JUDGMENT OF THE COURT
15 OCTOBER 1969[1]

Württembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola[2] (Reference for a preliminary ruling by the Bundesarbeitsgericht, Kassel)

Case 15/69

Summary

Free movement of persons — Workers — Equality of treatment — National law affording protection against disadvantages resulting from fulfilment of obligations for military service — Application to the nationals of other Member States.

(EEC Treaty, Article 48; Regulation No 38/64/EEC of the Council, Article (9)1; Regulation (EEC) No 1612/68 of the Council, Article 7)

A rule of national law protecting workers from the unfavourable consequences, as regards conditions of work and employment in the undertaking, arising out of absence through obligations for military service must also be applied to the nationals of other Member States employed in the territory of the State in question who are subject to military service in their country of origin.

In Case 15/69

Reference to the Court under Article 177 of the EEC Treaty by the Bundesarbeitsgericht (Federal Labour Court), Kassel, for a preliminary ruling in the action pending before that court between

WÜRTTEMBERGISCHE MILCHVERWERTUNG-SÜDMILCH-AG, Rosensteinstraße 20, Stuttgart-N,

appellant,

and

SALVATORE UGLIOLA, worker, Rosensteinstraße 20, Stuttgart-N,

respondent,

on the interpretation of Article 9 of Regulation No 38/64 of the Council of 25 March 1964 (Official Journal, No 62 of 17 April 1964) and of Article 7 of Regulation No 1612/68 of the Council of 15 October 1968, on freedom of movement for workers within the Community (Official Journal L 257 of 19 October 1968; English Special Edition, 1968 (II), p. 475).

1 — Language of the Case: German.
2 — CMLR.

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chamber, A. M. Donner, A. Trabucchi (Rapporteur), W. Strauß and J. Mertens de Wilmars, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:
Salvatore Ugliola, an Italian national, employed by Württembergische Milchverwertung-Südmilch-AG from 29 May 1971, did his military service in Italy from 12 May 1965 to 3 August 1966 and his employment with this undertaking was thereby interrupted from 6 May 1965 to 14 August 1966.
Before the competent German court, Mr Ugliola had requested that his period of military service be taken into account in calculating the duration of his employment with the defendant, in pursuance of the provisions of the law on security of employment during military service ('Arbeitsplatzschutzgesetz' of 30 March 1967 as amended on 21 May 1968), in force in the German Federal Republic. This law provides in particular:

'(a) Article 1(1):
When a worker is called up for military service or reserve training, the contract of employment shall be suspended during that period.

(b) Article 6(1) and (2):

(1) When a worker resumes his previous employment after basic military service or reserve training, he must suffer no disadvantage, either to his occupational prospects or to his position with his employer by reason of his absence on military service.

(2) The period of basic military service or of reserve training shall be taken into account in calculating the duration of his occupation and the period of service with his employer; however, as regards apprentices and those undergoing vocational training, the period of military service shall be taken into account in the calculation of the duration of his occupation only after the end of the apprenticeship. The period of basic military service or of reserve training shall be regarded as time spent in service and employment, for the purpose of wage regulations and collective contracts in the public service'.

Mr Ugliola based his claim, *inter alia*,

on Regulations Nos 38/64 and 1612/68 of the Council of the EEC. Article 9 of Regulation No 38/64 states that:

> 'A worker who is a national of a Member State may not, in the territory of another Member State, be differently treated from national workers by reason of his nationality. He shall enjoy the same protection and receive the same treatment as national workers in respect of any conditions of employment and work, in particular as regards remuneration and dismissal.'

Article 7 of Regulation No 1612/68 is worded as follows:

> '1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement of re-employment.
> 2. He shall enjoy the same social and tax advantages as national workers.
> 3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
> 4. Any clause of a collective or individual agreement or of any other collective arrangements concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.'

The Württembergische Milchverwertung-Südmilch undertaking questioned the justification for this claim, maintaining, in particular, that the provisions of the German law referred to above do not form part of labour law, but of public law.

