JUDGMENT OF THE COURT (Sixth Chamber)

9 November 2000 *

In Case C-75/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundessozialgericht, Germany, for a preliminary ruling in the proceedings pending before that court between

Edmund Thelen

and

Bundesanstalt für Arbeit,

on the interpretation of Articles 6 and 7 of Regulation (EEC) No 1408/71 of the Council 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and amended by Council Regulation (EEC) No 2332/89 of 18 July 1989 (OJ 1989 L 224, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in the same Ministry, acting as Agents,

— the Spanish Government, by S. Ortíz Vaamonde, Abogado del Estado, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2000,

gives the following

Judgment

1 By order of 21 January 1999, received at the Court on 3 March 1999, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 6 and 7 of Regulation (EEC) No 1408/71 of the Council 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and amended by Council Regulation (EEC) No 2332/89 of 18 July 1989 (OJ 1989 L 224, p. 1, hereinafter 'the Regulation').

2 That question was raised in proceedings between Edmund Thelen and the Bundesanstalt für Arbeit (Federal Labour Office) concerning his entitlement to unemployment benefit.

Legal background

3 Article 6 of the Regulation provides that, subject to certain reservations set out in particular in Article 7 thereof, the Regulation is to replace any social security convention binding either two or more Member States exclusively, or at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.

4 Articles 67 to 71 of the Regulation, which constitute Chapter 6, entitled 'Unemployment', of Title III of the Regulation, concern unemployment benefits. Under Article 67(3), only if the person concerned has completed lastly periods of insurance or employment in the Member State where the unemployment benefits are claimed can account be taken of periods of insurance or employment completed in another Member State.

5 That condition is not, however, contained in the unemployment insurance convention concluded between the Federal Republic of Germany and the Republic of Austria on 19 July 1978 (hereinafter 'the convention'), the first sentence of Article 7(1) of which provides: 'Periods of employment in respect of which contributions are compulsory and which have been completed under the legislation of the other contracting State must be taken into account in assessing whether the conditions for the acquisition of rights are fulfilled and in determining how long entitlement to benefits is to last, provided that the claimant possesses the nationality of the contracting State in which the benefits are claimed and habitually resides in the territory of that State.'

6 Under Paragraph 100(1) of the Arbeitsförderungsgesetz (Law on Employment Promotion, hereinafter 'the AFG'), a person is entitled to unemployment benefit if he is unemployed, is available to the employment services, completes the qualifying period, has registered as unemployed at the employment office and has applied for unemployment benefit. Under the combined provisions of the first sentence of Paragraph 104(1) and the first sentence of Paragraph 106(1) of the AFG, entitlement to unemployment benefit for 156 days is conditional upon prior employment for 360 days in the course of the reference period in a job for which contributions are compulsory under Paragraph 168 of the AFG. Pursuant to Paragraph 104(2) and (3) of the AFG, the reference period, which is three years, immediately precedes the first day of the period of unemployment as from which the other conditions for entitlement to registration as a job seeker are fulfilled. It also appears from the order for reference that the regulatory authorities in Germany have not availed themselves of Paragraphs 108 and 109 of the AFG under which they may take account of periods of employment or insurance completed abroad.

The main proceedings

7 Mr Thelen, a German national, lived from 1986 to 1996 in Austria where from 18 July 1991 to 15 June 1993, from 1 to 20 December 1993 and from 1 February 1994 to 31 January 1996 he was in an occupation which under Austrian Law was subject to compulsory unemployment insurance contributions.

8 Having moved to Trier, Germany, he applied to the employment office in that city for unemployment benefit for the period 4 March to 31 July 1996, but his claim was rejected on the ground that he had not completed the qualifying period. A subsequent complaint and a claim before the Sozialgericht (Social Court), Trier, were also rejected.

9 On appeal, the Landessozialgericht (Higher Social Court) Rheinland-Pfalz found that Mr Thelen's periods of employment since 1 January 1994, on which date the Agreement on the European Economic Area entered into force, should not in principle be taken into account because of the replacement of the convention by the Regulation on that date and that the conditions laid down by Article 67(3) or Article 71 of the Regulation were not fulfilled. But it considered that the periods of employment at issue should be taken into account in accordance with Article 7 of the convention because Articles 48(2) and 51 of the EC Treaty (now, after amendment, Articles 39(2) EC and 42 EC) do not to allow a situation in which, as a result of the entry into force of the Regulation, workers lose advantages conferred by a convention between Member States. It therefore upheld Mr Thelen's claim.

10 The defendant administration appealed on a point of law against that decision to the Bundessozialgericht, which queried whether it might be possible, notwithstanding the entry into force of the Regulation in Austria, to rely on the provisions of the convention under the conditions defined by the judgments of the Court in Case C-227/89 *Rönfeldt* [1991] ECR I-323, Case C-475/93 *Thévenon* v *Landesversicherungsanstalt Rheinland-Pfalz* [1995] ECR I-3813 and Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* v *Instituto Nacional de la Seguridad Social* [1997] ECR I-5501. It observed in particular that those

judgments relate to retirement or invalidity schemes and that the conclusion reached in them cannot necessarily be transposed to an unemployment insurance scheme of the kind at issue in the main proceedings, which displays particular characteristics regarding the qualifying period.

