OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 27 June 1995 *

A — Introduction

1. The purpose of the questions referred by the national court is to ascertain whether the Community rules on invalidity insurance, referred to in the order for reference, and the fundamental principle of freedom of movement for workers, to which they relate, preclude reliance on the 'risk-selection provisions' laid down by the relevant national legislation in the present case in order to deny the applicant in the main proceedings welfare benefits to which he might otherwise be entitled.

2. The following is a brief description of the facts which gave rise to the questions before the Court.

Mr Moscato, an Italian national residing in Belgium, worked from 10 March 1981 until 28 February 1985 for Sphinx NV at Maastricht in the Netherlands, his status being that of a frontier worker. Subsequently, following termination of his employment contract on account of the restructuring of that undertaking, he received — as a former frontier worker — unemployment benefit from the competent Belgian institution from 28 February 1985 until 13 November 1987.

On 13 November 1987 Mr Moscato started work at the Chesswick factory at Roermond in the Netherlands. On 9 February 1988 he stopped working on account of psychological problems.

By letter of 12 May 1989 the defendant notified Mr Moscato of its decision to refuse his application for invalidity benefit under the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work; hereinafter 'the AAW') and under the Wet op de Arbeidsongeschiktheidsverzekering (Law on Invalidity Insurance; hereinafter 'the WAO') in respect of his inability to work as from 9 February 1988. That decision was based on the fact that by 13 November 1987, that is to say, by the time the applicant commenced work, his state of health made the onset of incapacity for work within six months plainly foreseeable. The applicant appealed against that measure to the Arrondissementsrechtbank (District Court), Amsterdam.

* Original language: Italian.

3. The defendant bases its refusal to grant the applicant invalidity benefit on Article 21(1) (opening words) and (c) of the AAW and Article 30(1) (opening words) and (b) of the WAO. Essentially, those provisions allow the professional and trade association responsible for payment of the benefits not to take into account incapacity for work which has occurred within six months of the commencement of the insurance cover where the state of health of the insured person at that time makes the onset of incapacity for work within six months plainly foreseeable.

4. The national court decided that the following questions should be referred to the Court of Justice for a preliminary ruling:

'1) (a) In the light *inter alia* of the *Rebmann* judgment, must Article 13(2)(a) of Council Regulation (EEC) No 1408/71 be interpreted to the effect that in the period during which the plaintiff was in receipt of unemployment benefit in Belgium he was subject to Netherlands legislation?

1 (b) If the answer to Question 1(a) is in the affirmative, does Article 39(5) of Regulation No 1408/71, in the light *inter alia* of the *Noij* and *Daalmeijer* judgments, preclude the assumption that the plaintiff remained subject to Netherlands legislation on invalidity benefit, given that he was a long-term unemployed frontier worker receiving unemployment benefit from the institution in his country of residence?

2) In the light *inter alia* of the principle of freedom of movement for workers underlying Regulation No 1408/71, does Article 39(1) thereof preclude the application to the plaintiff of a risk-selection provision as set out in Article 30(1)(b) of the WAO and Article 21(1)(c) of the AAW?'

B — Analysis

5. Consideration of the first two questions set out in the order for reference logically depends on the reply which it is thought appropriate to give to Question 2. In fact, unless Question 2 is answered in the negative, those questions are irrelevant for the purposes of these proceedings: Question 2 must therefore be addressed first, thus changing the order in which the questions are put.

6. By Question 2 the Court is asked to determine whether Community law — that is to say, 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 [1] (hereinafter 'the Regulation') and the underlying principle of freedom of movement for workers — precludes reliance on the 'risk-selection provisions' laid down in both the WAO and the AAW in order to refuse the applicant invalidity benefit.

7. Taking that to be the point at issue, let me turn first to the regulation. Above all it must be determined which of its provisions are relevant to the present case. The first provision to consider is Article 39(1), which provides that 'the institution of the Member State, whose legislation was applicable at the time when incapacity for work followed by invalidity occurred, shall determine, in accordance with that legislation, whether the person concerned satisfies the conditions for entitlement to benefits, taking account, where appropriate, of the provisions of Article 38'. Article 38(1) — the only paragraph of Article 38 which is relevant for our purposes — provides that 'the competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefit conditional upon the completion of periods of insurance shall take account, to the extent necessary, of periods of insurance completed under the legislation of any other Member States, as if they were periods completed under the legislation which it administers'.

