JUDGMENT OF THE COURT (Fifth Chamber)
15 October 1991 *

In Case C-302/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour du Travail (Higher Labour Court), Mons (Belgium), for a preliminary ruling in the proceedings pending before that court between

Caisse auxiliaire d'assurance maladie-invalidité and

Institut national d'assurance maladie-invalidité

intervener

and

Napoléon and Jocelyne Faux,

on the interpretation of Regulation No 36/63/EEC of the Council of 2 April 1963 on social security for frontier workers (Journal Officiel 1963, 62, p. 1314),

THE COURT (Fifth Chamber),

composed of: Sir Gordon Slynn, President of the Chamber, acting as President of the Fifth Chamber, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: French.

after considering the written observations submitted on behalf of:

— the Institut National d'Assurance Maladie-Invalidité, intervener in the main proceedings, by A. Wattier and J. Saint-Ghislain, of the Mons Bar;

— Mr and Mrs Faux, respondents in the main proceedings, by Gaston Dramaix and José Chevalier, of the Mons Bar;

— the Commission of the European Communities, by Dimitrios Gouloussis, a member of its Legal Service, acting as Agent;

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 4 June 1991,

after hearing the Opinion of the Advocate General at the sitting on 3 July 1991,

delivers the following

Judgment

1 By a judgment of 28 September 1990, which was received at the Court on 5 October 1990, the Cour du Travail (Higher Labour Court), Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Regulation No 36/63/EEC of the Council of 2 April 1963 concerning social security for frontier workers (Journal Officiel 1963, 62, p. 1314) and Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and to members of their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 Those questions were raised in the context of proceedings between Napoléon and Jocelyne Faux, in their capacity as the heirs of Mrs Desse, who died in the course of the proceedings, and the Caisse Auxiliaire d'Assurance Maladie-Invalidité (Auxiliary Sickness and Invalidity Insurance Fund) (hereinafter referred to as 'CAAMI') and the intervener, the Institut National d'Assurance Maladie-Invalidité (National Institute for Sickness and Invalidity Insurance) (hereinafter referred to as 'INAMI').

3 Mrs Desse, a French national who worked in Belgium as a frontier worker from 25 February 1957 until 4 December 1970, the date of her dismissal, received unemployment benefit in France under Article 19(1) of Regulation No 36/63 until 11 October 1971, the only interruption being between 2 and 21 February, when she received sickness benefit from the Belgian insurance authority.

4 Mrs Desse was recognized as unfit for work by CAAMI from 12 October 1971 until 30 September 1980, when she retired. None the less, by a decision of 11 May 1973, CAAMI refused to grant her sickness and invalidity insurance benefits. Mrs Desse brought proceedings against that decision before the Tribunal du Travail (Labour Court), Tournai, which, on 4 June 1976, gave judgment in her favour.

5 CAAMI, supported by INAMI, appealed against that judgment to the Cour du Travail, Mons, which decided to stay its proceedings pending a ruling by the Court on the following questions:

'1. Did a French employed person, who was resident in France and had worked exclusively in Belgium for almost 14 years as an employed person, lose her status as a frontier worker within the meaning of Article 1(1)(c) of Regulation (EEC) No 36/63 (a status which was still recognized when she was given notice on 4 December 1970)?

Did she lose her status as a frontier worker by virtue of the fact that she was wholly unemployed and received benefit on that account from the French institution for her place of residence during the period from 24 February 1971

to 11 October 1971 pursuant to Article 19(1) of Regulation (EEC) No 36/63, even though it would appear from Articles 2(1) and 19(1) of that regulation that she retained that status?

2. Where she suffered illness and incapacity for work and subsequent invalidity recognized pursuant to the Belgian legislation on sickness and invalidity insurance (Law of 9 August 1963), from 12 October 1971 to retirement age (30 September 1980), can she or can she not claim benefit in respect of initial incapacity (for one year) and thereafter invalidity benefit from the competent Belgian institution pursuant to Article 6 of Regulation No 36/63?

3. Having regard to Regulation No 36/63 and the special supplementary provisions which it made necessary (see the fifth recital in the preamble to that regulation), must it be held that the period of unemployment in France, although not recognized in that country of residence as a period of insurance or a period treated as such or an equivalent period, must be accepted in Belgium, the country of the place of previous employment, as a period of insurance or a period treated as such or an equivalent period in particular for the application of the Belgian law of 19 August 1963 on sickness and invalidity insurance (Articles 66, 67, 68 and 75), the answer to this question being linked to Article 19(1) of Regulation No 36/63 which by implication requires frontier workers who have become wholly unemployed to avail themselves of their entitlement to unemployment benefit and consequently to register as persons seeking work in the country of their place of residence (in the present case, France), rather than in the country of the place of work and compulsory social security insurance where they lost their employment?

4. Finally, in the alternative, if the first three questions are answered in the negative and Regulation (EEC) No 3 is held to apply as from 12 October 1971 and Regulation No 1408/71 to apply as from 1 October 1972 with reference to sickness and invalidity insurance, is the institution of the country of the place of work and compulsory social security insurance for employed persons (in this case, Belgium) obliged to treat the period of unemployment in respect of which benefit was paid in France under Article 19(1) of Regulation (EEC) No 36/63

(even though that period was not recognized in France as a period of insurance or a period treated as such or an equivalent period) as a period of insurance or a period treated as such or an equivalent period within the meaning of Articles 66 (qualifying period), 68 and 75 (by virtue of the continuing eligibility of the person entitled) of the Law of 9 August 1963 on sickness and invalidity insurance?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

7 By its first question, the national court seeks essentially to ascertain whether Article 1(1)(c) of Regulation No 36/63 must be interpreted as meaning that a frontier worker loses that status by virtue of the fact that he is wholly unemployed.

8 INAMI contends that, for the purposes of the application to a worker of Regulation No 36/63, that worker must meet the definition of a frontier worker given in Article 1(1)(c) of that regulation, and in particular must be pursuing an occupation in the territory of a Member State other than the State in which he resides. That condition, it says, is not satisfied when the worker is wholly unemployed. In support of its argument, INAMI relies on the interpretation of the expression 'pursues his occupation' given by the Administrative Commission established under Article 43 of Regulation No 3 of the Council of 25 September 1958 concerning social security for frontier workers (Journal Officiel 1958, 30, p. 597). That commission had considered the expression to have a very wide scope, including, in particular, 'workers partially or intermittently unemployed as provided for in Article 19(2) of Regulation No 36/63'. INAMI draws the conclusion from that interpretation that wholly unemployed workers, whose entitlement to unem-

ployment benefit is determined by Article 19(1) of that regulation, are no longer frontier workers.

9 It should be pointed out that, although the interpretation for which INAMI contends may find some support in the letter of the expression 'pursues his occupation in the territory of another Member State' contained in Article 1(1)(c) of Regulation No 36/63, it is in contradiction with the content and the actual terms of other provisions of that regulation, namely Articles 19(1) and 10.

10 Article 19(1) of that regulation refers to the benefits to which a 'wholly unemployed frontier worker' is entitled. Under Article 10 'a frontier worker who, in accordance with the provisions of Article 19(1) or (2), receives unemployment benefit under the legislation of a Member State, is entitled during the same period, together with the members of his family, to benefits in kind from the institution of his place of residence'. It follows from those provisions that an unemployed frontier worker retains his status as a frontier worker.

11 With regard to the argument based on the interpretation by the Administrative Commission established under Article 43 of Regulation No 3, it is sufficient to point out that, as the documents before the Court show, the problem which gave rise to that interpretation concerned solely the question whether or not a frontier worker in receipt of benefits for partial or intermittent unemployment is to be regarded as 'pursuing his occupation' within the meaning of Article 1(1)(c) of Regulation No 36/63. The situation of wholly unemployed workers on the other hand, was not considered.

12 The answer to the first question submitted by the national court must therefore be that Article 1(1)(c) of Regulation No 36/63 must be interpreted as meaning that a

frontier worker does not lose that status by virtue of the fact that he is wholly unemployed.

Second question

13 By its second question, the national court essentially seeks to ascertain whether a wholly unemployed frontier worker may claim benefits for incapacity for work, and thereafter for invalidity, from the competent institution of the Member State in which he was last employed.

14 With regard, first, to benefits for incapacity for work, it is sufficient to point out that, since the wholly unemployed frontier worker retains his status as a frontier worker, Article 6 of Regulation No 36/63, which imposed on the Member State of employment responsibility for the cash sickness benefits which a frontier worker could claim if he resided in the territory of that State, applies in this case.

15 With regard to the invalidity benefits of a wholly unemployed frontier worker it follows from Article 39(1) of Regulation No 1408/71 that they are to be paid by the competent institution of the Member State in whose territory he resides. However, as the Commission has pointed out, that provision is not applicable in the main proceedings. That provision was in fact inserted into Regulation No 1408/71 by Council Regulation (EEC) No 2793/81 of 17 September 1981 amending Regulation No 1408/71 (Official Journal 1981 L 275, p. 1), which did not enter into force until the day of its publication, that is to say on 29 September 1981.

16 Accordingly, the version of Article 39 of Regulation No 1408/71 in force at the material time for the purposes of the main proceedings must be considered. It follows from paragraphs (1) and (2) of that article that invalidity benefits are the responsibility of the institution of the Member State whose legislation was applicable at the time when the incapacity for work, followed by invalidity, occurred, provided that the person concerned satisfies the conditions laid down by that legislation.

17 In a situation such as that referred to in the main proceedings, it must be accepted that, pursuant to Regulation No 36/63 and in particular Article 6 thereof, the Member State whose legislation was applicable at the time when the incapacity of a wholly unemployed frontier worker occurred could only be the Member State in which he was last employed.

18 The answer to the second question submitted by the national court must therefore be that, according to the law applicable in the main proceedings, a wholly unemployed frontier worker may claim benefits for incapacity for work by virtue of Article 6(1) of Regulation No 36/63 and thereafter invalidity benefits by virtue of Article 39(1) and (2) of Regulation No 1408/71 from the competent institution of the Member State in which he was last employed.

Third question

19 By its third question, the national court seeks essentially to ascertain whether the period during which a frontier worker was wholly unemployed and required, under Article 19(1) of Regulation No 36/63, to claim unemployment benefit in the Member State of residence, though not recognized in that State as a period of sickness insurance or a period treated as such, must be regarded as such in the State in which the frontier worker was last employed, where the legislation applicable at the material time treated periods of unemployment completed in its territory as periods of sickness insurance.

20 In order to answer that question, some aspects of both national law and Community law underlying the problem raised in the main proceedings must be considered.

21 It is apparent from the documents before the Court that, at the material time, Belgian legislation, applicable as the legislation of the State in which the person concerned was last employed (see paragraph 17, above), made the grant of benefits for incapacity for work subject in particular to the condition of a minimum period of work and insurance (Articles 66 and 68 of the Belgian Law of 9 August 1963

establishing and organizing a scheme of compulsory sickness and invalidity assurance *Moniteur belge*, 1-2.11.1963). Pursuant to Articles 21(3) and 45(1)(1)(c) thereof, unemployed workers were considered to be entitled to benefits for incapacity for work, a period of unemployment thus being treated as a period of insurance.

22 It follows from the order for reference that the competent Belgian institution refused Mrs Desse the disputed benefits on the ground that the period during which she received unemployment benefits in France, her State of residence, was not recognized in that State as an insurance period.

23 The fact that Mrs Desse received unemployment benefits in France and not in Belgium was a necessary consequence of the application of Community law. It follows from the actual terms of Article 19(1) of Regulation No 36/63 that a wholly unemployed frontier worker may claim unemployment benefits solely from the Member State in which he resides (see judgment in Case 1/85 *Miethe* v *Bundesanstalt für Arbeit* [1986] ECR 1837, paragraph 10, on the interpretation of Article 71(1)(a) of Regulation No 1408/71, which is worded in largely the same terms as Article 19(1) of Regulation No 36/63).

24 On the basis of all those factors, the question submitted by the national court as to whether the period during which the person concerned received unemployment benefit in France is to be treated as an insurance period for the purposes of the grant of benefits for incapacity for work under the Belgian legislation can be answered only in the affirmative.

25 It is true, as the Court has pointed out on several occasions (see, for example, the judgment in Case 14/67 *Landesversicherungsanstalt Rheinland-Pfalz* v *Welchner* [1967] ECR 331) and as INAMI has argued, that both Regulation No 3 (Article 1(p] and Regulation No 1408/71 (Article 1(r)), applicable in the main proceedings, state that 'insurance periods' mean periods defined or treated as such by the legislation under which they were completed.

26 It must be stated, however, that in a situation such as that in the main proceedings that interpretation would mean that a frontier worker who had registered as unemployed in the Member State of residence pursuant to Article 19(1) of Regulation No 36/63 would be refused, in the Member State in which he was last employed, benefits for incapacity for work which he could have claimed if he had registered as seeking employment in that Member State and if, as a result, his period of unemployment had been treated as a period of sickness insurance.

27 The Court has consistently held (see judgments in Case 9/67 *Colditz* v *Caisse d'assurance vieillesse des travailleurs salariés de Paris* [1967] ECR 229, Case 24/75 *Petroni* v *Office national des pensions pour travailleurs salariés* [1975] 1149, paragraph 13, and Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraph 18) that the objective of Articles 48 to 51 of the Treaty would not be attained if, after exercising their right of free movement, migrant workers were to lose social security advantages guaranteed by the legislation of a single Member State.

28 It follows from the foregoing that the provisions defining insurance periods in Regulations No 3 and No 1408/71 may not be interpreted as meaning that they may result in depriving migrant workers of the advantages which they could have claimed under the legislation of a single Member State, thus posing an obstacle to the objective pursued by Articles 48 to 51 of the Treaty (see judgments in the *Colditz* case, above, and in Case 100/78 *Rossi* v *Caisse de compensation pour allocations familiales des régions de Charleroi et Namur* [1979] ECR 831 and Case 733/79 *Caisse de compensation pour allocations familiales des régions de Charleroi et Namur* v *Laterza* [1980] ECR 1915).

29 The answer to the third question must therefore be that the period during which a frontier worker is wholly unemployed and required, pursuant to Article 19(1) of Regulation (EEC) No 36/63, to claim unemployment benefit in the Member State of residence, although not recognized in that Member State as an insurance period or equivalent period must be treated as such in the Member State in which the person concerned was last employed where the legislation applicable at the material time treated periods of unemployment completed on its territory as periods of sickness insurance.

30 Having regard to the answer given to the third question, there is no need to reply to the fourth question.

Costs

31 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Cour du Travail, Mons, by a judgment of 28 September 1990, hereby rules:

1. **Article 1(1)(c) of Regulation (EEC) No 36/63 of the Council of 2 April 1963 on social security for frontier workers must be interpreted as meaning that a frontier worker does not lose that status by virtue of the fact that he is wholly unemployed;**

2. **According to the law applicable in the main proceedings, a wholly unemployed frontier worker may claim benefits for incapacity for work by virtue of Article 6(1) of Regulation (EEC) No 36/63 of the Council of 2 April 1993 on social security for frontier workers and thereafter invalidity benefits by virtue of Article 39(1) and (2) 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;**

3. **The period during which a frontier worker is wholly unemployed and required, pursuant to Article 19(1) of Regulation (EEC) No 36/63 of the Council of 2 April 1963 on social security for frontier workers, to claim unemployment benefit in the Member State of residence, although not recognized as an insurance period or equivalent period in that Member State, must be treated as such in the Member State in which the person concerned was last employed**

where the legislation applicable at the material time treated periods of unemployment completed on its territory as periods of sickness insurance.

Slynn Grévisse

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 15 October 1991.

J. G. Giraud
Registrar

Gordon Slynn
President of Chamber acting as
President of the Fifth Chamber