11 Considering that the decision to be given in the proceedings before it thus depended upon the interpretation of Articles 6 and 7 of the Regulation, the Bundessozialgericht stayed proceedings pending a preliminary ruling from the Court on the following question:

'Are Articles 6 and 7 of Regulation (EEC) No 1408/71 to be interpreted as meaning that, because of the principle of freedom of movement for workers, they do not preclude the continuance in force of a convention concluded between States in the field of unemployment insurance which is more advantageous for the insured person, although in consequence of the reference period entitlement to unemployment insurance benefits can no longer be derived from the period before the entry into force of the Regulation?'

The question referred to the Court

12 The German and Spanish Governments consider that that question should be answered in the negative. According to them, the present circumstances are different from those at issue in *Rönfeldt, Thévenon* and *Naranjo Arjona,* cited above, in that Mr Thelen, who no longer worked in Austria on 31 December 1993 and did not resume work there until after 1 January 1994, that is to say after the entry into force of the Regulation, suffered no harm as a result of replacement of the convention by the Regulation. The Spanish Government draws attention to the particular nature of unemployment benefits, which are characterised by their immediacy and the fact that, unlike retirement and invalidity pensions, they cannot give rise to acquired rights.

13 The Commission suggests, on the contrary, that the answer to the question should be that Articles 6 and 7 of the Regulation do not prevent the convention from continuing to apply to the extent to which it proves more advantageous to the person concerned. It considers, essentially, that there is no reason to limit the ruling reached in *Rönfeldt*, cited above, to retirement and invalidity schemes and that temporary interruption of an employment relationship has no impact on the application of the ruling in that case. Although conceding that, when Mr Thelen resumed work, one month after the entry into force of the Regulation, he could not of course legitimately expect still to be treated in accordance with the convention, the Commission points out in particular that, in view of the date of his claim, the reference period adopted by German law started on 4 March 1993, that is to say before the date on which the convention was replaced by the Regulation.

14 In paragraph 22 of *Rönfeldt*, cited above, which is concerned with the way in which a retirement pension is to be calculated, the Court first pointed out that, as it had already held in Case 82/72 *Walder* v *Bestuur der Sociale Verzekeringsbank* [1973] ECR 599, Articles 6 and 7 of the Regulation make it clear that replacement by it of the provisions of social security conventions concluded between Member States is mandatory and is subject to no exception beyond the cases expressly mentioned in the Regulation.

15 However, in the same judgment the Court held that Articles 48(2) and 51 of the Treaty preclude the loss of social security advantages which result from the inapplicability, following the entry into force of the Regulation, of conventions operating between two or more Member States and incorporated in their national law.

16 In paragraphs 25 and 26 of *Thévenon*, cited above, the Court stated that that principle could not, however, apply to workers who had not exercised their right to freedom of movement until after the entry into force of the Regulation.

17 Finally, in *Naranjo Arjona*, cited above, and Case C-153/97 *Grajera Rodríguez* v *INSS and TGSS* [1998] ECR I-8645, the Court held that the same principle was applicable in the case of payment of an old-age or invalidity pension to workers who were already employed in another Member State before the entry into force of the Regulation as between that State and their State of origin.

18 In the main proceedings, it is common ground that the claimant, a German national, was already employed in Austria before the entry into force, on 1 January 1994, of the Agreement on the European Economic Area, the effect of which, as between the Federal Republic of Germany and the Republic of Austria, was to replace the provisions of the convention by those of the Regulation. Accordingly, by virtue of the case-law cited above, that substitution cannot deprive him of the rights and advantages accruing to him from the convention.

19 That finding is not undermined by the fact that the main proceedings are concerned with an unemployment insurance scheme, which displays particular characteristics regarding the qualifying period, and not, as in the judgments cited above, a retirement or invalidity pension scheme.

20 The relative brevity of the qualifying period for unemployment benefit is not specific to insurance of that kind. The operation of certain invalidity schemes, in which the amount of benefits is not dependent upon the length of the periods of insurance, is governed by a comparable mechanism.

21 Moreover, the mere fact that the claimant temporarily interrupted his employment on the date of entry into force of the Regulation cannot deprive him of the benefit of rights deriving from application of the convention.

22 In that connection, it need merely be pointed out that the starting point of the reference period provided for by the German legislation, calculated on the basis of Mr Thelen's claim, falls on a date prior to the entry into force of the Regulation on 1 January 1994. Moreover, it is common ground that on that date, by virtue of the provisions of the convention, the claimant fulfilled the requirements of that legislation governing the qualifying period. Thus, Mr Thelen was legitimately entitled to expect to retain his right, under the convention, to receive unemployment benefit in Germany.

23 The answer to the question submitted must therefore be that Articles 6 and 7 of the Regulation do not preclude application of provisions of an inter-State convention on unemployment insurance which are more advantageous for the insured, provided that the latter exercised his right to freedom of movement before the date of entry into force of the Regulation, even if, as a result of the reference period prescribed by the national legislation applicable to determination of the insured's entitlement, it is not possible for him to claim a right to benefits based entirely on the period prior to that date.

Costs

24 The costs incurred by the German 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 proceedings, 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 (Sixth Chamber),

in answer to the question referred to it by the Bundessozialgericht by order of 21 January 1999, hereby rules:

Articles 6 and 7 of Regulation (EEC) No 1408/71 of the Council 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 (EEC) No 2001/83 of 2 June 1983 and amended by Council Regulation (EEC) No 2332/89 of 18 July 1989, do not preclude application of provisions of an inter-State convention on unemployment insurance which are more advantageous for the insured, provided that the latter exercised his right to freedom of movement before the date of entry into force of that regulation, even if, as a result of the reference period prescribed by the national legislation applicable to determination of the insured's entitlement, it is not possible for him to claim a right to benefits based entirely on the period prior to that date.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber