OPINION OF ADVOCATE GENERAL JACOBS
delivered on 11 May 1995 *

1. Under Council Regulation (EEC) No 1408/71 [1] an unemployed person who receives unemployment benefit in the State in which he was last employed is under certain conditions entitled to spend a period of three months in another Member State in search of work while continuing to receive unemployment benefit. Where at the very end of that period he falls ill and applies for sickness benefits, does the regulation confer on the sickness insurance institution of his State of last employment a discretion to grant sickness benefits beyond the three-month period notwithstanding the fact that the person, although ill, was capable of travelling back to that State? That, essentially, is the issue which has led the Bundessozialgericht to refer to the Court a series of questions concerning the interpretation of Article 25 of Regulation No 1408/71.

The relevant Community legislation

2. Article 25 of Regulation No 1408/71, which deals with the award of sickness and maternity benefits to unemployed persons and members of their families, must be read in conjunction with Article 69 of the regulation, which lays down rules governing the retention of the right to unemployment benefits by unemployed persons going to a Member State other than the competent State. Article 69 provides as follows:

'1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

(a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorize his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of

* Original language: English.

1 — 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: see the amended and updated version established by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

each of the Member States to which he goes and be subject to the control procedure organized therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under the provisions of paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time limit may be extended by the competent services or institutions.

...'

3. Article 25 of Regulation No 1408/71 provides:

'1. An unemployed person who was formerly employed or self-employed, to whom the provisions of Article 69(1) or the second sentence of Article 71(1)(b)(ii) apply, and who satisfies the conditions of the legislation of the competent State for entitlement to benefits in kind and in cash, taking account where appropriate of the provisions of Article 18, shall receive for the period provided under Article 69(1)(c):

(a) benefits in kind provided on behalf of the competent institution by the institution of the Member State in which he seeks employment in accordance with the provisions of the legislation which the latter institution administers, as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the Member State in which the unemployed person seeks employment, benefits may be provided by the latter institution on behalf of the former institution in accordance with the provisions of the legislation of the competent State. Unemployment benefits under Article 69(1) shall not be granted for the period during which cash benefits are received.

2. ...

3. ...

4. Without prejudice to any provisions of the legislation of a Member State which permit an extension of the period during which sickness benefits may be granted, the period provided for in paragraph 1 may, in cases of *force majeure*, be extended by the competent institution within the limit fixed by the legislation administered by that institution.'

The facts and questions

4. Mr Perrotta, an Italian national, was last employed as a building labourer in Germany. On 8 January 1985 he registered as unemployed in Germany and, pursuant to Article 69 of Regulation No 1408/71, was authorized by the competent German institution, the Munich Arbeitsamt, to go to Italy for a period of three months ending on 19 March 1985 in order to seek employment there. During his stay in Italy he received unemployment benefit from the German institution through the relevant Italian institution.

5. On 15 March 1985 he fell ill and spent the period from 22 April to 9 May 1985 in hospital in Italy. On 19 March 1985, i. e. the last day of the three-month period for which he was authorized to stay in Italy, he applied to the Italian institution for cash benefits on account of his incapacity for work. The application was forwarded by the Italian institution to the defendant sickness insurance institution, the Munich Allgemeine Ortskrankenkasse, which by a decision of 29 April 1985 refused to grant the benefits on the ground that the three-month period for which he was authorized to stay in Italy expired on 19 March 1985. In his written observations to the Court Mr Perrotta states that it is common ground between the parties that his illness persisted until 19 June 1985, after which date he returned to Ger-

many; he also confirms that he received sickness benefits from the defendant in respect of the remaining five days of the three-month period, i. e. from 15 March to 19 March 1985.

6. In his administrative appeal of 2 August 1985 Mr Perrotta claimed that, since he had been unfit for work and unable to travel from 15 March 1985, the defendant should extend the three-month period in the exercise of its discretion and grant him sickness benefit for the duration of his incapacity for work. Before adopting a decision the defendant consulted the Arbeitsamt on the matter of the extension of the three-month period and was informed that what was at issue was extension of the three-month period for payment of sickness benefits under Article 25(4) of the regulation rather than extension of the period of stay authorized by the Arbeitsamt under Article 69. Thereupon the defendant dismissed Mr Perrotta's administrative appeal by a decision of 29 April 1986 on the ground *inter alia* that it was not possible to extend the period for which sickness benefits were granted to him in Italy because illness could not be regarded as a case of *force majeure* for the purposes of Article 25(4) of the regulation.

7. Following the dismissal by the Sozialgericht of his action against that decision, Mr Perrotta appealed to the Landessozialgericht. The latter dismissed his appeal on the ground *inter alia* that illness and incapacity for work did not as such constitute a case of *force majeure*. Mr Perrotta's illness at the end of the three-month period was not so serious as to prevent him from returning to Munich within the time limit. The Landessozialgericht referred in that connection to evidence given by a medical expert, who concluded from the medical documents produced that Mr Perrotta had been suffering from rheumatic arthritis of the wrists and degenerative changes to the spinal column, but had none the less been capable of travelling. It may be noted that in his written observations to the Court Mr Perrotta questions the reliability of such evidence on the ground that it was given six and a half years after the illness purely on the basis of documentary records.

8. The Bundessozialgericht (hereinafter 'the national court'), to which Mr Perrotta has now appealed, has referred the following questions to the Court for a preliminary ruling:

'(1) (a) Must the competent sickness insurance institution treat an application for cash benefits owing to incapacity for work which has been lodged with the sickness insurance institution of the place to which the unem-

ployed person has gone on the last day of the period provided for in Article 25(1) in conjunction with Article 69(1)(c) of Regulation (EEC) No 1408/71 as being at the same time an application lodged within the prescribed period for extension of the period pursuant to Article 25(4) of Regulation (EEC) 1408/71, even when an express application for an extension is first made after the issue of a notice declining to grant the cash benefit applied for?

(b) If not, may the abovementioned period still be extended upon an application made after the expiry of the period?

(2) Does the discretionary decision to be made by the competent institution under Article 25(4) of Regulation (EEC) No 1408/71 presuppose that the unemployed worker was prevented by *force majeure* from returning to the competent State for sickness insurance benefits within the three-month period provided for in Article 25(1) in conjunction with Article 69(1)(c) of Regulation (EEC) No 1408/71, or in the context of that discretionary decision is a finding also to be made as to whether a case of *force majeure* exists?

(3) Must a case of *force majeure* within the meaning of Article 25(4) of Regulation (EEC) No 1408/71 be assumed if the unemployed person who is unable to work owing to his illness has not returned to the competent State within the three-month period, even though he was able to travel?'

Previous case-law

9. As already noted, Article 25 of the regulation is closely linked with Article 69. The Court has had occasion to consider the provisions of Article 69 in its judgments in *Coccioli* [2] and *Testa*. [3] At paragraph 8 of its judgment in *Testa* the Court described the effect of the provision in the following terms:

'It follows from the express terms of that provision that continued entitlement to benefits as against the competent State beyond the three-month period depends on the worker's returning to that State before that period has expired and that he "shall lose all entitlement to benefits under the legislation of the competent State" in the event of his late return. The only eventuality in which a

2 — Case 139/78 *Coccioli* v *Bundesanstalt für Arbeit* [1979] ECR 991.

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

worker may retain his entitlement to benefits as against the competent State should he return after the three month period has expired is that envisaged by the second sentence of Article 69(2) which, in certain cases, allows the competent services or institutions to extend that period.'

10. At paragraphs 13 and 14 of the same judgment the Court explained that the provision was nevertheless compatible with the Treaty provisions on the free movement of workers:

'As the Court has already observed in its judgment in ... *Coccioli* ..., in giving a worker the right to go to another Member State to seek employment there, Article 69 of Regulation No 1408/71 confers on a person availing himself of that provision an advantage as compared with a person who remains in the competent State inasmuch as, by the effect of Article 69, he is freed for a period of three months of the duty to keep himself available to the employment services of the competent State and to be subject to the control procedure organized therein, even though he must register with the employment services of the Member State to which he goes.