8. It is clear from the order for reference that the national court views the present case as falling within the terms of Article 39(1). I agree with that view. However, it must be borne in mind that Article 39(1) is applicable to the present case in conjunction with Article 38(1) to which it expressly refers. When those two provisions of the regulation are read together, it becomes evident that the applicant is entitled to the welfare benefit claimed in the main proceedings. I shall now give the reasons justifying that view.

9. Article 39(1) states that, for the purposes of awarding the benefit at issue, the competent institution is the one designated by the national legislation applicable to the claimant at the time when the incapacity for work, followed by invalidity, occurred. That institution must decide, in accordance with the legislation which it must administer, whether

1 — OJ 1983 L 230, p. 6.

the claimant meets the requirements necessary to qualify for welfare benefits. Article 39(1) also provides that matters falling within its scope are subject to the principle of *lex loci laboris*, as generally affirmed by Article 13(2) of the regulation.

10. In the applicant's case, incapacity for work occurred while he was working in the Netherlands. That fact was ascertained by the national court, which states that 'on 13 November 1987 [Mr Moscato] was not — even partially — unfit for work within the meaning of the AAW and WAO'. Consequently, it must be accepted that the present case is governed by Netherlands legislation. The competent welfare institution is therefore the one designated thereunder.

Incapacity for work for the purposes of the Regulation specifically denotes the physical state of a person who, for reasons of health, is obliged to cease work partially or totally.

For the purposes of identifying the national legislation applicable and, accordingly, the competent welfare institution, Article 39(1) of the Regulation refers to the precise time at which the physical state of incapacity occurs — followed, in so far as it persists over a period of time, by invalidity. Eligibility for benefits arises when the worker is no longer able to go on working. Thus the state of invalidity on which entitlement to welfare benefits depends is incapacity resulting in the cessation of work. The Regulation refers to the time at which 'incapacity for work followed by invalidity occurred': literally and logically, it follows that the crucial factor governing entitlement to welfare benefits is an incapacity for work which has clearly and fully materialized and does not merely consist in premonitory symptoms. When a worker finds himself in the factual circumstances envisaged by the Regulation, he is compelled to cease work, because his physical condition does not permit him to continue working. Nor could it be otherwise. That moment is then the precise time of the onset of incapacity for work, within the meaning of the Regulation, and is therefore the only one to be taken into consideration in order to determine both the applicable legislation and the institution responsible for awarding the welfare benefits.

11. That said, it remains to be seen what conditions are placed by Netherlands legislation on the award of the benefit sought by the applicant. The risk-selection provisions laid down in the Netherlands legislation allow the competent national insurance institution to leave out of account invalidity

which materializes within six months of the commencement of the insurance cover. According to the defendant, the purpose of that provision is to prevent fraud or abuse on the part of a worker who, having symptoms indicating the onset of invalidity, begins to work in the Netherlands so as then to receive benefits to which he will be entitled once actual incapacity for work materializes.

Whatever the intention behind that rule, the Netherlands legislature has not, in adopting it, simply laid down a formula defining invalidity following incapacity for work, but has also provided for the completion of a specific insurance period before the worker in question can be entitled to the relevant welfare benefits. If incapacity occurs before that period is complete, benefits are payable only where, in the opinion of the competent institution, it was impossible to tell from the claimant's state of health on starting work that within the following six months a situation of that nature would arise. Otherwise, the competent institution may, during that period, disregard the invalidity. However, once six months have elapsed after the commencement of the insurance cover, the person suffering incapacity for work will be entitled to the benefits he seeks.

Such is the actual tenor of the rule. It means that the national legislation applicable to the present case falls in turn within the purview of Article 38(1) of the Regulation, which expressly concerns cases in which the competent national scheme makes the acquisition, retention or recovery of the right to benefit conditional upon the completion of a period of insurance.

12. Article 38(1) provides that the competent social security institution must take into account periods of insurance completed under the legislation of any Member State other than that to which it belongs as if they were periods completed under the legislation which it administers. That is a fundamental rule from which no derogation is possible, deriving from the need to ensure freedom of movement for workers in relation to the social security sphere.

Under the Community legislation, insurance periods are 'aggregated', as it is commonly termed; that is to say, insurance periods completed by a worker in two or more Member States are in principle regarded as a single and continuous insurance period. The aggregation rule thus laid down by Community

law also impinges on the provisions of national legislation, in the sense that the competent social security institution is required under the Regulation to take into account the insurance periods completed by the worker concerned in other Member States, even if the national legislation which it administers contains no provision to that effect.

13. Now that those observations have been made, we must examine more closely how the present case may be caught by the Community rule which I have just recapitulated.

From the point of view of Community law, it does not matter, for the purposes of this case, whether or not the Netherlands legislation makes operation of the risk-selection rule contingent upon the person concerned having expressly applied for invalidity benefit during the six months following commencement of the insurance cover. Nor is it relevant that under the national rules the competent social security institution may exercise a discretion in applying the rules in question.

The important point is, rather, that the domestic law to be applied contains risk-selection provisions of the type at issue. Those provisions may be relied on against the claimant and would deprive him of the right to welfare benefits if the Community legislation, which is binding on the competent social security institution, did not prohibit that result.

14. Pursuant to the rule laid down by Article 38(1) of the regulation, under which periods of insurance are to be aggregated, the plaintiff's insurance history must be considered as a whole, by taking the sum total of the various periods of his working career — together with those periods which are deemed equivalent — in the Netherlands or in other Member States.

That is why the risk-selection rule laid down by the national legislation could not be relied upon against the claimant in order to refuse him invalidity benefit. Pursuant to Article 38(1), for the purposes of calculating the six-month period stipulated by Netherlands law, the period during which the claimant was engaged in work did not start on 13 November 1987, but — without loss of continuity — from the time when he commenced working in another Member State of the Community, following which he continued working, within the meaning of the Regulation, again in other Member States, and ceased working

on 9 February 1988 in the Netherlands, upon the occurrence of invalidity. If the risk-selection provisions are interpreted in the way required by the Community regulation, it is clear that the insurance period which they have in view commenced on a date which must certainly go back more than six months before the claimant ceased work in the Netherlands.

15. Consequently, the provisions of Netherlands law which are relevant in this case can only be applied to the claimant in conjunction with the rule laid down by Article 38. Furthermore, the fact that those provisions arise from the need to protect the Netherlands social security system against possible abuse or fraud does nothing to diminish the discriminatory nature which they would acquire if applied in such a way that migrant workers like the claimant were treated differently from non-migrant workers.

The sound management of the social security system is undoubtedly a legitimate interest which the national legislature is entitled to pursue in its own sphere of competence, but not to the point of sacrificing the rights guaranteed to workers by Community law by reason of the principle of freedom of movement. Since national legislation in this area must comply with the requirements of Community law, it cannot be relied on against a worker who is entitled under Community law to a social welfare benefit.

16. The conclusion I have reached is not affected even if the analysis of the case referred to the Court is conducted independently of the Regulation and solely on the basis of the principles laid down in Articles 48 and 51 of the Treaty. Both those provisions are of direct importance for resolving the point at issue. Article 48 lays downs the fundamental principle underlying freedom of movement, according to which workers may not be treated differently by reason of nationality. That principle has consistently been interpreted by the Court [2] as prohibiting discrimination against a worker on the ground that he has pursued his occupation in different Member States of the Community.

Furthermore, the effectiveness of the right to freedom of movement is specifically ensured, in matters of social security, by Article 51 of the Treaty which expressly lays down the principle of the aggregation of insurance periods completed by workers in different Member States. Article 51 therefore offers the special guarantee which, as we have seen above, is binding in the present case in accordance with the Regulation. Thus it is the Treaty which establishes the guarantee. The Regulation implements it, putting into

2 — See *inter alia* Case 152/73 *Sotgiu* [1974] ECR 153 and Case C-175/88 *Biehl* [1990] ECR I-1779.

effect the implications for social security matters of the fundamental rule laid down by Article 51.

