JUDGMENT OF THE COURT
11 OCTOBER 1973 [1]

Ludwig Kunz
v Bundesversicherungsanstalt für Angestellte
(preliminary ruling requested by the Bundessozialgericht)

Case 35/73

Summary

Social Security — Migrant workers — Sickness insurance — Pensioners entitled to draw pensions under the legislation of several Member States — Residence in the territory of one of these States — Benefits in kind provided by the legislation of a State other than that of residence — Non-entitlement
(Regulation No 3, Article 22)

Article 22 of Regulation No 3 of the Council concerning social security for migrant workers is to be interpreted as meaning that the State where he is resident does not have to issue benefits in kind to a pensioner who is entitled to draw pensions under the legislation of several Member States and who is resident in one of them, where this is not provided for by the law of that State.

In Case 35/73

Reference to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht for a preliminary ruling in the action pending before that court between

LUDWIG KUNZ of Amsterdam — Netherlands,

plaintiff and respondent,

and

BUNDESVERSICHERUNGSANSTALT FÜR ANGESTELLTE, Berlin 31,

defendant and appellant,

on the interpretation of Article 22 of Regulation No 3 of the Council of the

1 — Language of the Case: German.

EEC concerning the social security for migrant workers, (OJ No 30, 16. 12. 1958, p. 561/58).

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

By order dated 20 October 1972 the Third Senate of the Bundessozialgericht (Federal Social Court) requested the Court of Justice of the European Communities to give a preliminary ruling on the following question:

Is Article 22 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers to be interpreted as meaning that the State where he is resident must issue benefits in kind under pensioners' sickness insurance to a pensioner who is entitled to draw pensions under the legislation of several Member States and is resident in one of them, even though this is not provided for by the law of that State, whereas another Member State, under whose legislation the pensioner is also entitled to a pension, would have had to issue such benefits?

Article 22 (1) of Regulation No 3 reads:

'Where a pensioner entitled to draw pensions under the legislation of several Member States is permanently resident in the territory of a Member State in which one of the institutions liable for payment of his pension is situated, and he is entitled to benefits in kind under the legislation of that State, the benefits in kind shall be issued to him and the members of his family by the institution of his place of permanent residence, as though he were a pensioner whose pension was payable solely under the legislation of his country of permanent residence. The cost of such benefits shall be borne by the institution of the country of permanent residence.'

The plaintiff was born on 15 February 1900; he now lives in the Netherlands of which he is a national. On reaching 65 years of age he obtained an old-age pension from the defendant under a decision of 6 July 1965 as a result of an application which he had made for this purpose on 12 October 1964.

Moreover, since 1 February 1965, the

plaintiff has received in the Netherlands an old-age pension under the General Old Age Law. Further, it appears from a certificate given by a Dutch insurance society (Amsterdams Onderling Ziekenfonds) that since 1955 he has been voluntarily insured against sickness by this Society and that he pays on this account a monthly premium of 48.75 florins. The sickness benefits from this society cover *inter alia* all treatment by a general medical practitioner selected by the insured; all treatment by recognized specialists upon a letter from the general practitioner; assistance with the costs of dental treatment and dentures; complete care and treatment in hospital for a period not exceeding 365 days per case, medicaments and bandaging which are prescribed by the general practitioner, specialist or dentist.

The parties are at issue on the question whether Article 381 (4) of the German Reichsversicherungsordnung (RVO) affords the plaintiff the right of obtaining the allowance referred to in this provision (Beitragszuschuß) towards the contributions which he pays for the sickness insurance which he has taken out on a voluntary basis in the Netherlands.

On 25 August 1969 the plaintiff asked the defendant to make an allowance towards the contribution which he was paying for sickness insurance.

By decision dated 16 Ocotber 1969 the defendant rejected this application on the grounds that under Article 22 (1) of EEC Regulation No 3 in conjunction with Article 24 of EEC Regulation No 4 'insurance against sickness for pensioners' during the plaintiff's residence in the Netherlands was the responsibility of the Dutch insurance institution there.

The plaintiff appealed against this decision to the Sozialgericht, maintaining that the EEC Regulations on which the defendant relied were not an obstacle to the payment of an allowance towards the contributions for sickness cover which he was paying in the Netherlands.

The Sozialgericht rescinded the decision dated 16 October 1969 by judgment dated 26 February 1971 and ordered the defendant to grant the plaintiff the disputed allowance not exceeding the lawful amount with effect from 1 February 1965. The Sozialgericht saw in Article 22 of Regulation No 3 no obstacle to an allowance for the contribution.

On 22 May 1971 the defendant appealed against this judgment, which the Landessozialgericht confirmed on 3 November 1971.

