security scheme of that State during the temporary posting of the employee in question to a non-member country, any provision which discriminates against nationals of other Member States must be disregarded.

Galmot Due

Everling Kakouris Joliet

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 4 JULY 1984 [1]

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1 — Translated from the German.

Mr President,
Members of the Court,

A — In the action which gave rise to the request for a preliminary ruling which falls to be considered today the plaintiff is a French undertaking which places workers, paid by it, temporarily at the disposal of other undertakings (a temporary-employment undertaking). Its employees, who are insured under the French social security scheme, include Michel Van Robaeys, a Belgian national who was resident in Belgium when his contract was concluded. It was the plaintiff's intention that he should continue to be insured under the French social security scheme when he was sent to Nigeria on a temporary posting in June 1981. The defendant in the main proceedings, the Caisse Primaire d'Assurance Maladie [Local Sickness Insurance Fund], Paris [hereinafter referred to as "the Fund"] refused to permit this. It based its refusal on the second paragraph of Article 39 of the Law of 3 January 1972, which became the third paragraph of Article L 341-3 of the Code du Travail [Labour Court]; it provides as follows:

"Without prejudice to international agreements, no temporary-employment undertaking may place foreign workers at the disposal of any person whatsoever if the service in question is to be provided outside French territory."

Since that view was upheld by the Commission de Recours Gracieux [Complaints Board of the Caisse], Prodest appealed to the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole [Social Security Tribunal of First Instance].

The plaintiff justified its contention that Mr Van Robaeys should continue to be insured under the French social security scheme on the basis of an accord concluded on 28 March 1973 between France and, as it wrongly believed, *Nigeria* (in fact it is with Niger). That accord was published by a Decree of 6 February 1975 and Article 5 provides as follows:

"Les travailleurs qui, étant occupés habituellement sur le territoire de l'une des Parties contractantes par une entreprise dont ils relèvent normalement, sont détachés sur le territoire de l'autre Partie contractante afin d'y effectuer un travail déterminé pour le compte de ladite entreprise, demeurent soumis à la législation de cette première Partie comme s'ils continuaient à être occupés sur son territoire, à condition que la durée prévisible du travail qu'ils doivent effectuer n'excède pas un an.

..."

It also relied upon the principle, laid down in Community law, whereby workers are entitled to equal treatment irrespective of their nationality and to equal access to employment. In particular, it contended that, since by virtue of Regulation No 1612/68 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), nationals of Member States of the Community are not, when in France, to be treated as foreigners but rather are to be treated in the same way as French workers, the restriction on the way in which foreign workers my be employed, contained in Article 39 of the French Law of 3 January 1972, cannot be applied to workers from the countries of the European Community. Accordingly, they could not be refused the right to insurance under the French social security scheme on the ground that they are working outside of Europe, since such workers would then have no means of obtaining social security cover.

The Commission de Première Instance considered that the dispute referred to it raised a problem of interpretation of Community law. By an interlocutory decision of 3 June 1983 it therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

"May an insured person who is a national of a Member State of the European Economic Community, is employed by a French company and is resident in France, claim that his insurance under the French general social security scheme should be maintained for the duration of his posting to Nigeria, by virtue of Regulation No 1612/68 of the Council, and in those circumstances is it appropriate to disregard the restriction contained in the second paragraph of Article 39 of the Law of 3 January 1972 which has been adopted as the third paragraph of Article L 341-3 of the Labour Code?"

In the proceedings before this Court, the Fund relied solely on the contention which it had advanced before the French court, namely that Mr Van Robaeys could not continue to be insured under the French social security scheme because the aforementioned French legal provisions did not permit this. A circular drawn up by it in March 1976 concerning the proviso in respect of Community law laid down in Article L 341-3 of the Code du Travail was not relevant because it referred only to activities engaged in *inside* the Community and not to those engaged in *outside* it.

By contrast, the Commission set out its opinion extensively in its written observations. It came to the conclusion that the prohibition of discrimination between workers from Member States of the Community by reason of their nationality, contained in Regulation No 1612/68, applied also to nationals of Member States who, although employed by undertakings established in other Member States, are to work outside the Community.

That interpretation was espoused during the oral proceedings by the representative of Prodest who also mentioned that during Mr Van Robaeys' posting to Nigeria contributions would continue to to be paid on his behalf to the French social security authorities.

B — I find the arguments advanced in support of that view entirely convincing. I propose therefore that the ruling of the Court of Justice on the problem referred to it should reflect that view.

1. It must first of all be remembered that this case is concerned with the interpretation of the important principle of freedom of movement, that is to say with a fundamental right of Community citizens which, as was stated in the judgment in Case 167/73 [1974] ECR 59, paragraph 43, at p. 372 [1]), is one of the foundations of the Community. For that reason, an interpretation which ensures the full effectiveness of that principle is called for. In addition, that is the only course which is in conformity with the case-law which has grown up concerning Regulation No 1612/68, and according to which the principle of non-discrimination ought to lead to the greatest possible integration of workers within the Community (Case 32/75 [2]).

1 — Judgment of 4. 4. 1974 in Case 167/73, *Commission of the European Communities* v *French Republic*, [1974] ECR 359, at p. 372.

2 — Judgment of 30. 9. 1975 in Case 32/75, *Anita Cristini* v *Société Nationale des Chemins de Fer Français*, [1975] ECR 1085.

2. It must however be noted — and the Commission has demonstrated this in detail — that neither the provisions of the Treaty (Articles 48 and 49) nor the secondary legislation (Regulation No 1612/68 on freedom of movement for workers within the Community; Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health; Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Regulation No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, and the Directive of 5 March 1962 on freedom to take skilled employment in the field of nuclear energy) give a clear answer as to the scope of the principle of freedom of movement and in particular they give no clear answer to the question whether that principle also applies where an activity is to be performed outside the Community for an undertaking established inside the Community.

It must none the less be recognized that it is not exclusively the *performance* of the activity which is relied on as a connecting factor in the provisions under consideration. The place in which the contract of employment was concluded is also significant in this connection and often free access to employment and to the labour market is important (as, for example, in Article 1 of Regulation No 1612/68 and in Directive 68/360). It is particularly significant that the Directive of 5 March 1962 refers to specific activities relating to the European Atomic Energy Community which by their very nature are carried on only outside the Communtiy (they are set out in an annex to the directive).

3. Several judgments of the Court of Justice are particularly relevant to the problem raised since they deal on the one hand with the scope of the principle of freedom of movement as such and, on the other, with the provisions of social security law intended to implement that principle.

(a) The first case (Case 36/74 [1974] ECR 1405 [1]) concerned a provision of the rules of the Union Cycliste Internationale (a worldwide association) by virtue of which, in so-called motor-paced bicycle racing which counted towards the world cycling championship, the pacemaker had to be of the same nationality as his cyclist. The question arose whether it mattered from the point of view of Community law whether the championships in which the aforementioned rule was applied took place inside or outside the Community. Mr Advocate General Warner took the view, in the light of the fact, which was clear from the order for reference, that the aforementioned rule could have an effect on Community territory even in a year in which the world championship took place outside the Community, that the restriction relating to nationality was contrary to Community law because it *affected* events, and therefore employment, within Community territory.

1 — Judgment of 12. 12. 1974 in Case 36/74, *B. N. O. Walrave and L. J. N. Koch* v *Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, [1974] ECR 1405, at p. 1417.

That idea was apparently also taken up in paragraph 28 of the Court's decision, as follows: "By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community."

Accordingly, it may be said that access to employment and the carrying on of activities are not the only considerations which are important for determining the scope of Community law in the area of freedom of movement — what is of much greater significance is any effect which there may be upon employment in the Community.

(b) The other case which is of interest in these proceedings (Case 87/76 [1977] ECR 687 [1]) concerned a dispute between an Italian worker resident in Italy and a Belgian social security institution. The institution refused to pay an invalidity allowance in respect of insurance periods during which the Italian worker had been employed in the former Belgian Congo because, according to the relevant Belgian law, which confirmed and guaranteed rights deriving from a colonial decree, a condition for entitlement to an allowance of that kind was that the usual place of residence of the person concerned had to be either in Belgium or in one of the former Belgian colonies. Mr Advocate General Capotorti's opinion on the question which arose in that case as to the scope of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Article 10 of which renders such residence clauses inoperative) was that it was not the locality where the person was employed which should be regarded as decisive but rather the relationship between the worker and the social security institution of a Member State. The Court of Justice also took that view when interpreting the word "legislation", as used in Article 2 of Regulation No 1408/71, which defines the persons covered by the regulation. It was also significant that the case concerned benefits which had been guaranteed by the legislation of a Member State. Because the legal relationship in question had its origin in the territory of the Community and a legal connection with the Community therefore existed, the Court of Justice considered that the application of Community law was justified even though the dispute concerned employment outside the Community, namely, in a territory which at the time maintained special relations with a Member State (paragraph 21).

4. It is immediately apparent in the present case, — and here I refer to the considerations set out in the judgment in Case 36/74 [2] — that failure to apply the principles of Community law (and thus acceptance of discrimination between French citizens on the one hand and nationals of other Member States, on the other, as provided for in the second paragraph of Article 39 of the Law of 3 January 1972) would have serious effects on the labour market and on working conditions in the Community.

1 — Judgment of 31. 3. 1977 in Case 87/76, *Walter Bozzone* v *Office de Sécurité Sociale d'Outre-Mer,* [1977] ECR 687, at p. 694.

2 — Judgment of 12. 12. 1974 in Case 36/74, *B. N. O. Walrave and L. J. N. Koch* v *Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo,* [1974] ECR 1405, at p. 1417.

A possible result might be that nationals of other Member States would not be employed by French temporary-employment undertakings operating mainly in non-member countries and that would not only have a negative effect on the career of the workers concerned but would also mean that those French temporary-employment undertakings, which should also benefit from the principle of freedom of movement, would under certain circumstances be obliged to do without more highly qualified staff. A further result might be that if they did not enjoy the benefit of the principle of non-discrimination when working in non-member countries workers from other Member States might be employed on unfavourable terms and that would have adverse repercussions on the employment of French workers. It should be recalled in this connection, however, that the prohibition af any discrimination based on nationality, whatever be its nature or extent, between workers of the Member States also has the effect, according to the judgment in Case 167/73 ([1974] ECR at p. 373) [1], "of guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law" (paragraph 45). Finally, the fact must not be overlooked (as the Commission has rightly pointed out) that reference only to the place in which work in carried out, without regard to other factors, as a criterion for applying the principles of Community law would lead to a great deal of legal uncertainty, which is hardly reconcilable with the increasing mobility of modern economic life.

5. The Commission is therefore right to say that employment relationships originating in the Community should be considered in their entirety and that true equality of treatment exists only if it covers all aspects of an activity. The application of the principle of non-discrimination in the context of freedom of movement can thus certainly not be refused in a case in which a national of a Member State concludes a contract of *employment* with an undertaking in another Member State, under the law of that State, even when the activity to which the contract relates is to be performed in a territory outside the Community. That means that the refusal to allow Mr Van Robaeys to continue to be insured under the French social security scheme cannot be based on the third paragraph of Article L 341-3 of the Code du Travail. It follows that, since Regulation No 1408/71 contains no provisions dealing with social security cover in respect of activities carried on outside the Community, national law, extended by the principle of non-discrimination, must supply the appropriate solution. Since the accord with Niger and therefore Article L 768 of the French Law on social security are not to be taken into account, only Article L 769 of that law is relevant for that purpose in the present case. That article provides that workers who are sent by their employer to work abroad temporarily remain subject to French social security legislation, provided that the employer undertakes to pay all the contributions due.

1 — Judgment of 4. 4. 1974 in Case 167/73, *Commission of the European Communities* v *French Republic*, [1974] ECR 359, at p. 372.

C — Thus, the question raised by the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole can only be answered as follows:

Application of the principle of non-discrimination which, under Community law, applies to freedom of movement for workers is not excluded in a case where an employment relationship exists between a national of a Member State and an undertaking established in another Member State, even where the paid activity is to be performed not in the Community but outside Community territory. A national provision which is incompatible with that principle is thus inapplicable. Maintenance of affiliation to the social security scheme may not be refused on the basis of provisions of that kind which are contrary to the principle of non-discrimination.