Mr Ugliola's claim was accepted by the German courts, both at first instance and on appeal; the appeal court adopted the argument based on Regulation No 38/64. By reason of the fundamental importance of the case, the Landesarbeitsgericht (Higher Labour Court) authorized an appeal to the Bundesarbeitsgericht (Federal Labour Court), which, by order of 27 February 1969, received at the Court Registry on 28 March 1969, requested the Court of Justice of the European Communities, under Article 177 of the EEC Treaty, to give a preliminary ruling on the following question:

> 'Must Article 9(1) of Regulation No 38/64 of 25 March 1964 and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal of the European Communities, German language edition No 62 of 17 April 1964 and L 257 of 19 October 1968) [the English Special Edition 1968 (II), p. 475 contains Regulation (EEC) No 1612/68] be interpreted to mean that a worker who is a national of a Member State and who is employed in the territory of another Member State, is entitled to have the period of his military service taken into account in the calculation of the duration of his service with his employer, in accordance with the legislation of the country of employment, in respect of the period during which he had to interrupt his employment in order to fulfil his obligations for military service in his country of origin?'

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the Commission of the European Communities and the Government of the Federal Republic of Germany submitted written observations.

Upon hearing the report of the Judge-

Rapporteur and the opinion of the Advocate-General, the Court decided that it was unnecessary to hold any preliminary inquiries.

The two parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted their oral observations at the hearing on 9 July 1969.

The Advocate-General delivered his opinion on 10 July 1969.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted under Article 20 of the Statute of the Court may be summarized as follows:

A — *Observations of the Commission of the European Communities*

As regards the admissibility of the request for interpretation, the fact that the question submitted by the Bundesarbeitsgericht concerns two successive provisions, one of which is no longer in force, presents no difficulty.

It is not impossible that, by virtue of national law, the provisions of Regulation No 38/64 may be applicable. This question is within the jurisdiction of the national court alone.

As regards the substance of the request for interpretation, it is in accordance with both the text of the Community provisions in question and the objectives and very nature of the Community that the periods spent by migrant workers on military service in other Member States should be taken into account in accordance with the principle of equality of treatment laid down by Article 48 of the EEC Treaty and referred to in Regulation Nos 38/64 and 1612/68.

The words 'in particular' appearing in the second sentence of Article 9(1) of Regulation No 38/64 and in Article 7(1) of Regulation No 1612/68, show that the cases of application of the principle of equality of treatment set out in these provisions are only examples and cannot therefore cover exhaustively the vast sphere of conditions of employment and work. The taking into account of periods of military service in the determination of seniority in civil employment has direct consequences on such conditions. Moreover, the call-up of a migrant worker for military service was taken into consideration by the abovementioned Community Regulations (Article 6(2) and Article 7(2) of Regulation No 38/64) in the context of questions concerning the right of residence and eligibility for certain kinds of employment as well as by Council Directives No 64/240 (Official Journal No 62 of 17 April 1964, p. 981/64, Article 5(3)) and No 68/360 (Official Journal L 257 of 19 October 1968, Article 6(2)). These provisions are evidence of the concern to prevent migrant workers from finding themselves at a disadvantage in their employment as a result of their doing their military service in another Member State. Not to take into consideration periods of military service in the country of employment would penalize the migrant worker for choosing to work in another Member State. The 'Arbeitsplatzschutzgesetz' is not concerned with the terms or the performance of the civic duty which military service constitutes, but rather with the legal effects on a given contract of employment, arising from the absence of a worker who has to do military service. Consequently, like all regulations concerning security against dismissal and continued payment of salary in case of illness, the provisions of the law in question must be considered to form part of the 'conditions of employment and work' within the meaning of Article 9(1) of Regulation No 38/64 and of Article 7(1) of Regulation No 1612/68.

This being so, and in view also of the discussions which preceded the adoption of the regulations in question (which dealt with the need to assimilate migrant workers completely to national workers) it must be concluded that the prohibition on discrimination also applies to the national provisions concerning the advantages in employment which accrue from military service. Moreover, provisions which guarantee employment in the case of call-up for military service exist in all the Member States and are intended to prevent a worker from finding himself at a disadvantage, as a result of his military service, as regards the provisions of the labour legislation.

B — *Observations of the Government of the Federal Republic of Germany*

1. Principle argument

The German law on security of employment ('Arbeitsplatzschutzgesetz') provides for a series of special measures which, from a financial point of view, represent a not inconsiderable burden, both for the German public sector in particular and for the German economy in general.

As regards those employed in the private sector, this law provides not only for the period of time spent on military service to be counted towards the workers' period of service with their employer, but also, *inter alia*, for the following benefits:

— in the case of premature discharge from military service, the Federal State must guarantee the increased expenses which the German employer has to bear as a result of the temporary employment of two people in the same post (Article 1(5));
— by virtue of Article 4, periods of military service must not be taken into account in the calculation of annual leave;
— by virtue of Article 5, the Federal State must bear the entire burden of the contributions to be paid by persons who have to do military service and who have taken out additional insurance for old-age and for surviving beneficiaries;
— by virtue of Article 11, in the case of periods of military service not exceeding three days, the Federal State must continue to reimburse the wages to which the worker is entitled.

The scope of the decision on the question of interpretation submitted to the Court of Justice is thus wider than the specific problems of treating the time spent on military service as service with the employer.

The German law in question is part of the body not of labour law but of military law. Consequently, it is outside the scope of Regulations Nos 38/64 and 1612/68.

This is shown in particular by Articles 223 and 224 of the Treaty, which reserve the field of defence matters to the exclusive competence of each Member State. By means of the law in question the German State made use of its sovereign power to grant certain special measures to compensate for a service which is required of nationals in the public interest, which is not generally required of foreigners. The German law in question, therefore, concerns national defence and as such falls outside, the provisions of the Treaty.

2. First subsidiary argument

Although the Community regulations in question must be considered to concern the 'law on the security of employment', they in no way offend against the prohibition on discrimination. In accordance with the requirement set out in Article 48 of the Treaty, this prohibition means that the nationals of a Member State must be treated in another Member State as the nationals of that State.

The special measures provided for in the German law on security of employment during military service benefit nationals and foreigners alike who do their

military service in the Bundeswehr. On the other hand, a German citizen doing his military service abroad with another Member State, does not benefit from these special measures. According to the law in question, the inequality of treatment is not linked to the nationality but to the performance of the military service in the Bundeswehr. It is an objective criterion, the choice of which was not arbitrary once it is linked to a low concerning national defence, the costs of which are borne by the Federal Republic alone. By enlarging the ambit of this law in favour of workers who have performed their military service in other Member States of which they are nationals, the German State would be indirectly relieving the defence budget of those States. In the absence of Community integration in the field of defence it is possible for different national regulations to exist in this area, in particular as regards the general concept of military service. Differential treatment under the 'Arbeitsplatzschutzgesetz' is also justified in these circumstances. In particular, the indiscriminate application of this law to foreigners could lead to an accumulation of the respective advantages offered by the various national laws in this matter.

3. Second subsidiary argument

Even if it could be considered that the rules contained in the 'Arbeitsplatzschutzgesetz' constituted an infringement of the prohibition on discrimination, this infringement would nevertheless be authorized by virtue of Article 48 of the Treaty which permits discrimination for reasons of public security.

Grounds of judgment

1 By order dated 27 February 1969, received at the Court Registry on 28 March 1969, the Bundesarbeitsgericht (Federal Labour Court), Kassel, has submitted a question in accordance with Article 177 of the Treaty establishing the EEC on the interpretation of Article 9(1) of EEC Regulation No 38/64 of the Council of 25 March 1964 and Article 7 of EEC Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

2 This question asks whether the abovementioned articles 'must . . . be interpreted to mean that a worker who is a national of a Member State and who is employed in the territory of another Member State, is entitled to have the period of his military service taken into account in the calculation of the duration of his service with his employer, in accordance with the legislation of the country of employment, in respect of the period during which he had to interrupt his employment in order to fulfil his obligations for military service in his country of origin'.

3 The regulations of which interpretation is requested are based upon Article 48 of the Treaty which, in order to ensure the free movement of workers which is essential to the Common Market, prescribes the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employ-

ment. This provision is subject to no reservations other than the restriction set out in paragraph (3) concerning public policy, public security and public health. The Community rules relating to matters of social security are based on the principle that the law of each Member State must ensure that nationals of other Member States employed within its territory receive all the benefits which it grants to its own nationals.

4 The fulfilment by migrant workers of an obligation for military service owed to their own State is liable to affect their conditions of work and employment in another Member State. Articles 6(2) and 7(2) of EEC Regulation No 38/64, Article 5(3) of Directive No 64/240 of the Council and Article 6(2) of Directive No 68/360 of the Council provide for the protection of migrant workers against certain consequences affecting their conditions of work and employment which might arise from their being called up for military service. The nature of these consequences remains substantially the same, whether the worker is called up by the State in which he is employed or by another Member State of which he is a national.

5 A national law which is intended to protect a worker who resumes his employment with his former employer from any disadvantages occasioned by his absence on military service, by providing in particular that the period spent in the armed forces must be taken into account in calculating the period of his service with that employer falls within the context of conditions of work and employment. Such a law cannot therefore, on the basis of its indirect connexion with national defence, be excluded from the ambit of Article 9(1) of EEC Regulation No 38/64 and Article 7 of EEC Regulation No 1612/68 on equality of treatment and protection for migrant workers 'in respect of any conditions of employment and work'.

6 Apart from the cases expressly referred to in paragraph (3), Article 48 of the Treaty does not allow Member States to make any exceptions to the equality of treatment and protection required by the Treaty for all workers within the Community by indirectly introducing discrimination in favour of their own nationals alone based upon obligations for military service. Consequently, as a rule of national law protecting workers from the unfavourable consequences, as regards conditions of work and employment in an undertaking, arising out of absence through obligations for military service must also be applied to the nationals of other Member States employed in the territory of the State in question who are subject to military service in their country of origin.

7 Therefore, the abovementioned provisions entitle a migrant worker who is a national of a Member State and who has had to interrupt his employment

with an undertaking in another Member State in order to fulfil his obligations for military service in the country of which he is a national, to have the period of his military service taken into account in the calculation of his seniority in that undertaking, to the extent to which the periods of military service in the country of employment are also taken into account for the benefit of national workers.

8 The costs incurred by the Commission of the European Communities and by the Government of the Federal Republic of Germany, which have submitted observations to the Court, are not recoverable.

9 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 Bundesarbeitsgericht, Kassel, the decisions as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 48 and 177;
Having regard to Article 9 of EEC Regulation No 38/64 of the Council of 25 March 1964 and Article 7 of EEC Regulation No 1612/68 of the Council of 15 October 1968;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Bundesarbeitsgericht, Kassel, by judgment of that court dated 27 February 1969, hereby rules:

The principle of equality of treatment set out, on the basis of Article 48 of the EEC Treaty, by Article 9(1) of EEC Regulation No 38/64 of the Council of 25 March 1964 and Article 7 of EEC Regulation No 1612/68 of the Council of 15 October 1968 entitle a migrant worker who is a national of a Member State and who had to interrupt his

employment with an undertaking in another Member State in order to fulfil his obligations for military service in the country of which he is a national, to have the period of his military service taken into account in the calculation of his seniority in that undertaking, to the extent to which the periods of military service in the country of employment are also taken into account for the benefit of national workers.

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 15 October 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 JULY 1969[1]

Mr President,
Members of the Court,

The Bundesarbeitsgericht (Federal Labour Court), the appeal court in matters of labour law, is asking you to rule on the scope of Article 9(1) of Regulation No 38/64 of the Council of 25 March 1964 and Article 7 of Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. Must these Articles be interpreted to mean that a worker who is a national of a Member State and who is employed in the territory of another Member State is entitled, in accordance with the legislation of the country of employment, to have the period of his military service in his country of origin taken into account in the calculation of his seniority with his employer, where he has interrupted his employment in order to fulfil his obligations for military service?

I

The action which led the German high court to submit this question to you arose in the following circumstances. Mr Ugliola, an Italian national, has worked since May 1961 as a dairy employee with the Württembergische Milchverwertung-Südmilch, an undertaking situated in the German Federal Republic. He interrupted his employment from 6 May 1965 to 14 August 1966 in order to do his military service in Italy, and then immediately returned to his job with his former employer.
The question then arose of the application in his favour of the German law which guarantees employment when an employee is called up for military service. Under this law, which has been in force since 31 March 1957, the contract of employment shall be suspended during the period in which the worker is required to do his basic military service

1 — Translated from the French.