JUDGMENT OF THE COURT
17 FEBRUARY 1977 [1]

Silvani Di Paolo v Office National de l'Emploi (preliminary ruling requested by the Cour de Cassation of Belgium)

Case 76/76

1. *Social security for migrant workers — Unemployment of a worker, other than a frontier worker, occupied in another Member State — Benefits — Claim in the Member State of residence — Concept of residence*
   (Regulation No 1408/71, Article 71 (1) (b) (ii)

2. *Social security for migrant workers — Unemployment of a worker, other than a frontier worker, occupied in another Member State — Benefits — Claim in the Member State of residence — Grant — Conditions*
   (Regulation No 1408/71, Article 71 (1) (b) (ii)

1. The concept of the Member State in which the worker resides, appearing in Article 71 (1) (b) (ii) of Regulation No 1408/71, must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated.
   The addition of the words 'or who returns to that territory' implies merely that the concept of residence in a State does not necessarily exclude non-habitual residence in another Member State.
2. For the purposes of applying Article 71 (1) (b) (ii), account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances.

In Case 76/76

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

SILVANA DI PAOLO

and

OFFICE NATIONAL DE L'EMPLOI (National Employment Office)

1 — Language of the Case: French.

on the interpretation of Article 71 of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community

THE COURT

composed of: H. Kutscher, President, A. M: Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference of 16 June 1976 and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I. — Facts and procedure

Miss Di Paolo, an Italian national, born in Italy, entered Belgium to live with her parents in 1965. In that country and until June 1972 she received lower secondary technical education, main subject commerce, and higher technical secondary education, main subjects secretarial skills and English language. In September 1972 she went to the United Kingdom where she stayed until the end of July 1973. During that stay, from 11 September 1972 to 29 July 1973, she was employed in a hospital. Upon returning to her parents' home in Belgium, Miss Di Paolo, by then unemployed, lodged an application with the Belgian Office National de l'Emploi for unemployment benefits on 5 October 1973. By decision of 12 February 1974 the Office rejected her application on the grounds that she did not fulfil the qualifying conditions laid down by the Royal Decree of 20 December 1963, in that she could not show the number of working days during the ten months preceding her application required by Belgian legislation in order to obtain unemployment benefits.

Basing herself on Article 67 (1) of Regulation No 1408/71, which provides that periods of insurance or employment shall be aggregated for the purposes of ascertaining entitlement to unemployment benefits, Miss Di Paolo brought her cases before the Tribunal du Travail, Brussels, claiming that it should overrule the decision of the Office National de l'Emploi.

By judgment of 28 October 1974 the Tribunal du Travail found that since Miss Di Paolo had been employed in the United Kingdom from 11 September 1972 to 29 July 1973 and could claim the benefit of the exception laid down by Article 71 (1) (b) (ii) of the said regulation, she was therefore entitled to rely on the aforesaid Article 67 (1), and decided that she should be granted unemployment benefits as from the date of her application. The Office National de l'Emploi appealed against that judgment to the Cour du Travail, Brussels. By judgment of 19 June 1975 the latter allowed the appeal. The Administrative Commission on Social Security for Migrant Workers had decided, by Decision No 94 of 24 January 1974 (OJ) C 126, 1974, p. 22), that Article 71 (1) (b) (ii) applies to certain categories of workers, apart from seasonal workers, and the Cour du Travail took the view that Miss Di Paolo did not come within any of those categories.

Miss Di Paolo then brought an appeal on a point of law against that judgment of the Cour du Travail. In support of her appeal she argues that since she maintained her residence in Belgium during her period of employment in the United Kingdom and then returned to Belgium, she could claim the application of Article 71 (1) (b) (ii) of Regulation No 1408/71 and receive unemployment benefits under the provisions of Belgian legislation. She also argued that since the decisions of the Administrative Commission have no binding force, the contested judgment erred in subjecting the application of Article 71 (1) (b) (ii) to the restrictions laid down in Decision No 94 of the Administrative Commission, for those restrictions conflict with the provisions of the aforesaid Article 71, or at any rate could not be deduced from those provisions.

Community Provisions

As regards unemployment benefits, Article 67 (1) of Regulation No 1408/71 provides that the competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of insurance periods shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State.

Article 67 (3) provides that, except in the cases referred to in Article 71 (1) (a) (ii) and (b) (ii), application of the provisions of paragraphs (1) and (2) shall be subject to the condition that the person concerned should have completed lastly periods of insurance in accordance with the provisions of the legislation under which the benefits are claimed.

Article 69 lays down the conditions and limits within which a worker who is entitled to unemployment benefits in a Member State may go to another Member State in order to seek employment there while retaining, for three months, the right to benefits in the competent State.

Article 70 provides that in these cases, benefits shall be provided by the institution of each of the States to which an unemployed person goes to seek employment, but that the competent institution of the Member State to whose legislation a worker was subject at the time of his last employment shall be obliged to reimburse the amount of the same.

Article 71, which contains certain exceptions to this system and of which the scope is in dispute in the present case, provides that an unemployed person 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.

Subparagraphs (a) (i) and (ii) concern the case of frontier workers; subparagraph (b) (ii) provides that:

'a worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such worker has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under Article 69, make a claim for benefits under the legislation to which he was last subject.'

In interpreting this provision, the Administrative Commission of the European Communities on Social Security for Migrant Workers decided that:

'1. In addition to seasonal workers, Article 71 (1) (b) (ii) of Regulation (EEC) No 1408/71 shall also apply to the following categories of workers.
   (a) workers employed in international transport as referred to in Article 14 (1) (b);
   (b) workers other than workers employed in international transport who normally pursue their activity in the territory of several Member States as referred to in Article 14 (1) (c);
   (c) workers employed by an undertaking straddling a common frontier as referred to in Article 14 (1) (d);
   in such cases where they are residing in the territory of a Member State other than the competent State.'

Question Referred and Procedure

Taking the view that the decision of the Administrative Commission, criticized in Miss Di Paolo's appeal, raised a question of interpretation of Community law, the Cour de Cassation of Belgium decided by order of 16 June 1976 to stay the proceedings and refer the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'What meaning and scope are to be given the words 'in which he resides or who returns to that territory' contained in Article 71 (1) (b) (ii) of Regulation (EEC) No 1408/71 of the Council of the European Communities and in particular as regards the concepts of residence and return to the territory; what are the criteria applicable and at what point of time must the conditions of residence and return to the territory be fulfilled?

Written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC were submitted on behalf of Miss Di Paolo, the Office National du Travail and the Commission of the European Communities.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of written observations submitted before the Court

Observations of the applicant

The appellant in the main action is of the opinion that the Administrative Commission, by limiting the scope of Article 71 (1) (b) (ii) of Regulation No 1408/71 to certain categories of workers, has interpreted that provision in a restrictive way which is irreconcilable with the purpose of Article 71. It results from the heading to Article 71 and from the wording of that article that, in addition to frontier workers, it applies to workers who

'(a) during their last employment, were resident in a Member State other than the competent State or who return to their country of residence after having been employed in the territory of another State;
(b) are not entitled to unemployment benefits in accordance with Article 69 of the regulation by virtue of the legislation of the country in which they were last employed.'

Article 84 (2) of the implementing Regulation No 574/72 provides that 'In order to claim benefits under Article No 71 (1) (b) (ii) of the Regulation, an unemployed person shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the Implementing Regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefit under Article 69 of the Regulation.' It seems clear that that provision itself sets a limit to entitlement in that it requires that a worker must first claim his rights under the legislation of the State where he was last employed. The appellant in the main action fails to understand, therefore, why its application should be limited solely to frontier workers, seasonal workers and workers employed in international transport.

Another condition that a worker referred to by Article 71 (1) (b) (ii) must satisfy in order to obtain unemployment benefits is that he must be resident in the territory of the State in which he is registered as seeking work. Not only must he in fact be resident in that State at the time when he claims unemployment benefits, but he must also have maintained his residence there during his last employment on the territory of another State.

According to Article 1 (h) of Regulation No 1408/71, the expression 'residence' means the 'habitual residence' of the worker. That definition seems too vague. In order to apply Article 71 correctly, in the applicant's view, the concept of 'residence' should be extended and interpreted as meaning the place where the migrant worker has, or retains, the centre of his interests and of his affairs while he works in another State. The words 'or who returns to that territory', which appear in subparagraph (b) (ii), suggest that in reality what is meant is the place where the worker has his domicile and where the members of his family are.

