JUDGMENT OF THE COURT
OF 20 MARCH 1979 [1]

Giovanni Coccioli
v Bundesanstalt für Arbeit
(preliminary ruling requested by the Sozialgericht Hildesheim)

Case 139/78

1. *Social security for migrant workers — Unemployment — Benefits — Retention of entitlement to benefits during stay in another Member State — Period of three months — Extension — Request made after expiration of period — Extension permissible*
(Regulation No 1408/71 to the Council, Art. 69 (2))

2. *Social security for migrant workers — Unemployment — Benefits — Retention of entitlement to benefits during stay in another Member State — Period of three months — Extension — Discretion of national authorities*
(Regulation No 1408/71 of the Council, Art. 69 (2))

1. An extension of the period referred to in Article 69 (2) of Regulation No 1408/71 is permissible even when the request is made after the expiration of that period.

2. Article 69 (2) of Regulation No 1408/71 does not restrict the freedom of the competent services and institutions of the Member States to take into consideration, with a view to deciding upon any extension of the period laid down by that Regulation, all factors which they regard as relevant and which are inherent both in the individual situation of the workers concerned and in the exercise of effective control.

In Case 139/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht (Social Court) Hildesheim for a preliminary ruling in the action pending before that court between

GIOVANNI COCCIOLI

1 — Language of the Case: German.

and

BUNDESANSTALT FÜR ARBEIT (Federal Employment Bureau)

on the interpretation of Article 69 (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT

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

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted in pursuance of Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and Procedure

Under Article 69 (1) (c) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416), a worker who is wholly unemployed, who is entitled to benefits in one Member State and who goes to another Member State in order to seek employment there is to retain his entitlement to such benefits for a maximum period of three months from the date when he ceased to be available to the employment services of the State which he left. Article 69 (2) provides that:

"If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under 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."

Mr Coccioli, an Italian national residing in Göttingen in the Federal Republic of Germany, last qualified for unemployment benefit (Arbeitslosenhilfe) as from 13 December 1976. He was paid unemployment benefit by the Arbeitsamt (Employment Office) Göttingen from 13 December 1976 to 18 December 1976. On 15 December 1976, Mr Coccioli informed the Arbeitsamt of his intention to return to Italy. In consequence, on 17 December 1976 the Arbeitsamt drew up Certificate E 303 concerning retention of entitlement to unemployment benefits. That certificate stated that the applicant was entitled to benefits for a period of three months, that is to say from 19 December 1976 to 18 March 1977. At the same time the applicant received explanatory leaflet E 303/5, drawn up in Italian, in which attention is drawn *inter alia* to the fact that if the applicant seeks employment outside the Federal Republic of Germany for longer than three months, any rights which he may still have in connexion with German unemployment insurance are lost on the expiry of that period. According to the form, the Arbeitsamt which issued the E 303 certificate may authorize exceptions.

During the said month of December 1976, the applicant went back to Erchi in Italy in order to find employment. There was no likelihood of placement for him in that area either at the time when he went back or in the following weeks.

On 16 March 1977, he fell ill and was declared unfit for work from 16 March to 14 May 1977.

On 15 May 1977 he came back to the Federal Republic of Germany and on 16 May 1977 he applied to the Arbeitsamt Göttingen for unemployment benefit, alleging that he had been prevented by his illness from coming back to the Federal Republic within the prescribed period of three months. The Arbeitsamt refused the application, taking the view that an exceptional extension of the three-month period within the meaning of the second sentence of Article 69 (2) of Regulation No 1408/71 was not possible, because the search for work had ceased to justify the applicant's stay in Italy long before his incapacity for work arose, since there was no likelihood of placement in the area to which he had gone in search of work and since by extending his stay in Italy for other reasons the applicant had taken upon himself the risk of an unforeseeable event occurring which would prevent him from coming back to the Federal Republic in time.

The applicant objected unsuccessfully to the refusal of his application by the Arbeitsamt, and brought the matter before the Sozialgericht (Social Court) Hildesheim, which by an order of 8 June 1978 stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Is an extension of the time-limit under Article 69 (2) of Regulation (EEC) No 1408/71 permissible if the application for extension is made after expiry of the period?

2. If so:

   Are the competent employment services acting within the limits of their discretion in rejecting an exceptional case for extension of the period because

   (a) there was no likelihood of placement for the unemployed person in the other Member State to which he had gone seeking work and

   (b) return within the prescribed period was impossible as a result of sudden illness?"

The order making the reference was registered at the Court Registry on 14 June 1978.

Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by the Bundesanstalt für Arbeit (Federal Employment Bureau), the defendant in the main action, and by the Commission of the European Communities.