17. Under the Netherlands legislation, the fact that the claimant has worked in more than one Member State places him at a disadvantage compared with a worker who, although he may have been engaged in a variety of occupations, has always worked in the Netherlands.

As the defendant itself admitted, if Mr Moscato had worked only in the Netherlands, even moving from one area to another, the operation of the risk-selection rule would not have entailed for him the adverse effects at issue.

The root cause of the discrimination is therefore the fact of his having worked in different Member States. In practice, a person who moves to the Netherlands in order to work there must start afresh so far as his insurance record is concerned. The Netherlands legislation is not in fact concerned with the migrant worker's occupational and insurance record, which is not taken into account by the risk-selection provisions.

Consequently, those rules, as framed and applied, interfere with freedom of movement for workers. Those who wish to work in the Netherlands — especially those who are older and presumably more vulnerable to illness — run the risk of losing the right to invalidity benefits, however long their working history may be. Thus workers from other Member States are discouraged from moving to work in the Netherlands. As far as the present case is concerned, the national legislation must not contravene the general principle of freedom of movement or the specific rules laid down by the Treaty with regard to the calculation of insurance periods for migrant workers.

Thus, as we see, the way in which the risk-selection provisions may be applied to the claimant is limited directly by the Treaty. The migrant worker's right to aggregation of insurance periods is guaranteed by Article 51 as a natural corollary to freedom of movement: it is a Community right — based on the Treaty, even before it was laid down by the Regulation — the enjoyment of which may not be impaired by risk-selection provisions entailing the effects ascribed under Netherlands law. Consequently, there is only one correct way to read those provisions and that is in accordance with the

Treaty and with the Regulation, deriving from one or other of those sources of Community law the criteria for their application to migrant workers. If the provisions in question are read in that manner, this will, as far as possible, prevent the Netherlands risk-selection provisions from being construed in such a way 'as to discourage' — to quote the Court in *Van Munster* [3] — 'a migrant worker from actually exercising his right to freedom of movement'. In the present case, that interpretative criterion must be observed, with this note of caution: as has been pointed out, the principles and rules of Community law referred to by the national court bear upon the provisions and operation of the national legislation on risk-selection: they aim not only to prevent freedom of movement for workers from being undermined, but also to prevent in practice national rules of that kind from going beyond the limits of their proper application and thereby denying migrant workers the right to welfare benefits to which they are entitled.

Questions 1(a) and 1(b)

18. The purpose of the two remaining questions is essentially to ascertain, in the event that the rule deriving from Article 39(1) in conjunction with Article 38(1) of the Regulation, or, more generally, the provisions of Articles 48 and 51 of the Treaty, is not to be applied, whether the claimant was subject to Netherlands legislation during the period in which he was unemployed in Belgium. In the event of an affirmative answer to that question, the referring court could have assumed that the period during which the claimant worked in the Netherlands commenced on an earlier date, so that the six-month limit laid down by the AAW and WAO risk-selection rules was no longer a bar. However, the reply which has already been given to Question 2 makes the other two questions irrelevant.

Conclusions

In the light of the foregoing I therefore propose that the Court give the following answer to the questions referred by the Arrondissementsrechtbank, Amsterdam:

3 — Case C-165/91 [1994] ECR I-4661.

Community law — both Article 39(1) of 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, and Articles 48 and 51 of the Treaty — precludes reliance on a 'risk-selection provision' contained in Article 30(1)(b) of the Wet op de Arbeidsongeschiktheidsverzekering and Article 21(1)(c) of the Algemene Arbeidsongeschiktheidswet in order to refuse a claimant invalidity benefits to which he would otherwise be entitled.

Furthermore, the 'risk-selection' rules of Netherlands social security legislation must in any event be read in the light of the principles and rules laid down by Articles 48 and 51 of the Treaty in order to ensure that migrant workers are neither penalized through the operation of those provisions nor discouraged from actually exercising their right to freedom of movement.