In conclusion, the applicant takes the view that by Article 71 (1) (b) (ii) of Regulation No 1408/71 the legislature of the European Communities intended to guarantee that migrant workers should receive the unemployment benefits available under the legislation of the country of residence when no such entitlement exists under the legislation of the country of their last employment.

She suggests, therefore, that the answer to the question referred should be as follows.

'In addition to unemployed frontier and seasonal workers, Article 71 (1) (b) (ii) of Regulation No 1408/71 of the Council applies to unemployed workers who are not entitled to unemployment benefits under the legislation of the country of their last employment pursuant to the provisions of Article 69 of the regulation, who make themselves available to the employment services of the State in which they in fact reside at the time when they claim unemployment benefits, and who have maintained their residence within the territory of another Member State during their last employment.

The benefits are to be paid by the competent institution of the place of residence in accordance with and to the extent laid down by the legislation which it applies. In determining entitlement it shall where necessary take into account the periods of employment or insurance completed on the territory of the

Member State where the worker concerned was last employed.'

Observations of the Office National de l'Emploi

Article 71 (1) (b) (ii) is said to constitute an exception to the general rule laid down by Article 67 (3). A reading of that provision thus suggests that it is enough for the interested party to take up residence within the territory of any Member State and make himself available to the employment services in that State in order to take advantage of the aggregation of benefits. Such a literal interpretation of that provision is not, however, acceptable. It would mean that this exception would have so wide a scope that the general principle governing the aggregation of benefits set out in Article 67 (3) would become meaningless.

Faced with these apparent contradictions between the two articles, the Administrative Commission of the European Communities on Social Security for Migrant Workers interpreted the exception in the only way allowing it to be reconciled with the general principle.

The opinion of the Administrative Commission does not in any way contradict the definition of residence given in the judgment of the Court in the case of *Angenieux* v *Hakenberg* ([1973] ECR 935). That definition was given in respect of the first subparagraph of Article 13 (c) of Regulation No 3, that is to say of the case where the worker pursues an occupation within the territories of several Member States.

In the present case, however, the applicant worked in only one Member State and does not come within the categories of workers set out in Decision No 94. In these circumstances one cannot put an overwide interpretation on the concept of residence so as to bring within the ambit of Article 71 (1) (b) (ii) all migrant workers having a fairly stable job in a Member State who have left their family in the country of origin.

The fact that decisions of the Administrative Commission are not binding certainly does not mean that the national courts and the Court of Justice cannot uphold the highly authoritative interpretations contained in those decisions.

Its opinion is particularly apposite both by reason of the ability of its members and of the fact that its decisions on questions of interpretation must be unanimous (see the opinion of Mr Advocate-General Gand, Case 19/67, *Bestuur der Sociale Verzekeringsbank* v *Van der Vecht*, [1967] ECR 357).

The interpretation of the Administrative Commission has the merit of taking into account the exceptional nature of this article in relation to the general rule set out in Article 67, and it thus contributes to legal certainty.

Accordingly, the Office National de l'Emploi suggests that the Court should give the following answer to the question referred:

'Where, as in the case under consideration, a worker pursues an occupation which links him for normal purposes with the territory of a single Member State, the expression "residence" contained in Article 71 (1) (b) (ii) of Regulation No 1408/71 means the place where he has voluntarily and permanently fixed the centre of his occupational activities.'

Observations of the Commission

The Commission points out that the decisions of the Administrative Commission are not binding on the courts and only have the status of opinions. Furthermore, the Commission states that in fact it appears that the members of the Administrative Commission were not all

of one mind on the question of the categories of workers covered by the provision under discussion.

Taking into account the fact that the decisions of the Administrative Commission are declaratory, the Commission takes the view that the list of categories of workers appearing in Decision No 94 cannot be considered to be exhaustive. In fact certain workers, while not classifiable in any of the categories, nevertheless satisfy the criteria fixed by Article 71 (1) (b) (ii).

Article 71 is an exception to the general rule, both as regards aggregation of periods and as regards payment of benefits. The purpose of the provision is to ensure that an unemployed worker shall receive benefits in the country where he is resident even though there is no connexion by way of insurance between him and it. That therefore presupposes that other links exist between the worker and his country of residence, and certainly closer links than those which, in general, connect migrant workers with their country of origin. If Article 71 is not to be considered as covering exceptional sitautions, Article 69 would cease to be meaningful, taking into account the conditions to which it subjects the exportation of benefits. This is corroborated by the fact that the workers covered by Article 71 (1) (b) (ii) may first benefit from the general rule set out in Article 69 and, upon the expiry of the three months fixed by that provision, continue to receive unemployment benefits, but under the legislation of their country of residence. This is a very great advantage compared with workers as a whole. Such an advantage can be justified only by the very special situation of the workers whom the Council intended to be covered by Article 71 (1) (b) (ii). It follows that, although it is not exhaustive, the list of categories of workers who may benefit from that provision appearing in Decision No 94 and the recitals in the preamble to that decision are useful pointers in determining who are the potential beneficiaries under Article 71 (1) (b) (ii) of Regulation No 1408/71.

The decisive element in applying Article 71 is the fact that the person concerned must reside in a Member State other than the State to whose legislation he was subject during his last employment.

It is certain that most migrant workers may be supposed to have a domicile in a Member State other than the country of employment, and to have the centre of their interests in another Member State and moreover that they return to that State at regular intervals, though not often enough to be treated as frontier workers. These criteria, therefore, although useful, are not decisive.

Another element may be taken into consideration. It is the length of stay. A short stay within the territory of the country of employment is one of the characteristics applying to all the categories of workers covered by Decision No 94 of the Administrative Commission. A short stay within the territory of a Member State does not automatically prove that the worker has maintained his residence within the territory of another Member State. Other elements of fact must therefore be sought to establish a recognizable connexion between the person and the territory of habitual residence. The importance of these elements, such as degree of permanence, continuity despite periodic interruptions, intentions, and external appearances, must be assessed in each case in order to determine the extent to which the territorial connexion is the rule, due attention being paid to the kind of work performed by the person concerned: Opinion of Mr Advocate-General Trabucchi in Case 13/73, *Hakenberg* ([1973] ECR 935).

As regards the concept of return and the distinction made in Article 71 (1) (b) (ii) between workers who make themselves available for work to the employment services in the territory of the Member State in which they reside and those who

return to the territory of that Member State, it must be taken that this is a distinction between two different situations both covered by Article 71.

The first situation involves workers such as seasonal workers, workers posted abroad or those in Miss Di Paolo's situation, who leave the territory of the Member State in which they reside in order to work for a certain period in another Member State, and of whom it may be said, taking into account the brevity of the interruption of residence in the Member State in which they reside, that they are returning to the territory of the Member State where they are habitually resident. The second situation involves workers such as frontier workers, workers in international transport or sales agents, who return at frequent intervals to their country of residence, so that they may be considered as never having left their country of residence and in respect of whom there can therefore be no question of a return to that Country.

The Commission suggests the following answer to the question referred:

'In order to determine whether, for the purposes of applying Article 71 (1) (b) (ii) of Regulation No 1408/71, a worker who returns to the territory of the Member State in which he resides, after working for a short period within the territory of another Member State, has maintained his residence within the territory of the first Member State, account should in addition be taken of the brevity of his temporary residence in the country of employment, the duration and continuity of residence within the territory of the first Member State and all the elements of fact of a personal or occupational nature which show evidence of a durable connexion between the worker and that territory, including in particular the element of intention.'

At the hearing on 9 December 1976, the Commission of the European Communities, represented by its Agent, Miss Jonczy, submitted its oral observations.

The Advocate-General delivered his opinion at the hearing on 26 January 1977.

Law

1 By order of 16 June 1976, which reached the Court on the following 28 July, the Belgian Cour de Cassation has referred a question, under Article 177 of the EEC Treaty, on the interpretation of Article 71 (1) (b) (ii) of Regulation (EEC) No 1408/71 (OJ English Special Edition, 1971 (II), p. 416).

2 The question has arisen in respect of a dispute as to whether an Italian national (the appellant in the main action), who last worked in the United Kingdom and then returned to her family in Belgium, is entitled to unemployment benefits under Belgian law.

3 Since the appellant has not worked in Belgium and since Belgian law requires that a certain number of days of work must be performed over a reference

period of 10 months preceding the claim in order that entitlement to unemployment benefits may be acquired, the appellant in the main action has relied on Article 67 (1) of Regulation No 1408/71.

