OPINION OF ADVOCATE GENERAL LENZ

delivered on 25 April 1996 *

A — Introduction

1. The question referred for a preliminary ruling by the Belgian Cour de Cassation (Court of Cassation) concerns the interpretation of Article 69(4) of Regulation (EEC) No 1408/71 [1] (hereinafter 'the Regulation') which contains a special rule for Belgium.

2. Under Article 69(1) of the Regulation an unemployed person staying in another Member State to seek work retains in principle his entitlement to unemployment benefits for three months. Pursuant to the second sentence of Article 69(2) that period can be extended in exceptional cases. If the unemployed person returns to the competent State before expiry of that period, he continues to be entitled to benefits in accordance with Article 69(2). If, on the other hand, he returns after that period has expired, Article 69(2) provides that he loses his entitlement. Article 69(4) contains a special rule for Belgium, applicable if he returns *after* the period has expired, under which he is not to requalify for benefits until he has been employed in that State for at least three months.

3. The question for decision in this case is whether, where an unemployed person satisfies all the conditions under domestic law for acquisition of entitlement to unemployment benefits, he must additionally satisfy the requirement of three months' previous employment within the meaning of Article 69(4).

4. The plaintiff and respondent on a point of law in the main proceedings was in receipt of unemployment benefit in Belgium when, on 14 July 1985, he returned to his native country, Italy, to seek employment, relying on Article 69(1) of the Regulation to retain his entitlement to unemployment benefits. However, he returned to Belgium not by 13 October 1985, as he should have, but in the middle of December 1985, having failed

* Original language: German.

1 — Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version contained in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

to find work. On 3 January 1986 he took up new employment in the construction industry. Because of adverse weather conditions he became unemployed again on 20 January 1986 and applied for unemployment benefit, which the Office National de l'Emploi (National Employment Office) refused on the basis of Article 69(4) of the Regulation. Mr Calogero took legal action against that decision and was successful in the Cour du Travail (Higher Labour Court), Liège. While he could not, according to the judgment, rely on Article 123 [2] of the Royal Decree of 1963 (hereinafter 'the Royal Decree') to retain his status as an entitled person, he was entitled to benefits as he satisfied all the qualifying conditions for acquiring benefits within the meaning of Article 118 of the Royal Decree, that is to say at least 450 days of work or days to be treated as such in a reference period of 27 months.

5. The Office National de l'Emploi appealed against that judgment to the Cour de Cassation, contending that an unemployed person who, relying on Article 69 of the Regulation, goes to another Member State to seek work but exceeds the time-limit laid down by that provision must *in every case* be employed for at least three months before he can enjoy Belgian unemployment benefits again.

2 — I return later to the content of Article 123, see point 11.

6. The Cour de Cassation has referred the following question to the Court of Justice for a preliminary ruling:

Must Article 69(4) 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, in the version contained in Regulation (EEC) No 2001/83 of 2 June 1983, be interpreted as meaning that the requirement that an unemployed person must have been employed for at least three months after returning to Belgium is applicable where the unemployed person does not rely on Article 123 of the Royal Decree of 20 December 1963 to claim that he has preserved his entitlement to unemployment benefits but where he demonstrates that, on the date of his application, he satisfied the conditions setting qualifying periods for acquisition of entitlement to those benefits?

7. The Office National de l'Emploi, as applicant on a point of law in the main proceedings, the Belgian and French Governments and the Commission have taken part in the proceedings before the Court of Justice. I will return to their observations in my assessment of the law.

B — Opinion

8. One judgment interpreting Article 69(4) of the Regulation has previously been given on a preliminary reference, [3] but the question before the Court was different from that in this case. Essentially, the issue there was whether an unemployed person requalified for benefits simply by being employed for three months within the meaning of Article 69(4), irrespective of any further requirements under national law. The judgment in *Di Conti* therefore does not form a precedent for this case.

9. Article 69(4), which applies only to Belgium, cannot be divorced entirely from the provisions of Belgian law. The Court of Justice held in *Di Conti* that Article 69(4) could not be interpreted without regard to the particular features of the Belgian legislation.

10. In my opinion, those features are of considerable importance in this case as well. Article 118 of the Royal Decree [4] defines the conditions for acquisition of entitlement to unemployment benefits. It lays down for different age groups specific minimum periods of employment, or periods to be treated as such, within specific reference periods. According to the documents before the Court, the plaintiff needed to have completed 450 days of work or days to be treated as such within a 27 month period.

11. Article 123 of the Royal Decree, [5] on the other hand, governs conditions for recovering entitlement to (that is to say requalifying for) benefits after a break in their grant for specific periods. A worker who has become unemployed retains in principle [6] his status as a person entitled to benefits if their grant has been interrupted for not more than three years.

