JUDGMENT OF THE COURT (Third Chamber)

11 September 2008 *

In Case C-228/07,

REFERENCE for a preliminary ruling under Article 234 EC, by the Verwaltungsgerichtshof (Austria), made by decision of 25 April 2007, received at the Court on 9 May 2007, in the proceedings

Jörn Petersen

v

Arbeitsmarktservice Niederösterreich,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2008,

after considering the observations submitted on behalf of:

— Mr Petersen, by U. Seamus Hiob, Rechtsanwalt,

— the Austrian Government, by E. Riedl and M. Winkler, acting as Agents,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Spanish Government, by J. Rodríguez Cárcamo, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

— the Commission of the European Communities, by V. Kreuschitz and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4(1) and 10(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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), and the interpretation of Article 39 EC.

2 The reference has been made in the course of proceedings between Mr Petersen and the Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich (Regional Office of the Lower Austria Employment Service, the 'Employment Service') regarding the latter's refusal to continue to pay him, following the transfer of his residence to Germany, the advance granted to unemployed persons who have applied for the grant of a benefit under the statutory pension and accident insurance scheme on the ground of reduced capacity to work or incapacity to work.

Legal context

Community rules

3 Article 4(1) of Regulation No 1408/71 provides as follows:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

…

(g) unemployment benefits;

…'

4 According to the first sub-paragraph of Article 10(1) of the regulation:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

5 Article 69(1) of the regulation provides as follows:

'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 with the employment services of the competent State as a person seeking work and must have remained available 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 the 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.'

6 Article 71 of the regulation governs the payment of benefits to unemployed persons who, during their last employment, resided in the territory of a Member State other than the competent State.

National legislation

7 Paragraph 7 of the Arbeitslosenversicherungsgesetz 1977 (Law on Unemployment Insurance; BGBl. No 609/1977, as it appears at BGBl. No 71/2003; 'the AlVG'), entitled 'Unemployment benefit — Conditions of entitlement', provides as follows:

'1. A person is entitled to unemployment benefit if:

1. he is available to be placed in work,

2. he has completed the eligibility period, and

3. he has not finished the benefit period.

2. A person is available to be placed in work if he can and is entitled to take up employment (subparagraph 3), and is capable of working (Paragraph 8), is willing to work (Paragraph 9) and is unemployed (Paragraph 12).

…

4. The requirement that a person must have the capacity to work shall not apply in respect of unemployed persons who have been granted measures for professional rehabilitation, where the person has achieved the purpose of those measures (Paragraph 300(1) and (3) of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security 'ASVG')) and completed the required eligibility period in accordance with that measure.

…'

8 According to Paragraph 16 of the AlVG, entitled 'Suspension of unemployment benefit':

'1. Entitlement to unemployment benefit is suspended where

…

(g) the person is abroad, to the extent that neither subparagraph 3 nor provisions based on international treaties are applicable

…

3. On application by the unemployed person, and following a hearing before the regional board, the suspension of unemployment benefit under subparagraph 1(g) above may be lifted in exceptional circumstances for up to three months while the entitlement to benefit otherwise exists (Paragraph 18). Exceptional circumstances are circumstances in the interest of terminating unemployment, in particular where the unemployed person goes abroad in order to seek employment or to introduce himself to an employer, or to undertake training, or circumstances based on compelling family reasons

…'

9 Paragraph 23 of the AlVG, entitled 'Advance pension payments', is worded as follows:

'1. Unemployed persons who have applied for

(1) a benefit on the ground of reduced capacity to work or incapacity to work or temporary benefits from the statutory pension and accident scheme, or

(2) a benefit on the ground of old-age from the pension scheme under the General Law on Social Security, the Gewerbliches Sozialversicherungsgesetz (Law on Industrial Social Security), or the Bauern-Sozialversicherungsgesetz (Law on Farmers' Social Security), or by way of exceptional retirement benefit under the Nachtschwerarbeitsgesetz (Law on Strenuous and Night Employment),

may be granted unemployment benefit or emergency benefit, by way of advance, until the decision on their application for these benefits.

2. An advance grant of unemployment benefit or emergency benefit may be made if

(1) apart from capacity to work, willingness to work and readiness to work, the requirements for a claim to these benefits are satisfied,

(2) on the basis of the existing circumstances it is likely that the social security benefits will be granted, and

(3) in the case of number 2 of subparagraph 1, there is an additional confirmation from the pension provider that it is anticipated that for reasons relating to the ground of the application it will not be possible to establish whether there is an obligation to pay the benefit within the two months following the relevant date for the pension.

3. Where an application is made for a payment under number 1 of subparagraph 1, a person shall also be regarded as unemployed if his existing contract of employment no longer entitles him to wages and his entitlement to sick pay has been exhausted.

4. The advance shall equal the unemployment benefit (or emergency benefit) payable subject to a maximum of one thirtieth of the average amount of the benefits, including child supplements, available under numbers 1 and 2 of subparagraph 1. Where the regional office of the Employment Service is made aware by a written notice from the social security provider that the anticipated benefit will be lower, the advance payment is to be reduced accordingly. Where number 2 of subparagraph 1 applies, the advance shall be granted retroactively with effect from the relevant date for the pension, provided that the applicant for a pension has applied within 14 days of the issue of confirmation under number 3 of subparagraph 2.

5. If a regional office has granted an advance under subparagraph 1 or unemployment benefit or emergency benefit, any entitlement of the unemployed person to a benefit under number 1 or 2 of subparagraph 1 for the same period shall be transferred to the Federal Republic, for the purpose of supporting employment policy, in the amount of the benefit paid by the regional office, except for sickness insurance contributions, when the regional office makes a claim to the social security provider for the entitlement to be transferred (assignment ipso jure). The assignment of the claim is limited to the amounts to be paid retroactively and shall be satisfied first.

6. Sickness insurance contributions paid out of the unemployment insurance fund (Paragraph 42(3)) for the period identified in subparagraph 5 shall be reimbursed by statutory sickness insurance funds through the Hauptverband der österreichischen Sozialversicherungsträger (Principal Association of Austrian Social Security Funds), at the percentage laid down by Paragraph 73(2) of the General Law on Social Security of amounts which are reimbursed by pension funds in accordance with subparagraph 5.

7. If a pension is not awarded under subparagraph 1, the advance shall be regarded as unemployment benefit or emergency benefit, as the case may be, for so long as and in the amount in which it is paid, so that in particular there shall be no general retroactive payment of any shortfall and the period of payment shall be shortened in accordance with Paragraph 18.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Mr Petersen is a German national who has worked as an employed person in Austria. On 14 April 2000 he applied to the Austrian Pension Benefits Authority for an incapacity pension under the statutory retirement pension scheme. That application having been rejected, he brought an action against that decision.

11 While those judicial proceedings were ongoing, the Employment Service granted Mr Petersen an advance in accordance with Paragraph 23 of the AlVG. Mr Petersen, who was still resident in Austria at that time and was considering moving back to Germany, applied to the Employment Service for the advance unemployment benefit to be continued after his change of residence.

12 On 28 October 2003, the Employment Office rejected that application. Mr Petersen appealed to the Verwaltungsgerichtshof against that decision.

13 In its decision, the national court points out that the exportability of the benefit at issue in the main proceedings depends on whether it is regarded as an 'unemployment benefit' or an 'invalidity benefit' under Article 4(1) of Regulation No 1408/71, since Article 10(1) thereof provides for exportability in the second case whereas Article 69 of the regulation limits exportability in the first case to a particular situation which is not relevant in the main proceedings.

14 In the national court's view, the benefit at issue in the main proceedings has elements of both of those benefits. On the one hand, it is paid from unemployment benefit funds and requires the applicant to be unemployed and to have completed the eligibility period for unemployment benefit. On the other hand, the benefit in question is part of the statutory retirement or accident insurance scheme and the applicant is

not required to be capable of working, willing to work and available for work. The latter two factors distinguish the main proceedings from the situation in *Acciardi* (Case C-66/92 [1993] ECR I-4567), in which the Court held that a benefit which was available to partially incapacitated unemployed persons and which took the place of unemployment benefit was to be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) of Regulation No 1408/71.

15 In the national court's view, if the benefit at issue in the main proceedings is to be regarded as an 'unemployment benefit' within the meaning of the abovementioned provision, the question arises as to whether the suspension of benefits where the person is abroad is compatible with Article 39 EC, given that, by contrast with the case provided for by Article 69 of Regulation No 1408/71, there is no supervision by the Employment Service as regards readiness to take up employment, whether in Austria or in another Member State.

16 In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a monetary unemployment benefit granted to unemployed persons who have applied for the grant of a benefit under the statutory pension and accident insurance scheme on the ground of reduced capacity to work or incapacity to work until a decision is made on their application which is an advance payment of such benefit and is to be subsequently set off against such benefit, and which, although subject to the conditions that the person is unemployed and has completed a minimum eligibility period, is not subject to the other requirements for the payment of unemployment benefit, namely capacity to work, willingness to work and readiness to work, and which is paid only if, having regard to the circumstances, it is likely that benefits will be granted under the statutory pension and accident insurance scheme, an 'unemployment benefit' within the meaning of Article 4(1)(g) [of Regulation No 1408/71], or an 'invalidity benefit' within the meaning of Article 4(1)(b) of that Regulation?

(2) If the answer to the first question is to the effect that the benefit referred to is an unemployment benefit within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71:

Does Article 39 EC preclude a national provision which provides that — apart from a discretion available on application by the unemployed person in cases of exceptional circumstances for up to three months — the claim to the benefit is suspended if the unemployed person lives abroad (in another Member State)?'

The questions referred to the Court

The first question

17 In its first question, the national court is seeking to determine the nature of a benefit such as the one at issue in the main proceedings. It asks, essentially, whether such a benefit is to be regarded as an 'invalidity benefit' within the meaning of Article 4(1)(b) of Regulation No 1408/71 or an 'unemployment benefit' within the meaning of Article 4(1)(g) thereof.

18 It must be pointed out that, pursuant to Article 4(1)(b) and (g) of Regulation No 1408/71, the latter applies to legislation concerning the branches of social security relating to invalidity benefits, including those intended for the maintenance or improvement of earning capacity, and to unemployment benefits.

19 According to settled case-law, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37, and Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 63).

20 In the present case, it is not disputed that that is the case in regard to the benefit at issue in the main proceedings since the grant of the benefit depends on objective criteria laid down in Paragraph 23 of the AlVG and the competent authorities do not have the power to assess the individual needs of the applicant; furthermore, the benefit is intended to cover, according to the particular case, the risk of invalidity or unemployment, which appear in Article 4(1)(b) and (g) of Regulation No 1408/71.

21 With regard to determining the precise nature of the benefit at issue in the main proceedings, it is clear from the Court's case-law that social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits (see, to that effect, Case 171/82 *Valentini* [1983] ECR 2157, paragraph 13, and Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 25).

22 The question whether a benefit such as the one at issue in the main proceedings is to be regarded as an 'invalidity benefit' or an 'unemployment benefit' within the meaning of Article 4(1)(b) or (g) of Regulation No 1408/71 must be considered in the light of those principles.

23 With regard, first, to the purpose and object of the benefit at issue in the main proceedings, it is clear from the provisions of Paragraph 23 of the AlVG, and in

particular, Paragraph 23(1) to (3), that, as the Advocate General points out, in substance, in points 58 and 59 of his Opinion, the purpose of the benefit in question is to provide an applicant for invalidity benefit who is unemployed or has no income, when the circumstances indicate that the pension should be granted, with the financial means to meet his needs until a definitive decision is adopted on his application and, consequently, during a period in which it is still uncertain whether the applicant can return to professional life.

24 As the German Government pointed out in its observations, the benefit at issue in the main proceedings thus seeks to permit the person applying for an invalidity pension to remain in the employment market during the period of uncertainty so as to avoid making a subsequent return more difficult if the application for an invalidity pension is rejected.

25 It is clear from the foregoing that, like all unemployment benefits, the benefit at issue in the main proceedings, which is also paid by the authorities competent in the matter of unemployment, is essentially to replace the remuneration lost by reason of unemployment and thereby provide for the maintenance of the unemployed person (Case C-102/91 *Knoch* v *Bundesanstalt für Arbeit* [1992] ECR I-4341, paragraphs 44 and 45; *Acciardi*, cited above, paragraphs 16 and 17; and Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 27). If the invalidity pension is refused, the benefit at issue is, in regard to the duration thereof and to the amount granted, regarded as unemployment benefit pursuant to Paragraph 23(7) of the AlVG.

26 It is true that the benefit at issue in the main proceedings is also linked to an application for an invalidity pension and, if the pension is subsequently granted, the authorities competent in regard to invalidity pensions are required to refund the amounts paid by way of the above benefit to the authorities competent in regard to unemployment.

27 However, it must be stated, as the Austrian Government pointed out, that although, for the purposes of granting the benefit at issue in the main proceedings, entitlement to such an invalidity pension must, pursuant to Paragraph 23(2)(2) of the AlVG, be

probable, the lack of paid employment must, on the other hand, be established, since unemployment is an essential condition for the grant of the benefit.

28 The consequence, in particular, is that if the recipient of the benefit at issue in the main proceedings obtains employment, he loses the right to the benefit. The Court has already decided that a benefit granted if the risk of loss of employment materialises and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment must be regarded as constituting an unemployment benefit (*De Cuyper*, cited above, paragraph 27).

29 In addition, with regard to the basis on which the benefit at issue in the main proceedings is calculated, it must be pointed out that the amount thereof is determined, pursuant to Paragraph 23(4) of the AlVG, in the same way as unemployment benefit. It is true that, under that provision, the amount of the benefit is limited to that of the invalidity pension applied for. However, as the German Government has indicated, that ceiling is intended solely to avoid the beneficiary having to refund amounts unduly paid if the invalidity pension is granted.

30 Finally, with regard to the conditions for the grant of the said benefit, it must be noted that, in addition to the fact that the provisions applicable to that benefit are laid down in the rules concerning unemployment benefit and that the benefit is paid by the authorities competent in regard to unemployment, the applicant for an invalidity pension must fulfil the conditions for entitlement to unemployment benefit in terms of length of affiliation; in addition, the period of entitlement to the benefit must not be exhausted.

31 It is common ground that, if the right to unemployment benefit is exhausted during the period in which the benefit at issue in the main proceedings is being paid, the right to the former benefit ceases at the same time, notwithstanding the fact that no definitive decision has been adopted concerning the application for an invalidity pension.

32 However, Mr Petersen and the Spanish Government point out that, by way of derogation from the requirements laid down in the national rules for entitlement to unemployment benefit, it is not required, for the purposes of obtaining the benefit at issue in the main proceedings, that the applicant show that he is capable of working, willing to work and available for work.

33 However, although it is true that those requirements could constitute an important characteristic of the conditions of eligibility for unemployment benefit (see, to that effect, Case 79/81 *Baccini* [1982] ECR 1063, paragraphs 15 and 16; *Acciardi*, cited above, paragraphs 16 and 17; Case C-25/95 *Otte* [1996] ECR I-3745, paragraph 36; and *De Cuyper*, cited above, paragraph 27), the fact of being dispensed from fulfilling those conditions in a particular case cannot, as such, affect the very nature of the benefit at issue in the main proceedings.

34 In the present case, such a dispensation is intended solely to adapt the conditions for the grant of that benefit to the situation of an applicant for an invalidity pension whose capacity and availability for work are, in fact, uncertain during the period in which a definitive decision is being adopted in regard to him (see, by analogy, *De Cuyper*, paragraphs 30 and 34).

35 Under those circumstances, it must be held that it is clear both from the purpose and object of the benefit at issue in the main proceedings and from the basis on which it is calculated that, notwithstanding the fact that it is linked to an application for an invalidity pension, such a benefit is directly related to the risk of unemployment referred to in Article 4(1)(g) of Regulation No 1408/71.

36 Consequently, the answer to the first question must be that a benefit such as the one at issue in the main proceedings must be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) of Regulation No 1408/71.

The second question

37 In its second question, the national court is asking, essentially, whether Article 39 EC is to be interpreted as preventing a Member State from making the grant of a benefit such as the one at issue in the main proceedings, which must be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) of Regulation No 1408/71, subject to the condition that the recipients must be resident on the national territory of that State, prohibiting the exportability of such a benefit to another Member State.

38 First of all, it must be noted that although Article 10(1) of Regulation No 1408/71 — which provides, '[s]ave as otherwise provided in this Regulation', for the waiver of residence clauses in regard to the benefits enumerated therein — expressly mentions invalidity benefits, which are therefore, in principle, exportable to another Member State (Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 40), it does not mention unemployment benefits. That provision therefore does not preclude the legislation of a Member State from making entitlement to such a benefit conditional on residence in the territory of that State (see, to that effect, *De Cuyper*, cited above, paragraph 37).

39 In that regard, Regulation No 1408/71 provides, however, for two situations in which the competent Member State is required to allow recipients of an unemployment allowance to reside in the territory of another Member State while retaining their entitlement to benefit. Firstly, there is the situation provided for in Article 69 of the regulation, allowing unemployed persons who go to a Member State other than the competent State 'in order to seek employment there' to retain their entitlement to unemployment benefit. Secondly, there is the situation referred to in Article 71 of that regulation, relating to unemployed persons who, during their last employment, were residing in the territory of a Member State other than the competent State (*De Cuyper*, cited above, paragraph 38).

40 However, it clearly follows from the order for reference that a situation such as that of Mr Petersen is not covered by either of those articles and, consequently, that

Regulation No 1408/71 does not contain any provisions governing cases such as the one which is the subject of the main proceedings.

41 It must be pointed out, however, that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes (Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23, and Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27).

42 Whilst, in the absence of harmonisation at Community level, Member States retain the power to organise their social security schemes, they must none the less, when exercising that power, comply with Community law and, in particular, the provisions of the EC Treaty on freedom of movement for workers (see, to that effect, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33, and Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39).

43 According to settled case-law, the aims of Articles 39 EC to 42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see, to that effect, Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22; Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 20; and *Hosse*, cited above, paragraph 24).

44 It follows that, contrary to the view of the Austrian and German Governments, it must be considered whether the rules applicable to a benefit such as the one at issue in the main proceedings are compatible with Article 39 EC.

45 It must be borne in mind in that regard that, according to settled case-law, the concept of 'worker' within the meaning of Article 39 EC of the Treaty has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15; and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 12).

46 In the present case, it is clear from the order for reference that, before the facts which gave rise to the dispute in the main proceedings, Mr Petersen worked as an employed person in a Member State and was consequently a 'worker' within the meaning of Article 39 EC. A national of a Member State who, like Mr Petersen, leaves his Member State of origin to work as an employed person in another Member State must be regarded as exercising the right of freedom of movement for workers provided for in Article 39 EC.

47 That conclusion is not called into question by the fact that, at the time of the later transfer of his residence to his State of origin after the competent authorities had granted him the benefit at issue in the main proceedings, Mr Petersen was unemployed and had applied for an invalidity pension.

48 According to settled case-law, migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship (see, to that effect, Case 39/86 *Lair* [1988] ECR 3161, paragraph 36; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32; Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 41; Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 34; and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 27).

49 That is the case in regard to benefits the payment of which is dependent on the prior existence of an employment relationship which has come to an end and is intrinsically linked to the recipients' objective status as workers (*Meints*, cited above, paragraph 41, and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 57).

50 In a situation like the one in the main proceedings, where the benefit at issue was intended to provide income for an unemployed applicant for an invalidity pension who had worked as an employed person in the Member State concerned, it must be stated that since, as the Advocate General points out in point 72 of his Opinion, such a benefit is linked to the risks of both unemployment and invalidity, it flows directly from an 'employment relationship' within the meaning of Article 39 EC.

51 It follows that a national of a Member State in a situation such as that of Mr Petersen must be regarded as continuing to be a 'worker' within the meaning of Article 39 EC for the purposes of obtaining the benefit at issue and, consequently, such a national comes within the scope of that article.

52 It must therefore be considered whether a residence requirement such as that imposed for the grant of the benefit at issue in the main proceedings constitutes an 'obstacle to the freedom of movement for workers' within the meaning of Article 39 EC.

53 According to settled case-law, the equal treatment rule which appears in Article 39(2) EC prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, in particular, *Meints*, cited above, paragraph 44; Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 29; and Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 18).

54 Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*Meints*, cited above, paragraph 44; *Hartmann*, cited above, paragraph 30; and *Geven*, cited above, paragraph 19).

55 That is true of a residence condition such as the one to which the grant of the benefit at issue in the main proceedings is subject, which can be more easily met by national workers than by those from other Member States, since the latter workers above all, particularly in the case of unemployment or invalidity, tend to leave the country in which they were formerly employed to return to their countries of origin (see, to that effect, *Paraschi*, cited above, paragraph 24, and Case C-290/00 *Duchon* [2002] ECR I-3567, paragraph 38).