The right to retain unemployment benefits conferred by Article 69 therefore contributes to ensuring freedom of movement for workers in accordance with Article 51 of the Treaty. The fact that that advantage is limited in time and subject to the observance of certain conditions is not such as to bring Article 69(2) into conflict with Article 51. The latter provision does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto.'

11. In *Coccioli* the Court went some way towards mitigating the rigour of Article 69(2) by holding, at paragraph 5, that:

'In this respect it must be observed that Article 69(2) of Regulation No 1408/71 does not provide that a request for extension must necessarily be made before the expiration of the period.

In fact, amongst the "exceptional cases" capable of justifying an extension of the period some may be of such a nature that they prevent not only the return of the unemployed person to the competent State within the period prescribed, but equally the lodging of a request for extension, before the expiration of that period.'

12. In *Coccioli* the Court also held the competent authorities to have a wide discretion

in deciding whether a case was to be considered 'exceptional' for the purposes of Article 69(2):

'[Article 69(2)] does not restrict the freedom of the competent services and institutions of the Member States to take into consideration, with a view to deciding upon any extension of the period laid down by the regulation, all factors which they regard as relevant and which are inherent both in the individual situation of the workers concerned and in the exercise of effective control' (paragraph 9).

13. However, at paragraph 21 of the judgment in *Testa* the Court added the following qualification:

'... Whilst, as the Court held in [Coccioli], 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.'

The relationship between Articles 25 and 69

14. As the Commission points out, the right to sickness benefits under Article 25 of the regulation is an accessory of the right to unemployment benefit under Article 69. A person continues to be entitled to benefits under Article 25 only for the period for which he has the right to unemployment benefits under Article 69. Moreover, by virtue of the last sentence of Article 25(1)(b), unemployment benefits under Article 69(1) are not granted for the period during which cash benefits are received under Article 25.

15. In my view Article 25(1), in providing for payment of sickness benefits for the period referred to in Article 69(1)(c), must be taken to provide for payment of such benefits for the three-month period referred to in that provision, as extended in exceptional cases pursuant to Article 69(2). An unemployed person therefore retains sickness cover as of right throughout the period for which he is permitted by the competent employment institution to search for work in another Member State. It follows that the

application of Article 25(4) is limited to cases where the illness of the unemployed person extends beyond the period for which he was authorized by the competent institution to remain in the State to which he has gone in search of work.

16. Such a view is consistent with the scheme of Articles 69 and 25. As already noted, the right to sickness benefits under Article 25 is an accessory of the right to unemployment benefits under Article 69. It would be illogical and contrary to the aim of facilitating the movement of workers if an unemployed person who was allowed to remain in another Member State in search of work did not retain sickness cover. In my view, therefore, sickness cover is automatically extended under Article 25(1) in the 'exceptional cases' in which the three-month period in Article 69(1)(c) is extended.

17. Such a view is also consistent with the use in Article 25(4) of the term '*force majeure*', which is narrower than the term 'exceptional cases' in Article 69(2). If the decision to extend the period for receipt of sickness benefits did not follow automatically from the decision to extend the period for receiving unemployment benefits, one would have expected the competent sickness authority to have the same discretion under Article 25(4) as that accorded to the competent employment institution under Article 69(2); in other words one would have expected the term 'exceptional cases' to be used in both provisions. In my view, the use of the narrower term '*force majeure*' in Article 25(4) may be explained by the fact that the question of an extension under that provision arises only where an unemployed person is prevented from returning at the end of the three-month or longer period authorized by the competent employment services.

18. Although in this particular case the three-month period provided for by Article 69(1)(c) was not extended, the above analysis is important for the purpose of understanding the scheme of the regulation and of interpreting the term '*force majeure*' in Article 25(4).

19. Before turning to the national court's questions I must deal with a preliminary point raised by Mr Perrotta.

20. Mr Perrotta contends that the national court's questions are based on an incorrect interpretation of Article 25(1) of the regulation. He challenges the national court's conclusion that he was not entitled to continued payment of benefits after the end of

the three-month period laid down in Article 69(1)(c). At the material time the German rules provided for continued payment of benefits for a maximum of 78 weeks in the case of illnesses commencing during a period of affiliation to an insurance scheme. In Mr Perrotta's view, Article 25(1) allows an unemployed person to continue to receive benefits in respect of an illness occurring during the three-month period notwithstanding any residence clause in the national legislation. The provision denies protection only for illnesses commencing after the three-month period.

21. That view is however inconsistent with the wording of Article 25(1), which states that an unemployed person who was formerly employed and to whom the provisions of Article 69(1) apply is to 'receive [sickness benefits] for the period provided under Article 69(1)(c)'. It does not provide that the person concerned is to continue to receive sickness benefits, after the period referred to in Article 69(1)(c), in respect of any incapacity for work occurring during that period.

22. Moreover, Mr Perrotta's view is difficult to reconcile with the terms of Article 25(4). On his view Article 25(4) does not apply where the unemployed person fell ill before the end of the authorized period of stay. It applies only where the illness occurs after the end of that period. Since, therefore, on Mr Perrotta's view Article 25(4) applies where the unemployed person has chosen to remain after the end of the authorized period, it is difficult to see what the *force majeure* referred to in that provision prevents the unemployed person from doing. On Mr Perrotta's view Article 25(4) ought logically to confer unfettered discretion on the competent institution to pay further benefits. Moreover, his view would lead to the anomalous situation in which an unemployed person would cease, after exceeding the authorized period of stay, to receive unemployment benefits, but would subsequently receive sickness benefits, at the discretion of the competent institution, if he fell ill.

23. Contrary to Mr Perrotta's view, I do not think the provisions of Articles 69 and 25 can be regarded as setting a trap for the unemployed person. As I have already explained, the combined effect of those provisions is to allow a worker to go in search of work to another Member State for a period of three months, or for such longer period as may exceptionally be authorized by the competent institution, without suffering the loss of entitlement to unemployment and sickness benefits which might otherwise occur under national law by reason of his ceasing to be resident in the competent State.

It is only if, for reasons constituting *force majeure*, the unemployed person is prevented from returning to the competent State at the end of the authorized period that he must seek the discretionary payment of benefits under Article 25(4). Moreover, as I shall explain below, I share the Commission's view that, where *force majeure* exists, the discretion of the competent sickness institution is in practice extremely limited.

24. I turn therefore to the national court's first question.

Question 1

25. By its first question the national court seeks to ascertain whether, by making an application for cash benefits in respect of incapacity for work on the last day of the three-month period, the unemployed person is also to be regarded as applying for an extension of that period under Article 25(4) and, if not, whether the period may be extended upon an application made after the expiry of the period.

26. Those who have submitted written observations all favour a flexible interpretation of Article 25(4). Mr Perrotta contends that the competent institution should consider the possibility of extending the period provided for in Article 25(4) whether the institution of the place where the unemployed person is staying informs it of the length of his illness or whether the unemployed person himself applies for extension, and should do so even where this occurs after the expiry of the period. The Italian Government considers that an application for benefits for periods beyond the three-month period necessarily encompasses a request for extension of the three-month period. That is particularly so here where the application for benefits was made on the last day of the three-month period. The German Government observes that requests should be interpreted in favour of the insured person in the light of the facts of the case. Since in this case Mr Perrotta clearly had an interest in continuing to receive benefits after the three-month period, his request should be interpreted in that way.

27. The Commission adopts the somewhat different view that there is no time limit for requesting extension of the period for receiving sickness benefits under Article 25(4). If, however, a request for extension must be made within the three-month period, then a request for cash benefits within that period must also be treated as a request for extension. If the request cannot be so treated, the

unemployed person may expect the institution of the State in which he is staying to apply for extension of the three-month period at the same time as it notifies the competent institution of the illness.

28. In my view an application for sickness benefits made by an unemployed person during the period referred to in Article 69(1)(c) should also be treated, where necessary, as a request for extension of that period.

29. Article 26 of Council Regulation (EEC) No 574/72 [4] lays down the following rules for the implementation of Article 25(1) of Regulation No 1408/71:

'1. In order to receive benefits in cash and in kind under Article 25(1) of the Regulation for himself and for the members of his family, an unemployed person shall submit to the sickness insurance institution of the place where he has gone a certified statement for which, prior to his departure, he should have applied to the competent sickness insurance institution. If the unemployed person does not submit the said certified statement, the institution of the place to which he has gone shall obtain it from the competent institution.