12. Acquisition, retention and recovery of entitlement to benefits must therefore be distinguished. Those terms are incidentally also dealt with in Article 67 of the Regulation.

13. The real question is whether applicants for unemployment benefits must satisfy the

3 — Case C-163/89 *Di Conti* [1990] ECR I-1829.

4 — Now Article 30 in the new version of the Royal Decree of 25 November 1991.

5 — Now Article 42 in the new version of the Royal Decree of 25 November 1991.

6 — Subparagraph 1 of Article 123(1).

requirement of three months' employment under Article 69(4) of the Regulation in every case, whatever the basis of their claim, if they have taken advantage of Article 69(1) of the Regulation and exceeded the time-limit laid down therein.

14. The *Office National de l'Emploi* proceeds on the basis that Article 69(4) of the Regulation constitutes an optional special rule, to be applied only at the request of claimants, who thereby waive application of the general rules of the competent State. It contends that three months' prior employment is required whenever Article 69(1) is relied on, as otherwise Article 69(4) would be devoid of purpose. Article 123 of the Royal Decree, which relates to retaining the status of an entitled person, cannot be viewed in isolation from the acquisition of that status under Article 118. In any event, Articles 118 and 123 will often give the same result. In this case the plaintiff's entitlement could have been based on either Article 118 or Article 123. It is artificial to distinguish between acquisition and retention of entitlement when applying Article 69(4) of the Regulation, as in that context a worker has *always* previously received unemployment benefit. 'Requalification for benefits' is a general concept which one can therefore assume, in view of the earlier entitlement, will always be satisfied under Article 69(4).

15. The *Belgian Government* relies in its observations on the case-law of the Court of Justice. In *Testa* v *Bundesanstalt für Arbeit*, [7] the Court of Justice held that Article 69 of the Regulation contained an independent body of rules which derogated from the domestic rules of the Member States and had to be interpreted uniformly in all the Member States. Loss of entitlement to benefits under Article 69(2) of the Regulation on exceeding the three-month time-limit was accordingly not determined by referring back to national law, but arose independently.

16. The Belgian Government maintains that Article 69(4) is therefore a special provision relating to unemployed persons requalifying for benefits on returning to Belgium. In the light of the judgment in *Testa*, Article 69 can only be interpreted as meaning that, in relying upon that provision and consequently waiving application of general national rules, an unemployed person who exceeds the three-month time-limit cannot invoke Article 123 of the Royal Decree. He can be granted benefits only if, on the date that he reapplies, he has been employed for three months and has satisfied all the conditions for acquiring entitlement to unemployment benefits under Article 118 of the Royal Decree.

7 — Joined Cases 41/79, 121/79 and 796/79 *Testa* v *Bundesanstalt für Arbeit* [1980] ECR 1979.

17. In *Di Conti*, [8] it observes, the Court of Justice did not follow that interpretation, however, holding that an unemployed person requalified for benefits if he had retained his status as a person entitled thereto under Article 123 and had been employed for a minimum of three months.

18. There is thus a risk that Article 69 of the Regulation will not be uniformly applied in all the Member States, as all the other Member States need not apply their national rules on requalifying for benefits and retention of entitlement thereto, whereas in Belgium the national rules are to be applied, pursuant to Article 69(4) of the Regulation, subject only to the requirement of three months' employment. An unemployed person in Belgium can therefore almost always acquire a new entitlement to benefits on the basis of periods of employment completed before going abroad, subject only to compliance with Article 69(4) of the Regulation, while unemployed persons in other Member States cannot invoke a residuary entitlement to unemployment benefits but can at most claim social benefits.

19. In this case, the Belgian Government continues, the plaintiff bases his claim on the general requirements for acquiring entitlement to benefits under Article 118 of the Royal Decree. The Court of Justice appears in fact to have meant in *Di Conti* that Article 69(4) of the Regulation applied only to requalifying for benefits or retaining entitlement thereto and not to acquiring such entitlement. However, to grant him entitlement to benefits on the basis of Article 118 of the Royal Decree would conflict with *Di Conti* because he would not have had to be employed for a three-month period within the meaning of Article 69(4) of the Regulation. In so far as Article 69(4) of the Regulation constitutes a special rule, if an unemployed person wrongfully exceeds the three-month time-limit under Article 69(1) he must be employed for three months before becoming entitled to unemployment benefits again.

