JUDGMENT OF THE COURT (SECOND CHAMBER) OF 15 MARCH 1978 [1]

Maria Frangiamore v Office National de l'Emploi (preliminary ruling requested by the Belgian Cour de Cassation)

Case 126/77

Social security for migrant workers — Unemployment — Acquisition of right to benefits — Aggregation of periods of insurance or employment — Possibility of counting period of employment as period of insurance — Conditions
(Regulation No 1408/71 of the Council, Art. 1 (r) and Art. 67 (1))

It is clear from Article 1 (r) of Regulation No 1408/71 that, in order to ascertain whether a period of employment may be assimilated to a period of insurance for the purposes of the application of the rule concerning aggregation set out in Article 67 (1), reference must be made to the legislation under which such period was completed. Thus a period of employment completed under the legislation of a Member State other than that in which the competent institution is established, and defined or recognized as an insurance period under that legislation, is not subject to the condition laid down in Article 67 (1) *in fine* of Regulation No 1408/71.

In Case 126/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Belgian Cour de Cassation for a preliminary ruling in the action pending before that court between

MARIA FRANGIAMORE

and

THE OFFICE NATIONAL DE L'EMPLOI (National Employment Office)

on the interpretation of Article 67 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to

1 — Language of the Case: French.

employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416)

THE COURT (Second Chamber)

Composed of: M. Sørensen, President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the 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 procedure

The appellant in the main action, an Italian national, was employed in Italy as a domestic servant from 21 December 1958 to 4 August 1973, and from 27 August 1973 to 30 November 1973 she worked for 83 days for an undertaking in Belgium.

When she became unemployed in Belgium she claimed unemployment benefits in December 1973.

In order to comply with the conditions regarding the qualifying period laid down by Article 118 of the Royal Decree of 20 December 1963 on employment and unemployment (*Moniteur Belge* of 18 January 1964, *Pasinomie* 1963, III, p. 1615), and in view of her age, the person concerned should have completed 450 working days or days treated as such within the 27 months prior to her claim, that is from 3 September 1971 to 2 December 1973.

The 83 working days which she had completed in Belgium were insufficient in themselves for her to acquire a right under Belgian legislation.

The person concerned therefore applied for the aggregation pursuant to Article 67 of Regulation (EEC) No 1408/71 of the Council with her Belgian periods of employment of the periods completed by her in Italy as *addetta ai servizi domestici* (domestic servant) which are considered in Italy, pursuant to Presidential Decree No 1403 of 31 December 1971 (Gazzetta Ufficiale of 10 April 1972, No 94), as unemployment insurance periods for the

period from 2 July 1972 to 4 August 1973.

Article 67 of Regulation (EEC) No 1408/71 determines the effect of the aggregation of periods in regard to the acquisition of the right to unemployment benefits:

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of insurance periods shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation.
2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

The National Employment Office, the competent Belgian institution, refused to effect this aggregation on the ground that, according to Belgian legislation (Article 5 of the Royal Decree of 28 November 1969, *Moniteur Belge* 5 December 1969, *Pasinomie* 1969 p. 1849) working days completed as a domestic servant cannot be taken into consideration for the purposes of Articles 118 and 120 of the said Royal Decree of 20 December 1963.

The person concerned then instituted proceedings before the Tribunal de Travail (Labour Tribunal), Liège, which, in its judgment of 23 September 1975, ordered the National Employment Office to pay her unemployment benefits as from 3 December 1973.

However, following an appeal that judgment was annulled by a judgment of 29 June 1976 of the Cour de Travail (Labour Court), Liège, which confirmed the decision refusing the benefits. That court held that, notwithstanding the provisions of Article 1 (r) and (s) of Regulation (EEC) No 1408/71, Article 67 (1) of that regulation lays down that, in order to be taken into account in Belgium for the purposes of unemployment insurance, periods of employment or insurance completed in Italy would have to be considered as insurance periods if they had been completed under Belgian legislation.

When the matter was brought before the court of last instance, the Belgian Cour de Cassation, that court, by a judgment of 19 September 1977, stayed the proceedings and decided to submit to the Court of Justice of the European Communities the following preliminary question:

"Must the provision contained in Article 67 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971, pursuant to which a Member State shall take into account a period of employment completed under the legislation of another Member State only if that period of employment would have been counted as an insurance period had it been completed under the legislation of the first Member State, be taken to mean that that condition applies even if the period of employment is counted as an insurance period in the other Member State?"

It should be noted that the Cour de Cassation in its judgment making the

reference presupposes that the legislation applicable (in the present case, Belgian legislation) makes the acquisition of the right dependent on the completion of insurance periods.

By an Order of the President of the Court of Justice of 1 February 1978 the case was assigned to the Second Chamber.

Having heard the report of the Judge Rapporteur and the views of the Advocate-General the Court (Second Chamber) decided to open the oral procedure without any preliminary inquiry.

II — Summary of the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community

The *appellant in the main action* observes that Article 67 of Regulation (EEC) No 1408/71 permits account to be taken in connexion with the acquisition, retention or recovery of the right to unemployment benefits, of both *periods of insurance* (paragraph (1)) and *periods of employment* (paragraph (2)) completed under the legislation of any other Member State. Only in the case of periods of employment which do not constitute periods of insurance within the meaning of the legislation under which they were completed does Article 67 (1) lay down as a condition of their validity that such periods should be considered as periods of insurance by the competent institution.

