OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 24 October 1991 *

Mr President,
Members of the Court,

1. This request for a preliminary ruling is concerned with the definition of the scope of Articles 19 and 25 of Regulation (EEC) No 1408/71 of the Council [1] in a case whose facts are as follows: Mrs Twomey, a United Kingdom national who worked and resided for a time in the United Kingdom, terminated her employment and moved — for highly personal reasons it would seem — to Ireland where she has since lived without pursuing an activity.

A few months after moving to Ireland, Mrs Twomey — who at the time was just over 20 — was certified as being unfit for work due to low back pain.

Mrs Twomey accordingly applied to the United Kingdom Department of Social Security for the sickness benefit in cash provided for by national legislation. However, her application was rejected pursuant to the provisions of Section 82(5) of the Social Security Act 1975, which precludes entitlement to such benefits where the applicant is '*absent* from Great Britain'.

It is undisputed — and this must be emphasized — that in the circumstances Mrs Twomey did not register with the United Kingdom employment services after her employment came to an end but that, had she remained in that country, she would still have qualified for sickness benefit; hence the sole reason which caused the entitlement acquired as a result of her affiliation to the social security scheme of the country of employment to lapse was her transfer of residence to another Member State.

2. Against that background the national court is asking the Court of Justice in substance to rule on the question whether the requirement of territoriality, to which Section 82(5) of the Social Security Act subjects receipt of the sickness benefit claimed, is valid as against the claimant. In particular, the national court wishes to ascertain whether a situation of that kind is governed by Article 19 or by Article 25 of Regulation No 1408/71.

3. In that connection, the Chief Adjudication Officer and the Commission have expressed widely differing views. The former maintains that only Article 25 is relevant for the purposes of this case and that the residence requirement prescribed by the contested legislation is justified by that provision.

The Commission, on the other hand, rules out the possibility that Article 25 may be

* Original language: Italian.

1 — 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).

relevant and maintains that this case falls entirely within the scope of Article 19, which would imply that the claimant is entitled to 'export' to the country to which she has moved the benefit provided for by the United Kingdom legislation.

4. Turning to the question itself, let me point out first of all that Article 25, which concerns specifically unemployed persons and their families, establishes with regard to sickness benefit a system essentially modelled on that for employment benefit referred to in Articles 69 and 71 of Regulation No 1408/71.

As far as the scope *ratione personae* is concerned, Article 25 concerns only unemployed persons to whom Article 69 or Article 71 is applicable, that is to say unemployed persons who either move to a Member State other than the competent State in order to seek employment there or who, when they were last employed, resided in a Member State other than the competent State.

As far as its ambit is concerned, that provision — as I have said — subjects sickness benefit to rules essentially parallel to those laid down for unemployment benefit. Hence an unemployed person who moves to another Member State to seek work there and who, in accordance with Article 69, retains for three months the right to receive unemployment benefit from the competent State (the State in which he was last employed) may, under Article 25, qualify over the same period for sickness benefit, both in kind (granted by the institution of the State to which he has moved, on account of the competent institution), or in cash (granted, in principle, by the competent institution). Similarly, an unemployed person who, when last employed, resided in a State other than the competent State (the State of employment) and who, under Article 71(1)(a)(ii) or (b)(ii), qualifies for unemployment benefit in the country of residence will also qualify for sickness benefit (in kind and in cash) in accordance with the legislation of that country.

5. Bearing those factors in mind, it seems to me that the scope of Article 25 can be defined fairly accurately. That provision is designed to cater for a situation in which sickness benefit is claimed by persons who are affiliated to an unemployment scheme, who are therefore registered with the employment services and who qualify for the benefit in question.

Article 25 therefore concerns primarily sickness benefit to which entitlement arises precisely as a result of affiliation to an unemployment scheme and for which a person may be eligible if he is registered with the competent employment services. If necessary, Article 25 could also be applied in relation to sickness benefit to which entitlement arises under another national insurance scheme, but which is in any event claimed by a person who is at the same time entitled to unemployment benefit. In both cases, however, as stated earlier, the fundamental condition for Article 25 to come into operation for the purpose of regulating a given relationship is that the sickness benefit in question should be claimed by a person who qualifies at the same time for unemployment benefit. If that requirement is not fulfilled, the application of Article 25 would seem to be wholly inappropriate from a rational point of view since it would make no sense to refer to such a provision, which is designed to establish a consistent

relationship between sickness benefit and unemployment benefit, in a situation in which the claimant receives no unemployment benefit since he is not registered as unemployed.

In this case, the claimant is not affiliated to any unemployment scheme and is not therefore in receipt of benefit. Recourse to Article 25 would therefore appear to be wholly misconceived.

6. That said, the question remains whether, in the specific circumstances of this case, the claimant can usefully rely on Article 19 of the regulation to defeat the application of the residence requirement provided for by the contested national legislation.

It should be borne in mind in that connection that, as is clear from the order for reference, Mrs Twomey bases her entitlement to sickness benefit not on her status as an unemployed person but exclusively on her previous affiliation to the social security scheme provided for employed persons. It should also be remembered that the claimant fulfilled all the requirements laid down by the national legislation for acquiring entitlement to the benefit in question: it is only because she moved to Ireland that Mrs Twomey lost that right.

That being so, it must be pointed out that Article 19 concerns sickness benefit claimed by a 'worker' residing within the territory of a Member State other than the competent State. The question which arises in this case therefore is whether Article 19 may be relied upon only by a worker in active employment or also by a person who, like the claimant, is unemployed for the time being?

I believe that question can simply be answered in the affirmative, having regard to the following factors.

In the first place, under Article 1(a) of Regulation No 1408/71 the concept of worker is defined exclusively on the basis of a person's affiliation to an insurance scheme and not on the basis of the actual pursuit of an activity.

In the second place, that approach is firmly supported by the case-law of the Court. In the *Pierick* judgment [2] the Court had already stated as follows:

'Article 1(a) of Regulation No 1408/71 defines the concept of "worker" as any person who is compulsorily or voluntarily insured under one of the social security schemes referred in subparagraphs (i), (ii) or (iii) of that provision. Laid down "for the purpose of this regulation", such a definition has a general scope, and in the light of that consideration covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw

2 — Judgment of 31 May 1979 in Case 182/79 Algemeen Ziekenfonds Drenthe-Platteland v Pierik [1979] ECR 1977.

pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them.'

Similarly, in *Walsh*[3] the Court pointed out that:

'It follows from certain provisions of Regulation No 1408/71 that it applies to certain categories of persons who, when the contingency occurs, do not have the status of "employed persons" within the meaning of the law of employment. It would be contrary to the spirit of those provisions and to one of the essential objectives of the regulation, which is to guarantee to workers who move within the Community their accrued rights and advantages, to exclude from the scope of the regulation — by giving a restrictive interpretation to the definition of the term "worker" — any other case where, under the relevant legislation, the insurance continues to cover the insured against risks but the insured is no longer bound to pay contributions.'

An approach along the same lines is also to be found in the Court's later judgment in *Coppola.*[4]

7. Having regard to that broad interpretation of the concept of worker elicited from the case-law, it seems to me that in the circumstances the disputed sickness benefit must be held to be governed by Article 19 of Regulation No 1408/71. The aforesaid precedents demonstrate — contrary to the contention of the Chief Adjudication Officer — that for the purposes of the application of Article 19, it is unnecessary for the contingency to have occurred while the worker was still in active employment; it is sufficient if, at the time when sickness supervenes, the person concerned, although unemployed, is covered by the insurance scheme of the competent State.

Furthermore, it must also be pointed out that the interpretation of Article 19 advocated here is — as the Commission has rightly pointed out — consistent with the fundamental principle concerning the retention of accrued rights, which aims to ensure that a migrant worker who exercises his freedom of movement is not thereby deprived or in any event threatened with the loss of social security benefits granted to him by the legislation of a Member State.[5] That is a principle which, in view of its importance in affording the highest degree of protection to one of the fundamental freedoms provided for by the Treaty, must be guaranteed in the fullest possible manner and therefore serves as a fundamental point of reference in defining the scope of the provisions of Regulation No 1408/71.

The application of Article 19 in this case does not have any effect other than to permit the claimant to 'export' the sickness benefit granted to her by the legislation of the competent State, thereby ensuring, entirely in keeping with the fundamental aims of the regulation, that the entitlement to benefit acquired by reason of her affiliation to the national insurance scheme does not lapse *solely* because of the transfer of residence from one Member State to another.

3 — Judgment of 22 May 1980 in Case 143/79 Walsh v National Insurance Officer [1980] ECR 1639.

4 — Judgment of 12 January 1983 in Case 150/82 Coppola v Insurance Officer [1983] ECR 43.

5 — See the judgment of 4 October 1991 in Case C-349/87 Paraschi v Landesversicherungsanstalt Württemberg [1991] ECR I-4501, at paragraph 22.

8. Finally, for the sake of completeness, it is necessary to deal with two objections raised by the Chief Adjudication Officer with regard to the solution suggested above.

In the first place, the Adjudication Officer maintained that Article 19 would be applicable only if the transfer of residence from the competent State to the other Member State took place *during* the employment relationship and not — as in this case — after the termination of that relationship. Secondly, the Chief Adjudication Officer stated that the application of Article 19 to an unemployed worker would be irreconcilable with the existence in the regulation of an *ad hoc* provision for unemployed persons such as Article 25.

With regard to the first objection, it is readily apparent that the restrictive construction put on Article 19 by the Chief Adjudication Officer is quite unjustified having regard to the wording and the scheme of the provision. Where Regulation No 1408/71 purported to lay down that the difference between the competent State and the State of residence had to continue *during* the employment relationship, it did so expressly. A reference in that connection is to be found precisely in Article 71, whilst there is no express reference in the wording of Article 19. Furthermore, apart from the fact there is nothing in the wording to support it, such a limitation of the scope of Article 19 would in any event seem to be groundless and inconsistent with the aim of ensuring a broad degree of protection for the accrued rights of migrant workers.

As for the second objection, it strikes me as equally unfounded. Article 25, and Article 25 alone, is relevant in cases in which sickness benefit is claimed by a person who is at the same time in receipt of unemployment benefit. Conversely, Article 19 remains applicable in a case, which would in any event appear to be of fairly marginal significance, where sickness benefit is claimed by a person who is unemployed but is not affiliated to any unemployment scheme. In the latter case, as I have said, the application of Article 19 ensures that a person who has acquired entitlement to sickness benefit under the legislation of the competent State is not deprived of it, as a result of residence requirements of the kind provided for by the contested legislation, exclusively by reason of his transfer of residence to another Member State.

9. In the light of those considerations, I propose that the question submitted by the national court should be answered as follows:

'Where, under the legislation of a Member State, a person is entitled to sickness benefit in cash, after the termination of the employment relationship and even though he is not affiliated to an unemployment scheme, Article 19 of Regulation No 1408/71 precludes the application of a residence requirement of the kind provided for by the contested legislation, which causes entitlement to the aforesaid benefit to lapse exclusively by reason of the claimant's transfer of residence to a Member State other than the competent State.'