JUDGMENT OF THE COURT (Third Chamber)
16 October 2001 *

In Case C-212/00,

REFERENCE to the Court under Article 234 EC by the Tribunal du travail de Mons (Belgium) for a preliminary ruling in the proceedings pending before that court between

Salvatore Stallone

and

Office national de l'emploi (ONEM),

on the interpretation of Articles 1(f)(i) and 68(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to

* Language of the case: French.

employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), acting for the President of the Third Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Mr Stallone, by D. Rossini, trade union representative,

— the Office national de l'emploi (ONEM), by A. Bridoux-Culem, avocat,

— the Belgian Government, by A. Snoecx, acting as Agent,

— the Spanish Government, by R. Silva de Lapuerta, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp and D. Martin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Stallone, the Belgian Government and the Commission at the hearing on 29 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2001,

gives the following

Judgment

1 By judgment of 24 May 2000, received at the Court on 30 May 2000, the Tribunal du travail de Mons (Labour Court, Mons) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 1(f)(i) and 68(2) 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 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, 'the Regulation').

2 That question was raised in proceedings between Mr Stallone and the Office national de l'emploi (National Employment Office, 'ONEM') concerning the refusal of ONEM to pay Mr Stallone unemployment benefit at the higher rate known as the 'head of household' rate.

Legal background

Community legislation

3 Article 1 of the Regulation, headed 'Definitions', reads as follows:

'For the purpose of this Regulation:

...

(f) (i) *member of the family* means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided ...; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person. ...'

4 Article 68(2) of the Regulation, which is in Title III, Chapter 6, entitled 'Unemployment benefits', provides:

'The competent institution of a Member State whose legislation provides that the amount of benefits varies with the number of members of the family, shall take into account also members of the family of the person concerned who are residing in the territory of another Member State, as though they were residing in the territory of the competent State. This provision shall not apply if, in the country of residence of the members of the family, another person is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration.'

National legislation

5 Under Article 66 of the Royal Decree of 25 November 1991 concerning rules on unemployment (*Moniteur Belge*, 31 December 1991, p. 29888, 'the Royal Decree'), to receive the benefits provided for in the decree, an unemployed person must be habitually resident in Belgium; he must also be actually resident in that Member State.

6 Article 110(1) of the Royal Decree reads as follows:

'"Worker with a dependent family" means a worker who:

(1) lives together with a spouse who has neither income from a trade or profession nor other income; in such a case no account shall be taken of the existence of any income of other persons with whom the worker lives;

(2) does not live together with a spouse but lives together exclusively with:

(a) one or more children, provided that he can claim family allowances for at least one of them, or that none of them has income from a trade or profession or other income;

(b) one or more children and other relatives by blood or marriage, to the third degree inclusive, provided that he can claim family allowances for at least one of those children and that the other relatives by blood or marriage have neither income from a trade or profession nor other income;

(c) one or more relatives by blood or by marriage, to the third degree inclusive, who have neither income from a trade or profession nor other income.

...'

7 Article 114(3) of the Royal Decree states that the basic daily amount of unemployment benefit is to be increased, for a worker with a dependent family, throughout the period of unemployment by a single complement for loss of income fixed at 5% of the average daily remuneration.

8 As to the definition of living together, Article 59 of the Ministerial Decree of 26 November 1991 concerning the application of the Royal Decree (*Moniteur Belge*, 25 January 1992, p. 1593) states:

'Living together means the fact that two or more persons live together under the same roof and principally decide household questions jointly.

Members of the household are also deemed to live together if:

(1) they are called up for military service or serve as conscientious objectors;

(2) they are imprisoned, interned or placed in an establishment for mental patients, during the first 12 months;

(3) they are temporarily resident elsewhere for professional reasons.'

Facts of the main proceedings and the question referred for a preliminary ruling

9 According to the documents in the case, Mr Stallone, an Italian national, resides in Belgium. After having been employed there from 16 May 1977 to 19 February 1978, he was first granted unemployment benefit in Belgium on 20 February 1978. When making that application for benefit, he stated that he lived with his wife and one of his children.

10 It appears from the written observations of ONEM that Mr Stallone's wife and children continued to live with him in Belgium until 1 May 1991, when they went back to live in Italy.

11 On 20 September 1993 Mr Stallone applied to ONEM, on a form entitled 'Application for derogation on grounds of force majeure', for unemployment benefit at the 'head of household' rate, namely the increased rate given to workers with a dependent family as defined in Article 110(1) of the Royal Decree. His

application was based on the fact that his wife and children, although resident in Italy, were in fact dependent on him.

12 ONEM rejected Mr Stallone's application, but appears not to have notified him of its decision. He was informed indirectly of the refusal of his application on 1 December 1993, when he applied to the competent body for payment of the unemployment benefit.

13 Following the rejection of his application by ONEM, Mr Stallone brought an action before the referring court, contesting the rejection. In view of the apparent conflict between the Belgian legislation on the one hand and the provisions of Community law on the other, the Tribunal du travail de Mons stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Do the EC treaties, the EC rules, and in particular Articles 1(f) and 68(2) of Council Regulation (EC) No 118/97 of 2 December 1996, in their current versions or in the version they had between 1 December 1990 and the date hereof, preclude Article 110(1), first and second subparagraphs, of the Royal Decree of 25 November 1991 concerning rules on unemployment in that this national provision makes the award of a better rate of unemployment benefit subject to a condition that the unemployed person lives with certain members of the family, and not solely to the condition that they are actually or mainly dependent on the unemployed person?'

14 By this question, the referring court essentially asks whether Article 68(2) of the Regulation, read in conjunction with Article 1(f)(i), precludes national rules such as those at issue in the main proceedings under which the entitlement to the higher rate of unemployment benefit is conditional on the unemployed person

living together with the members of his family in the territory of the competent Member State.

15 The first observation to make is that the first sentence of Article 68(2) of the Regulation prescribes that the 'competent institution of a Member State whose legislation provides that the amount of benefits varies with the number of members of the family shall take into account also members of the family of the person concerned who are residing in the territory of another Member State, as though they were residing in the territory of the competent State'.

16 As the Commission rightly observes, that provision proceeds from the principle that an unemployed person whose family resides, as he does, in the host Member State may not be treated differently from an unemployed person the members of whose family reside in the territory of another Member State. The aim of Article 68(2) of the Regulation is to avoid indirect discrimination against migrant workers, since they are essentially the ones who will be affected by a condition that the members of their families reside on national territory. That provision thus gives specific expression to the rule of equal treatment in Article 3(1) of the Regulation.

17 Next, Article 68(2) of the Regulation applies to national rules such as those at issue in the main proceedings which, as the national court states in its judgment, implicitly but necessarily require that the members of the family reside on national territory, since the unemployment benefits are granted only to unemployed persons who actually reside there.

18 Finally, ONEM is wrong to argue that Article 68(2) of the Regulation does not apply to the main proceedings in view of the fact that, for an unemployed person

to receive the higher rate of unemployment benefit, he need only live with one of the persons mentioned in Article 110(1) of the Royal Decree, and the amount of the benefit moreover 'does not vary according to the number of members of the family'. To give that provision so restrictive an interpretation would be incompatible with its objective as defined in paragraph 16 above (see, to that effect, Case C-66/92 *Acciardi* [1993] ECR I-4567, paragraphs 22 to 26).

19 ONEM and the Belgian Government are likewise wrong to argue that Article 68(2) of the Regulation does not apply to the national rules at issue in the main proceedings because they do not refer to a condition of residence in the host Member State but make the award of the higher rate of unemployment benefit subject to proof that the unemployed person and the members of his family live together, that condition being justified in particular by the need to check that they really are dependent on the unemployed person.

20 It must be recalled, as the Commission rightly points out, that the term 'member of the family' is defined for the purposes of the Regulation in Article 1(f)(i), and that, according to that definition, where legislation regards as a member of the family only a person living under the same roof as the worker, that condition is considered satisfied if the person in question is mainly dependent on that person.

21 Having regard to that definition, Article 68(2) of the Regulation must be interpreted as applying to national rules under which receipt of a higher rate of unemployment benefit is subject to the unemployed person living together with the dependent members of his family.

22 It also follows that reasons relating to monitoring such as those put forward by ONEM and the Belgian Government cannot, without depriving that aspect of the definition of 'member of the family' of its effectiveness, justify a condition of living together which has the consequence that a person with dependent members of his family resident in another Member State may not receive the higher rate of unemployment benefit.

23 Accordingly, the answer to the question must be that Article 68(2) of the Regulation, read in conjunction with Article 1(f)(i) thereof, precludes national rules, such as those at issue in the main proceedings, under which receipt of a higher rate of unemployment benefit is conditional on the unemployed person living together with the members of his family in the territory of the competent Member State.

24 It should be pointed out that this interpretation, which derives from Articles 68(2) and 1(f)(i) of the Regulation, is the same for the entire period covered by the national court's question, since those provisions remained substantially unchanged throughout that period.

Costs

25 The costs incurred by the Belgian and Spanish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 question referred to it by the Tribunal du travail de Mons by judgment of 24 May 2000, hereby rules:

Article 68(2) 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 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, read in conjunction with Article 1(f)(i) thereof, precludes national rules, such as those at issue in the main proceedings, under which receipt of a higher rate of unemployment benefit is conditional on the unemployed person living together with the members of his family in the territory of the competent Member State.

Gulmann Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2001.

R. Grass

Registrar

F. Macken

President of the Third Chamber