JUDGMENT OF THE COURT (First Chamber)
22 September 1988 *

In Case 236/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landessozialgericht für das Land Nordrhein-Westfalen for a preliminary ruling in the proceedings pending before that Court between

Anna Bergemann

and

Bundesanstalt für Arbeit

on the interpretation of Article 71 (1) (a) (ii) and (b) (ii) of Regulation (EEC) 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 1987 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983, L 230, p. 6) and of Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, of 24 January 1974 (Official Journal 1974, C 126, p. 22),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: German.

after considering the observations submitted on behalf of

Mrs A. Bergemann, plaintiff in the main proceedings, by Kurt Leingärtner, Rechtsanwalt,

the Bundesanstalt für Arbeit, defendant in the main proceedings, by Ulrich Monfort,

the Commission of the European Communities, by Dimitrios Gouloussis, a member of its Legal Department, assisted by Dr Bernd Schulte,

having regard to the Report for the Hearing and further to the hearing on 4 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting of 15 June 1988,

gives the following

Judgment

1 By an order of 11 June 1987, which reached the Court on the following 31 July, the Ninth Senate of the Landessozialgericht für das Land Nordrhein-Westfalen (Higher Social Court for the *Land* Nordrhein-Westfalen) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Article 71 (1) (a) (ii) and (b) (ii) of Regulation (EEC) 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), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983, L 230, p. 6), and of Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, of 24 January 1974 (Official Journal 1974, C 126, p. 22).

2 These questions arose in proceedings between Anna Bergemann and the Bundesanstalt für Arbeit (Federal Employment Office).

3 Mrs Bergemann, a Netherlands national, worked and resided in Venlo, the Netherlands. On 5 June 1984 she married a German national and, the following day, transferred her residence to the home of her husband in Kerken, Federal Republic of Germany.

4 Since this transfer of residence took place during a period of leave which lasted until the end of her employment relationship on 30 June 1984, Mrs Bergemann did not return to the Netherlands to order to pursue her occupation in that country.

5 On 20 August 1984 Mrs Bergemann applied to the German authorities for unemployment benefit, which was refused to her by decision of 27 November 1984. Her appeal against this decision was also rejected, on 25 February 1985. On 26 March 1985 Mrs Bergemann instituted proceedings in the Duisburg Sozialgericht (Social Court Duisburg) which, by a judgment of 9 September 1985, dismissed her action. The plaintiff appealed against that judgment with the Landessozialgericht für das Land Nordrhein-Westfalen.

6 In its order making the reference, the Landessozialgericht stresses, in the first place, that Mrs Bergemann does not satisfy the conditions laid down in the Arbeitsförderungsgesetz (Law on the Promotion of Employment, hereinafter referred to as 'the Employment Law') for the award of unemployment benefit or unemployment assistance because she had never worked under the provisions of the Employment Law and had therefore not completed the qualifying period, corresponding to the pursuit of an occupation and giving rise to the payment of contributions for a minimum period of 360 days, provided for in Paragraph 168 of that law. The Landessozialgericht states, further, that insurance or employment periods completed by the plaintiff in the Netherlands cannot be taken into account by the German authorities, since, under Article 67 (3) of Regulation No 1408/71, the competent State with regard to employment benefits is the State of last employment, in this case the Netherlands.

7 The Landessozialgericht nevertheless took the view that Mrs Bergemann might possibly be entitled to rely on the exceptions provided for in Article 71 (1) (a) (ii) or (b) (ii) of Regulation No 1408/71 in order to claim the benefits in question from the authorities of the State of residence. It therefore decided to stay the proceedings and refer to the Court for a preliminary ruling on the following questions:

'Does a worker qualify for the status of "frontier worker" within the meaning of Article 1 (b) and Article 71 (a) of Regulation (EEC) No 1408/71 during a period of leave in accordance with the terms of his employment contract, when he does not in fact return to work following that period of leave and indeed before the end of the employment relationship, in other words he never returns to his place of employment in one Member State from his place of residence in another?

If he does not:

Does Article 71 (b) (2) of Regulation (EEC) No 1408/71 apply only to the classes of persons referred to in Decision No 94 of the Administrative Commission of the European Communities Social Security for Migrant Workers of 24 January 1974?'

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

The first question

9 By its first question, the national court seeks in substance to ascertain whether a worker who, in the course of his last employment, transfers his residence to another Member State and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there, can be regarded as a 'frontier worker' within the meaning of Articles 1 (b) and 71 (1) (a) (ii) of Regulation No 1408/71.

10 The parties to the main proceedings and the Commission agree that a worker in the situation described by the national court cannot be regarded as a 'frontier worker' within the meaning of the abovementioned provisions.

11 In this respect, it is sufficient to note that according to Article 1 (b) of Regulation No 1408/71 ' "frontier worker" means any employed . . . person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week . . . '.

12 It follows from that provision that only workers who, on the one hand, reside in a State other than the State of employment and who, on the other, return regularly and frequently, in other words 'daily or at least once a week' to their State of residence may be regarded as having the status of frontier workers.

13 Accordingly, a worker who, after having transferred his residence to a Member State other than the State of employment, no longer returns to that State, is not covered by the term 'frontier worker' within the meaning of Article 1 (b), cited above. Accordingly, such a worker cannot rely on the terms of Article 71 (1) (a) (ii) of that regulation.

14 The reply to the first question submitted by the national court should therefore be that a worker who, in the course of his last employment, transfers his residence to another Member State and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there, cannot be regarded as a 'frontier worker' within the meaning of Articles 1 (b) and 71 (1) (a) (ii) of Regulation No 1408/71.

Second question

15 By its second question, the national court raises, in substance, two separate issues:

the first is whether Article 71 (1) (b) (ii) applies exclusively to the categories of workers referred to in Decision No 94 of 24 January 1974 of the Administrative Commission on Social Security for Migrant Workers;

the second is whether, if it does not, Article 71 (1) (b) (ii) applies to a worker in the situation described by the national court, namely a worker who, in the course of his last employment, transfers his residence to another Member State for family reasons and who, after that transfer, no longer returns to the State of employment to pursue an occupation there.

16 As far as the first point is concerned, it is sufficient to note that the Court has already held in its judgment of 17 February 1977 in Case 76/76 (*Di Paolo* [1977] ECR 315) that Decision No 94 'cannot be considered to have enumerated exhaustively the categories of workers who may come within the provision' of Article 71 (1) (b) (ii), 'nor to have excluded certain other categories who have maintained similarly close ties with their country of habitual residence'.

17 Accordingly, in reply to the first point raised by the national court it should be stated that Article 71 (1) (b) (ii) of the aforesaid regulation is not applicable exclusively to the categories of workers referred to in Decision No 94 of the Administrative Commission on Social Security for Migrant Workers.

18 As regards the second point, it should be observed, that, according to the ninth recital in the preamble to Regulation No 1408/71, the provisions of Article 71 are intended to guarantee to migrant workers unemployment benefits under the most favourable conditions for seeking new employment.

19 To this end, Article 71 (1) (b) (ii) provides that an employed person other than a frontier worker, who is wholly unemployed, who, in the course of his last employment, resided on the territory of a Member State other than the State of

employment, and makes himself available to the employment services in the territory of the Member State in which he resides, or who returns to that territory, is to receive unemployment benefit in accordance with the legislation of that State as if he had last been employed there.

20 As the Court has held (see the judgment of 17 February 1977 in Case 76/76, cited above), this possibility of receiving unemployment benefits in the State of residence is justified for certain categories of workers who retain close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside. It is reasonable that workers who have such links with the State in which they reside should be accorded the best conditions in that State for finding new employment.

21 In the light of these considerations, Article 71 (1) (b) (ii) must be regarded as applicable to a case, such as the present one, of a worker who has transferred her residence to a State other than the State of employment for family reasons namely, the wish to live with her spouse and their child, in view of the fact that, in such circumstances there can be no doubt that she can enjoy in the State of residence, rather than the State of employment, more favourable conditions for obtaining new employment.

22 Accordingly, in reply to the second point raised by the national court it should be stated that Article 71 (1) (b) (ii) of Regulation No 1408/71 is applicable to a worker who, in the course of his last employment, transfers his residence to another Member State for family reasons and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, 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 (First Chamber),

in answer to the questions referred to it by the Landessozialgericht für das Land Nordrhein-Westfalen by an order of 11 June 1988,

hereby rules:

(1) A worker who, in the course of his last employment, transfers his residence to another Member State and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there, cannot be regarded as a 'frontier worker' within the meaning of Articles 1 (b) and 71 (1) (a) (ii) of Regulation No 1408/71;

(2) Article 71 (1) (b) (ii) of the aforesaid regulation is not applicable exclusively to the categories of workers referred in Decision No 94 of the Administrative Commission on Social Security for Migrant Workers;

(3) Article 71 (1) (b) (ii) of that regulation is applicable to a worker who, in the course of his last employment, transfers his residence to another Member State for family reasons and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there.

Bosco Joliet Schockweiler

Delivered in open court in Luxembourg on 22 September 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the First Chamber