JUDGMENT OF THE COURT
OF 6 JULY 1978 [1]

Directeur Régional de la Sécurité Sociale de Nancy v Paulin Gillard and Caisse Régionale d'Assurance Maladie du Nord-Est, Nancy (preliminary ruling requested by the Cour d'Appel, Nancy)

Case 9/78

1. *Social security for migrant workers — Community rules — Substantive field of application — Benefits covered and benefits excluded — Distinction*
(Regulation No 1408/71 of the Council, Article 4 (1) and (4))

2. *Social security for migrant workers — Community rules — Substantive field of application — Benefits excluded — Old-age benefits for former prisoners of war*
(Regulation No 1408/71 of the Council, Article 4 (4))

1. The fact that a provision creating benefits for victims of war or its consequences is inserted in national social security legislation is not by itself decisive in determining that the benefit referred to in the above-mentioned provision is a social security benefit within the meaning of Regulation No 1408/71, as the distinction between benefits which are excluded from the field of application of that regulation and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purposes and the conditions for its grant.

2. Article 4 (4) of Regulation No 1408/71 must be interpreted as meaning that the regulation does not apply to benefits for former prisoners of war consisting in the grant, to workers who prove that they underwent a long period of captivity, of an advanced old-age pension, the essential purpose of such benefits being to provide for former prisoners of war testimony of national gratitude for the hardships endured between 1939 and 1945 on behalf of France and its Allies and thus granting them, by the provision of a social benefit, a *quid pro quo* for the services rendered to those States.

In Case 9/78,

Reference to the Court under Article 177 of the EEC Treaty by the Cour d'Appel (Court of Appeal), Nancy, (Social Chamber), for a preliminary ruling in the action pending before that court between

1 — Language of the case: French.

DIRECTEUR RÉGIONAL DE LA SÉCURITÉ SOCIALE DE NANCY (Regional Director of Social Security, Nancy),

and

1. PAULIN GILLARD, Belgium, and

2. CAISSE RÉGIONALE D'ASSURANCE MALADIE DU NORD-EST (North-East Regional Sickness Insurance Fund), Nancy,

on the interpretation of certain provisions of Regulation 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

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the written observations submitted in pursuance of Article 20 of the Protocol on the Statue of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Paulin Gillard, date of birth 6 September 1915, of Belgian nationality and resident in Belgium, was employed in France. From 28 May 1940 to 21 June 1945, that is, more than 60 months, he was a prisoner of war in Germany as a member of the Belgian armed forces.

When he reached the age of 60 he obtained from the Caisse Régionale d'Assurance Maladie du Nord-Est, Nancy, (hereinafter referred as to "the

Fund"), an advance old-age pension as from 1 October 1975 at the normal rate of 25% of his average annual wage. Gillard was the holder of a former prisoner-of-war card issued by the Belgian Ministry for Defence and invoking the principle of equality of treatment between national workers and workers who were nationals of another Member State, he claimed an advance old-age pension at the rate of 50% in pursuance of:

(a) Article L 382 (2) of the Code de la Sécurité Sociale (Social Security Code), as provided for by Law No 73-1051 of 21 November 1973, according to which:

"The pension granted to insured persons who are former prisoners of war shall be calculated by taking into account the rate normally applicable at 65 when, at their request, the pension is awarded at an age between 61 and 60 years for those who were in captivity for at least 54 months".

(b) Article 1 (1) of Decree No 74-54 of 23 January 1974 implementing the above-mentioned law, in pursuance of which such insured persons, "who prove that they have at least 37½ months' insurance" shall be awarded a pension equal to 50% of the basic wage.

The Fund rejected Mr Gillard's application, observing that he could not prove that he was a former prisoner of war except by means of a document issued by the Belgian Ministry for Defence whereas the benefit claimed could only be awarded to insured persons who proved the length of their captivity and military service in wartime in the French or Allied Forces "by producing their service record or a certificate issued by the competent military authority or by the Ministry for Ex-Servicemen or the Office National des Anciens Combattants (National Ex-Servicemen's Office)".

On 13 May 1976 Mr Gillard made a complaint against this refusal to the Fund's Arbitration Committee. As the Committee did not announce its decision within one month Mr Gillard took his complaint to the Commission de Première Instance du Contentieux de la Sécurité Sociale de Nancy (Tribunal of First Instance for Disputes in Social Security Matters, Nancy). The latter, having regard to the case-law of the Court of Justice relating to the prohibition of discrimination based on nationality, repeated in Article 8 of Regulation No 3 of the Council, took the view that Mr Gillard was entitled to the benefit of the Law of 21 November 1973 and thus to receive a pension equal to 50% of the average annual wage as he was a former prisoner of war and had done military service in wartime in the French or Allied Forces as certified by the Belgian Ministry for Defence.