20. The *French Government* relies on the judgment in *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [9] to question the legality of the special rule applicable to Belgium. In its view, the Office National de l'Emploi is taking refuge behind Community law so as not to apply the more favourable rule of national law. Article 69(4) of the Regulation is a special rule which, like exempting provisions generally, must be interpreted restrictively. Accepting the interpretation advanced by the Office National de l'Emploi would result in Community law erecting additional obstacles to free movement of workers which would be contrary to the purposes of Article 69 of the Regulation and to those pursued through Community

8 — Cited above in footnote 3.

9 — Case 41/84 [1986] ECR 1.

law. The French Government here refers to the judgments in *Petroni* v *ONPTS*, [10] *Baccini* v *ONEM* [11] and *ONPTS* v *Romano* [12] to show that Community law cannot deprive workers of advantages conferred on them solely under a Member State's own legal system. Finally, the French Government points out that in some Member States, partly for legal reasons, [13] and partly on the basis of consistent practice, [14] Article 69(2) of the Regulation is regularly not applied.

21. The *Commission* seeks to achieve a coherent interpretation of the Regulation and the case-law on it. It relies on *Di Conti* to contend that Article 69(4) of the Regulation applies exclusively to cases of requalifying for benefits. The submission of the Office National de l'Emploi that a three-month employment period in accordance with Article 69(4) of the Regulation is a further requirement for acquiring entitlement to benefits, which it had advanced previously in *Di Conti*, cannot therefore be accepted. The three-month period is not relevant to conditions for acquiring entitlement.

22. The Commission also considers that the judgments in *Testa* and *Di Conti* do not conflict. Admittedly, the Court of Justice held in *Testa* [15] that Article 69 contained an independent body of rules in favour of workers claiming the benefit thereof which constituted an exception to national law, irrespective of the rules laid down in the latter regarding retention and loss of entitlement to benefits. [16] The exception provided for by that independent body of rules concerns, however, the temporary retention of entitlement to benefits by a person entitled thereto who goes to another Member State to seek work. The judgment in *Testa* provides no support for the assumption that Article 69 of the Regulation also contains an independent body of rules which constitutes an exception concerning the substantive conditions for acquisition of entitlement to benefits. Therefore, the Commission concludes, it can also not be assumed that Article 69(4) of the Regulation contains in that respect an exhaustive set of rules for Belgium.

23. As regards the scope of Article 69(4) of the Regulation, viewed in the light of the previous case-law, it should first be explained that while the Court ruled in *Testa* on Article 69 of the Regulation and, in particular, the ramifications of Article 69(2), that judgment did not deal with Article 69(4). In it the Court of Justice held that a worker who returns to the competent State after the

10 — Case 24/75 [1975] ECR 1149.

11 — Case 79/81 [1982] ECR 1063.

12 — Case 58/84 [1985] ECR 1679.

13 — See paragraphs G.9 and L.16 inserted into Annex VI to Regulation No 1408/71 by Regulation (EEC) No 2332/89 of 18 July 1989 (OJ 1989 L 224, p. 1) relating to, respectively, Ireland and the United Kingdom:
'An unemployed person returning to Ireland at the end of the period of three months for which he continued to receive benefits under the legislation of Ireland in application of Article 69(1) of the Regulation shall be entitled to apply for unemployment benefits notwithstanding Article 69(2) if he satisfies the conditions laid down in the aforementioned legislations'; and
'An unemployed person returning to the United Kingdom after the end of the period of three months during which he continued to receive benefits under the legislation of the United Kingdom pursuant to Article 69(1) of the Regulation shall continue to be entitled to unemployment benefits by way of derogation from Article 69(2) if he satisfies the conditions laid down in the aforementioned legislation.'

14 — For example in France.

15 — This was submitted by the Commission in the oral proceedings.

16 — See in this connection *Testa* (cited above in footnote 7, paragraph 5)

three-month period referred to in Article 69(1)(c) of the Regulation has expired may in principle no longer claim entitlement, by virtue of the first sentence of Article 69(2), to benefits as against the competent State. Demonstrably correct though that statement may appear at first sight, it cannot be based on *Testa*, for the judgment in that case says that it applies only 'unless the said period is extended pursuant to the second sentence of Article 69(2)'. [17]

24. When considering the compatibility of Article 69(2) of the Regulation with fundamental rights guaranteed under Community law, the Court of Justice clearly introduced a test of proportionality which cannot be derived directly from the wording of the Regulation. The Court held:

'Finally, it must be emphasized that the second sentence of Article 69(2), which provides that in exceptional cases the three-month period laid down by Article 69(1)(c) may be extended, ensures that the application of Article 69(2) does not give rise to disproportionate results. As the Court ruled in its judgment of 20 March 1979, *Coccioli* (...), an extension of the period is permissible even when the request is made *after that period has expired*. Whilst (...) the competent services and institutions of the States enjoy a wide discretion in deciding whether to extend the period laid down by the regulation, in exercising that discretionary power they must take account of the *principle of proportionality* which is a general principle of Community law. In order correctly to apply that principle in cases such as this, *in each individual case* the competent services and institutions *must take into consideration the extent to which the period in question has been exceeded, the reason for the delay in returning and the seriousness of the legal consequences arising from such delay*.' [18]

25. Although that reasoning does not contain a direct statement on the interpretation of Article 69(4) of the Regulation, it indicates nevertheless that a worker who relies on Article 69(1) of the Regulation should not suffer a disproportionate disadvantage as regards his entitlement to benefits, even if he exceeds the time-limit.

26. Particularly interesting in that context is the French Government's observation that in

17 — Operative part of the judgment in *Testa* (cited above in footnote 7).

18 — See the judgment in *Testa* (cited above in footnote 9, paragraph 21, emphasis added).

both France and other Member States Article 69(2) is simply not applied. [19]

27. In fact no statement on the scope of Article 69(4) is to be derived from *Testa*, not least because it was wholly irrelevant to the decision in that case, which arose from three orders for reference from Germany.

28. Article 69(4) is without doubt an *exempting provision* applicable to Belgium. There is nothing to indicate that the principle that exemptions are generally to be construed restrictively should not be applied. The *text* of the provision refers expressly to requalifying for benefits and not, for instance, to retaining or, indeed, acquiring entitlement to benefits. I have already commented on the *legislative history* of the provision in my Opinion in *Di Conti*. [20] There I pointed out that, as submitted in those proceedings, Article 69(4) of the Regulation was intended to compensate for the generous Belgian rule under which a person generally retains his status as an entitled person during a break in benefit of up to three years.

29. That argument also appeared in the judgment, where it was held:

'It is in return for the unemployed persons' retention of their rights to benefit for quite a long period while not remaining available to the Belgian employment services that they are required, under Article 69(4), to be employed again for at least three months in order to requalify for benefit when they return to Belgium.' [21]

30. In the light of Article 123 of the Royal Decree, the spirit and purpose of Article 69(4) of the Regulation is, therefore, to reconcile the general restriction of the period during which an unemployed person need not be available to the employment services of the competent State to three months, under Article 69(1), with the substantially longer period of generally three years allowed by Article 123, during which an entitled person does not claim benefits but can requalify for benefits at any time. [22]

31. In *Di Conti* [23] the Court of Justice applied Article 69(4) of the Regulation only

19 — See paragraph 20 above.

20 — Opinion of 7 March 1990 in Case C-163/89 *Di Conti* [1990] I-1835.

21 — Judgment in *Di Conti*, paragraph 16 (cited above in footnote 3).

22 — See *Di Conti*, paragraph 15 (cited above in footnote 3).

23 — See paragraphs 12 and 17.

to requalification for benefits and not to acquisition of entitlement thereto. That conclusion, which is also applicable here, is supported, moreover, by the argument that workers may not be placed in a worse position through the intervention of Community law than they would have been under national law alone. Any other interpretation would restrict the free movement of workers and would therefore be contrary to Article 51 of the EC Treaty and the express aims of Regulation No 1408/71. [24]

32. The argument of the Office National de l'Emploi that Article 69(4) of the Regulation would be devoid of purpose if it applied only to requalifying for benefits and not to acquiring entitlement thereto does not hold, as instances can well be envisaged in which requalifying for benefits is possible while the conditions for acquiring entitlement are not fulfilled. For example, in the event of a break in receiving benefit that is fairly long but falls within the time-limit under Article 123 of the Royal Decree, it is quite possible that the periods of employment within the immediately preceding reference period required for acquiring entitlement to benefits might not have been completed.

33. The Belgian Government's further argument that applying Articles 118 and 123 of the Royal Decree often leads ultimately to the same result cannot, for that reason, obscure the difference between acquisition of entitlement to benefits and requalifying for benefits.

34. The provision's wording, legislative history and spirit and purpose, as well as its function in the legislative context as a whole, support the view that Article 69(4) of the Regulation applies solely in cases of requalifying for benefits.

C — Conclusion

35. In view of the foregoing I propose the following reply to the question referred for a preliminary ruling:

24 — See for example the fifth recital to the Regulation.

Article 69(4) of Regulation (EEC) No 1408/71, in the version contained in Regulation (EEC) No 2001/83, is to be interpreted as meaning that the requirement that an unemployed person must have been employed for at least three months after returning to Belgium is applicable only where the unemployed person claims to requalify for benefits and not to acquisition of entitlement to benefits under the law of the Member State.