JUDGMENT OF THE COURT (Fifth Chamber)

6 November 2003 *

In Case C-311/01,

Commission of the European Communities, represented by H. Michard and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster and I. van der Steen, acting as Agents,

defendant,

APPLICATION for a declaration that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under Article 69 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), of

* Language of the case: Dutch.

going, under the conditions laid down in that provision, to one or more Member States in order to seek employment there while retaining their entitlement to unemployment benefit, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the regulation,

THE COURT (Fifth Chamber),

composed of: A. La Pergola (Rapporteur), acting for the President of the Fifth Chamber, P. Jann and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 December 2002, where the Commission was represented by H. van Vliet and the Kingdom of the Netherlands by N.A.J. Bel, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 August 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under Article 69 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) ('Regulation No 1408/71'), of going, under the conditions laid down in that provision, to one or more Member States in order to seek employment there while retaining their entitlement to unemployment benefit, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the regulation.

Legal context

2 The preamble to Regulation No 1408/71 states inter alia:

'... it is... particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject...'

3 Article 1(o) of Regulation No 1408/71 provides that, for the purpose of the regulation, 'competent institution' means:

'(i) the institution with which the person concerned is insured at the time of the application for benefit; or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; or

(iii) the institution designated by the competent authority of the Member State concerned...'

4 In accordance with Article 1(q) of Regulation No 1408/71, '"competent State" means the Member State in whose territory the competent institution is situated'.

5 In Section 2, headed 'Unemployed persons going to a Member State other than the competent State', of Chapter 6 of Title III of Regulation No 1408/71, Article 69(1) and (2) provides:

'Conditions and limits for the retention of the right to benefits

1. 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 and within the following limits:

(a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organised therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under the provisions of paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time limit may be extended by the competent services or institutions.'

6 Article 70(1) of Regulation No 1408/71 provides:

'In the cases referred to in Article 69(1), benefits shall be provided by the institution of each of the States to which an unemployed person goes to seek employment.

The competent institution of the Member State to whose legislation an employed or self-employed person was subject at the time of his last employment shall be obliged to reimburse the amount of such benefits.'

7 In Section 3, headed 'Unemployed persons who, during their last employment, were residing in a Member State other than the competent State', of Chapter 6 of Title III of Regulation No 1408/71, Article 71(1)(a)(ii) states:

'1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State, shall receive benefits in accordance with the following provisions:

(a) ...

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense'.

Facts and pre-litigation procedure

8 When Mr Lorenz, a Netherlands resident who was a frontier worker in Germany, became wholly unemployed, he drew unemployment benefit borne by the Netherlands institutions, in accordance with Article 71(1)(a)(ii) of Regulation No 1408/71.

9 Since Mr Lorenz planned to go to France to seek employment there, he asked the Nederlandse Gemeenschappelijk Administratiekantoor ('the GAK') whether he would continue to receive unemployment benefit during his stay in that Member State. The reply given was that, in view of his status as a frontier worker, he did not qualify for the arrangements laid down by Article 69 of Regulation No 1408/71.

10 After receiving a complaint from Mr Lorenz, the Commission questioned the Netherlands Ministry for Social Affairs and Employment, which told it that it shared the interpretation adopted by the GAK with regard to Article 69 of Regulation No 1408/71.

11 Having decided to initiate the infringement procedure laid down in Article 226 EC, on 29 May 1998 the Commission gave the Kingdom of the Netherlands formal notice to submit its observations to it. That Member State replied on 2 October 1998 that it contested the charges set out by the Commission.

12 Not being satisfied with the explanations provided by the Kingdom of the Netherlands, on 30 July 1999 the Commission sent it a reasoned opinion calling on it to comply with the opinion within a period of two months. Since the Kingdom of the Netherlands indicated, by letter of 8 October 1999, that it stood by its view, the Commission decided to make the present application.

Consideration of the application

Arguments of the parties

13 The Commission submits that the Netherlands administrative practice of denying the benefit of the arrangements set up by Article 69 of Regulation No 1408/71 to wholly unemployed frontier workers covered by Article 71(1)(a)(ii) of that regulation who are resident in the Netherlands and wish to go to another Member State in order to seek employment there infringes those provisions.

14 The wording of Article 71(1)(a)(ii) of Regulation No 1408/71 indicates that such a worker is to receive unemployment benefits in accordance with the legislation of the State of residence as though he had been subject to that legislation while last employed and that such benefits are to be provided to him by the institution of the State of residence at its own expense, so that that institution and that Member State have, respectively, the status of 'competent institution' and of 'competent State' within the meaning of Articles 1(o) and (q) and 69 of that regulation. It follows that that worker must qualify for the arrangements set up by Article 69 at the expense of the Member State of residence.

15 The Commission contends that the interpretation for which it argues is also consistent with the aim of the foregoing provisions.

16 The Court has previously held that Article 71(1)(a)(ii) is intended to ensure that migrant workers, including frontier workers, receive unemployment benefit on the conditions most favourable to the search for new employment, by equating the system of unemployment benefits for frontier workers with that of workers whose last employment was in the State of residence.

17 As regards Article 69 of Regulation No 1408/71, it is apparent from the recital in the preamble to that regulation set out in paragraph 2 of this judgment, as it is from the heading of Section 2 of Chapter 6 of Title III in which Article 69 is to be found, that the legislature intended to facilitate the search for employment in other Member States for all unemployed persons without distinction. As the Court has confirmed, that provision thus has the aim of contributing to the free movement of workers.

18 The interpretation put forward by the Kingdom of the Netherlands would, in the Commission's submission, deny frontier workers the benefit of Article 69 unless

they take up residence in the Member State where they were last employed. Such an interpretation would, moreover, give rise to discrimination between unemployed persons residing in the Member State where they were last employed, entitled to benefit from Article 69, and frontier workers who would not be so entitled. It fails to have regard both to the need to interpret Regulation No 1408/71 in such a way as not to discourage frontier working and to the regulation's objective of ensuring that all Member State nationals enjoy equal treatment under the different national laws and that workers are entitled to social security benefits irrespective of their place of employment and residence.

19 In its defence, the Netherlands Government submits first, that, as is apparent from the provision's very wording, in order for Article 69 of Regulation No 1408/71 to apply the unemployed person must derive his entitlement to unemployment benefit from the national legislation itself under the conditions laid down by it and not from another provision of Regulation No 1408/71 which, like Article 71(1)(a)(ii), attaches the person concerned to the national legislation by means of a fiction.

20 That interpretation is dictated by the fact that Article 69 is to be interpreted strictly inasmuch as it confers on the persons concerned a right not laid down by the Member States' national law (Joined Cases 41/79, 121/79 and 796/79 *Testa and Others* [1980] ECR 1979, paragraphs 4 and 5) and that a person whose benefit entitlement exists only by virtue of Regulation No 1408/71 cannot rely on such an entitlement to claim benefits which, as provided by that regulation, must be derived from the domestic legislation itself (Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071, paragraph 19).

21 The Netherlands Government contends, second, that the State of residence cannot be considered to be the 'competent State' for the purposes of Article 69(1) of Regulation No 1408/71.

22 It is clear from the very heading of Section 3 of Chapter 6 of Title III of Regulation No 1408/71 and from the Court's case-law that the Member State where the person concerned was last employed remains the competent State, the latter's obligations being only suspended and not extinguished (Case 145/84 *Cochet* [1985] ECR 801, paragraphs 15 and 24, and Case C-131/95 *Huijbrechts* [1997] ECR I-1409, paragraphs 24, 25 and 26). The benefits are simply calculated pursuant to the legislation of the State of residence and do not originate from that legislation.

23 Nor does any provision expressly designate the institution of the State of residence as the competent institution for the purpose of applying Article 69 of Regulation No 1408/71 so that that State also cannot be considered to be the 'competent State' under Article 1(q) of the regulation.

24 Third, the Commission's view is irreconcilable with the provision in Article 70 of Regulation No 1408/71 according to which the competent institution of the Member State to whose legislation a worker was subject at the time of his last employment is obliged to reimburse the amount of the benefits referred to in Article 69 of the regulation to the institution of the Member State to which the unemployed person has gone to seek work.

25 Fourth, the Netherlands Government submits that the case-law relating solely to Article 71 of Regulation No 1408/71 cannot be taken to mean that the Court has held that the whole of Chapter 6 of Title III of the Regulation is intended to ensure that workers who go elsewhere receive unemployment benefit on the conditions most favourable to the search for new employment. On the contrary, one of the *raisons d'être* for Article 71(1)(a)(ii), namely that the chances of an

unemployed person finding work are greater in his State of residence, ceases to apply if he leaves that State, so that the latter cannot be required to 'export' unemployment benefits, particularly when the person concerned did not pay contributions in that Member State when employed in his last job.

26 Nor, in the Netherlands Government's submission, can the recital in the preamble to Regulation No 1408/71 set out in paragraph 2 of this judgment mean that frontier workers are to be recognised as having a right which is not expressly conferred upon them by the regulation, in particular as the wording of that recital, which refers to the export of benefits provided for by the legislation of the Member State to which the unemployed person was last subject, rather points in favour of the view defended by the Netherlands Government.

27 Fifth, that view is also confirmed by the fact that the Commission once drew up a proposal designed, inter alia, to insert a fourth paragraph in Article 69 of Regulation No 1408/71 extending entitlement under that provision to wholly unemployed frontier workers receiving unemployment benefit from the State of residence (see COM (80) 312 final, OJ 1980 C 169, p. 22).

28 The Netherlands Government contends in conclusion that, given the seriousness of the gaps displayed by the arrangements under Article 69 of Regulation No 1408/71, legal certainty precludes those gaps from being filled by case-law, intervention by the Community legislature being necessary for that purpose.

Findings of the Court

29 First, as the Commission has correctly stated, it is clear from the very wording of Article 71(1)(a)(ii) of Regulation No 1408/71 that a wholly unemployed frontier worker is to receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides. It is also clear from its wording that the competent institution for the provision of unemployment benefits is that of the State of residence (Case 67/79 *Fellinger* [1980] ECR 535, paragraph 5).

30 As the Commission observes, the Court has previously stated that that provision, in derogation from the general rule of attachment to the legislation of the State of employment, established a specific attachment to the social security system of the Member State of residence as regards unemployment benefits, for reasons of practicality and efficacy rendering such an attachment more appropriate and more in conformity with the interests of frontier workers (see Case 58/87 *Rebmann* [1988] ECR 3467, paragraphs 13, 14 and 15, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraph 32). The Court has also pointed out that that provision clearly requires the legislation of the Member State of residence alone to be applied and not, therefore, the legislation of the State of employment (Case C-201/91 *Grisvard and Kreitz* [1992] ECR I-5009, paragraph 16), and the frontier worker concerned may therefore claim unemployment benefits only from the State in which he resides (see Case 1/85 *Miethe* [1986] ECR 1837, paragraph 12).

31 Contrary to what the Kingdom of the Netherlands suggests, the fact that the legislation of the Member State of residence applies to a wholly unemployed frontier worker falling within the scope of Article 71(1)(a)(ii) on the basis of a legal fiction according to which he must, for the purposes of application of that

legislation, be regarded as having been subject thereto while last employed is therefore not such as to affect the conclusion that such a worker falls, in this area, within the competence of the State of residence alone.

32 Nor is that conclusion affected by the fact that the Member State where the unemployed person was last employed, the obligations of which are suspended and not extinguished for so long as he continues to reside in another Member State, recovers its fundamental competence in the matter should the worker concerned take up residence there (*Cochet*, cited above, paragraphs 15 and 16, and *Huijbrechts*, cited above, paragraph 24). It is moreover to be remembered that in such a situation the factor which determines whether Article 71 of Regulation No 1408/71 applies at all, namely the residence of the person concerned in a Member State other than that to whose legislation he was subject during his last employment (see, in particular, Case C-454/93 *Van Gestel* [1995] ECR I-1707, paragraph 24), necessarily no longer pertains, so that Article 71(1)(a)(ii) ceases to be applicable (*Huijbrechts*, paragraph 28).

33 Since the Member State of residence thus has sole competence for payment, in accordance with its legislation and through its institutions, of unemployment benefits to a frontier worker covered by Article 71(1)(a)(ii) of Regulation No 1408/71, it follows that that Member State, likewise, is alone able to ensure that payment of unemployment benefit to him may continue if he goes to another Member State in order to seek employment there.

34 In this connection, it is clear, second, that contrary to the submissions of the Netherlands Government there are no grounds for finding that Article 69 of Regulation No 1408/71 cannot apply to such a worker.

35 Such an interpretation would first of all fail to have regard to the purpose of Article 71(1)(a)(ii) of the regulation, which, as the Commission correctly points out, consists in particular in equating the system of unemployment benefits for frontier workers with that of workers whose last employment was in the State of residence (*Grisvard and Kreitz*, cited above, paragraph 17).

36 Nor does the wording or spirit of Article 69 of Regulation No 1408/71 indicate that the Community legislature intended to exclude frontier workers from the scope of that provision.

37 Article 69 is stated to apply to any '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', which is so in the case of a frontier worker covered by Article 71(1)(a)(ii) of Regulation No 1408/71, who, as is clear from paragraphs 29 to 33 of this judgment, is entitled to unemployment benefit in accordance with the provisions of the legislation of the Member State in which he resides at the expense of the competent institution of that Member State.