After 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 — Written observations submitted under Article 20 of the Protocol on the Statute of the Court

On Question 1, the *defendant in the main action* points out that according to general usage extension of a time-limit assumes that the time-limit has not yet expired. However, it is doubtful whether this was the real intention of the authors of Regulation No 1408/71 as regards the period laid down in Article 69 (1) (c). Experience has shown that almost all applications for extension of the time-limit are submitted to the defendant after expiry of the three-month period. This results partly from the fact that applicants underestimate the time required for postal delivery. Therefore for social reasons the defendant inclines towards the view that it is possible to extend the three-month period even after it has expired, provided that all the other conditions are fulfilled.

In the defendant's view, Question 2 is inadmissible, because it refers not to the interpretation of Article 69 (2) of the regulation but to the exercise of the administration's discretion under that provision in this particular case. The question whether the employment services abused their discretion by basing their decision on unlawful considerations can be decided only in the light of the facts of the case, taking account of all the circumstances. However, Article 177 of the EEC Treaty does not give the Court of Justice jurisdiction to assess the facts of the case pending in the main action in the light of a legal rule.

The *Commission* first of all raises the issue of the possible incompatibility of Article 69 (2) of Regulation No 1408/71 with Article 51 of the EEC Treaty. It argues that an unemployed person who returns to the competent Member State and fulfils all the requirements for continued entitlement to benefits under the legislation of that State is punished under Article 69 (2) for exceeding the time-limit by forfeiture of any further rights which may exist *exclusively under the legislation of the said State.*

The Commission points out that the Arbeitsförderungsgesetz (Law for the promotion of employment) also provides for sanctions. According to Article 120 of the Arbeitsförderungsgesetz, unemployment benefits are suspended for six working days when the unemployed person does not comply with a request by the Arbeitsamt to present himself. Exceeding the three-month period may be regarded as equivalent to failing to fulfil the obligation to present oneself. Therefore the only question remaining to be settled is whether the total forfeiture of further rights under Article 69 (2) is disproportionate and for that reason unfounded in internal law.

The Commission points out the nature of the problem raised by Article 69 (2) and continues its observations on the assumption that that provision is compatible with Article 51 of the Treaty.

As regards Question 1, the Commission notes that Article 69 (2) makes no provision as to whether extension of the time-limit must be applied for before or after the period has expired, from which it may be inferred that an application for extension may be made either before or after expiry of the period. However, an application is admissible only if it is made as quickly as may reasonably be expected in the particular circumstances of the case under consideration.

As to Question 2, the Commission points out that the second sentence of Article 69 (2) does not place any obligation on the employment services to extend the time-limit, even in exceptional cases. Extension is left to the duly-exercised discretion of the authorities.

The national court correctly asks not what the criteria are for the proper exercise of discretion in applying the second sentence of Article 69 (2), but whether the competent Arbeitsamt exceeded the limits of its discretion in the particular circumstances of the facts of the case in the main action.

The following considerations appear relevant for the purpose of defining those limits:

According to the second sentence of Article 69 (2), if a case is *exceptional*, this suffices for an extension of the time-limit to be granted. Any development which departs from the normal and usual course of events may be an "exceptional case". It must be required that the unemployed person concerned was not the cause of or responsible for the exceptional character of the case. Any illness sufficiently serious to make the unemployed person's return within the prescribed period appear impossible or undesirable from the medical point of view constitutes an "exceptional case" within the meaning of the aforementioned provision.

The question then arises whether the employment services may, without abusing their discretion, make the unemployed person concerned bear the risk of illness if there is no likelihood of placement for him in the place to which he has gone seeking work. The purpose of Article 69 (1) of the regulation is to ensure that benefits continue to be granted so that employment may be sought in another Member State. If in a

particular case there is no likelihood of placement for the unemployed person in the State to which he has gone seeking work, the continued granting of benefits fails to fulfil its objective. In accordance with the purpose of the provision, an unemployed person who has gone seeking work should be required to return forthwith to the competent Member State as soon as he has established that his efforts are in vain.

In conclusion, it is the Commission's view that the questions asked by the Sozialgericht Hildesheim could broadly be answered as follows:

1. An extension of the time-limit under the second sentence of Article 69 (2) of Regulation No 1408/71 is permissible even if the application for extension is made after expiry of the period. However, an application thus made is admissible only if it is made as quickly as may reasonably be expected in the particular circumstances of the case under consideration.

2. Even if the unemployed person seeking work suddenly falls ill, the employment services do not exceed the limits of their duly-exercised discretion in denying the existence of an exceptional case such as to justify extension of the period under the second sentence of Article 69 (2) because there was no likelihood of placement for the unemployed person in the place to which he had gone seeking work, provided that the unemployed person concerned was aware of that fact.

III — Oral Procedure

At the hearing on 30 January 1979 the defendant in the main action, represented by its director, M. Müller, and the Commission, represented by N. Koch, acting as Agent, presented oral argument.

At the hearing the defendant in the main action explained in particular the administrative practice followed by the German authorities in applying Article 69 of Regulation No 1408/71. It appeared from that explanation that the German authorities do not seek to ascertain in advance whether the quest for work abroad has any chances of success because, at the time of the lodging of Form E 303, it is impossible to state with certitude in every case whether the visit abroad is undertaken for the purpose of seeking work or whether, on the other hand, there is a risk of abuse. It is only when the worker comes back late — that is to say after the period of three months has elapsed — and when an application is made for an extension that inquiry is made to ascertain whether the visit to another Member State was in fact justified by the quest for employment. The circumspect attitude of the German authorities in regard to the grant of an extended period is explained in particular by the fact that applications for Form E 303 have shown a considerable increase and that they are always presented at the beginning of the summer holidays and before the Christmas festivities.

The Advocate General delivered his opinion at the hearing on 21 February 1979.

Decision

1 By order of 8 June 1978, lodged at the Court Registry on 14 June, the Sozialgericht Hildesheim referred to the Court, in pursuance of Article 177 of the EEC Treaty, two questions relating to the interpretation of Article 69 (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 These questions were raised in the context of proceedings between the applicant in the main action, an Italian national domiciled in the Federal Republic of Germany, and the Bundesanstalt für Arbeit (Federal Employment Bureau) in which the applicant seeks to establish his right to the continuance of unemployment benefits involving an exceptional extension of the three-month period laid down by Article 69 (2) of Regulation No 1408/71.

3 The first of the two questions put by the Sozialgericht is whether an extension of the period in pursuance of Article 69 (2) of Regulation No 1408/71 is permissible when the request for an extension was put forward only after the expiration of the period; the second question is whether, in the event of an affirmative reply to the first question, the competent employment services are acting within the limits of their discretion in refusing to agree that there is an exceptional case for extension of the period because:

"(a) there was no likelihood of placement for the unemployed person in the other Member State to which he had gone seeking work; and

(b) return within the prescribed period was impossible as a result of sudden illness".

First question

4 Article 69 (1) (c) of Regulation No 1408/71 permits a worker who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to unemployment benefits to go to one or more other

Member States in order to seek employment and to retain his entitlement to benefits during a maximum period of three months from the date when he ceased to be available to the employment services of the State which he has left.

In the words of paragraph (2) of that article

"If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under 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."

Hence, the second sentence of Article 69 (2) of Regulation No 1408/71 permits the competent employment services "in exceptional cases" to extend the period of three months to which continuance of benefits referred to in this provision is limited.

5 In this respect it must be observed that Article 69 (2) of Regulation No 1408/71 does not provide that a request for extension must necessarily be made before the expiration of the period.

In fact, amongst the "exceptional cases" capable of justifying an extension of the period some may be of such a nature that they prevent not only the return of the unemployed person to the competent State within the period prescribed, but equally the lodging of a request for extension, before the expiration of that period.

6 The answer to be given to the first question must therefore be that an extension of the period referred to in Article 69 (2) of Regulation No 1408/71 is permissible even when the request is made after the expiration of that period.

Second question

7 Article 69 of Regulation No 1408/71, in giving a worker the right to go to another Member State to seek employment, confers on a person who avails himself of that provision an advantage as compared with a person who remains in the competent State inasmuch as, by the effect of Article 69, he is

freed for a period of three months of the duty, which is the counterpart of the grant of unemployment benefits, to keep himself available to the employment services of the competent State and to be subject to the control procedure organized therein, even though he must register with the employment services of the Member State to which he goes.

8 It is for the authorities concerned to check whether the use made by the worker of the right conferred upon him by Article 69 of Regulation No 1408/71 was in conformity with the objective for which it was instituted.

Consequently it is for the competent services and institutions of the Member States to assess in each specific case the factual circumstances constituting an "exceptional case" as relied on in support of a request for extension of the period referred to in Article 69 (2) of Regulation No 1408/71.

9 The answer to be given to the second question should therefore be that that provision does not restrict the freedom of the competent services and institutions of the Member States to take into consideration, with a view to deciding upon any extension of the period laid down by the regulation, all factors which they regard as relevant and which are inherent both in the individual situation of the workers concerned and in the exercise of effective control.

Costs

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

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Sozialgericht Hildesheim by order of 8 June 1978,

hereby rules:

1. **An extension of the period referred to in Article 69 (2) of Regulation No 1408/71 is permissible even when the request is made after the expiration of that period.**

2. **That provision does not restrict the freedom of the competent services and institutions of the Member States to take into consideration, with a view to deciding upon any extension of the period laid down by the Regulation, all factors which they regard as relevant and which are inherent both in the individual situation of the workers concerned and in the exercise of effective control.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 20 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President