaty, must Article 35(3) of Regulation No 1408/71 be interpreted to the effect that sickness benefits cannot be refused, pursuant to a national risk-selection provision such as that contained in Article 44(1)(a)(1) of the ZW, to a worker who (almost immediately) following a period in which he became covered by the legislation on sickness benefit, is insured in the Member State whose national legislation contains a risk-selection provision like that mentioned above?

2. If the answer to Question 1 is in the affirmative, does that interpretation also apply where the unfitness for work which led to the application of a national risk-selection provision arose during a period of insurance against the financial consequences of sickness under

the Member State's legislation of which the risk-selection provision also forms part?

3. Having regard to Article 25(2) of Regulation No 1408/71, does it make any difference to the way the first question is answered whether a worker, before working as an employed person in the competent Member State, was in the situation referred to in Article 71(1)(a)(ii) or Article 71(1)(b)(ii) of Regulation No 1408/71?

4. If Question 3 is answered in the affirmative, must Article 25(2) of Regulation No 1408/71 be interpreted as meaning that the workers to whom this provision applies must be taken to include a worker who meets all the conditions set out in Article 71(1)(a)(ii) or Article 71(1)(b)(ii) of Regulation No 1408/71, even where he has never received unemployment benefit under those provisions from the institution in his country of residence because no such application was ever made?'

Analysis

7. Before addressing the questions referred to the Court, I must first clarify a point. As submitted by the Commission and confirmed at the hearing, the provisions of Community law referred to in the order for reference are not those applicable to the present case. Suffice it to note first, taking the questions in the same sequence as they appear in the order for reference, that Article 35(3) of Council Regulation (EEC) No 1408/71 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 Regulation (EEC) No 2001/83 of 2 June 1983, [1] (hereinafter 'the Regulation') is not relevant here, although it is the provision referred to by the national court in Question 1. That question concerns the interpretation of the Regulation where national rules provide that welfare benefits are payable only if the claimant meets the conditions relating to the onset of the illness. The Commission and the defendant point out, however, that the relevant provision of Netherlands law — Article 44(1) of the ZW — does not stipulate any such conditions, but merely determines the time when invalidity occurs for the purposes of entitlement to benefit. The provision referred to in the order for reference therefore has no bearing on the case under consideration. The other questions referred by the national court are predicated on the answer to Question 1: for this reason alone they have not been correctly formulated. Furthermore, Questions 3 and 4 refer to another provision of the Regulation, namely

1 — OJ 1983 L 230, p. 6.

Article 25(1), which is also irrelevant to the applicant's situation. Those questions assume that the claimant was unemployed at the time when she became unfit for work, an assumption which, according to the Commission and the defendant, is incorrect. I agree. The fact is that she has always worked and has never applied for unemployment benefit or other related benefits.

In those circumstances, I suggest that the analysis requested of the Court should focus on the essence of the issues which the national court intended to raise, by looking at the Community rules requiring interpretation instead of those erroneously referred to in the order for reference.

In short, the questions raised by the Netherlands court concern, in their different aspects, the question whether or not Community law precludes the national risk-selection rules from being applied to the claimant, causing her to be denied sickness benefits to which she would otherwise be entitled. On the other hand, in the circumstances which gave rise to these proceedings, Community law can render inapplicable the national legislation only in so far as the claimant is a migrant worker who has worked and had insurance cover continuously.

8. I therefore propose that the questions referred to the Court be re-worded and condensed into the following question:

'Does Community law, by operation of both the fundamental principle of freedom of movement for workers, laid down by Articles 48 to 51 of the Treaty, and the provisions of the Regulation, particularly Article 18 thereof, preclude application to Mrs Klaus of a risk-selection provision such as Article 44(1) of the Ziektewet, in order to refuse her sickness benefits to which she would otherwise be entitled?'

The reason for the reference to Article 18 of the Regulation which I have made in re-wording the question is to be found in the considerations set out in the order for reference. According to the national court, it is necessary to determine whether Article 18 is applicable in the present case, since that article is referred to in Article 25(2), which that court took to be the material provision.

9. Article 18(1) of the Regulation provides:

'The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance, employment or residence shall, to the extent necessary, take account of periods of insurance, employment or residence completed under the legislation of any other Member State as if they were periods completed under the legislation which it administers.'

10. Before considering how Article 18 should be interpreted in this case, it must be established which national legislation applies to it, for the purposes of the Regulation.