This certified statement must testify the existence of the right to the said benefits under the conditions set out in Article 69(1)(a) of the Regulation; indicate the duration of such right, taking into account the provisions of Article 69(1)(c) of the Regulation; and specify the amount of cash benefits to be provided, where appropriate, by way of sickness insurance during the abovementioned period, in the case of incapacity for work or hospitalization.

2. The unemployment insurance institution of the place where the unemployed person has gone shall testify on a copy of the certified statement referred to in Article 83 of the implementing Regulation, which shall be sent to the sickness insurance institution of that same place, that the conditions laid down in Article 69(1)(b) of the Regulation have been fulfilled and shall specify the date from which they were fulfilled, and the date from which the unemployed person shall receive unemployment insurance benefits at the expense of the competent institution.

This certified statement shall be valid for the period laid down in Article 69(1)(c) of the Regulation, for as long as the conditions are fulfilled. The unemployment insurance institution of the place where the unemployed person has gone shall, within three days, inform the said sickness insurance institution if the conditions are no longer satisfied.

3. ... .

4 — Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, as contained in Annex II of Council Regulation (EEC) No 2001/83, OJ 1983 L 230, p. 6.

4. In order to receive the cash benefits provided for by the legislation of the competent State, the unemployed person shall, within three days, send a certificate of incapacity for work, issued by the doctor providing treatment for him, to the sickness insurance institution of the place to which he has gone. He shall also state the date up to which he has received sickness insurance benefits and his address in the country where he is.

5. The sickness insurance institution of the place to which the unemployed person has gone shall, within three days, notify the competent sickness insurance institution and the competent unemployment insurance institution, as well as the institution where the unemployed person is registered as seeking employment, of the date when the incapacity for work began and ended.

6. In the cases defined in Article 25(4) of the Regulation, the sickness insurance institution of the place to which the unemployed person has gone shall inform the competent sickness insurance institution and the competent unemployment insurance institution that it considers that the conditions justifying the extension of the period during which benefits in cash and in kind may be granted are satisfied, stating the grounds on which its opinion is based, and shall attach to the communication it sends to the competent sickness insurance institution a detailed report from the examining doctor on the condition of the patient, indicating the probable period during which the conditions for applying Article 25(4) of the Regulation will exist. The competent sickness insurance institution shall then take the decision as to the extension of the period during which benefits may be granted to the sick unemployed person.

7. ...'

30. It may be noted that under those provisions the sickness institution of the State to which the unemployed person has gone has general responsibility for monitoring individual cases and for ensuring that the competent institutions are kept fully informed. Thus, where an unemployed person falls sick and applies to it for cash benefits, it must notify the competent sickness and unemployment institutions; where the unemployed person has failed to submit to it a certified statement issued by the competent sickness institution, it must obtain the statement itself from that institution. Where it considers that an extension of the three-month period is justified, it must inform the competent sickness and employment institutions, giving the reasons for its opinion.

31. Neither Article 25(4) of Regulation No 1408/71 nor Article 26(6) of Regulation No 574/72 makes any reference to a formal application by the unemployed person for extension of the three-month period. Instead the underlying assumption seems to be that the institution of the State to which the unemployed person has gone will already be aware of his illness as a result of his application for cash benefits, will have notified the competent institutions and will continue to monitor his state of health; if his illness

seems likely to continue beyond the three-month period it will obtain a detailed doctor's report (if one has not already been submitted), examine whether it considers an extension of the period to be justified and, if so, notify the competent institutions.

32. Against that background it seems unnecessary to require an unemployed person who has already applied for cash benefits to make a further request for extension of the period for which benefits are granted. It is reasonable to assume that a person who applies for cash benefits wishes to continue receiving them, if possible, for the duration of his illness. Moreover, strict insistence on formal requirements would be particularly inappropriate in the case of Article 25(4), which applies only where the unemployed person's illness is such as to fulfil the requirements of *force majeure*.

