

**ADMINISTRATIVE COMMISSION OF THE EUROPEAN COMMUNITIES ON SOCIAL SECURITY
FOR MIGRANT WORKERS**

RECOMMENDATION No 22

of 18 June 2003

concerning the Gottardo judgment, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States

(2003/868/EC)

THE ADMINISTRATIVE COMMISSION OF THE EUROPEAN COMMUNITIES ON SOCIAL SECURITY FOR MIGRANT WORKERS,

Having regard to Article 81(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community ⁽¹⁾, under which it is made responsible for dealing with all administrative questions arising from the provisions of Regulation (EEC) No 1408/71 and subsequent Regulations,

Having regard to Article 81(c) of the same Regulation, under which it is responsible for fostering and developing cooperation between Member States in social security matters,

Whereas:

- (1) Regulation (EEC) No 1408/71, adopted on the basis of Article 42, is an essential instrument for exercising the fundamental freedoms provided for by the Treaty.
- (2) The principle of non-discrimination on the grounds of nationality is an essential safeguard for the freedom of movement of employed persons, as provided for in Article 39 of the Treaty. This implies the abolition of all discrimination between the settled workers in the Member States and migrant workers with respect to employment, pay and other working conditions.
- (3) In *Gottardo* ⁽²⁾, the Court of Justice acted on this principle as set out in Article 39 in relation to a person resident in the Community who had worked in France, Italy and Switzerland. This person did not have sufficient entitlement for a pension in Italy and asked for her periods of insurance completed in Switzerland and Italy to be aggregated, as provided for under the bilateral convention between Italy and Switzerland for the benefit of their nationals.

(4) The Court ruled in this case that when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of the other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so (paragraph 34).

(5) In this connection, the Court stated that its interpretation of the term 'legislation' in Article 1(j) of Regulation (EEC) No 1408/71 ⁽³⁾ cannot affect the obligation of every Member State to comply with the principle of equal treatment laid down in Article 39 of the EC Treaty.

(6) The Court considered that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country did not constitute an objective justification for the refusal by the Member State party to that convention to extend to nationals of the other Member States the advantages which its own nationals derive from that convention.

(7) Nor did the Court accept the objections to the effect that a possible increase in the financial burden and administrative difficulties in liaising with the competent authorities of the non-member country in question could justify the Member State which is party to the bilateral convention failing to comply with its Treaty obligations.

⁽¹⁾ OJ L 149, 5.7.1971, p. 2.

⁽²⁾ Judgment of 15 January 2002, Case C-55/00.

⁽³⁾ Judgment of 2 August 1993, Case C-23/92 *Grana-Novoa*, ECR I-4505.

- (8) It is important that all appropriate conclusions be drawn from this judgment, which is crucial for Community nationals who have exercised their right to move freely to another Member State.
- (9) For this reason, it should be made clear that bilateral conventions on social security between a Member State and a non-member country must be interpreted to the effect that the advantages enjoyed by nationals of the Member State which is party to the convention should in principle also be granted to a Community national who is in the same situation in objective terms.
- (10) Irrespective of the uniform application of the Gottardo ruling to individual cases, the existing bilateral conventions should be reviewed. With regard to agreements concluded previously, Article 307 of the EC Treaty states: 'the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established', and with regard to agreements concluded after 1 January 1958, or after the date of a Member State's accession to the European Community, Article 10 of the EC Treaty requires that these same Member States 'abstain from any measure which could jeopardise the attainment of the objectives of the Treaty'.
- (11) With regard to new bilateral conventions on social security concluded between a Member State and a non-member country, it is important to bear in mind that these should include a specific reference to the principle of non-discrimination on the grounds of nationality in relation to nationals of other Member States who have exercised their right to move freely in the Member State which is a party to the convention concerned.
- (12) The application of the Gottardo judgment to individual cases depends largely on the cooperation of non-member countries, since they must certify the periods of insurance completed there by the person concerned.
- (13) The Administrative Commission should deal with this question, given that the ruling in Gottardo is concerned with the application of the principle of equal treatment in the field of social security,

RECOMMENDS:

1. In accordance with the principle of equal treatment and non-discrimination between a State's own nationals and the nationals of other Member States who have exercised their right to move freely pursuant to Article 39 of the EC Treaty, the advantages as regards pensions which are enjoyed by a State's own workers (employed and self-employed persons) under a convention on social security with a non-member country are also, in principle granted to workers (employed and self-employed persons) who are nationals of the other Member States and are in the same situation in objective terms.
2. New bilateral conventions on social security concluded between a Member State and a non-member country should make specific reference to the principle of non-discrimination, on the grounds of nationality, against nationals of another Member State who have exercised their right of free movement in the Member State which is a party to the convention concerned.
3. The Member States should inform the institutions in countries with which they have signed social security conventions whose provisions apply only to their respective nationals about the implications of the Gottardo ruling and should ask them to cooperate in applying the ruling of the Court. Member States which have concluded bilateral conventions with the same non-member countries may act jointly in requesting such cooperation. This cooperation is clearly essential if the ruling is to be complied with.

*The Chairman of the Administrative
Commission*

Théodora TSOTSOROU
