OPINION OF ADVOCATE GENERAL ELMER

delivered on 21 February 1995 *

Introduction

1. In this case four questions have been referred to the Court for a preliminary ruling concerning 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. [1]

In the light of the information provided by the Spanish Government at the hearing, the question has, however, arisen in the meantime as to whether the Court has jurisdiction to answer the questions referred to it at all.

Facts

2. Under Spanish Law No 31 of 2 August 1984 on Unemployment Protection (hereinafter 'Law No 31/1984'), a distinction is made in the payment of unemployment benefits between those based on compulsory contributions (Title I of Law No 31/1984) and those not linked to previous contributions on the part of the unemployed person (Chapter I of Title II of Law No 31/1984). Chapter II of Title II of Law No 31/1984 makes provision for 'asistencia sanitaria' which may be obtained under certain conditions where an applicant does not satisfy the requirements for either contributory or non-contributory unemployment benefits.

3. The plaintiffs in the main proceedings, Teresa Zabala Erasun, Francisco Casquero Carillo and Elvira Encabo Terrazos (hereinafter 'Zabala and Others') are Spanish citizens who have, over various periods, worked in France as employed persons. However, they lost their jobs in France, and applied for and obtained unemployment benefits of the type linked to compulsory contributions (Title I of Law No 31/1984).

After the period in which they were entitled to contributory benefits had expired, the plaintiffs sought unemployment benefits under Chapter I of Title II of Law No

* Original language: Danish.

1 — OJ, English Special Edition 1971 (II), p. 416, in the codified version of Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as last amended by Council Regulation (EEC) No 1249/92 of 30 April 1992 (OJ 1992 L 136, p. 28).

31/1984. The applications were rejected, however, by the Spanish Instituto Nacional de Empleo (hereinafter 'INEM'), on the ground that, in its declaration pursuant to Article 5 of Regulation No 1408/71 concerning the national benefits falling within the scope of the Regulation, the Kingdom of Spain had only included benefits linked to compulsory contributions, whereas benefits which were not subject to earlier contributions by the employed persons were not mentioned in the declaration. [2]

The order for reference

Zabala and Others thereupon brought proceedings against INEM. The cases are now pending before the appeal court, the Tribunal Superior de Justicia de la Comunidad Autónoma del Païs Vasco. In connection with those appeals, that court referred the following four questions to the Court of Justice:

'1. Does the declaration notified by the Kingdom of Spain to the President of the Council of the European Communities and published in the Official Journal of the European Communities on 22 April 1987 constitute a legal provision in respect of which questions of interpretation must not be resolved by the ordinary national courts?

2. If so, must the exclusion which the declaration reveals be accepted as valid in law, so as to exclude from the scope of the declaration the social assistance unemployment allowances provided for by Spanish legislation?

3. If the above interpretation is not possible, must the declaration by the Spanish State be deemed, by way of penalty, to include that cover so that it must be added to those expressly listed despite the fact that it is not mentioned?

4. Should neither of the above interpretations be accepted, is the omission in the declaration by the Kingdom of Spain to be understood as intending not to exclude such unemployment protection definitively but to defer cover until a later date as yet undetermined?'

4. After the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco had referred the above questions to the Court, the Spanish Government paid out the bene-

2 — The declaration was published in OJ 1987 C 107, p. 1.

fits claimed. The Kingdom of Spain, moreover, issued a declaration pursuant to Articles 5 and 97 of Regulation No 1408/71 according to which the benefits in question do fall within the substantive scope of application of the regulation. [3]

5. In the circumstances INEM allowed the claims of Zabala and Others and asked the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco to withdraw the questions referred to the Court.

Meanwhile, in an order of 19 May 1994, the court which made the reference maintained its request for a preliminary ruling and at the same time refused to accept that the Spanish Government could bring the case to an end by acceding to the claims of Zabala and Others. According to the order of 19 May 1994, the reason for this is that under Spanish procedural law a case such as that pending in the main proceedings may not be settled by the parties before the appeal court. The Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco further stated that:

'the interest at issue, which cannot be disassociated from an examination of the question referred for a preliminary ruling, goes beyond the limits of the dispute between the parties and the specific facts of the situation giving rise to the main proceedings. The reference to the Court of Justice of the European Communities concerns points relating to the application of Article 3(1), Article 4(1) and (2) and Articles 5 and 97 of Regulation No 1408/71. It seeks a definition from the Court of the scope of those rules of secondary Community law and amplification or clarification of those provisions which will have binding force as an adjunct to them.'

Regulation No 1408/71

6. The question of which social benefits granted by the Member States are covered by Regulation No 1408/71 is governed by Article 4 thereof. Under Article 4(1), the regulation is to apply *inter alia*

'to all legislation concerning the following branches of social security:

...

(g) unemployment benefits

...'

3 — The amended declaration was published in OJ 1993 C 321, p. 2.

In Article 4(2), it is specified that the regulation is to apply to all general and special social security schemes, whether contributory or non-contributory. The regulation does not therefore cover social and medical assistance (Article 4(4)).

Under Article 5 the Member States are to specify the legislation and schemes referred to in Article 4(1) in declarations to be notified and published in accordance with Article 97.

Procedure before the Court

7. The Spanish Government has stated that the Kingdom of Spain's amended declaration on Regulation No 1408/71 in its view does not solely take effect for the future but reflects the fact that the Spanish Government now believes that Spanish unemployment benefits were always covered by Article 4(1)(g) of Regulation No 1408/71, regardless whether the benefits were linked to contributions or not.

In view of the above and the fact that the benefits have now been paid, the Spanish Government contended that the case was now devoid of purpose and that the Court of Justice should therefore refuse to answer the questions referred to it. The Court's reply to the questions must either be essential for the actual dispute or for future cases on unemployment benefits under Chapter I of Title II of Law No 31/1984, and the Court should therefore, in accordance with its case law in Case 104/79 *Foglia* v *Novello* [4] decline to give a ruling on the questions referred to it.

8. In the light of the position taken by the Spanish Government, the Commission did not wish to dissuade the Court from declining to reply to the questions referred to it, since it did not consider that a ruling on the questions was necessary for the solution of the present case or to give guidelines for future disputes. If the Court accepted jurisdiction to answer the questions, the Commission would argue that the benefits in question were covered by the scope of Regulation No 1408/71.

Procedural issues

9. Under the Court's settled and plentiful case-law, it is

4 — Judgments in Cases 104/79 *Foglia* v *Novello* [1980] ECR 745 and 244/80 *Foglia* v *Novello* [1981] ECR 3045.

'... *solely* for the national courts before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court' (emphasis added). [5]

In a similar context the Court decided that it would be otherwise only in cases where either it appeared that the procedure under Article 177 had been misused and had been resorted to, in fact, in order to elicit a ruling from the Court by means of a spurious dispute or it was obvious that the provisions of Community law submitted for the interpretation of the Court could not apply. [6]

10. A reference for a preliminary ruling is not, under the Court's case-law, lacking any connection with the facts of the main case simply because the dispute which gave rise to the questions referred does not, or does no longer, on the basis of the evidence before the Court exist. [7] No significance can therefore be attached *per se* to the fact that the Spanish Government has paid the benefits claimed as regards the question whether the Court of Justice has jurisdiction to answer the questions referred to it.

Nor can significance be attached to the fact that in future the Spanish Government will in similar cases construe Regulation No 1408/71 as covering the social benefits in question so that no similar cases should arise. The fact is that Article 177, which requires cooperation and a clear division of functions as between the national courts and the Court of Justice, does not allow the Court to criticize the grounds of an order for reference or the relevance of the questions submitted. [8]

11. It should, moreover, be mentioned that it is only on the assumption that the amended declaration is binding as far as the application of Regulation No 1408/71 is concerned and has retrospective effect that it may be presumed that similar cases will no longer arise. The question whether the declaration has such effects is a question of substance rather than procedure.

5 — See the judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, at paragraph 34, and similar judgments in Case C-368/89 *Crispoltoni* [1991] ECR I-3695, at paragraph 10, Case C-186/90 *Durighello* [1991] ECR I-5773, at paragraph 8, Case C-197/91 *FAC* [1993] ECR 2639, at paragraph 12, and Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, at paragraph 18.

6 — See the judgment in Case C-231/89 *Gmurzynska* [1990] ECR I-4003, at paragraph 23, the similar order in Case C-286/88 *Falciola* [1990] ECR I-191, paragraph 6, and judgments in Case 126/80 *Salonia* [1981] ECR 1563, at paragraph 6, and Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, at paragraph 26.

7 — See, for example, the judgments in Case 86/78 *Peureux* [1979] ECR 897, at paragraph 6, and Case C-3/90 *Bernini* [1992] ECR 1071, at paragraph 10.

8 — See the judgment in Case C-297/89 *Ryborg* [1991] ECR I-1943, at paragraph 9, and the similar judgments in Case 111/75 *Mazzalai* [1976] ECR 657, at paragraph 9, and Case C-83/91 *Meilicke* [1992] ECR I-4871, at paragraph 24.

12. I do not believe the present dispute to be spurious as was the case in *Foglia* v *Novello*. Here there is no question of the Court ruling on a procedural device arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute.

On the contrary, before the national court the Spanish Government sought to have the questions referred for preliminary ruling withdrawn, and before the Court it has sought to have the questions rejected.

13. Finally, it does not appear either from the letter from the court which made the reference, in which it maintains its request for a preliminary ruling on the questions referred, or from the observations made at the hearing that any of the three cases from which the reference arose are no longer pending. The questions referred for a preliminary ruling cannot therefore be rejected on the grounds that no account will be taken of a preliminary ruling. [9]

14. In the light of the foregoing I do not consider that the Court should refuse to answer the questions referred to it.

The legal authority of declarations by the Member States under Articles 5 and 97

15. With its first and second questions the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco is seeking clarification as to whether a Member State's declaration under Article 5 of Regulation No 1408/71 is determinant as far as the question whether the social benefits of the Member State in question fall within the substantive scope of the regulation is concerned.

16. The fact that in its declaration a Member State has referred to a specific law is regarded, under the Court's case-law, as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No 1408/71. [10]

17. The Court has not yet had the opportunity of deciding whether a Member State's declaration must also be regarded as proof that the benefits granted on the basis of a law mentioned in the declaration and which became payable before the declaration is

9 — In that connection see the judgments in Case C-159/90 *Grogan* [1991] ECR I-4685, at paragraph 12, Case 338/85 *Pardini* [1988] ECR 2041, at paragraph 11, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, at paragraph 18.

10 — See the judgment in Case 35/7 *Beerens* [1977] ECR 2249, at paragraph 9.

published are social security benefits within the meaning of Regulation No 1408/71.

In my view, there can, however, be little real doubt that that is the case. The legal authority of a Member State's declaration under Article 5 of the Regulation is precisely — as the Court emphasized with the word 'proof' — not dispositive in character but purely a statement of fact that sets out the current and past relationship between the benefits in question and Regulation No 1408/71.

18. It follows that the Kingdom of Spain's amended declaration as published in the C Series of the Official Journal of the European Communities on 27 November 1993 must be regarded as proof that the social security regulations mentioned in the amended declaration have, since their implementation, always fallen within the substantive scope of Regulation No 1408/71.

19. Accordingly it is in my view unnecessary to reach a decision on the question which is now of purely historical and hypothetical interest of whether the absence of any reference to the benefits in question in the Kingdom of Spain's declaration meant that those benefits did not fall within the substantive scope of Regulation No 1408/71. [11]

Conclusion

In view of the foregoing I would propose that the Court reply to the questions referred to it as follows:

— The Kingdom of Spain's declaration pursuant to Article 5 of Council Regulation (EEC) No 1408/71, as amended and published on 27 November 1993, must be

11 — If there had been no declaration, there would have been no difficulty in deciding that the benefits were covered by Article 4(1)(g). The benefits are granted in accordance with clear criteria laid down by law, the competent national authorities have no discretion regarding the individual applicants' personal needs and the benefits in question relate to one of the social situations expressly listed in Article 4(1).

regarded as proof that the benefits referred to in the amended declaration fall within the substantive scope of Regulation (EEC) No 1408/71, regardless whether a claim to the benefits arose before or after publication of the declaration in the Official Journal of the European Communities.