33. I do not consider it necessary to consider the Commission's view that there is no time limit for applying for extension of the period for receiving benefits. It is common ground that Mr Perrotta fell ill and applied for cash benefits within the three-month period. He must therefore be regarded as having applied for extension within that period. Nor is the fact, mentioned by the national court in its question, that an unemployed person subsequently makes an express application for extension after the end of the three-month period of any consequence.

34. Accordingly, I conclude that Question 1(a) must be given an affirmative answer. It is therefore unnecessary to consider Question 1(b).

Questions 2 and 3

35. By its second question the national court asks whether the competent institution's discretion under Article 25(4) extends to the question whether a case of *force majeure* exists. By its third question it asks whether *force majeure* must be assumed if the unemployed person, who is unable to work on account of his illness, has not returned to the competent State within the three-month period even though he was able to travel.

36. Before dealing specifically with those questions, which may conveniently be examined together, I shall consider what is meant by the term '*force majeure*' in Article 25(4).

37. Mr Perrotta, referring to the Court's judgment in *Rindone*, [5] considers that an unemployed person who is unable to work fulfils the requirements of *force majeure* for the purposes of Article 25(4), regardless of whether he is unfit to travel, provided that the occurrence or length of the illness is not attributable to gross negligence on his part. The German and Italian Governments and the Commission, on the other hand, endorse the Bundessozialgericht's suggestion that it is necessary to consider whether it is reasonable in the particular circumstances to expect the person concerned to return to the competent State.

38. In my view the Court should adopt the solution suggested by the Bundessozialgericht. I do not think Mr Perrotta can place reliance in this connection on the Court's judgment in *Rindone*. In that case the Court held *inter alia* that Article 18(5) of Regulation No 574/72 was to be interpreted to the effect that a person residing in a Member State other than the competent State to whom Article 19 of Regulation No 1408/71 applied was not obliged to return to the State of the competent institution to undergo a medical examination there for the purpose of assessing his incapacity for work. However, Article 19 of the regulation covers the very different situation where the employed or self-employed person satisfies the conditions of the legislation of the competent State for entitlement to benefits notwithstanding his residence in another State. Article 25, in conjunction with Article 69, confers an entitlement to benefits which the unemployed worker would not otherwise have under national law and does so for a limited period, at the end of which he must return to the competent State in order to retain entitlement to benefits there.

39. Moreover, I do not share the Italian Government's view that the difference in wording of Articles 69(2) and 25(4) is purely terminological. By allowing the competent employment institution to extend the period for seeking work in 'exceptional cases' Article 69(2) permits it to take account of all the circumstances of the case: see paragraph 9 of the judgment in *Coccioli* cited at paragraph above. In coming to its decision it will in particular need to assess, possibly after consulting the employment service of the State to which the individual has gone, whether his employment prospects in that State are such that he should be allowed more time to find employment there. Article 25(4), on the other hand, allows the period for receiving sickness benefits to be extended only in cases of *force majeure*. As I have already stated, the use of that term, which is narrower than the expression 'exceptional cases' used in Article 69(2), may be explained by the fact that Article 25(4) concerns a different situation. Its scope is limited to cases in which the period of stay authorized by the competent

5 — Case 22/86 *Rindone* v *Allgemeine Ortskrankenkasse Bad Urach-Münsingen* [1987] ECR 1339.

employment services has come to an end. In taking a decision under Article 25(4), the competent sickness institution is not obliged to perform the balancing act required of the competent employment service under Article 69(2). Its sole interest is that the person concerned should return to the competent State.

40. The Court has considered the term '*force majeure*' in a number of cases, in particular in the sphere of agriculture. The principles governing the interpretation of the term were summarized in the recent judgment in *An Bord Bainne Co-operative Ltd and Compagnie Inter-Agra SA* [6] where the Court stated at paragraphs 10 and 11:

'... it must first be borne in mind that the Court has consistently held that, since the concept of *force majeure* does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate.

The concept of *force majeure* adopted by the agricultural regulations takes into account the particular nature of the public-law relationships between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the concrete provisions of the regulations in question that the concept of *force majeure* is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice ... .' [7]

41. In my view those principles, although laid down in a different context, may be applied to the present case. As the German Government observes, illness must in principle be regarded as an abnormal and unforeseeable circumstance outside the control of the person concerned. There is in any event no suggestion that Mr Perrotta's illness did not fulfil those requirements. However, illness cannot of itself constitute *force majeure*, since the reference to that term in Article 25(4) would then be redundant. Nevertheless *force majeure* is not limited to absolute impossibility; it is sufficient that the person concerned could not, in spite of the exercise of all due care, have avoided the consequences, except at the cost of excessive sacrifice. That principle may in my view be translated, in the context of Article 25(4), into a test of whether the unemployed

6 — Case C-124/92 *An Bord Bainne Co-operative Ltd and Compagnie Inter-Agra SA* v *Intervention Board for Agricultural Produce* [1993] ECR I-5061.

7 — See also Case 4/68 *Schwarzwaldmilch* v *Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377 and Case C-136/93 *Transáfrica SA* v *Administration of the Spanish State* [1994] ECR I-5757.

person can reasonably be expected to return to the competent State within the required period.

42. The competent institution must therefore conduct an appraisal of the circumstances of the case and in particular consider whether the journey would be likely to cause a significant deterioration in his condition. It would not, in my view, be reasonable to expect a person to travel if the journey would seriously jeopardise his chances of recovery. Even in less serious cases it might be appropriate for the competent institution to allow the person concerned to postpone his journey for a limited period if this would eliminate the risk of deterioration.

43. I now turn to the Bundessozialgericht's second question. Different replies are proposed in the written observations. The Commission and the Italian Government consider that the competent institution's discretion extends to the question of the existence of *force majeure*, whereas Mr Perrotta and the German Government consider that the competent institution has no discretion in this matter.

44. In my view, it is necessary to distinguish between the competent institution's power of appraisal in relation to the existence of a case of *force majeure* and its discretion to extend the period for receiving sickness benefits. It is the responsibility of the competent institution, subject to review by the courts, to appraise the facts of a particular case in order to determine whether the requirements of *force majeure*, as defined above, are met. The actual discretion conferred upon the competent institution by the regulation is however limited to deciding whether 'in cases of *force majeure*' the period for payment of benefits should be extended. As the Commission suggests, it is difficult to see how, in a case where *force majeure* exists, a refusal to extend the period for payment of benefits would not be arbitrary. It would seem that the competent institution's discretion would in practice be limited to determining the period of the extension. It should of course also be noted that Article 25(4) applies without prejudice to any provisions of national law permitting extension of the period for receiving benefits.

45. Contrary to the Italian Government's view, I do not consider it appropriate to extend to Article 25(4) the rulings in *Coccioli* and *Testa* in which, as already noted, the Court held that the competent institutions had a wide discretion as regards the appraisal of 'exceptional cases' under Article 69(2). As I have already explained, the competent institution's task of determining whether a case is to be regarded as exceptional for the purposes of Article 69(2) entails a more complex assessment than the finding which the

competent institution must make under Article 25(4).

46. The answer to the national court's third question follows from the above discussion: see paragraphs to. The fact that an unemployed person is physically capable of returning to the competent State is not of itself conclusive for the purpose of determining whether the requirements of *force majeure* are met. The competent institution must consider whether, in the light of all the circumstances, it is reasonable to expect the unemployed person to travel. In particular it would not be reasonable to expect a person to travel if the journey might cause a significant deterioration in his condition.

Conclusion

47. Accordingly the national court's questions should in my view be answered as follows:

(1) The competent institution must treat an application for cash benefits submitted, within the period referred to in Article 69(1)(c) of Regulation No 1408/71, to the sickness institution of the place to which the unemployed person has gone as a request for extension of that period lodged pursuant to Article 25(4) of the regulation.

(2) The discretion of the competent institution under Article 25(4) of Regulation No 1408/71 to extend the period for receiving sickness benefits arises only where the unemployed worker was prevented by *force majeure* from returning to the competent State within the period referred to in Article 69(1)(c).

(3) The requirements of *force majeure* are fulfilled if the unemployed person cannot reasonably be expected to return to the competent State within the period referred to in Article 69(1)(c).