JUDGMENT OF THE COURT (Third Chamber)
8 April 1992 *

In Case C-62/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bognor Regis Social Security Appeal Tribunal (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Gordon Sinclair Gray

and

Adjudication Officer

on the validity of Articles 67(3) and 69(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Third Chamber),

composed of: F. Grévisse, President of the Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: English.

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Regierungsdirektor im Bundesministerium für Wirtschaft, and by Joachim Karl, Oberregierungsrat im Bundesministerium für Wirtschaft, acting as Agents,

— the United Kingdom, by H. A. Kaya, of the Treasury Solicitor's Department, acting as Agent,

— the Council of the European Communities, by Jill Aussant and Chiara Zilioli, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom, represented by Eleanor Sharpston, Barrister, and from the Council and the Commission, at the hearing on 29 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1992,

gives the following

Judgment

1 By order of 25 January 1991, received at the Court on 13 February 1991, the Social Security Appeal Tribunal, Bognor Regis (United Kingdom), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the validity of Articles 67(3) and 69(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 The questions were raised in proceedings between Mr Gray, a national of the United Kingdom, and the Adjudication Officer.

3 After working in the United Kingdom, Mr Gray had settled in 1971 with his wife on Grand Canary Island (Spain), where he worked until 11 January 1990 as manager of a restaurant which was owned by his wife. Before returning to the United Kingdom on 26 February 1990 Mr Gray did not register in Spain as a person seeking work.

4 On returning to the United Kingdom Mr Gray claimed unemployment benefits with effect from 28 February 1990. His application was refused by the Adjudication Officer on the ground that, since he had not completed his last period of insurance in the United Kingdom and had not registered himself as a person seeking work in Spain prior to returning to the United Kingdom, he could not avail himself of Article 67 or Article 69 of Regulation No 1408/71.

5 The Social Security Appeal Tribunal heard Mr Gray's appeal against the Adjudication Officer's decision. Having determined that Mr Gray was likewise not entitled to avail himself of Article 71(1)(b)(ii) of Regulation No 1408/71, on the ground that he had not resided in the United Kingdom during his last employment, the tribunal was in doubt as to whether Article 67(3) and Article 69(1) of that regulation were compatible with Article 51 of the EEC Treaty. It therefore decided to stay the proceedings in order to refer the following questions to the Court for a preliminary ruling:

'Are Article 67(3) and Article 69(1) of Regulation (EEC) No 1408/71 invalid in the sense that they derogate from the provisions of Article 51 of the Treaty whereby "the Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers"?

If so, what is the effect of such invalidity on Mr Gray's claim?'

6 Reference is made to the Report for the Hearing for a full account of the facts of the case before the national court, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

7 The Social Security Appeal Tribunal's doubts arise from the possibility that some of the provisions of Regulation No 1408/71 constitute obstacles to freedom of movement for workers.

8 The majority of its members consider that both the requirement laid down by Article 67(3) that an unemployed person wishing to have periods of insurance or employment aggregated must have completed his last period of insurance or employment in the Member State in which the unemployment benefits are applied for and the requirements laid down in Article 69(1) that an unemployed worker seeking employment in another Member State must, in order to maintain entitlement to unemployment benefits, have registered himself as a person seeking work and have remained available to the employment services of the Member State of last employment for four weeks, impede freedom of movement for workers. It is thought that those provisions may involve financial disadvantages for workers who cease working in one Member State and then go directly to seek work in another Member State.

9 The doubts of the majority of the members of the national tribunal therefore arise from the idea that, contrary to what Article 51 of the EEC Treaty would appear to require, Article 67(3) and Article 69(1) of Regulation No 1408/71 do not lay down in the field of social security, particularly with regard to unemployment, the measures necessary to establish freedom of movement for workers.

10 It is to be noted that by providing, first, that in the case of Community nationals moving to a Member State periods of insurance or employment completed under

the legislation of any other Member State are to be taken into account in that State for the purposes of the acquisition, retention or recovery of entitlement to unemployment benefits and, secondly, that unemployed workers seeking work in another Member State are for a limited period to retain entitlement to unemployment benefits provided for by the legislation of the State in which they were last employed even though they are not available to the employment services of that State, Regulation No 1408/71 confers on those workers rights which they would not otherwise enjoy and which thus help to ensure freedom of movement for workers in accordance with Article 51 of the Treaty.

11 It is further to be noted that, as the Court ruled in its judgment in Joined Cases 41/79, 121/79 and 796/89 (*Testa* v *Bundesanstalt für Arbeit* [1980] ECR 1979, at paragraph 14), Article 51 of the Treaty does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto.

12 As regards the entitlement to unemployment benefits of workers seeking employment in a Member State other than that in which they last worked or paid contributions, the Council considered it necessary that such entitlement should be subject to conditions designed to encourage such persons to seek work in the Member State in which they were last employed, to make that State bear the burden of providing the unemployment benefits, and, finally, to ensure that those benefits are granted only to those actually seeking employment. In attaching such conditions to Article 67(3) and Article 69(1) of Regulation No 1408/71, the Council made proper use of its discretion.

13 It follows that consideration of the question raised by the national tribunal has disclosed no factor of such a kind as to affect the validity of Article 67(3) and Article 69(1) of Regulation No 1408/71.

Second question

14 In view of the answer given to the first question, the second question does not call for an answer.

Costs

15 The costs incurred by the United Kingdom Government and by the German Government, and by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Bognor Regis Social Security Appeal Tribunal by order of 25 January 1991, hereby rules:

Consideration of the question raised by the national tribunal has disclosed no factor of such a kind as to affect the validity of Article 67(3) and Article 69(1) of Council Regulation 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983.

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 8 April 1992.

J.-G. Giraud
Registrar

F. Grévisse
President