According to the Landessozialgericht, the aforementioned rule of Community law is not applicable in the plaintiff's case, because he does not have, as is therein required as a condition, a legal claim to benefits in kind against the institutions in the country where he is resident. No obligation to grant such a claim arises under this Regulation; therefore his insurance against sickness does not fall upon the State where he is resident, as the defendant alleges. Since he has indisputably taken out full insurance to cover medical expenses he is entitled to the allowance which he claims.

The defendant complains in the appeal on a point of law to the Bundessozialgericht, that Article 22 of EEC Regulation No 3 ought to have been applied. This Regulation contains, it is true, no express provision for a case such as the present one where a pensioner, entitled to several pensions, has no claim to benefits in kind in case of sickness against the social security institutions of the State in whose territory he has his place of residence. The principle can nevertheless be derived from the first two paragraphs of the Regulation that always only the institution of *one* State, namely the State where he is resident, is responsible for 'the insurance against sickness of pensioners', even if the pensioner has no claim to benefits in kind under the legislation of that State, so long as he has such a claim under the legislation of the other State. Therefore the Dutch

institution is bound to guarantee the plaintiff the free insurance protection against sickness to which he would be entitled under the German legislation concerning 'insurance against sickness of pensioners', which in the present case is displaced. The defendant asks that the judgments of the Courts below be reversed and that the action be dismissed.

The plaintiff, who considers the disputed judgment to be correct, asks that the appeal on the point of law be dismissed.

The Bundessozialgericht considers that the action depends on the question whether Article 22 of EEC Regulation No 3 excludes the right which the plaintiff otherwise has under Article 381 (4) RVO of requiring the defendant to grant an allowance towards the contributions.

If the defendant's view of the law is correct — and the Bundessozialgericht holds that in any case it is not obviously wrong (of the observations of the EEC Commission in Case 33/65 of the Court of Justice of the European Communities, Rec. 1965, on the 'principle' of Article 22), — and if Article 22 of EEC Regulation No 3 must be interpreted, or completed by analogy, in the sense claimed by the defendant, then the plaintiff's claim to an allowance from the defendant (Article 381 (4) of RVO) would be replaced by the obligation imposed on the competent Dutch institution to provide benefits in kind equivalent to those envisaged by the German legislation for pensioners insured against sickness.

The Bundessozialgericht adds that the question put is not covered by the judgment in Case 33/65, Rec. 1965, that this judgment laid down only that 'allowances' for contributions in accordance with Article 381 (4) RVO are not benefits in kind within the meaning of Article 22 of EEC Regulation No 3, and that the present case concerns on the other hand the question whether benefits in kind under the sickness insurance scheme for pensioners must, under EEC law, be provided by an institution which is not bound to provide such benefits under its 'national' law.

The order referring the matter was registered at the Court on 28 February 1973. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the plaintiff in the main action, represented by Martin Rosenbaum, advocate in Dusseldorf, and the Commission of the European Communities, represented by Peter Karpenstein, member of the legal service of the Commission, have submitted observations. On the report of the Judge-Rapporteur, after hearing the Advocate-General, the Court decided to proceed without any preparatory inquiry.

The Commission of the European Communities presented oral arguments at the hearing on 11 July 1973.

The Advocate-General delivered his opinion at the hearing on 18 September 1973.

II — Observations submitted under Article 20 of the Statute

The observations submitted under Article 20 of the Statute can be summarized as follows:

A — The plaintiff

The request for a preliminary ruling presupposes that the plaintiff is a migrant worker. This is not the case since the plaintiff did not voluntarily enter the territory of another Member State (the Netherlands) but did so as a refugee to escape racial or political persecution. It is on the basis of the periods of employment and insurance completed before his emigration, which were recognized by way of compensation for the persecution he had suffered, that the defendant accorded him the benefit of the retirement pension.

Article 381 (4) RVO provides that when he is not subject to compulsory insurance and when he must therefore contribute to a private insurance a pensioner shall be entitled correspondingly to an allowance towards the contribution paid for the sickness insurance. The plaintiff is not compulsorily insured. He practises in the Netherlands, in complete independence, a liberal profession as a writer. The sickness insurance which he has voluntarily contracted provides comprehensive cover.

The allowance towards the contribution paid for the sickness insurance is a benefit of a special nature arising from the internal law and does not constitute a benefit in kind as has already been decided by the Court of Justice of the European Communities in the aforementioned Judgment 33/65. The State where he is resident is not bound to assume this obligation to grant a benefit which is incumbent on the competent insurance institution.

EEC Regulation No 1408/71, which became binding in its entirety and applicable in all Member States on 14 June 1971, establishes a limitation as to subject matter in Article 4 and a limitation as to persons in Article 28 (1).

B — The Commission

The fact that it concerns a pensioner entitled to draw pensions under the legislation of several Member States, who resides in the territory of one of these States which pays his pension, to a certain extent enables the question to be limited to Article 22 (1) of Regulation No 3. However, according to the Commission, the discussion in the original proceedings ranged over a wider field: the controversy is whether Article 22 (1) alone, or another provision of this Article, possibly in conjunction with paragraph (1), permits the conclusion that apart from any consideration of national legislative provisions regarding pensioners who draw pensions provided by several Member States and who live in the territory of one of them the cost of sickness insurance always falls on the institution of the country of residence, or whether it is so at least in the case where the pensioner is entitled to benefits of compulsory sickness insurance as a result of the legal provisions of another Member State, which for its part must pay a pension.

Article 22 of Regulation No 3 determines on the one hand the question of the conditions in which a pensioner or a member of his family can directly require benefits in kind in the event of sickness from the institution of the State where he is resident or staying. In conjunction with Article 23, it prescribes also when this institution can require reimbursement of expenditure which it has made under Article 22, the authority from which it can reclaim this reimbursement and the amount thereof. The regulations, which are very complex in their details, do not give rise to rights in the sense as understood by the defendant except in the cases referred to in paragraphs (5) and (6) where a pensioner or a member of his family requires treatment in a State other than that in which the pensioner resides. In all the other cases Article 22 does not require the State of residence to provide benefits in kind to a pensioner or a member of his family save where the said pensioner fulfils at least the conditions required by the national legislation for receiving such benefits.

According to paragraphs (1) and (3) of Article 22 the State of residence is not required to provide benefits in kind for a pensioner or a member of his family save where these persons have a right to such benefits as a result of legislation which applies to them. These provisions, it is true, make a distinction according to whether the pensioner is entitled to a pension from a single or several States and according to whether there is or is not a right to a pension from the country of residence. As appears from the second part of paragraphs (1) and (2) of Article 22, these distinctions are important only to determine the

institution which will finally have to pay. They do not alter at all the fact that the institution of the place of residence is required to provide benefits in kind to a pensioner or person entitled to a sickness allowance only where the latter is entitled to such benefits as a result of legislative provisions which are applicable to him.

Where the legislation of the State of residence — as is the case with the Netherlands — does not provide for compulsory sickness insurance for pensioners, the institutions of this State are not therefore required to provide, in the event of sickness, benefits in kind to the pensioner who resides in the territory of the said State, or a member of his family. Thus the entitlement to benefits in kind would exist not 'under the legislation of that State', but at the most as a result of the free decision taken by the person concerned to subscribe to a sickness insurance.

The rules provided for by Article 22 (1) and (2) of Regulation No 3 do not constitute an ideal solution. These rules reflect only very imperfectly the fundamental idea of the chapter relating to sickness or maternity benefits of 'guaranteeing to workers whose condition requires medical care as speedy and efficacious a treatment as possible'. If nevertheless the Commission believes that it must propose a negative reply to the Court of Justice as regards the question put, it does so essentially for two reasons:

1. First, it is precisely those provisions of Regulation No 3 governing the question of benefits in kind provided to the pensioner whose condition requires treatment in the country of residence, which are based on the existence of a right under the legislation of the State of residence. The provisions of Article 24 (2) and (3) of Regulation No 4 in this respect provide a clear confirmation free from any ambiguity.

2. The fact that Regulation No 3 has only partly achieved an ideal system, under which institutions of the place of residence or the place of stay would have a general obligation, is apparent also from a comparison with the provisions of Article 27 et seq. of Regulation No 1408/71. Whereas Article 27 of this Regulation is limited to repeating the text of Article 22 (1) of the former Regulation, Article 28 provides that the pensioner shall receive benefits in kind for himself or for the members of his family from the institution of the place of residence even when under the legislation of the State in whose territory he resides he does not have such a right. Article 28 of Regulation No 1408/71 thus no longer insists on the requirement of the existence of a right being also recognized by the legislation of the country of residence. All that is required is that the legislation of at least one of the States from whom the person concerned receives a pension provides entitlement to benefits in kind if the pensioner comes to reside in the territory of that State. It is not therefore possible to refer to these rules to interpret Regulation No 3.

It is impossible to draw from the case of Dekker, 33/65, Rec. 1965, conclusions permitting a reply to the question submitted to the Court in the context of the present case.

The Commission proposes the following answer to the question referred to the Court:

Article 22 of Regulation No 3 cannot be interpreted as meaning that the State in whose territory a pensioner who is entitled to draw pensions under the legislation of several Member States resides, is bound to provide him with benefits in kind under sickness insurance even though its legislation does not provide for this.

Grounds of judgment

1 In accordance with Article 177 of the Treaty establishing the EEC, the Bundessozialgericht, by order made on 20 October 1972 and lodged with the Registry on 28 February 1973, has referred to the Court a question on the interpretation of Article 22 of Regulation No 3 of the Council concerning social security for migrant workers.

This question has arisen in an action concerning the application made by the plaintiff in the main action to the Bundesversicherungsanstalt für Angestellte, Berlin, for an allowance provided for in Article 381 (4) RVO towards the contributions which he pays on a voluntary basis to a Dutch society for sickness insurance.

The defendant in the main action rejected this application on the ground that the plaintiff, not being subject to the German sickness insurance scheme, was not entitled to an allowance towards his contributions, and that under Article 22 of Regulation No 3 the sickness insurance of pensioners was the responsibility of the institution in the place of residence, in the case in question a Dutch institution.

2 A declaration is sought as to whether 'Article 22 of Regulation No 3 is to be interpreted as meaning that the State where he is resident must issue benefits in kind under pensioners' sickness insurance to a pensioner who is entitled to pensions under the legislation of several Member States and is resident in one of them, even though this is not provided for by the law of that State, whereas another Member State, under whose legislation the pensioner is also entitled to a pension, would have had to issue such benefits'.

Article 22 (1) of Regulation No 3 provides that 'where a pensioner entitled to draw pensions under the legislation of several Member States is permanently resident in the territory of a Member State in which one of the institutions liable for payment of his pensions is situated, and he is entitled to benefits in kind under the legislation of that State, the benefits in kind shall be issued to him and the members of his family by the institution of his place of permanent residence, as though he were a pensioner whose pension was payable solely under the legislation of his country of permanent residence. The cost of such benefits shall be borne by the institution of the country of permanent residence'.

This Article governs the situation of a pensioner according to whether he is entitled to draw pensions under the legislation of a single or several Member States, and whether or not the pensioner resides in the territory of a Member State where one of the institutions liable for his pensions is situated.

In the case in question the plaintiff in the main action, who is entitled to two pensions, one under the Old Age Insurance Law of the German Federal Republic, where he has lived, the other under the General Old Age Law of the Netherlands, where he resides, comes within the situation described in Article 22 (1).

3 The said Article subjects the grant of benefits in kind to the right which the pensioner possesses to receive such benefits under the legislation of the country where he resides.

This condition is clearly stipulated in Article 22 (1) and (2) regarding pensioners who fall sick in their country of residence, and thus appears basic and decisive.

4 Whereas on the one hand Article 22 (5) deals with the indirect entitlement of members of the family of a pensioner to benefits chargeable to the State of their place of residence, when this latter does not coincide with that of the head of household, and on the other hand Article 22 (6) deals with direct entitlement of the pensioner or a member of his family to benefits chargeable to the State of their place of temporary residence, such is not the situation referred to by the question.

The question is whether benefits in kind must be granted even in the case where the legislation in force in the country of residence does not provide for such benefits.

Such an interpretation is not in accord with the text of Article 22 (1).

Moreover there is nothing in any of the other provisions of Regulations Nos 3 and 4 to support this interpretation.

Although Article 17 of Regulation No 3 does not repeat the condition already referred to, it deals with employed persons or those treated as such and not with pensioners.

On the other hand Article 14 of Regulation No 4 confirms Article 22 (1) and (2).

5 Although, after the period referred to in the question, Article 28 of Regulation No 1408/71 of 14 June 1971 imposes an obligation on the country of residence giving rise to an entitlement on the part of the pensioner to receive benefits in kind in the event of sickness whatever the legislation of that country, it follows however from the grounds given for the proposal by the Commission of 6 November 1966 for the amendment of Regulation No 3, that this is an extension of the Community's social law, which until then was limited to coordinating national laws regarding social security.

6 It follows from the foregoing that benefits in kind under pensioners' sickness insurance cannot be provided by a fund which is not liable by its national law.

Costs

7 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers, especially Article 22;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Communities, especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT,

in answer to the question referred to it by the Bundessozialgericht by order of that Court dated 20 October 1972, hereby rules:

Article 22 of Regulation No 3 of the Council concerning social security for migrant workers is to be interpreted as meaning that the State where he is resident does not have to issue benefits in kind to a pensioner who is entitled to draw pensions under the legislation of serveral Member States and is resident in one of them, where this is not provided for by the law of that State.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 11 October 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 SEPTEMBER 1973 [1]

Mr President,
Members of the Court,

By order dated 20 October 1972 the Bundessozialgericht referred for a preliminary ruling a question on the interpretation of Regulation No 3 concerning social security for migrant workers. The following are the significant facts.

Mr Kunz, the respondent in the appeal in the main action, a Dutch citizen resident in The Netherlands, has been since February 1965 (i.e. since attaining 65 years of age) in receipt of an old age pension under the Dutch General Old Age Law. Moreover, by reason of the fact that before his flight to The Netherlands he was employed in Germany between the years 1921-1938,

1 — Translated from the German.