56 The Austrian Government has not sought to explain the objective which is to be achieved by the residence requirement imposed by the national rules for the grant of the benefit at issue in the main proceedings and, consequently, has not put forward any factor whatsoever to justify that condition in relation to the overriding reasons in the general interest protected by Article 39 EC.

57 In order to provide the national court with a complete answer, it should be pointed out, however, that although it is possible that the risk of seriously undermining the financial balance of a social security system may, in particular, constitute an overriding reason in the general interest (see, in particular, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 43), the existence of such a risk would be difficult to establish since, as the Advocate General points out in point 81 of his Opinion, by granting the benefit at issue in the main proceedings to applicants for an invalidity pension who, at the time that they submit their application, reside in the national territory, the competent authorities have in fact demonstrated their capacity to bear the economic burden of that benefit until such time as a definitive decision has been adopted in regard to it.

58 In addition, it must be pointed out that the residence requirement at issue in the main proceedings seems disproportionate since it is imposed in respect of a social security benefit which, like the benefit at issue in the main proceedings, is intended to be paid to applicants for an invalidity pension for a limited period which, according to the Austrian Government, does not exceed, on average, three to four months during which, while waiting for a definitive decision on the grant of such a pension, they are not required to be capable of working, willing to work and available for work (see, to that effect, *Collins*, cited above, paragraphs 68 and 69).

59 If, at the end of that waiting period, the invalidity pension is granted, the competent authorities in the Member State concerned, who must deduct from it the amounts paid by way of the benefit at issue in the main proceedings, will, in any event be required by Article 10(1) of Regulation No 1408/71 to pay the pension in question, even if the recipient transfers his residence to another Member State.

60 If, on the other hand, at the end of the said period, the invalidity pension is refused, in which case the benefit at issue must be changed, in regard both to its amount and to its duration, to the entitlement to unemployment benefit, the competent authorities of that Member State are no longer required to pay the latter benefit to the recipient unless he can show that that he fulfils the conditions laid down in Article 69 of Regulation No 1408/71 for the retention of the right to benefits as a worker seeking employment in another Member State, which implies that he must fulfil all the conditions laid down in the national law of the Member State of origin for entitlement to unemployment benefit.

61 In addition, the residence requirement at issue in the main proceedings also seems disproportionate since it is clear from the order for reference that, during the waiting period while a decision is being made on the application for an invalidity pension, applicants for the benefit at issue in the main proceedings, like the unemployed persons seeking work in another Member State to whom Article 69 of Regulation No 1408/71 applies, (Case 139/78 *Coccioli* [1979] ECR 991, paragraph 7), are not subject to any particular checks by the employment service of the Member State concerned, since they are dispensed from the obligations concerning capacity to work, willingness to work and availability for work.

62 In any event, even if such checks were provided for, it would still have to be ascertained whether it was not sufficient to request that the recipient go to the Member State concerned for the purpose of undergoing such checks, if necessary, on pain of suspension of payment of the benefit in the event of unwarranted refusal on the part of the recipient (see, to that effect, Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 45).

63 It follows from the foregoing that, with regard to the grant of a benefit such as the one at issue in the main proceedings and inasmuch as the file submitted to the Court does not contain any factor which might objectively justify a residence requirement, that requirement must be regarded as incompatible with Article 39 EC.

64 Consequently, the answer to the second question must be that, inasmuch as no factor has been put forward which shows that such a condition is objectively justified and proportionate, Article 39 EC must be interpreted as preventing a Member State from making the grant of a benefit such as the one at issue in the main proceedings, which must be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) of Regulation No 1408/71, subject to the condition that the recipients be resident in the national territory of that State.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **A benefit such as the one at issue in the main proceedings must be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) 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 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996;**

2. **Inasmuch as no factor has been put forward which shows that such a condition is objectively justified and proportionate, Article 39 EC must be interpreted as preventing a Member State from making the grant of a benefit such as the one at issue in the main proceedings, which must be regarded as an 'unemployment benefit' within the meaning of Article 4(1)(g) of Regulation No 1408/71, subject to the condition that the recipients be resident in the national territory of that State.**

[Signatures]