OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 24 JANUARY 1980 [1]

Mr President,
Members of the Court,

Mr Fellinger, a German national, is a plasterer. At the time of the events giving rise to this case he was living at Rehlingen, not far from Saarbrücken, and until 10 October 1974 he had worked for various employers in the Federal Republic and, in particular between 1 July and 10 October of that year, for the Siebenhaar undertaking in Mainz-Amöneberg. For the month of September 1974 his gross wage amounted to DM 3 872.

Between 11 October and 10 November 1974 Mr Fellinger was unemployed. Since then he has worked spasmodically. He found work in Luxembourg between 11 November and 19 December 1974; he was again unemployed between 20 December 1974 and 12 January 1975; he again had work between 13 January and 2 August 1975; he was once more unemployed between 3 and 19 August 1975 and he recommenced work from 20 August and continued until 20 November 1975. So far as we are aware he was not employed thereafter in the Grand Duchy and we were informed at the oral hearing that at that date he was in paid employment in Belgium.

During the periods in which he was unemployed the plaintiff received benefits from the Employment Office (Arbeitsamt), Saarlouis. Those benefits amounted initially to DM 264.60 per week and then, for the period commencing 1 January 1975, to DM 319.80. However, for the period from 3 to 19 August 1975 they were reduced to DM 199.20. The source of the litigation lies in a decision of the Employment Office, Saarlouis, of 5 December 1975 in terms of which that same sum was paid to him for the period which began on 21 November 1975.

It is agreed that Article 71 (1) (a) (ii) and Article 68 (1) of Regulation No 1408/71 form the basis of Mr Fellinger's entitlement to unemployment benefit for the period in question. The relevant provisions of German law are to be found in Article 112 of the Law on the promotion of employment (Arbeitsförderungsgesetz) under which benefits are to be calculated on the basis of the last wage or salary of the unemployed person.

Article 71 (1) (a) (ii) of Regulation No 1408/71 provides that:

"a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense".

Under Article 68 (1):

"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefit shall be calculated on the basis

1 — Translated from the French.

of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State."

The approach adopted by the employment office with regard to the granting of unemployment benefit to Mr Fellinger appears to have been as follows.

During the first two periods of unemployment that office took no account of Article 68 (1) of Regulation No 1408/71 but relied only on the Law on the promotion of employment and calculated the benefits on the basis of the wage received from the Siebenhaar undertaking. This method was no doubt the correct one for the period from 11 October to 10 November 1974 since Mr Fellinger was not then a frontier worker; but it would appear to be more questionable for the period from 20 December 1974 until 12 January 1975 which followed his first period of employment in Luxembourg. However, nothing has been made of this fact in argument.

On the other hand, the reason for the lower sum being paid for the two later periods of unemployment lies in the application to Mr Fellinger's case of the second sentence of Article 68 (1). The employment office gave practical effect to the criterion of "the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State" by calculating the benefits in terms of Article 112 (7) of the Law on the promotion of employment on the basis of the usual wage, under a collective agreement, of DM 9.93 per hour for plasterers working 40 hours per week.

Two premises in regard to the interpretation of Article 68 (1) underlie this view. The first is that in terms of the opening sentence of the paragraph unemployment benefit may be calculated on the basis of the wage or salary received in the last employment in the Member State of the competent institution only if that employment was the last employment prior to the period of unemployment. On the evidence, the plaintiff did not meet that condition.

The second premise is that the absence of employment, prior to becoming unemployed, in the territory of the Member State of the competent institution has to be considered as an example of employment for less than four weeks in that territory, which permits the second sentence of the paragraph to come into operation.

The plaintiff lodged with the Federal Labour Office (Bundesanstalt für Arbeit) an objection to the decision of 5 December 1975 on the ground that it involved an erroneous construction of Article 68 (1). He submitted, at that stage of the proceedings, that the first sentence of Article 68 (1) had to be construed literally. The basis for calculating unemployment benefit accordingly had to be the wage or salary earned in the last employment in the Member State of the competent institution *irrespective of the time at which that employment had been held.* That rule might yield to the rule in the second sentence only if the last employment had lasted for less than four weeks. Under that construction the benefits to which the plaintiff was entitled would have been based upon the wage which he had received in the Siebenhaar undertaking.

After his objection failed, the plaintiff brought proceedings before the Sozial-

gericht [Social Court] for the Saarland which were dismissed by judgment of 17 February 1977. He then appealed to the Landessozialgericht [Regional Social Court] which upheld his contention by judgment of 26 October 1977. An appeal on a point of law having been brought before it by the defendant (the Federal Labour Office), the Bundessozialgericht [Federal Social Court] by order of 15 February 1979 referred to this Court the following questions on the interpretation of Article 68 (1):

"(1) In the case of an unemployed frontier worker must the competent institution of the place of residence under the first sentence of Article 68 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 take into account the wage or salary in respect of his 'last employment' in the territory of that institution only if that employment was the last employment before he registered as unemployed?

(2) If Question 1 is answered in the negative: must the wage or salary in respect of the 'last employment' in the State of residence be taken into account even if, as here, that employment terminated 14 months before he last registered as unemployed?

(3) Has a person (still) been in employment of less than four weeks within the meaning of the second sentence of Article 68 (1) even if, in the territory of the State of residence, he has had no employment at all or, in any event, no employment such as may be taken into account in the light of the answers to Questions 1 or 2?"

These questions were evidently framed in the light of the two different interpretations of Article 68 (1) contended for by the parties before the Bundessozialgericht. But a third interpretation was suggested by the Commission in its written observations. According to the Commission, the last employment mentioned in Article 68 (1) refers to the last employment in point of time and not simply the last employment in the territory of the State of the competent institution. That provision must be interpreted as applying the principle according to which unemployment benefits have to be calculated on the basis of the last wage or salary actually received before employment was lost. Counsel for the plaintiff indicated at the hearing that he no longer argued for a literal interpretation of Article 68 (1) but adopted that of the Commission.

The answers to the questions put by the Bundessozialgericht depend upon which of these three interpretations is correct.

I begin with the literal interpretation.

The Court will recall that the first sentence of Article 68 (1) provides that the competent institution of the Member State the legislation of which is relevant "shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State". From a grammatical and syntactical point of view this provision is self-contained. Thus, as the court making the reference noted in its order "the wording of that provision rather suggests the interpretation that in each case the wage or salary in respect of the last employment in the territory before the unemployment should always be decisive irrespective of how long ago that was". However, that court entertained doubts on a construction which set no limit on the period of time which might have elapsed between the last employment in the territory of the State of the competent institution and the beginning of the period of unemployment.

Where a literal interpretation of a rule of written law leads to an unreasonable or unjust result is it permissible for the Court to look for another interpretation which avoids that result? In my opinion, one may be guided on this matter by general principles of interpretation and by the case-law of this Court.

The distinct roles of the legislator and the judge within a national legal system have been elegantly described by Portalis:

"There is the art of the legislator just as there is the art of the judge; and they are not alike. The art of the legislator lies in seeking for each issue those principles which are most beneficial to the common weal; the art of the judge lies in putting those principles into practice, in developing them and extending them by applying them wisely and rationally to individual cases; in studying the spirit of the law when its letter is lifeless; in not exposing himself to the danger of being in turn both slave and rebel and of transgressing through a spirit of servility."

In accordance with the distinction drawn by that eminent jurist, this Court may not substitute its discretion for that of the Community legislature; when the meaning of the legislation is clear it has to be applied with that meaning, even if the solution prescribed may be thought to be unsatisfactory. That is not to say, however, that the literal construction of a provision must always be accepted. If such a construction were to lead to a nonsensical result in regard to a situation which the Court believed the provision was intended to cover, certain doubts might properly be entertained in regard to it. In other words, the clear meaning and the literal meaning are not synonymous.

There have been many cases in which the Court has rejected a literal interpretation in favour of another which it found more compatible with the objective and the whole scheme of the legislation in question. A well-known example is provided by the three cases concerned with the prohibition expressed in the second paragraph of Article 4 of the Council Decision of 13 May 1965 on applying a common system of turnover tax concurrently with specific taxes taking the place of turnover tax. The cases in question are Case 9/70 *Franz Grad* v *Finanzamt Traunstein* [1970] ECR 825, Case 20/70 *Transports Lesage et Cie* v *Hauptzollamt Freiburg* [1970] ECR 861 and Case 23/70 *Erich Haselhorst* v *Finanzamt Düsseldorf-Altstadt* [1970] ECR 881. In a passage which is the same in all three judgments the Court stated that:

"It is true that a literal interpretation of the second paragraph of Article 4 of the Decision might lead to the view that this provision refers to the date on which the Member State concerned has brought the common system into force in its own territory.

However, such an interpretation would not correspond to the aim of the directives in question. The aim of the directives is to ensure that the system of value-added tax is applied throughout the Common Market from a certain date onwards. As long as this date has not yet been reached the Member States retain their freedom of action in this respect." ([1970] ECR at pp. 839, 875 and 894.)

There may also be cited to the same effect Case 6/72 *Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities* [1973] ECR 215, Case 6/74 *Johannes Coenrad Moulijn* v

Commission of the European Communities [1974] ECR 1287 and, in the field of social security, Case 2/67 *Auguste de Moor* v *Caisse de Pension des Employés Privés* [1967] ECR 197.

In my opinion, the problem to which the Supreme Court in Germany has drawn attention is sufficiently serious to free this Court from the necessity of applying Article 68 (1) in a strictly literal fashion. I therefore turn now to the other interpretations respectively advanced by the Federal Labour Office and the Commission.

The former body's solution involves an attempt to construe certain phrases in both the first and the second sentences of Article 68 (1). On the one hand, in both sentences, "the last employment" in the competent Member State must be understood as referring to the very last employment before the person concerned became unemployed. On the other hand, in the second sentence, employment in the territory of the competent Member State for less than four weeks must be understood as covering the case where the last employment was not in that State but in another Member State.

The principal objection to this construction is that by definition frontier workers are incapable of fulfilling the condition laid down in the first sentence of Article 68 (1). From that it would follow that where, under the legislation of the State of residence, the calculation of benefits is based on the amount of the previous wage or salary, a frontier worker could never have his benefits calculated on the basis of the wage or salary which he has actually received but only on the basis of a "notional" wage or salary. Since, as the Court is aware, the basis of calculation of that wage or salary is "the normal wage or salary" in the place of residence for an equivalent employment to that held in the Member State of employment, and since it is plain that daily movements usually take place from areas with low wages or salaries to those with high wages or salaries, the amount of benefits which would be due to frontier workers would only rarely bear any relationship to what they were earning before they became unemployed.

It appears improbable that the Council would have intended treating frontier workers so unfavourably in comparison with workers who go to live in another Member State. Accordingly, I consider the Federal Labour Office's interpretation to be wrong. The interpretation which was initially suggested by the Commission and subsequently taken up at the hearing by Counsel for the plaintiff is the one most difficult to reconcile with the letter of Article 68 (1). If, as the Commission submits, the decisive factor is the last wage or salary actually received by an unemployed person, how is the fact that the first sentence of Article 68 (1) refers to the wage or salary received by the person concerned in respect of his last employment in the territory of the Member State of the competent institution to be explained?

The Commission sought to overcome this difficulty by invoking what it described as the "fiction" contained in Article 71 (1) (a) (ii), whereby a frontier worker who is wholly unemployed is made subject to the legislation of the Member State of his residence "as though he had been subject to that legislation while last employed". The Commission advanced the argument that the "territory" of the competent State,

within the meaning of Article 68 (1), extended, in the case of frontier workers, to the territory where the legislation of that State was deemed to be applicable, that is to say, to the territory of the State of the last employment.

In truth, this analysis appears to me to be unnecessarily complicated. I agree, however, with the Commission on the principle upon which the letter of Article 68 (1) rests: the basis of calculation of unemployment benefits must be the last wage or salary actually received by the person concerned.

Effect may be given to this principle on the basis of the first sentence of this provision in the ordinary case where, under Article 13 (2) (a) of Regulation No 1408/71, the competent Member State is the State of employment. The purpose of that provision is simply to show clearly that it is the last wage or salary received in that State which has to be taken into account and not wages or salaries, whatever they may be, received in earlier employment in other Member States.

The absence of any modification of Article 68 for the special case of frontier workers does not mean that the draftsman did not intend to apply this principle to them. If it had been otherwise, and if their unemployment benefits had to be calculated on the basis of a wage or salary which they might have received years before in the Member State of their residence, this would obviously constitute an impediment to the free movement of workers. In my opinion, the first sentence of Article 68 (1) must be construed as if it provided that, in the case of any wholly unemployed frontier worker, the calculation of benefits should be based on the wage or salary received by the person concerned in the Member State in which he last worked. To echo the language of Portalis, I would say that any other interpretation would lead to transgressing against the spirit of Regulation No 1408/71 by being a slave to its letter.

I am fortified in this view by the fact that it accords with Article 81 of Regulation No 574/72 at least as well as does the interpretation advanced by the Federal Labour Office.

Finally, apparently unlike the Commission, I am not convinced that this solution is incompatible with the principle of not taking into account wages or salaries received abroad. In fact, that principle only applies in cases where the taking into account of wages or salaries received abroad is such as to restrict free movement, which is the opposite of the present case.

Accordingly, I consider that it would be inappropriate for the Court to answer directly the questions put by the court making the reference, it being accepted that those questions were intended to serve as criteria for choosing between two interpretations of Article 68 (1) of Regulation No 1408/71 both of which have turned out, in my opinion, to be erroneous.

I am therefore of the opinion that the Court should rule that, in the case of a wholly unemployed frontier worker, the competent institution of the place of residence shall take into account, under the first sentence of Article 68 (1), the wage or salary received by the person concerned in the Member State in which he worked during the period immediately preceding his becoming unemployed.