In my opinion, the applicable legislation is that of the Netherlands. It was there that Mrs Klaus was working when her incapacity for work due to illness first materialized. Until then, Mrs Klaus had worked alternately in the Netherlands and elsewhere without any loss of continuity in her insurance record, as I shall later explain at point 13.

It must therefore be concluded that in this context the general provision of Article 13(2)(a) of the Regulation, according to which 'a person employed in the territory of one Member State shall be subject to the legislation of that State' is applicable. In order to determine the applicable legislation, regard must be had, specifically, to the time at which incapacity for work arose and to the place where the worker was employed at that time. In the light of both those considerations, there is no doubt that in this case the applicable legislation is that of the Netherlands.

That conclusion cannot be rebutted by the fact that the applicable legislation must be determined by having regard to the time at which invalidity is confirmed, as the defendant contended in its observations.

Article 13 of the Regulation lays down a single unambiguous rule: the applicable national legislation is that of the State in which the worker concerned is employed. Mrs Klaus continued to work in the Netherlands until her illness made it impossible for her to carry on. That is sufficient, according to Article 13, to conclude that the Netherlands legislation is applicable and thus that the social security institution of that country has competence.

11. Now that it has been established that the applicable legislation is that of the Netherlands, the next question is: what are the conditions it lays down for the grant of sickness benefits?

The risk-selection rule laid down by the ZW makes the grant of sickness benefits subject to a temporal condition. Benefits are not payable where the incapacity for work due to illness already exists at the time when the worker became insured. Thus the test adopted is whether a period of time, however brief, has elapsed between the two dates which are relevant for the purposes of applying the rule: the time when the worker becomes insured and the time when incapacity for work occurs. That is what must be borne in mind in determining whether that provision may, in accordance with Community law, be applied to Mrs Klaus. The temporal condition, laid down by the Netherlands legislation as a risk-selection criterion, sets the limits of an insurance period, as defined in Article 18(1) of the Regulation. That provision is therefore applicable to the present case.

12. At this point, I refer to the observations I made in Case C-481/93 *Moscato*, mentioned above, concerning the application of Article 38(1). Article 18(1) is in fact parallel to Article 38(1). Furthermore, both rules derive from Article 51 of the Treaty, on which the Regulation was based.

13. As regards the brief period in which Mrs Klaus was not working when she returned to the Netherlands on the last occasion, I take the view that this cannot in any event affect the continuity of her insurance record. Indeed, I would say that the fact that a migrant worker is out of work for a short period during which he is physically moving from one Member State to another is inherent in the normal exercise of the right to freedom of movement. It is not an interruption which could be taken into account in order to exclude application of Article 18(1) of the Regulation in this case.

Indirect evidence of the soundness of that conclusion was in fact provided by the defendant which stated that, if Mrs Klaus had stopped working in the Netherlands and then resumed working in the Netherlands, her position would not have been adversely affected. It follows from the principle of non-discrimination that the result must be the same even if the period during which the claimant was out of work immediately preceding her last employment in the Netherlands was spent in another Member State of the Community.

I conclude, therefore, that the risk-selection provision laid down by Article 44 of the ZW cannot be applied to Mrs Klaus in order to refuse her sickness benefits to which she would otherwise be entitled.

14. As in the *Moscato* case, that conclusion can also be justified, independently of the Regulation, on the basis of Articles 48 and 51 of the Treaty. I can therefore refer to the relevant points in my Opinion in that case. I would merely observe that, in this case too, the defendant admitted, in the antepenultimate paragraph of its observations in relation to Question 2, that, if Mrs Klaus had worked only in the Netherlands and not in Spain, the insurance institution would not have refused her the sickness benefits in question.

Conclusion

15. In the light of the foregoing, I therefore propose that the Court should give the following reply to the questions referred to it by the Arrondissementsrechtbank, Amsterdam:

Community law — both Article 18(1) of Council Regulation (EEC) No 1408/71 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 Regulation (EEC) No 2001/83 of 2 June 1983, and Articles 48 to 51 of the Treaty — precludes the application of a 'risk-selection provision' contained in Article 44 of the Ziektewet to the claimant, in order to refuse her sickness benefits to which she would otherwise be entitled.

Furthermore, the Netherlands social security rules laying down a 'risk-selection provision' must in any event be interpreted in the light of the objectives of Articles 48 to 51 of the Treaty so as to prevent, as far as possible, migrant workers from being penalized through the application of those provisions and thereby discouraged from exercising their right to freedom of movement.