JUDGMENT OF THE COURT (Third Chamber)
12 June 1986 *

In Case 1/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht [Federal Social Court] for a preliminary ruling in the proceedings pending before that court between

Horst Miethe

and

Bundesanstalt für Arbeit [Federal Employment Office], Nuremberg

on the interpretation of Article 71 (1) of Regulation (EEC) No 1408/71 of the Council, of 14 June 1971, on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416)

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Y. Galmot and C. Kakouris, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

the Bundesanstalt für Arbeit, by Mr Müller, acting on the instructions of its President,

* Language of the Case: German.

the Commission of the European Communities, by Norbert Koch, a member of its Legal Department, acting as Agent, assisted by Bernd Schulte, of the Max-Planck-Institut für Ausländisches und Internationales Sozialrecht, Munich,

after hearing the Opinion of the Advocate General delivered at the sitting on 27 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By order of 25 October 1984, which was received at the Court on 3 January 1985, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 71 (1) of Council Regulation No 1408/71, 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

2 Those questions arose in proceedings between Mr Miethe and the Bundesanstalt für Arbeit, Nuremberg.

3 Horst Miethe, a German national, has always lived and worked in the Federal Republic of Germany. While continuing to work in Aachen as a sales representative for a German firm, he moved with his wife on 19 November 1976 to Eynatten (Limbusch) in Belgium for family reasons, namely to enable their children, who were attending a Belgian boarding school, to return home every evening.

4 On 20 December 1977, Mr Miethe, who continued to have an office in Aachen and also had the possibility of spending the night there, made a declaration of residence in that city in order to continue to hold a commercial traveller's licence. His wife made a similar declaration a few weeks later but the couple continued to be registered in the Belgian population register.

5 When he became unemployed at the end of September 1979, Mr Miethe made himself available to the employment services in Aachen and claimed unemployment benefits from the employment office in that city, which, by decision of 17 December 1979, rejected his claim on the ground that he did not have his residence or habitual abode in the Federal Republic of Germany. He lodged an objection to that decision, which was rejected by decision of 7 December 1980. Mr Miethe made no claim for unemployment benefits from the Belgian employment services and took up new employment in Germany on 1 May 1980.

6 Mr Miethe's action before the Sozialgericht [Social Court] Aachen against the above-mentioned decision of the employment office was dismissed. On appeal, the Landessozialgericht für das Land Nordrhein-Westfalen [Higher Social Court for North-Rhine Westphalia], by judgment of 15 December 1982, reversed the decision of the Sozialgericht and ordered the Bundesanstalt für Arbeit to pay the unemployment benefits sought by the claimant as from 3 October 1979. That judgment was based on the fact that although Mr Miethe was entitled, under Article 71 (1) (a) (ii) of Regulation No 1408/71, to receive unemployment benefits from the Belgian social security institution, that provision did not preclude the application of national law. Mr Miethe fulfilled the conditions laid down in the relevant German legislation by virtue of the fact that he remained at the disposal of the German employment services and continued to have his habitual abode in the Federal Republic of Germany.

7 The Bundesanstalt für Arbeit lodged an appeal against that decision with the Bundessozialgericht which, by order of 25 October 1984, decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 71 (1) (a) (ii) of Regulation (EEC) No 1408/71, which provides that the institution responsible for paying benefits to a frontier worker who is wholly unemployed is to be the institution of his place of residence, mean that benefits may not be claimed from the competent institution of the place where he was last employed, even if he is entitled to them under the legislation of that State despite his residence abroad, in particular because the unemployed frontier worker is available to the employment services of that State?

(2) If so:

(a) Does the institution of the place of residence still retain exclusive competence under Article 71 (1) (a) (ii) of Regulation (EEC) No 1408/71 even if the frontier worker:

has hitherto worked only in the State in which he was last employed, of which he is a national, and was also resident there until a few years ago;

maintains an office at the place of his last employment, which he used during his employment and uses in seeking employment whilst unemployed, which he has done only in that State;

besides his office, has sleeping facilities which he regularly used once or twice a week when employed and which he uses even more often while seeking employment;

during his absence from the office, is kept informed by another person by telephone of inquiries from clients or from the Arbeitsamt [Employment Office];

from both the office and his apartment close to the frontier, maintains his business and private contacts only in the State in which he was last employed, and all his friends and acquaintances are also in that State?

(b) Is it possible for Article 71 (1) (b) (i) of Regulation (EEC) No 1408/71 to be applied by analogy to such an "atypical' frontier worker?'.

First question

8 The Bundesanstalt für Arbeit and the Commission agree that Article 71 (1) (a) (ii) of Regulation No 1408/71 lays down a special rule derogating from the general principle set out in Article 13 of the same regulation, according to which insured persons are subject to the legislation of the Member State in which they are employed regardless of their place of residence or nationality. Article 71 (1) (a) (ii), according to which a frontier worker who is wholly unemployed is to receive benefits in accordance with the legislation of the Member State in whose territory he resides, does not offer any choice to workers who come within the scope of that provision and prevents them from obtaining benefits under the legislation of the Member State in which they were last employed.

9 It must be pointed out that under Article 71 (b) of Regulation No 1408/71, workers, other than frontier workers, who are wholly unemployed are entitled to make a choice between the benefits offered by the Member State in which they were last employed and those offered by the Member State in which they reside. They exercise that option by making themselves available either to the employment services of the State in which they were last employed (Article 71 (1) (b) (i] or to those of the Member State in which they reside (Article 71 (1) (b) (ii).

10 That option is not available to wholly unemployed frontier workers who, under the explicit provisions of Article 71 (1) (a) (ii), are entitled to claim benefits solely from the Member State in which they reside.

11 The mere fact that the legislation of the Member State of employment, considered in isolation and without reference to the provisions of Regulation No 1408/71, confers entitlement to benefits on a wholly unemployed frontier worker who resides in another Member State cannot lead to the conclusion that such a worker may exercise an option denied to him by Article 71 (1) (a) (ii). Such a solution would disregard the scope of Regulation No 1408/71 which, according to the fifth recital in the preamble thereto, is intended to coordinate national systems of social security legislation within the framework of freedom of movement for workers who are nationals of Member States.

12 The answer to the first question must therefore be that Article 71 (1) (a) (ii) of Regulation No 1408/71 must be interpreted as meaning that a wholly unemployed frontier worker who comes within the scope of that provision may claim benefits only from the Member State in which he resides even though he fulfils the conditions for entitlement to benefits laid down by the legislation of the Member State in which he was last employed.

Second question

13 In this question, the Bundessozialgericht seeks essentially to ascertain whether a wholly unemployed worker who, whilst coming within the definition of a frontier worker in Article 1 (b) of Regulation No 1408/71, has maintained particularly close personal and business links with the Member State in which he was last employed is to be regarded as coming within the scope of Article 71 (1) (a) (ii) or that of Article 71 (1) (b) of that regulation.

14 According to the Bundesanstalt für Arbeit, if a wholly unemployed worker comes within the definition of a frontier worker laid down in Article 1 (b), he falls within the scope of Article 71 (1) (a) (ii) and may claim benefits only from the Member State in which he resides. The distinction suggested in the order for reference between 'genuine frontier workers', who are covered by Article 71 (1) (a) (ii), and 'atypical frontier workers', who are covered by Article 71 (1) (b), finds no support in the wording of Article 71. Such a distinction would make it difficult for the administration to apply Article 71 of Regulation No 1408/71 and might give rise to abuse by imposing an unjustified financial burden on the social security institution of the Member State of employment whenever the benefits which it offered were higher than those offered in the Member State of residence.

15 According to the Commission, Article 71 of Regulation No 1408/71 is intended to permit the migrant workers concerned to obtain unemployment benefits in the place in which, as a rule, the most generous benefits are offered. Normally, a 'genuine' frontier worker lives in the Member State in which he, his family and his friends reside and in which he carries on his social and political activities. It is therefore normal that Article 71 (1) (a) (ii) should provide that where such a worker becomes wholly unemployed, the benefits he receives are to be provided by the institution of the Member State in which he resides. However that is not the case as regards certain workers who maintain much closer ties with the Member State in which they were last employed than with the Member State in which they reside and who are, in reality, 'false frontier workers'. Such workers should be permitted to have the benefit of Article 71 (1) (b) (i) of Regulation No 1408/71, which entitles them to benefits in the Member State in which they were last employed.

16 It must be borne in mind that, as the Court has already held in its judgment of 15 December 1976 in Case 39/76 *(Bestuur der Bedrijfsvereniging voor de Metaalnijverheid* v *L. Mouthaan* [1976] ECR 1901) and in its judgment of 27 May 1982 in Case 227/81 (*Aubin* v *UNEDIC and ASSEDIC* [1982] ECR 1991), Article 71 of Regulation No 1408/71 is intended to ensure that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment. That benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them.

17 That being so, it must be acknowledged that the rule in Article 71 (1) (a) (ii), to the effect that a wholly unemployed frontier worker coming within the definition

in Article 1 (b) is entitled to benefits solely in the Member State in which he resides, was based on the assumption that such a worker would find in that State the conditions most favourable to the search for new employment.

18 However, the objective pursued by Article 71 (1) (a) (ii) of Regulation No 1408/71 cannot be achieved where a wholly unemployed worker, although he satisfies the criteria laid down in Article 1 (b) of that regulation, has in exceptional circumstances maintained in the Member State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there. Such a worker must therefore be regarded as a worker 'other than a frontier worker' within the meaning of Article 71 and consequently comes within the scope of Article 71 (1) (b).

19 In such a case, it is for the national court alone to determine whether a worker who resides in a Member State other than that in which he was last employed none the less continues to enjoy a better chance of finding new employment in that State and must therefore come within the scope of Article 71 (1) (b) of Regulation No 1408/71.

20 The answer to the second question must therefore be that a worker who is wholly unemployed and who, although he satisfies the criteria laid down in Article 1 (b) of Regulation No 1408/71, has maintained in the Member State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there, must be regarded as a 'worker other than a frontier worker' and therefore comes within the scope of Article 71 (1) (b). It is for the national court alone to determine whether a worker is in that position.

Costs

21 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Bundessozialgericht by order of 25 October 1984, hereby rules:

(1) **Article 71 (1) (a) (ii) of Regulation No 1408/71 must be interpreted as meaning that a wholly unemployed frontier worker who comes within the scope of that provision may claim benefits only from the Member State in which he resides even though he fulfils the conditions for entitlement to benefits laid down by the legislation of the Member State in which he was last employed.**

(2) **A worker who is wholly unemployed and who, although he satisfies the criteria laid down in Article 1 (b) of Regulation No 1408/71, has maintained in the Member State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there, must be regarded as a 'worker other than a frontier worker' and therefore comes within the scope of Article 71 (1) (b). It is for the national court alone to determine whether a worker is in that position.**

Everling Galmot Kakouris

Delivered in open court in Luxembourg on 12 June 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber