OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 January 1987 *

Mr President,
Members of the Court,

In the context of the proceedings pending before the Bundessozialgericht [Federal Social Court] between Giuseppe Rindone and the Allgemeine Ortskrankenkasse Bad Urach, that court has referred to the Court of Justice a number of questions concerning the interpretation to be given to the provisions of the Community regulations on social security [1] in connection with the determination of whether a worker residing outside the country in which he is a member of the social security scheme is unfit for work.

As the Court has decided on many occasions, the answer to such questions must be guided by an interpretation of the provisions at issue in the light of the articles of the Treaty dealing with freedom of movement for workers. [2]

In its judgment of 25 February 1986, [3] the Court stated in particular that: '... the provisions of Regulation No 1408/71 ... were adopted to implement Article 51 of the EEC Treaty and must be interpreted in the light of the objective of Article 51, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, which is one of the foundations of the Community. Article 51 requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers by securing, *inter alia*, payment of benefits for persons resident in the territories of Member States. The aim of Articles 48 to 51 would not be attained if, as a consequence of the existence of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'.

It is in that spirit, therefore, that I will consider the questions referred to the Court.

First question

The Bundessozialgericht first asks the Court to reply to the following question:

'1. Does the competent institution have to accept the findings both in law and in fact of the institution of the place of residence in relation to the commencement and duration of incapacity for work in its decision on a claim for cash benefits (in this case, sickness benefit under Article 182 of the Reichsversicherungsordnung [Imperial Insurance Regulation] if it does not have the worker examined by a doctor of its own choice pursuant to Article 18 (5) of Regulation (EEC) No 574/72?'

1. In order to reply to that question, it is necessary to consider, in addition to the general principles already mentioned, the provisions of Regulation No 1408/71 (hereinafter referred to as 'the basic regulation').

* Translated from the French.

1 — 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 (Official Journal, English Special Edition 1971 (II), p. 416); Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159). Codified versions of these regulations were published in Official Journal 1980, C 138, pp. 1 and 65.

2 — Judgment of 28 May 1974 in Case 191/73 *Niemann* v *Bundesversicherungsanstalt für Angestellte* [1974] ECR 571, paragraph 5.

3 — Judgment of 28 February 1986 in Case 284/84, *L. A. Spruyt* v *Bestuur van de Sociale Verzekeringsbank* [1986] ECR 699, paragraphs 18 and 19.

It can be seen from Article 19 of that regulation that in regard to sickness and maternity benefits, a worker residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, is entitled to receive in the State in which he is resident:

(a) benefits *in kind* provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;

(b) *cash* benefits provided by the competent institution in accordance with the legislation which it administers.

In order to receive benefits *in kind*, it is therefore sufficient for the worker to register with the institution of the place of residence, submitting a certificate to the effect that he is entitled to such benefits.

The matter is then dealt with on the basis of the legislation of the country of residence (Article 17 (5) of Regulation No 574/72) unless the benefits to be granted are benefits in kind the probable or actual cost of which exceeds a fixed amount determined and periodically reviewed by the administrative commission set up under Regulation No 1408/71.

In that case, the competent institution must be informed in advance and it has 15 days within which to raise any objection and to state the reasons on which such objection is based (Article 17 (7) of Regulation No 574/72).

The following initial conclusion may therefore be drawn from the foregoing.

The question whether a person is or is not ill is decided exclusively by the social security institution of the country of residence which applies for that purpose solely its national legislation.

A finding that the worker is ill entails expenditure (including, where relevant, reimbursement of the cost of hospitalization) on the part of the institution of the country in which the worker is insured (the competent institution) from which it cannot escape unless the fixed amount has been exceeded.

Where *cash* benefits are applied for, Article 19 (b) of Regulation No 1408/71 states that they are to be provided not in accordance with the legislation of the country of residence, but in accordance with that of the country in which the worker is insured.

It is thus tempting to believe, solely on the basis of Article 19, that it is in any case for the worker to make contact with the competent institution in the country in which he is insured in order to furnish the necessary supporting evidence and to comply with all the formalities.

However, Article 18 of Regulation No 574/72 makes clear that even in the case of cash benefits, the institution of the country of residence has been given a very precise duty to assist the worker and the competent institution.

Article 18 of Regulation No 574/72 sets up a complete procedure of which the following elements seem to me decisive in determining the reply to be given to the national court's question:

The medical certificate issued by the doctor treating the worker making the initial finding of incapacity for work does not constitute decisive proof. That certificate merely initiates the examination to be carried out by the institution of the country of residence (Article 18 (1)).

The latter must have the worker medically examined within three days as if he was insured with it (Article 18 (2)).

The *report of the examining doctor* indicating the probable duration of the incapacity for work is to be forwarded to the competent institution within three days (Article 18 (3)) and that report thus constitutes the essential element in this procedure.

The institution of the place of residence must subsequently carry out any necessary checks or examinations *as if the worker were insured with that institution.* It adopts the decision that the worker is fit to resume work on behalf of the competent institution (Article 18 (4)) but, as the Court will see later, it may also make an immediate finding, following the initial examination, that the worker is not unfit for work.

In all cases the competent institution reserves the right to have the worker examined by a doctor of its own choice (Article 18 (5)).

It may withhold cash benefits because the worker has not completed the formalities laid down by the legislation of the country of residence or if it establishes that the worker is fit to resume work (Article 18 (6)).

What conclusions may be drawn from those provisions?

The use of the expression 'as if he were insured with that institution' as well as the reference to the formalities laid down by the legislation of the country of residence prove in my opinion that *in principle,* the institution of the country of residence acts on behalf of the competent institution in regard to the decision as to the existence of an incapacity for work and to the verification of its continuance and that its findings bind the institution of the country of residence.

That appears to me to be logical because the institution of the country of residence has already made an independent and definitive finding as to the worker's illness.

However, with regard to the incapacity for work, the finding made by the institution of the country of residence is definitive only if the competent institution does not choose to have the worker examined by a doctor of its own choice.

2. An examination of the various forms used by the institutions concerned (see Official Journal L 167 of 27 June 1983) confirms, in my view, the interpretation set out above.

It can be seen from Form E 115, entitled 'Claim for cash benefits for incapacity for work',[4] which must be filled out by the institution of the country of residence at the very beginning of the procedure, that that institution's examining doctor is called upon to give an opinion immediately on *whether or not there is an incapacity for work.* Point 6 of that form is drafted in the following terms:

'6. In the opinion of our examining doctor

6.1. — *the incapacity for work began on ... and will probably continue until ...*

6.2. — *there is no incapacity for work.*'

Note 7 at the end of the form indicates that in the second hypothesis, the institution of the country of residence must 'attach a copy of an E 118 form *sent to the person concerned*'.

4 — Official Journal L 167 of 27 June 1983, p. 1.

That means that if the examining doctor in the country of residence is of the opinion that the worker is not unfit for work, the institution of the country of *residence* is to send *to the person concerned, of its own motion,* an E 118 form entitled 'Notification of non-recognition or of end of incapacity for work'.

Contrary to the claim of one of the parties to the main proceedings, the institution of the country of residence thus has the power not merely to decide that the incapacity for work has ended but also to decide, from the very beginning and on behalf of the competent institution, that no incapacity for work exists. In both cases, Form E 118 must be used. On the back of that form is to be found the following information for the worker:

'You may appeal against the decision which is notified to you by this document to the authority competent to hear your appeal in the competent State or you may send your appeal to the authority competent to hear appeals in the country where you are staying or where you are resident.'

Form E 118 must also be used by the competent institution when it refuses to grant cash benefits. Point 3 of that form reads as follows:

'3.1. *The facts which have been brought to our notice*

3.2. The examination carried out by our doctor on . . . show(s)

3.2.1. that your incapacity for work is only partial

3.2.2. that you are entitled to partial cash benefits amounting to . . . from (date) . . .

3.2.3. that you are fit for work

3.2.4. that your incapacity for work ended on . . .'

The defendant in the main proceedings draws support from the line reading 'The facts which have been brought to our notice . . . show' for the proposition that 'the facts communicated by the institution of the place of residence (therefore) authorize the competent institution to reject the application without having to order a medical examination'.

I do not regard that argument as decisive because the form does not say 'the facts which have been brought to our notice *lead us to the conclusion*'; it says 'show'.

The content and the structure of Article 18, as well as the series of forms taken as a whole, lead me to the conclusion that the competent institution is not entitled to draw a distinction between the diagnosis established by the examining doctor in the country of residence and the conclusion which he drew from that diagnosis regarding the existence or otherwise of incapacity for work.

It seems more probable that the line in question was inserted to cover the case in which the examining doctor in the country of residence found a *partial* incapacity for work, particularly in cases of industrial accident (see note 7 on page 2 of Form E 116).

It would then be for the competent institution to determine the appropriate amount of the partial benefit.

3. In my opinion, a very important element in this debate is the following remark, made by the Bundessozialgericht on page 15 of its order for reference:

'If, however, [the competent institution] does not . . . have the worker examined by a doctor of its own choice, it might be necessary to regard it as being bound because the worker concerned is in principle entitled to protection of his legitimate

expectations. If subsequently the competent institution does not accept the findings of the doctors providing the treatment and the results of the examination by the institution of the place of residence, the worker may have problems of proof because he has in the meantime recovered his capacity for work.'

Article 18 of Regulation No 574/72 must be interpreted in a way which preserves the useful effect of the whole scheme established by Regulation No 1408/71.

However, if even in the absence of an examination by a doctor of the competent institution's own choice the institution was free not to accept the opinion of the examining doctor of the institution of the country of residence, a worker who moved from one Member State to another would find himself in the same situation in regard to proof of his incapacity for work as he was in before the adoption of Community Regulations Nos 3 and 1408/71. He could therefore just as easily send a medical certificate from the doctor treating him in the country of residence by post to the competent institution, with the hope that the latter would be good enough to regard it as convincing.

4. Another consideration which must not be lost sight of is that a social security institution does not normally have an examination carried out by its medical adviser unless it has doubts concerning the certificate issued by the doctor treating the worker.

However, under the scheme envisaged by Article 18 of Regulation No 574/72, *an examination by a doctor chosen by the institution of the country of residence is provided for automatically.*

It is true that, in this case, that examination was carried out only after a delay which may be strongly criticized and the only E 116 certificate forwarded to the competent authority dealt with a temporary illness (gastroduodenitis) which was not that mentioned in the earlier and later certificates drawn up by the doctor treating the plaintiff and the examining doctor (arthrosis in the lumbar region) as justifying his incapacity for work. However, that culpable negligence must not cause us to forget that as a general rule the social security institutions of the Member States do their work in a conscientious manner.

It is precisely in order to avoid the danger that negligence of that kind might lead to benefits being unduly granted that the possibility of having an examination carried out by a doctor chosen by the competent institution was provided for.

5. The Bundessozialgericht and the Bundesverband der Ortskrankenkassen point out that according to Article 19 (1) of Regulation No 1408/71 the worker must satisfy the conditions imposed by the legislation of the competent State and that, according to subparagraph (b), cash benefits are provided in accordance with the legislation administered by the competent institution; the examining doctor of the institution of the country of residence must therefore base his assessment on a legal concept drawn from the national law of the competent institution which is, inevitably, foreign to him.

Indeed, it does not seem to me to be possible to require a doctor to base his assessment on criteria applicable in a country other than his own.

But is that really the case here?

The first idea which comes to mind when faced with such a problem is to say that the assessment must be made on the basis of a Community interpretation of the concept of

incapacity for work in order to ensure as far as possible a uniform application of the Community provisions at issue.

In regard to the interpretation of the expressions 'sickness and maternity benefits' and 'invalidity benefits' within the meaning of Regulation No 1408/71, the Court has held that 'It is well established that the requirement that Community law be applied uniformly within the Community implies that the concepts to which that law refers should not vary according to the particular features of each system of national law but rest upon objective criteria defined in a Community context. In accordance with this principle, the concept of "sickness and maternity benefits" appearing in Article 4 (1) (a) of Regulation No 1408/71 is to be determined for the purpose of applying the regulation not according to the type of national legislation containing the provisions giving those benefits, but in accordance with Community rules which define what those benefits shall consist of.' [5]

Unfortunately I have not been able to find in the two regulations at issue an indication of what the Community definition of the concept of incapacity for work may be.

I am therefore of the opinion that the problem must be resolved in accordance with the spirit of the judgment of 11 March 1986 (Case 28/85, *Deghillage* v *Caisse primaire d'assurance maladie* [1986] ECR 1003, paragraphs 16 and 17), in which the Court decided that 'a procedure duly carried out in one Member State resulting in a diagnosis that the person is suffering from an occupational disease cannot be required to conform to the rules of another Member State's legislation' (paragraph 17).

A decision as to incapacity for work must therefore be made on the basis of the criteria in force in the Member State where the worker is.

The fact that Form E 116, entitled 'Medical report relating to incapacity for work *(Sickness,* maternity, accident at work, *occupational disease)*' is to be used both in the case of ordinary sickness and in the case of occupational disease tends to show that the case-law developed by the Court in the latter area may properly be applied.

It should be noted in that connection that Article 61 of Regulation No 574/72, dealing with cash benefits due as a result of accidents at work or occupational diseases is drafted in exactly the same terms as Article 18, dealing with cash benefits due in cases of 'ordinary' sickness.

When it does not avail itself of the opportunity of having an examination carried out by a doctor of its own choice, the competent institution is therefore bound by the 'conclusions' (see point 5.7 of Form E 116) of the examining doctor of the institution of the country of residence, arrived at on the basis of the rules applicable in his country.

If the system is to retain its useful effect, the competent institution must be bound by that finding even if, under its national law, it is not bound by the findings of its own examining doctor. In that sense, it is therefore bound both in fact and in law.

It may also be asked whether the definition of incapacity for work could be very

5 — Judgment of 10 January 1980 in Case 69/79, *Jordens-Vosters* v *Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie* [1980] ECR 75 at p. 84, paragraph 6.

different in the other Member States from that given by the Bundessozialgericht, namely: 'Incapacity for work arises where an insured person can no longer pursue his previous professional or trade activity either at all or only at the risk of aggravating his condition. In considering whether there is incapacity for work all that is necessary is to ask what was the insured's most recent activity and whether in view of his health he can still pursue it or a similar activity'.

The Bundesverband der Ortskrankenkassen [Federal Association of Local Sickness Funds] argues that only the competent sickness insurance fund is sufficiently familiar with the employment last exercised by the worker to be able to judge whether or not he is still capable of working.

However, it seems perfectly possible to me for a foreign doctor to obtain a sufficiently precise idea of the worker's most recent activity. He would merely need to ask him whether that activity was carried out in the open air or indoors, whether or not it required heavy physical effort, exposure to cold or to great heat, continual movement, constant standing or sitting, etc.

On the other hand, it would seem much more difficult for the competent institution to have at its disposal more information permitting it to form an opinion as to the state of health of a worker residing abroad than would be available to the examining doctor of the institution of the country of residence who examined him.

6. Finally, I must consider the objection to the effect that an obligation binding on the competent institution of the country in which the worker is insured cannot be based on Regulation No 574/72 because the latter merely lays down rules for implementing the basic regulation.

Only a provision included in Regulation No 1408/71 itself would make it possible to require the competent institution to be bound by the findings made by the institution of the country of residence.

In that regard, I would like to observe that Regulation No 574/72 is not an implementing regulation adopted by the Commission on the basis of an enabling clause contained in a Council regulation. It is, on the contrary, a measure adopted by the Council itself on the basis of the same provisions of the Treaty and according to the same procedures (opinion of the Parliament and of the Economic and Social Committee) as Regulation No 1408/71.

Even if certain provisions of Regulation No 574/72 constituted more than implementing measures, a question which it is not necessary to consider here, they would none the less have been validly adopted.

Second question

The second question put by the Bundessozialgericht reads as follows:

'2. If Question 1 is answered in the affirmative, is that also the case where the worker does not, within three days of commencement of the incapacity for work, apply to the institution of the place of residence by submitting a certificate of incapacity for work issued by the doctor providing treatment (Article 18 (1) of Regulation (EEC) No

574/72), and/or the institution of the place of residence has the worker medically examined but fails to observe the time-limits prescribed for that purpose, and for forwarding the report to the competent institution, in Article 18 (3) of Regulation (EEC) No 574/72?'

That question falls into two parts. The first part seeks to know what sanction may be attached to failure on the part of the worker to apply 'within three days of commencement of the incapacity for work . . . to the institution of the place of residence by submitting a notification of having ceased work or . . . a certificate of incapacity for work issued by the doctor treating the worker concerned' (Article 18 (1)).

In that regard, it should be pointed out first that Article 18 (6) of Regulation No 574/72 expressly provides that the competent institution may withhold cash benefits if the worker has not completed the formalities laid down by the legislation of the country of residence.

If those formalities themselves include a three-day time-limit, the situation is perfectly clear.

However, what is the situation when there is no such provision in national law?

I agree with the Commission that in such a case, expiry of the three-day time-limit cannot be regarded as barring the claim.

Support for that argument may be found principally in the judgment of the Court of 11 July 1985, in which it held that:

'There is indeed no sanction attached to the obligation to notify a change of residence laid down in Article 59 of Regulation No 574/72. Accordingly, failure to notify, or late notification of, a transfer of residence cannot entail loss of entitlement to the benefits due for the period between the transfer of residence and the date on which the competent institution was apprised of the transfer. However, when the competent institution of the Member State in which the recipient formerly resided is informed of the transfer of residence, it is entitled to ascertain, by means of a check in accordance with Article 51 of Regulation No 574/72, whether the conditions for receipt of the benefits were still fulfilled during the period in question.' [6]

Those principles appear to be equally applicable in this case.

The three-day time-limit laid down in Article 18 of Regulation No 574/72 is a procedural measure which contains no express automatic sanction for failure to comply with it. The principle of 'no loss of rights without an express provision' must be applied.

The failure on the part of the worker to comply with the time-limit may, however, operate against him. If it is no longer possible to verify medically his incapacity for work retroactive to the day on which it actually commenced, the worker will not be able to claim a right to cash benefits for the period which has already expired.

If, on the other hand, the medical examination carried out on the basis of notice given late by the worker to the institution of the place of residence reveals an incapacity for work from what is genuinely the first day of the illness, the worker will be entitled

6 — Judgment of 11 July 1985 in Case 261/84 *Scaletta* v *Union national des fédérations mutualistes neutres de Belgique* [1985] ECR 2711, paragraphs 14, 15 and 16.

to cash benefits retroactive to that day notwithstanding the absence of notice within the prescribed time-limit.

The second part of the second question concerns the consequences liable to flow from the failure on the part of the institution of the country of residence to comply with the time-limits imposed on it by Article 18 of Regulation No 574/72 for carrying out the medical examinations and transmitting the medical report to the competent institution.

In that regard, it is necessary to note first that the worker has no means of compelling the institution of the country of residence to comply strictly with the obligations imposed on it by Article 18.

However, as the Commission rightly pointed out, it is established in Community law that procedural flaws which are beyond the control of the beneficiary must not have effects which are unfavourable to him.[7]

Moreover, it is certain that the useful effect of the scheme established by Regulations Nos 1408/71 and 574/72 would be placed in considerable jeopardy if workers were to be sanctioned for delay or negligence on the part of the social security institutions of the country of residence.

Third and fourth questions

The Bundessozialgericht then asked the Court to reply to a series of questions concerning the right of the institution in the country in which the worker is insured to obtain a second medical opinion.

7 — Judgment of 6 October 1982 in Case 302/81 *Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443 at p. 3452, paragraph 8.

The questions are as follows:

'3. (a) May the competent institution also have the worker examined by a doctor in the country of employment pursuant to Article 18 (5) of Regulation (EEC) No 574/72?

(b) When the worker is requested to return to his country of employment in order to be examined by a particular doctor there must the request be accompanied by an assurance on the part of the competent institution that it will pay the expenses incurred in connection with the journey there and back?

(c) Should the insured at the same time be informed in writing of possible adverse legal consequences if he fails to comply with the request without good reason?

4. What are the legal consequences if the worker does not attend for examination in the country of employment?'

Let me say at once that it is inconceivable that the competent institution could *require* the person concerned, in respect of whom a certificate of incapacity for work has been issued in the Member State of residence, to return to the Member State in which the competent institution is located in order to undergo a medical examination there.

If such a discretionary right on the part of that institution were recognized, it would amount to permitting it to deprive as it saw fit the two regulations of their useful effect and to thereby return to the situation which existed before the adoption of Regulation No 3.

On the other hand, the competent institution is certainly entitled to have the worker examined by a doctor of its own

choice in the country of residence or by a doctor established in the country in which the worker was employed (or in any other Member State) and who visits the worker for that purpose.

Since it does not appear to me to be possible to require the worker to return to the Member State in which the competent institution is located, Questions 3 (b), 3 (c) and 4 have to my mind no purpose.

Conclusion

On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions referred to it:

(1) Article 18 (1) to (4) of Regulation (EEC) No 574/72 must be interpreted as meaning that the competent institution must reach a decision on the application for cash benefits on the basis, both in fact and in law, of the findings made by the examining doctor of the institution of the place of residence as regards the commencement and duration of incapacity for work, unless it makes its own findings in accordance with Article 18 (5) and (6).

(2) Without prejudice to the rights of the competent institution under Article 18 (6), that is also true if the worker fails to comply with his obligations under Article 18 (1).

If the worker's failure to comply with his obligations under Article 18 (1) interferes with or hinders the institution of the place of residence in the findings which it is required to make, the disadvantages to which that situation gives rise must be borne by the worker.

Procedural defects attributable to the institution of the place of residence rather than to the worker must not produce effects unfavourable to the latter.

(3) In accordance with Article 18 (5), the competent institution reserves the right in all cases to have the worker examined by a doctor of its own choice. That possibility includes examination by a doctor in the place of employment. However, Article 18 (5) does not permit the competent institution to require the worker to return to the country of employment for the purposes of an examination.