In June 1977 the Directeur Régional de la Sécurité Sociale de Nancy appealed against that judgment to the Cour d'Appel, Nancy. In his conclusions he claimed in particular that:

(a) Regulation No 1408/71 does not apply in the present case as the provisions of the French Law of 21 November 1973 do not, according to Article 4 (4) of that regulation, come within the field of application of the regulation;

(b) Alternatively, Article 13 (2) (d) of the said regulation designates, as the legislation applicable for the purpose also of taking into consideration any periods of military service, the legislation of the Member State for which the military service was performed and not the legislation of the Member State of affiliation;

(c) In any event the French Law of 21 November 1973 applies only to nationals and those assimilated to nationals or at least to the nationals

of States with which France has concluded a reciprocal agreement.

2. The Cour d'Appel, Nancy, by a judgment of 24 January 1978, decided to stay the proceedings and, in pursuance of Article 177 of the EEC Treaty, put the following questions to the Court of Justice for a preliminary ruling:

"1. Must Article 4 (4) of Regulation No 1408/71, pursuant to which that regulation is not to apply to 'benefit schemes for victims of war or its consequences', be interpreted as meaning that benefits which are not strictly in the nature of compensation and are payable to those workers who were victims of the war only in so far as it detrimentally affected their acquisition of old-age pension rights or similar rights, such as the old-age benefits instituted by the French Law of 21 November 1973 — Article L 332 (2) of the Code de la Sécurité Sociale — are also excluded?

2. If the answer to the first question is in the negative, must Article 13 (2) (d), pursuant to which a worker who is called up or recalled for service in the Armed Forces of a Member State is subject to the legislation of that State, be interpreted as meaning that it is also applicable to the particular old-age benefits which a national law may provide specifically for veterans and former prisoners of war?

3. If the question set out above is answered in the negative, does the principle of non-discrimination as laid down with regard to social security in Article 3 (1) of that regulation prevent a national law such as the French Law of 21 November 1973 from excluding from old-age benefits accorded to veterans and former prisoners of the 1939-1945 war, on the grounds of the hardship suffered by them and for services rendered by them to their country, citizens of the Community who satisfy those conditions only in relation to their own Member State?"

3. A copy of the judgment referring the matter to the Court reached the Court Registry on 27 January 1978.

The Fund, represented by the Chairman of its Board of Administration, and the Commission of the European Communities, represented by its Legal Adviser, Armando Toledano-Laredo, submitted written observations in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations submitted in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — The *Fund* takes the view that, having regard to the viewpoint adopted by the Members of its Arbitration Committee in identical cases, namely that:

(a) The provisions relating to the conditions for the grant of pensions are provisions of general application not taking the concept of nationality into account;

(b) Subsequent provisions cannot restrict the general scope of the earlier ones, *a fortiori* because Decree No 74-54 of 23 January 1974 provides that the persons concerned must prove the duration of their captivity or their military service in wartime in the French or Allied Forces;

it can only leave the matter in the hands of the Court.

B — The *Commission of the European Communities* makes the following observations:

— *With regard to the first question,* the answer must be in the negative. In fact, Article 4 (4) of Regulation No 1408/71, in excluding from the substantive field of application of the regulation "benefit schemes for victims of the war or its consequences", is referring to benefit schemes granted in the context of legislation other than social security legislation. However, the French Law No 73-1051 of 21 November 1973 which has been referred to in this matter — the implementation of which is effected by Decree No 74-54 of 23 January 1974 — constitutes indeed social security legislation since it supplements the French Code de la Sécurité Sociale.

— *With regard to the second question,* two cases may be envisaged:

(a) either captivity or military service in the French or Allied Forces constitutes an objective condition for the grant of the advantage in question; or

(b) the captivity and the military service are assimilated to an insurance period under French legislation.

In the first case French courts will find that the conditions required by the French law have been met and will apply that law.

In the second case on the other hand the assimilation of the captivity or military service to insurance periods under French legislation will be of such a nature as to bring about a conflict of laws between that legislation and Belgian legislation which is applicable in pursuance of Article 13 (2) (d) of Regulation No 1408/71. In that case, since, in pursuance of Article 13 (1) of the said regulation, a worker is to be subject to the legislation of a single Member State only, and having regard to the judgment of the Court of Justice in Case 92/63 *(Moebs (née Nonnenmacher)* v *Sociale Verzekeringsbank* [1964] ECR 281) French legislation would appear to be applicable in so far as France has not required the person concerned to contribute to the financing of a social security institution which is unable to provide him with additional benefits in respect of the same risk and the same period.

— *With regard to the third question,* finally, the answer whould be that the old-age benefit in question must be applied without the possibility of any derogation from the provisions of Article 3 (1) of Regulation No 1408/71, which prohibits all discrimination between the workers of Member States. Such workers have the right to benefit therefrom, naturally to the extent to which the competent authority or court decides that the two conditions required are fulfilled, namely the minimum of insurance and the minimum length of captivity or military service in wartime in the French or Allied Forces.

III — Oral procedure

The Fund, represented by Pierre Schlecht, and the Commission of the European Communities submitted written observations during the hearing on 1 June 1978.

The Advocate General delivered his opinion at the hearing on 15 June 1978.

Decision

1 By judgment of 24 January 1978, received at the Court Registry on 27 January 1978, the Cour d'Appel, Nancy, has put to the Court of Justice in pursuance of Article 177 of the EEC Treaty, questions concerning the interpretation of Regulation No 1408/71 of the Council 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).

2 These questions have arisen in the context of an action between the Directeur Régional de la Sécurité Sociale de Nancy (Regional Director of Social Security, Nancy), and a Belgian national receiving under French legislation an advance old-age pension at the normal rate of 25% of his annual average wage, awarded at his request at the age of 60.

3 The insured person, who, as a member of the Belgian armed forces, was a prisoner of war in Germany for more than 60 months, claimed, on the basis of a document issued by the Belgian Ministry for Defence and in reliance on the principle of equality of treatment between national workers and workers who are nationals of another Member State, which is to be found in Regulation No 1408/71, that the provisions of Article L 382 (2) of the French Code de la Sécurité Sociale, as supplemented by Law No 73-1051 of 21 November 1973, were applicable to him.

4 According to those provisions, the old-age pension granted to workers, ex-servicemen or former prisoners of war is calculated at the rate normally applicable at 65, namely 50 % of the basic wage, when, at their request, their pension is awarded at an age between 61 and 60, for those whose captivity lasted for at least 54 months.

5 By virtue of the last subparagraph of Article 1 (1) and of paragraph (2) of the same article of Decree No 74-1199 of 31 December 1974, amending Decree No 74-54 of 23 January 1974, in implementation of the above-mentioned law, the said benefit is only granted if the persons concerned prove the duration of their captivity and their military service in wartime in the French or Allied Forces "by producing their service record or a certificate issued by the competent military authority or by the Ministry for Ex-Servicemen or the National Ex-Servicemen's Office".

6 The social security institution rejected that application, pointing out *inter alia* that the entitlement of former prisoners of war conferred by the French law constitutes one of the "benefit schemes for victims of war or its consequences" referred to by Article 4 (4) of Regulation No 1408/71 and therefore does not come within the field of application of that regulation.

7 Consequently, it stated, the insured person could not rely on the provisions of Regulation No 1408/71 to claim the benefit in question in this case in pursuance of the principle of non-discrimination laid down by those provisions.

8 By its first question the national court asks the Court of Justice whether "Article 4 (4) of Regulation No 1408/71, pursuant to which that regulation is not to apply to 'benefit schemes for victims of war or its consequences', must be interpreted as meaning that benefits which are not strictly in the nature of compensation and are payable to those workers who were victims of the war only in so far as it detrimentally affected their acquisition of old-age pension rights or similar rights, such as the old-age benefits instituted by the French Law of 21 November 1973 — Article L 332 (2) of the Code de la Sécurité Sociale — are also excluded".

9 In order to reply to that question it is necessary to examine whether an old-age benefit such as that referred to by the French legislation may be considered as a social security benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71 and thus comes within the substantive field of application of that regulation as defined by the above-mentioned Article 4.

10 The first sentence of Article 1 of Law No 73-1051 states that "these provisions supplement Article L 332 of the Code de la Sécurité Sociale".

11 However, the fact that a provision of this type is or is not inserted in national social security legislation is not by itself decisive in determining that the benefit referred to in the above provision is a social security benefit within the meaning of Regulation No 1408/71.

12 In fact, the distinction between benefits which are excluded from the field of application of Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant.

13 It appears from the file that the benefit granted in pursuance of the national provisions in question has the essential purpose of providing for former prisoners of war who prove that they underwent a long period of captivity testimony of national gratitude for the hardships endured between 1939 and 1945 on behalf of France and its Allies and thus granting them, by an increase in the rate of old-age pension, a *quid pro quo* for the services rendered to those States.

14 Having regard to that purpose and those conditions of grant such a benefit does not exhibit the characteristics constituting a social security benefit within the meaning of Article 4 (1) of Regulation No 1408/71.

15 Article 4 of Regulation No 1408/71, in defining the material field of application of that provision, provides in paragraph (4) that the regulation is not to apply *inter alia* "to benefit schemes for victims of war or its consequences".

16 For those reasons the reply to the first question must be that Article 4 (4) of Regulation No 1408/71 must be interpreted as meaning that the regulation does not apply to social benefits for former prisoners of war such as the benefit provided under the French Law of 21 November 1973, Article L 332 (2) of the Code de la Sécurité Sociale.

17 Asf a result, the other questions put by the national court lose their point.

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

19 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Cour d'Appel, Nancy, by judgment of that court of 24 January 1978, hereby rules:

Article 4 (4) of Regulation No 1408/71 must be interpreted as meaning that the regulation does not apply to social benefits for former prisoners of war such as the benefit provided under the French Law of 21 November 1973, Article L 332 (2) of the Code de la Sécurité Sociale.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 6 July 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 15 JUNE 1978 [1]

Mr President,
Members of the Court,

Once again it is the Court's task to confirm the directly applicable nature of the principle of equality of treatment between nationals of a Member State and other Community citizens in the matter of the award of old-age pensions for employed persons. In this case it is a matter of the advanced award of an old-age pension.

I — According to French Law No 73-1051 of 21 November 1973, the old-age pension granted to employed persons, ex-servicemen or former prisoners of war is calculated at the rate normally applicable at 65 (50 %) when

1 — Translated from the French.