JUDGMENT OF THE COURT (Sixth Chamber)
1 February 1996 *

In Case C-308/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour du Travail, Liège, Belgium, for a preliminary ruling in the proceedings pending before that court between

Office National de l'Emploi

and

Heidemarie Naruschawicus

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

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, F. A. Schockweiler, P. J. G. Kapteyn, J. L. Murray and H. Ragnemalm, Judges,

* Language of the case: French.

Advocate General: A. La Pergola,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Naruschawicus, by Christine Theysgens and Benoît Lespire, of the Liège Bar,

— the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 October 1995,

gives the following

Judgment

1 By order of 15 November 1994, received at the Court Registry on 22 November 1994, the Cour du Travail (Labour Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 13(2)(a) and (d) and Article 71(1)(b)(i) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71').

2 Those questions were raised in proceedings between the Office National de l'Emploi (National Employment Office, hereinafter 'ONEM'), appellant, and Heidemarie Naruschawicus, respondent, concerning the decision by which the Regional Inspector refused Ms Naruschawicus unemployment benefit.

3 Ms Naruschawicus, a Belgian national, worked full time for the Belgian armed forces in Germany from 1 June 1981 to 20 April 1991. During that period she lived in Germany but, because she was a civil servant, retained her legal residence in Blégny, Belgium. As from 1 July 1991, she was re-engaged by the Belgian armed forces in Germany as a part-time worker.

4 Although continuing to live in Germany, Ms Naruschawicus claimed unemployment benefit as from 22 April 1991 from the Liège Regional Unemployment Office, the competent office by reason of her legal residence. She underwent checks by that office as to her status as an unemployed person, for which she periodically travelled to Liège from Arnsberg (Germany), where she lived.

5 Ms Naruschawicus was awarded benefits as from 22 April 1991 and received them until 30 June 1991. However, by decision of 21 November 1991, the Regional Inspector refused her the benefits retroactively, from 22 April 1991, and required reimbursement of the benefits paid in the meantime, on the ground that, as she did not actually live in Belgium, she had ceased to be available on the general employment market.

6 Ms Naruschawicus brought proceedings against that decision before the Tribunal de Travail (Labour Tribunal), Liège. By judgment of 25 February 1993, that court held that Ms Naruschawicus was entitled to unemployment benefit from the ONEM.

7 The ONEM appealed against that judgment to the Cour du Travail, Liège, which entertained doubts as to the interpretation of Article 13(2)(a) and (d) and Article 71(1)(b)(i) of Regulation No 1408/71.

8 Article 13(2) provides:

'Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...

(d) civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject'.

9 Article 71(1)(b) of Regulation No 1408/71 affords an unemployed person other than a frontier worker who, when last employed, lived in a Member State other than the competent Member State, the possibility of receiving unemployment

benefit under the legislation of either the competent Member State (subparagraph (i)) or the Member State of residence (subparagraph (ii)).

10 In particular, Article 71(1)(b)(i) provides:

'an employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution'.

11 In its judgment, the Cour du Travail, Liège, observes first that, whilst the respondent was employed, the Belgian State (Ministry of Defence), as employer, paid social security contributions to the ONEM, so that the competent State is, pursuant to Regulation No 1408/71, the Kingdom of Belgium.

12 It notes however that a particular feature of this case is that, whilst employed, the respondent was a civil servant working for the Ministry of Defence whereas, when her contract was terminated, that Ministry adopted the legal fiction of deeming her to have worked as an ordinary employee; she was therefore issued with the 'Form B' certificate provided for by Belgian legislation. The purpose of that retroactive classification was to grant her entitlement to unemployment benefit and sickness and invalidity-insurance cover. If the respondent was deemed to be an ordinary employee from the inception of her employment, the applicable legislation was German legislation by virtue of Article 13(2)(a) of Regulation No 1408/71,

whereas if she was deemed to be a civil servant or a person treated as such the applicable legislation was Belgian legislation by virtue of Article 13(2)(d) of Regulation No 1408/71.

13 The Cour du Travail, Liège, also considers that, assuming Belgian legislation to be applicable, it will still be necessary to clarify the meaning of availability for the purposes of Article 71(1)(b)(i) of Regulation No 1408/71 and, in particular, whether registration with the competent employment services is sufficient or whether there is an irrebutable presumption that actual residence outside national territory entails unavailability.

14 The national court therefore decided to stay the proceedings pending a ruling from the Court of Justice on the following questions:

'(1) Where a worker is a civil servant in the employ of a Member State, in this case Belgium (the Ministry of Defence), but works in another Member State, in this case Germany, in whose territory he actually resides and at the time of the termination of the contract of employment he is retrospectively considered as having worked as an employed person, does the applicable legislation for the purposes of entitlement to unemployment benefit and cover by the legislation on sickness and invalidity insurance fall to be determined by Article 13(2)(a) or by 13(2)(b) of Regulation No 1408/71?

(2) Is Article 71(1)(b)(i) of the regulation to be interpreted as meaning that a worker, other than a frontier worker, who is wholly unemployed may receive unemployment benefits payable by the competent State without regard to the requirement of residence provided that he registers as a person seeking work with the employment services of the competent institution even where, by virtue of distance, he is less available to respond to offers of employment

proposed by the said services and cannot be the subject of a check by the competent services of that institution to verify whether he fulfils the requirements for the grant of benefits?

(3) May a Belgian worker who has been resident for more than ten years in Germany where he was employed by the Belgian State, the employer for whom he is to resume work after some months of being wholly unemployed, be assimilated to a worker of the category governed by Article 71(1)(b) in view of the special personal and business links formed with the competent State?'

15 Before those question are considered, it should be noted that Article 4(4) of Regulation No 1408/71 excludes from the matters covered by it special schemes for civil servants and persons treated as such. It is apparent, however, from the documents forwarded by the national court that the latter is of the opinion that Ms Naruschawicus, as a civil servant of the Belgian State, was subject not to a special unemployment insurance scheme for civil servants but to the scheme which, under Belgian law, applies generally to employed persons.

The first question

16 By this question, the national court asks whether the legislation applicable to a civil servant in the employ of one Member State and working in the territory of another Member State who, on termination of his employment contract, is, by way of legal fiction, deemed by the first Member State to have worked as an ordinary employee and not as a civil servant, the purpose of that legal fiction being to give him the right to unemployment benefit and cover by the sickness and invalidity-insurance legislation, must be determined on the basis of Article 13(2)(a) or Article 13(2)(d) of Regulation No 1408/71.

17 It appears from the documents in the case that Ms Naruschawicus was a civil servant until the termination of her employment contract. Therefore, until that date, the legislation applicable to Ms Naruschawicus was that referred to by Article 13(2)(d) of Regulation No 1408/71. That legislation was, therefore, the one to which the administration which employed Ms Naruschawicus was subject, namely Belgian legislation.

18 That finding and the conclusions to be drawn from it under Article 13(2)(d) of Regulation No 1408/71 cannot be altered by the fact that, upon termination of her contract of employment, she was retroactively and fictitiously classed by the State which employed her as having worked as an ordinary employee in order to give her the right to unemployment benefit and to sickness and invalidity-insurance cover.

19 The answer to the first question must therefore be that Regulation No 1408/71 must be interpreted as meaning that the legislation applicable to a civil servant in the employ of one Member State working in the territory of another Member State who, upon termination of his employment contract, is retroactively deemed by the first Member State, by way of legal fiction intended to give him the right to unemployment benefit and cover by the sickness and invalidity-insurance legislation, to have worked as an ordinary employee and not as a civil servant, must be determined on the basis of Article 13(2)(d) of that regulation.

The second question

20 By its second question the national court seeks to determine whether Article 71(1)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person other than a frontier worker who, having been employed, is wholly unemployed, and who resides in the territory of a Member State other than the competent Member State, may obtain unemployment benefit from the competent State when he registers with the employment services of that State as a person seeking

employment, even though, by virtue of distance, he is less available to respond to offers of employment made by those services and cannot be the subject of checks by the competent services of that State to verify whether he fulfils the requirements for the grant of benefits.

21 It must be observed, first, that the fact that civil servants are mentioned as a separate category by Article 13(2)(d) of Regulation No 1408/71 with a view to determining the legislation applicable to them does not deprive them of their status as employed persons — a wider concept — as far as the application of the remaining provisions of that regulation is concerned (see to that effect Case C-71/93 *Van Poucke* v *Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen* [1994] ECR I-1101, paragraphs 17 and 18).

22 Consequently, Article 71(1)(b)(i) of Regulation No 1408/71 is applicable to civil servants in the same way as to any other employee.

23 According to that provision, 'an employed person, other than a frontier worker, who is ... wholly unemployed and who remains available to ... the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were resident in its territory...'.

24 However, that provision does not specify the circumstances in which the condition of availability is satisfied.

25 Nevertheless, it must be observed immediately that the fact that the person concerned resides in the territory of a Member State other than the competent State does not preclude the application of that provision — on the contrary, it is a precondition for its application.

16 Consequently, the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change his residence.

17 In the light of those considerations, it must be held that a person remains available to the employment services in the territory of the competent State if he registers with those services as a person seeking employment (see to that effect Case 227/81 *Aubin* v *UNEDIC and ASSEDIC* [1982] ECR 1991, paragraph 20) and undergoes the checks by the competent services of that State.

28 In view of the foregoing, the answer to the second question must be that Article 71(1)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person other than a frontier worker who, having been employed, is wholly unemployed, and who resides in the territory of a Member State other than the competent Member State, may obtain unemployment benefit from the competent State if he registers with the employment services of that State as a person seeking employment and undergoes the checks of those services.

The third question

29 This question was asked in case an employed person such as Ms Naruschawicus is excluded in principle from the scope of Article 71(1)(b)(i) of Regulation No 1408/71. However, by virtue of the answers given to the first and second questions, it is clear that a person in the circumstances of the respondent in the main proceedings is covered by that provision.

30 It is therefore unnecessary to answer the third question.

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Cour du Travail, Liège by judgment of 15 November 1994, hereby rules:

1. **Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 must be interpreted as meaning that the legislation applicable to a civil servant in the employ of one Member State working in the territory of another Member State who, upon termination of his employment contract, is retroactively deemed by the first Member State, by way of legal fiction intended to give him the right to unemployment benefit and cover by the sickness and invalidity-insurance legislation, to have worked as an ordinary employee and not as a civil servant, must be determined on the basis of Article 13(2)(d) of that regulation.**

2. **Article 71(1)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person other than a frontier worker who, having been employed, is**

wholly unemployed, and who resides in the territory of a Member State other than the competent Member State, may obtain unemployment benefit from the competent State if he registers with the employment services of that State as a person seeking employment and undergoes the checks of those services.

Kakouris Schockweiler Kapteyn

Murray Ragnemalm

Delivered in open court in Luxembourg on 1 February 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber