JUDGMENT OF THE COURT
OF 19 JANUARY 1978 [1]

Caisse Primaire d'Assurance Maladie d'Eure-et-Loir v Alicia Tessier, née Recq (preliminary ruling requested by the French Cour de Cassation)

'Persons to whom Regulation No 1408/71 is applicable — social security scheme applicable to all residents'

Case 84/77

1. *Social security for migrant workers — National scheme applicable to all residents — Application to a national of another Member State — Community rules — Benefit — Grant — Condition — Status as employed person — Definition with regard to British legislation — Criterion — Payment of social security contributions*
   (Regulation No 1408/71, Art. 1 (a) (ii) and Annex V)

2. *Social security for migrant workers — Community rules — Employed person — Insurance periods completed under the legislation of another Member State — Acquisition of a right — Accrued rights — Taking into account*
   (Regulation No 1408/71, Art. 18)

1. A national of a Member State who, in another Member State, has been subject to a social security scheme which is applicable to all residents can benefit from the provisions 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 only if he can be identified as an employed person within the meaning of Article 1 (a) (ii) of that regulation.

   As regards the United Kingdom in particular, in the absence of any other criterion, such identification depends by virtue of Annex V to that regulation on whether he was required to pay social security contributions as an employed person.

2. Rights acquired by a person who can be identified as a worker within the meaning of Article 1 (a) (ii) of Regulation No 1408/71 during his residence in a Member State must be taken into account by any other Member State as if they were periods required for the acquisition of a right under its own legislation.

In Case 84/77

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

1 — Language of the case: French.

CAISSE PRIMAIRE D'ASSURANCE MALADIE D'EURE-ET-LOIR, Chartres,

and

ALICIA TESSIER, NÉE RECQ, residing in Paris,

on the interpretation, as regards the effects in the field of social security of an au pair placement, 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,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Alicia Recq, a French national who at the time was living at Senonches, Eure-et-Loir, finished her studies in France in September 1973 when she was aged 17.

From 3 October 1973 to 30 April 1974 she resided in Great Britain where she was employed in a family as an au pair girl and followed evening classes at the Wilmslow Adult Education Centre.

Following her return to France on 2 May 1974 Miss Recq registered herself as a person seeking employment.

Having had to receive medical treatment in France from 17 May to 17 June 1974 Miss Recq requested the Caisse Primaire d'Assurance Maladie d'Eure-et-Loir (Sickness Fund for the Eure-et-loir hereinafter referred to as

'the Sickness Fund'), whose head office is in Chartres, to reimburse the costs she had incurred by way of benefits in kind under the sickness insurance scheme.

The Commission de Recours Gracieux (appeals committee) of the Sickness Fund refused to grant her request on the ground that the applicant could not obtain the reimbursement of her sickness expenses either as a dependant of her father, a person covered by the social security scheme, because she had finished her studies in September 1973 and had worked during her stay in the United Kingdom, or on the basis of a personal right as she failed to satisfy the condition of completion of a certain period of work required by Article L 249 of the French social security code or as a migrant worker because she did not hold that status within the meaning 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 (Official Journal, English Special Edition 1971 (II), p. 416).

On 21 November 1974 Miss Recq lodged an appeal against the decision of the Sickness Fund with the Commission de Première Instance du Contentieux de la Sécurité Sociale (Tribunal of First Instance for Disputes Concerning Social Security), Chartres.

By decision of 12 March 1975 that body ordered the Sickness Fund to assume the burden of the medical expenses incurred by the applicant on the ground that for National Insurance purposes in the United Kingdom she had the status of a student and that consequently she was entitled to sickness insurance benefits as a dependant of her father.

The Sickness Fund lodged an appeal in cassation against that decision on 23 May 1975.

The French Cour de Cassation, Social Chamber, by judgment of 3 June 1977, found that even if hypothetically the respondent to the appeal in cassation, who had now become Mrs Tessier and was living in Paris, could not at the time claim to be a dependant of her father within the meaning of the French legislation, the question arose whether or not she was able to claim social security benefits in kind in her own right under Regulation (EEC) No 1408/71. The Chamber therefore decided pursuant to Article 177 of the EEC Treaty to stay proceedings until the Court of Justice had delivered a preliminary ruling on the following questions:

'1. Whether a national of a Member State who, while residing in the territory of another Member State for the purposes of working there au pair and, at the same time, of following a part-time course of study, receives in that State social security benefits in kind, is a migrant worker within the meaning of Article 1 of Regulation No 1408/71;

2. Whether the rights acquired by such a national during his stay must be taken into account by any other Member State as if they were periods laid down for the acquisition of a right under its own legislation'.

The judgment of the French Cour de Cassation was received at the Registry of the Court of Justice on 5 July 1977.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Caisse Primaire d'Assurance Maladie d'Eure-et-Loir, the appellant in the main proceedings, on 19 September, by the Commission of the European Communities on 21 September and by the Government of the United Kingdom on the same date.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without holding a preparatory inquiry.

II — Written observations submitted to the Court

The *Caisse Primaire d'Assurance Maladie d'Eure-et-Loir,* the appellant in the main proceedings, submitted observations which are substantially as follows.

The first question

The reply to this question is derived from Article 1 (a) of Regulation No 1408/71 which defines the term 'worker'. The insurance system applicable in Great Britain is 'a social security scheme for all residents or for the whole working population' within the meaning of Article 1 (a) (ii) of the regulation; however, the manner in which that scheme is administered or financed does not enable a person working as an au pair to be identified as an employed person as required by the first indent of that provision.

The status of persons engaged au pair is in fact determined by the European Agreement on Au Pair Placements, signed at Strasbourg on 24 November 1969. According to the preamble to that agreement persons placed au pair belong neither to the student category nor to the worker category but to a special category which has features of both. The definition of au pair placement contained in Article 2 of the agreement rules out classification as a migrant worker. A migrant worker does not go abroad to improve his linguistic knowledge and general culture in exchange for certain services but for the purposes of work for which he receives normal remuneration. However, a person placed au pair receives board and lodging, is given adequate time to attend language courses as well as for cultural and vocational improvement, receives a certain sum of money as pocket money and renders to the receiving family services consisting in participation in day-to-day family duties up to a maximum of five hours per day.

It is true that at that time Great Britain was not a signatory to the agreement; the definitions contained therein, which are of a very general nature, may be accepted in so far as they merely set out in writing generally accepted practice in Europe and thereby confirm an existing situation.

It is evident from the European agreement of 24 November 1969 that persons engaged au pair are not workers within the meaning of Article 1 of Regulation No 1408/71.

A person engaged au pair in England having the opportunity to follow courses in a specialized teaching establishment cannot claim to fall within Article 1 (a) (ii) of Regulation No 1408/71 as the manner in which the British social security scheme is administered or financed does not allow such a person to be identified as an employed person.

It is true that Mrs Tessier received the free treatment granted under British legislation to any person residing in Great Britain: however, in her status as a person engaged au pair she did not fall within the system of National Insurance which in England is restricted to employed persons in the strict sense of the term: in England Mrs Tessier had the status of a student.

Accordingly the reply to the first question put by the Cour de Cassation can only be in the negative:

A national of a Member State who, while residing in the territory of another Member State for the purposes of working there au pair and of following a part-time course of study, receives in that State social security benefits in kind is not a migrant worker within the meaning of Article 1 of Regulation No 1408/71.

The second question

With regard to Article 18 of Regulation No 1408/71 concerning the aggregation of insurance periods it should be noted that in England Mrs Tessier was not covered by the National Insurance scheme and did not have the status of an employed person in that country. She was merely insured under the English social security scheme as applicable to all residents. As in that country she could not be identified as an employed person she did not there acquire during the relevant period any right enabling her to rely in France on Article 18 to cause the Sickness Fund to accord her social insurance cover in her own right.

The answer to the second question should therefore also be in the negative.

The *Government of the United Kingdom* observes that in England under the Statement of Immigration Rules for Control on Entry laid before the United Kingdom Parliament on 25 January 1973 an au pair placement does not create the relationship of employer to employee; neither the girl engaged au pair nor her host is liable for contributions under the Social Security Act 1975.

The first question

It is clear from the decided cases of the Court of Justice that the sphere of application of Regulation No 1408/71 is determined by a criterion of social security and not of labour legislation and that the concept of worker refers to all those who, as such and under whatever description, are covered by the different national social security systems. On the other hand the term 'worker' in Article 1 of Regulation No 1408/71 means a person who is compulsorily or voluntarily insured for one or more of the contingencies covered by the branches of social security dealt with in the regulation. The question arises therefore whether a person who during a period spent in England could have received social security benefits in kind may be regarded as having been insured under the regulation.

Under the legislation of the United Kingdom the right to sickness benefits in kind is not dependent upon the completion of insurance periods or periods of residence. The National Health Service Act 1946 imposed a legal duty to provide medical treatment for people ordinarily resident on the territory irrespective of whether or not they are workers within the meaning of that expression in Article 1 (a) of Regulation No 1408/71. Any medical treatment available to a person, who is not already a migrant worker to whom Regulation No 1408/71 applies, who enters Great Britain under an au pair arrangement will be the same as is available to any other non-employed visitor to the United Kingdom; the medical treatment is in no way dependent upon preceding insurance periods or periods of residence. It will not depend in any way upon the existence of an au pair arrangement.

To give an affirmative answer to the first question would have the effect of interpreting the meaning of 'worker' in Article 1 of Regulation No 1408/71 as applicable to any person, whether or not gainfully employed, coming to the United Kingdom from another Member State of the Community who, whilst in the United Kingdom, develops some illness which necessitates treatment under the National Health Service. Such an interpretation would clearly be outside the intention of the regulation as at present framed. The following answer should therefore be given to the first question:

A national of a Member State, staying in the territory of another Member State under an au pair arrangement which does not have the effect of making that person subject to a compulsory insurance scheme or an

optional continued insurance scheme, is not constituted a migrant worker within the meaning of Article 1 of Regulation (EEC) No 1408/71 by virtue of receiving social security benefits in kind which are provided for all persons, whether workers or not, whilst they are staying in that State.

The second question

If the answer to the first question is to the effect of that proposed above it will not be necessary to give any answer to the second question.

The observations of the *Commission of the European Communities* are substantially as follows:

The first question

The regulations adopted in application of Article 51 of the EEC Treaty, which is itself to be found in the chapter relating to the freedom of movement of workers, are only applicable to workers and assimilated persons. Because of the development of the different national social security systems it became more and more difficult to make a distinction between employed persons and self-employed workers; therefore in Article 1 (a) of Regulation No 1408/71 the Council preferred to substitute for the term 'wage-earners or assimilated workers' formerly used in Regulation No 3 of 1958 a definition of the expression 'worker' allowing the identification of employed persons taking account also of the case-law of the Court of Justice.

In view of the existence of national social security systems which are essentially based on a conception of insurance dependent on residence as a condition for entitlement and which establish schemes applicable to all the population it was necessary, in order to identify employed persons, to make reference either to the manner of financing of the social security schemes or to certain schemes organized solely for the benefit of employed persons.

In the present case it is necessary to determine whether the fact of having received sickness benefits in kind during a stay in the United Kingdom is sufficient to enable Mrs Tessier to be identified as an employed person within the meaning of the British legislation.

The British social security scheme is not a scheme confined to employed persons; it covers all the working population and even, for certain risks, in particular medical treatment, all residents.

Under Article 1 (a) (ii) of Regulation No 1408/71 employed persons can thus only be identified having regard to the manner in which the scheme is administered or financed. In this respect Annex V of the regulation sets out under heading I, United Kingdom:

'1. All persons required to pay contributions as employed workers shall be regarded as workers for the purposes of Article 1 (a) (ii) of the regulation'.

As the order making the reference does not indicate whether, during her stay in the United Kingdom, Mrs Tessier received wages in respect of which she had to make contributions two hypotheses are possible: either Mrs Tessier received remuneration in addition to certain benefits in kind; if the remuneration was in excess of £ 8 per week she would have had to pay contributions and would therefore have been an employed person; or if in exchange for her work she received no remuneration save the supply of board and lodging, she did not have to pay any contribution and was not therefore an employed person.

It would only be possible to reply to the question put by the Cour de Cassation by making reference to the social security scheme under which a national of a Member State receives sickness benefits in kind. The fact that a person receives sickness benefits in kind may be sufficient to identify him as an

employed person and therefore as a worker within the meaning of Article 1 of Regulation No 1408/71 if under a scheme for employed persons the insurance is either compulsory or on an optional continued basis. If on the other hand the insurance is compulsory under a social security scheme for all residents or for the whole working population the manner in which such scheme is administered or financed should enable a person entitled to sickness insurance benefits to be identified as an employed person; failing such criteria the person must be insured for some other contingency specified in Annex V under a scheme for employed persons, either compulsorily or on an optional continued basis.

The answer to be given to the first question should be as follows:

A national of a Member State who resides and works in another Member State and there receives sickness benefits in kind is only a worker within the meaning of Article 1 of Regulation No 1408/71 if the receipt of those benefits is the result of compulsory or optional continued insurance under a social security scheme for employed persons or, in the case of compulsory insurance under a social security scheme for all residents or for the whole working population, if the application of the social security legislation of the Member State in which he resides enables him to be identified as an employed person.

The second question

The answer to this question is derived directly from the conclusion reached in respect of the first question.

As the person in question cannot be identified or regarded as a worker within the meaning of Article 1 of Regulation No 1408/71 she does not fall within the personal sphere of application of that regulation as defined in Article 2. Since the regulation is not applicable to the person concerned the rights which she could have acquired in whatever way, under the social security legislation of the United Kingdom cannot be taken into account for the acquisition of a right to benefit in another Member State.

If however the person in question could be identified as a worker during her stay in the United Kingdom, Regulation No 1408/71 would be applicable to her in its entirety; in particular, by virtue of Article 18 of the regulation it would be possible to aggregate the periods completed under the British legislation as though they were periods completed under French legislation.

In the present case, however, the problem is complicated by the fact that Mrs Tessier was seeking employment, that is to say, was unemployed from the time of her return to France and during her illness.

It is therefore necessary to know whether she satisfies the conditions set out in Article 69 (1) of Regulation No 1408/71 for the retention of entitlement to unemployment benefit and therefore is entitled to sickness benefits in kind in accordance with Article 25 (1) (a). It is also possible that Mrs Tessier's position is covered by Article 71 of Regulation No 1408/71 as she is an unemployed person who, during her last employment, was residing in a Member State other than the competent State; in such a case in implementation of Article 71 (1) (b) (ii) she would be covered by the provisions of Article 25 (2).

In any event the rights acquired by Mrs Tessier during her stay in the United Kingdom could only be taken into account in so far as in the United Kingdom she was in employment giving her the status of worker within the meaning of Regulation No 1408/71.

The following answer should be given to the second question:

Rights acquired by a national of a Member State on the territory of another Member State can only be taken into consideration by the first State for the application of Regulation No 1408/71 in so far as, at the time of acquiring those rights, the national could claim the status of worker within the meaning of Article 1 of that regulation.

III — Oral procedure

The *Commission*, represented by its Legal Adviser, Marie-José Jonczy, presented oral argument and its answers to the questions put by the Court of Justice at the hearing on 30 November 1977.

The Advocate General delivered his opinion at the hearing on 14 December 1977.

Decision

1 By a judgment of 3 June 1977, which was received at the Court on 5 July 1977, the French Cour de Cassation, Social Chamber, referred to the Court for a preliminary ruling, pursuant to Article 177 of the EEC Treaty, two questions concerning the determination of the field of application 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) concerning the position with regard to the French sickness insurance scheme of a person who in the United Kingdom had been covered by a social security scheme applicable to all residents.

2 It appears from the judgment making the reference that after completing her schooling in France, Mrs Tessier (who at the time of the facts giving rise to the action was Miss Recq), the respondent in the main proceedings, stayed for a certain time in Great Britain working as an au pair and attending evening classes.

3 During that time she was entitled to use the National Health Service which is applicable to all persons ordinarily resident in the United Kingdom but it is not possible to establish from the facts contained in the file whether or not she was obliged to pay contributions under the British social security legislation.

4 After her return to France she registered as a person seeking employment and in respect of medical treatment received in that State she applied for French sickness insurance benefits from the Caisse Primaire d'Assurance Maladie d'Eure-et-Loir by which she had previously been covered as a dependant of her father who was insured by that Sickness Fund.

5 However the Sickness Fund refused to grant the benefits applied for on the grounds that having completed her schooling Mrs Tessier had lost the status of a dependant of her father without acquiring a personal right under the social security legislation applicable as she was unable to show that she had completed the requisite number of hours of employment or assimilated work during a reference period laid down under Article 249 L of the Social Security Code and because she could not be considered a migrant worker within the meaning of Regulation No 1408/71.

6 Following an application by Mrs Tessier the Commission de Première Instance du Contentieux de la Sécurité Sociale of Chartres, by decision of 12 March 1975, ordered the Sickness Fund to pay Mrs Tessier's sickness costs taking account of the social security status which she had acquired under the British legislation.

7 The Caisse Primaire d'Assurance Maladie lodged an appeal on a point of law against that decision and the Cour de Cassation took the view that even if Mrs Tessier could not claim to be a dependant of her father in order to receive social security benefits on her return to France, the question arose whether she might not be entitled to claim the benefits in her own right by virtue of Regulation No 1408/71 because she could have been regarded as an insured person under that regulation for the duration of her stay in Great Britain in accordance with the local legislation with the result that that insurance period would have to be assimilated to the reference period laid down by French law.

8 In order to settle this point of law the Cour de Cassation asks:

'1. Whether a national of a Member State who, while residing in the territory of another Member State for the purposes of working there au pair and, at the same time, of following a part-time course of study, receives in that State social security benefits in kind, is a migrant worker within the meaning of Article 1 of Regulation No 1408/71;

2. Whether the rights acquired by such a national during his stay must be taken into account by any other Member State as if they were periods laid down for the acquisition of a right under its own legislation'.

9 According to the wording of Article 2 of Regulation No 1408/71 the regulation is applicable in particular to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States.

10 Under Article 1 (a) (ii) of the regulation 'worker' means *inter alia* 'any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this regulation, under a social security scheme for all residents or for the whole working population if such person:

— can be identified as an employed person by virtue of the manner in which such scheme is administered or financed; or

— failing such criteria, is insured for some other contingency specified in Annex V under a scheme for employed persons, either compulsorily or on an optional continued basis'.

11 As regards the United Kingdom the following provision was added to Annex V of the regulation by the Act of Accession:

'All persons required to pay contributions as employed workers shall be regarded as workers for the purposes of Article 1 (a) (ii) of the regulation' (Official Journal, English Special Edition, 27 March 1972, p. 113).

12 From all these provisions it follows that whatever the occupational status of a national of a Member State who has resided in Great Britain in conditions such that he was subject to a social security scheme applicable to all residents, the applicability to him of Regulation No 1408/71 depends on whether he can be 'identified' as an employed person.

13 In the absence of any criteria based on the manner in which the scheme is administered or financed, pursuant to the first indent of Article 1 (a) (ii), for the United Kingdom such identification depends by virtue of the second indent and of Annex V on whether the person concerned was required to pay social security contributions as an employed person.

14 It is for the competent national authorities to establish whether or not that condition is fulfilled in a particular case.

15 If a person can be thus identified as a 'worker' within the meaning of Regulation No 1408/71 it follows that in accordance with Article 18 (1) of that regulation the institution of a Member State whose legislation makes the acquisition, retention or recovery of entitlement to benefits conditional upon the completion of insurance or employment periods must, in so far as is necessary, take into account the insurance or employment periods completed under the legislation of any other Member State as though such periods had been completed under its own legislation.

16 A reply to this effect should therefore be given to the questions referred to the Court by the Cour de Cassation.

Costs

17 The costs incurred by the Government of the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

18 As these proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the French Cour de Cassation by judgment of 3 June 1977, hereby rules:

1. **A national of a Member State who, in another Member State, has been subject to a social security scheme which is applicable to all residents can benefit from the provisions 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 only if he can be identified as an employed person within the meaning of Article 1 (a) (ii) of that regulation. As regards the**

United Kingdom in particular, in the absence of any other criterion, such identification depends by virtue of Annex V to that regulation on whether he was required to pay social security contributions as an employed person.

2. **Rights acquired by a person who can be identified as a worker within the meaning of Article 1 (a) (ii) of Regulation No 1408/71 during his residence in a Member State must be taken into account by any other Member State as if they were periods required for the acquisition of a right under its own legislation.**

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 19 January 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 DECEMBER 1977 [1]

Mr President,
Members of the Court,

The defendant in the main action which gave rise to the reference to this Court for a preliminary ruling with which we must deal today was born on 21 April 1956 and is of French nationality. After finishing her schooling in France in September 1973, she stayed in the United Kingdom from 3 October 1973 to 10 April 1974. She worked there as an au pair girl with a British family and in addition went to evening classes at an adult education centre.

Immediately after her return to France she registered herself with the competent authority as unemployed on 2 May 1974. From 17 May to 17 July 1974 she had to undergo medical treatment. She claimed from the competent French insurance institution reimbursement of the expenses incurred in this connexion.

The competent institution, however, the Caisse Primaire d'Assurance Maladie d'Eure-et-Loir (Sickness Fund for the Eure and Loir), refused this request. It takes the view that the applicant is not entitled to payment in right of her

1 – Translated from the German.