38 The recital in the preamble to Regulation No 1408/71 set out in paragraph 2 of this judgment, far from drawing a distinction between frontier and non-frontier workers, reflects the concern of the Community legislature to preserve the entitlement of an 'unemployed worker' to unemployment benefits in order to facilitate search for employment in the various Member States.

39 As the Court has previously stated, Article 69 of Regulation No 1408/71 thus has the aim of encouraging the mobility of persons seeking employment and helping to ensure the free movement of workers in accordance with Article 42 EC (Case C-163/89 *Di Conti* [1990] ECR I-1829, paragraph 13, and Case C-215/00 *Rydergård* [2002] ECR I-1817, paragraph 25).

40 It is clear that an interpretation of Article 69 of Regulation No 1408/71 which had the consequence of excluding from the benefit of that provision wholly unemployed frontier workers covered by Article 71(1)(a)(ii) of the regulation would be incompatible with such an objective. Treatment of that kind with regard to unemployment benefits would place those workers at a disadvantage compared with workers in general, for whom the State of employment, where they reside or stay, is normally the competent State and would accordingly conflict with the requirements of freedom of movement for workers (see, to similar effect, *Fellinger*, cited above, paragraph 6). Not only would those frontier workers be deterred, or even prevented, from going to another Member State in order to find employment there as they would then be unable to carry on drawing unemployment benefit, but they would in addition find themselves penalised for having exercised the right of freedom of movement which the Treaty guarantees to them because, unlike workers who have been employed in the Member State in which they reside, they would not be able to rely on the rights established by Article 69.

41 It must accordingly also be accepted that the wording contained in the abovementioned recital in the preamble to Regulation No 1408/71 according to which the benefits that must be preserved are those provided for by the legislation of the Member State 'to which [the worker] was last subject' cannot be understood as necessarily referring to the legislation of the Member State where he was last employed, but should, as the Commission rightly submits, be viewed as referring more generally to the legislation under which unemployment benefit was payable to him before he went to another Member State in order to seek employment there.

42 It follows from all of the foregoing that Article 69 of Regulation No 1408/71 must be interpreted as applying to wholly unemployed frontier workers covered by Article 71(1)(a)(ii) of that regulation, so that the Member State in which such workers reside is obliged to ensure, under the conditions laid down by Article 69, that their right to unemployment benefits is retained.

43 As the Advocate General has observed in point 50 of her Opinion, the fact that the Commission drew up proposals to amend Article 69 of Regulation No 1408/71 cannot have a bearing on that interpretation.

44 Nor, contrary to the Netherlands Government's submissions, can that interpretation be affected by the fact that Article 70 of Regulation No 1408/71 provides that, in the cases referred to in Article 69(1), benefits are to be provided by the institution of the Member State to which an unemployed person goes to seek employment and subsequently reimbursed by the competent institution of the Member State to whose legislation the worker was subject at the time of his last employment.

45 In the light of all the foregoing considerations and, in particular, the fiction according to which a wholly unemployed worker covered by Article 71(1)(a)(ii) of Regulation No 1408/71 must, for the purposes of applying the legislation of the Member State in which he resides, be regarded as having been subject to that legislation while last employed, Article 70 of the regulation must, in relation to such a worker, be interpreted as meaning that where he relies on Article 69, it is for the competent institution of the Member State in which he resides to reimburse benefits provided by the competent institution of the Member State in which the search for employment took place.

46 As to the fact, pointed out by the Netherlands Government, that the interpretation upheld in paragraph 42 of this judgment allows frontier workers to receive unemployment benefits from a Member State to which they did not pay contributions during their last employment, suffice it to state that that is a

consequence intended by the Community legislature which meant to increase workers' chances of finding new employment (see, to similar effect, *Van Gestel*, cited above, paragraph 26).

47 Having regard to all the foregoing considerations, it must be held that the Commission is right in submitting that the Netherlands administrative practice of denying the benefit of the arrangements set up by Article 69 of Regulation No 1408/71 to wholly unemployed frontier workers covered by Article 71(1)(a)(ii) of that regulation who are resident in the Netherlands and wish to go to another Member State in order to seek employment there infringes those provisions.

48 The application must therefore be granted and it should be held that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under Article 69 of Regulation No 1408/71 of going, under the conditions laid down in that provision, to one or more Member States in order to seek employment there while retaining their entitlement to unemployment benefit, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the regulation.

Costs

49 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under Article 69 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, of going, under the conditions laid down in that provision, to one or more Member States in order to seek employment there while retaining their entitlement to unemployment benefit, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the regulation;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

La Pergola Jann von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass V. Skouris

Registrar President