4 Article 67 (1) of the said regulation provides that as regards the acquisition, retention or recovery of the right to unemployment benefits, account shall be taken, to the extent necessary, of periods of insurance or employment completed under the legislation of any other Member State.

5 However, paragraph (3) of that article provides that, except in the cases referred to in Article 71 (1) (a) (ii) and (b) (ii), application of the provisions of paragraph (1) shall be subject to the condition that the person concerned should have completed lastly periods of insurance in accordance with the provisions of the legislation under which the benefits are claimed.

6 Article 71 (1) (b) (ii) covers the case of a 'worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory', and provides that he 'shall receive benefits in accordance with the legislation of that State as if he had last been employed there ...'.

7 The appellant in the main action, who has explained that she stayed in the United Kingdom merely in order to improve her knowledge of the English language, is of the opinion that she maintained her residence in Belgium and that she may therefore benefit from the exception contained in Article 71 (1) (b) (ii) of Regulation No 1408/71.

8 The Court is requested to interpret the words ' ... in which he resides or who returns to that territory', in particular as regards the concepts of residence and return to the territory, to explain which criteria are applicable and to state when the conditions of residence and return must be fulfilled.

9 Article 67 (3) of Regulation No 1408/71 lays down the rule that, except where otherwise provided, an unemployed person may claim unemployment benefits only if he has completed lastly periods of insurance or of employment in accordance with the provisions of the legislation under which the benefits are claimed.

10 Subject to certain conditions, Article 71 (1) of the said regulation makes exceptions to this requirement at subparagraph (a) (ii) in favour of frontier workers, and at subparagraph (b) (ii) in favour of certain migrant workers other than frontier workers.

11 The decisive element in applying Article 71, as a whole, is the residence of the person concerned in a Member State other than the State to whose legislation he was subject during his last employment.

12 The transfer of liability for payment of unemployment benefits from the Member State of last employment to the Member State of residence is justified for certain categories of workers who retain close ties with the country where they have settled and habitually reside, but it would no longer be justified if, by an excessively wide interpretation of the concept of residence, the point were to be reached at which all migrant workers who pursue an activity in one Member State while their families continue habitually to reside in another Member State were given the benefit of the exception contained in Article 71 of Regulation No 1408/71.

13 It follows from these considerations that the provisions of Article 71 (1) (b) (ii) must be interpreted strictly.

14 These considerations led the Administrative Commission (on social security for migrant workers) established under Article 80 of Regulation No 1408/71, in its opinion No 94 of 24 January 1974 OJ C 126 1974, p. 22), to hold that Article 71 (1) (b) (ii) applies only to seasonal workers and, in addition, to the workers referred to in Article 14 (1) (b), (c) and (d) of Regulation No 1408/71.

15 However, that decision, though clarifying the matter to a certain extent, cannot be considered to have enumerated exhaustively the categories of workers who may come within the provision, nor to have excluded certain other categories who have maintained similarly close ties with their country of habitual residence.

16 By virtue of the words 'in which he resides, or who returns to that territory', Article 71 (1) (b) (ii) covers two categories of workers whose situation is substantially the same.

17 The concept of 'the Member State in which he resides' must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated.

18 In this respect, the fact that the worker has left his family in the said State constitutes evidence that he has retained his residence there, but is not of itself sufficient to allow him the benefit of the exception laid down in Article 71 (1) (b) (ii).

19 In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.

20 Accordingly it is not only the family situation of the worker that should be taken into account, but also the reasons which have led him to move, and the nature of the work.

21 The addition of the words 'or who returns to that territory' implies merely that the concept of residence, such as defined above, does not necessarily exclude non-habitual residence in another Member State.

22 Thus for the purposes of applying Article 71 (1) (b) (ii) of Regulation No 1408/71, account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

24 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Belgian Cour de Cassation, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Belgian Cour de Cassation by order of 16 June 1976, hereby rules:

1. **The concept of the Member State where the worker resides, appearing in Article 71 (1) (b) (ii) of Regulation No 1408/71, must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated;**

2. **The addition to that provision of the words 'or who returns to that territory' implies merely that the concept of residence in one State does not necessarily exclude non-habitual residence in another Member State;**

3. **For the purposes of applying Article 71 (1) (b) (ii), account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances.**

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 17 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President