The appellant in the main action completed periods of employment as a domestic servant from 21 December 1958 to 4 August 1973. Since in Italy domestic staff have been insured against unemployment since 1 July 1972 the only period of employment which qualifies as a period of insurance is the period from 2 July 1972 to 4 August 1973.

Whilst that period of work did not count in Belgium as a period of employment, since domestic staff are not insured in Belgium against unemployment, it could be taken into account as a period of insurance pursuant to Article 1 (r) of Regulation No 1408/71. That provision in fact requires the competent institution to have regard to the legislation of the State in which the relevant periods of insurance were completed in order to assess the validity of such periods.

Accordingly the provisions of Article 67 (1) taken in conjunction with these of Article 1 (r) of Regulation No 1408/71 require the Belgian institution to accept the validity of the periods of insurance completed in Italy for the purpose of the acquisition of the right to unemployment benefits.

The Court of Justice has already delivered a ruling to this effect in the judgment delivered on 6 June 1972 in Case 2/72 *Murru* ([1972] ECR 333).

In conclusion, the appellant in the main action considers that the institution of a Member State which applies Article 67 (1) of Regulation (EEC) No 1408/71 and which makes recognition of periods of employment completed on the territory of another Member State subject to the condition that such periods of employment should have been considered as periods of insurance if they had been completed under its own legislation must consider periods of employment completed under the legislation of another Member State as valid periods of insurance provided that such periods of employment are recognized as periods of insurance by the legislation under which they were completed.

The *Commission*, after recalling that Article 67 (1) of Regulation (EEC) No 1408/71 corresponds, with the exception of certain purely formal modifications, to the provisions of Article 33 (2) and (3) of the previous Regulation No 3, claims that the sufficient number of foreign periods necessary for the purposes of aggregation in the State whose legislation is applicable is established with regard to *unemployment* as follows:

(a) If the legislation applicable requires the completion of *periods of insurance* Article 67 (1) provides two possibilities.

First, it permits aggregation of periods of insurance within the meaning of Article 1 (r), that is to say defined or recognized as such in another Member State.

Secondly, it provides the possibility of aggregating with such periods of insurance ordinary periods of employment defined or recognized as such in another Member State. In this case, however, with which the question of interpretation is in fact concerned, such periods of employment are not aggregated unless they would have been considered as periods of insurance if they had been completed under the legislation of the State where the aggregation is effected.

(b) If, on the other hand, the legislation applicable requires the completion of *periods of employment* Article 67 (2) permits the aggregation of periods of insurance or employment without repeating, with regard to periods of employment, the condition imposed by Article 67 (1) *in fine*.

The Commission observes that the Cour de Cassation, in its judgment making the reference, presupposes on the one hand, that the relevant legislation (in the present case Belgian legislation) renders the acquisition of the right conditional on the completion of *periods of insurance* and, on the other, that the period in dispute completed in Italy by way of domestic service is considered in Italy as a period *of insurance*.

The Commission relies upon the judgment of the Court of Justice in the *Murru* case and claims that, in order to determine whether a period of employment is to be considered as a period of insurance within the meaning of Article 1 (r) and of Article 67 (1). "reference must be made to the legislation under which such period was completed".

In those circumstances the condition laid down by Article 67 (1) *in fine* does not apply.

It is clear therefore that the Belgian institution, which administers legislation under which *periods of insurance* are taken into account within the meaning of Article 67 (1), has only to establish that, pursuant to Italian legislation, the period in question is an *insurance period* even if, within the meaning of Belgian legislation, that period is only a period of employment which is not regarded as a period of insurance.

In conclusion, the Commission considers that the reply to the question submitted must be as follows:

"The provision contained in Article 67 (1) of Regulation (EEC) No 1408/71 of 14 June 1971 of the Council of the European Communities, pursuant to which a Member State shall take into account a period of employment completed under the legislation of another Member State only if that period of employment would have been counted as an insurance period had it been completed under the legislation of the first Member State, is not applicable if that period of employment is counted in the other Member State as a period of insurance."

III — Oral procedure

At the hearing on 9 March 1978 the Commission of the European Communities, represented by its agent, Mr J.-C. Séché, submitted its oral observations.

The Advocate General delivered his opinion at the hearing on the same day.

Decision

1 By a judgment of 19 September 1977, which was received at the Court on 24 October 1977, the Belgian Cour de Cassation submitted to the Court of Justice under Article 177 of the EEC Treaty a question on the interpretation of Article 67 (1) 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).

2 Article 67 of Regulation No 1408/71, which concerns the position with regard to aggregation of periods for the acquisition of the right to unemployment benefits, states at paragraph (1):

"The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of insurance periods shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation."

3 Pursuant to Article 1 (r) of the regulation the words "insurance periods" mean "contribution periods or periods of employment as defined or recognized as insurance periods by the legislation under which they were completed . . .".

4 The question submitted by the Belgian Cour de Cassation asks whether the condition laid down in Article 67 (1) *in fine* applies even if the relevant period of employment is counted as an insurance period under the legislation of the Member State in which it was completed.

5 The extent of the right conferred by Article 67 (1) on a migrant worker to require the competent institution of a Member State to aggregate periods of insurance or employment which he has completed under the legislation of another Member State varies in accordance with the nature of the periods in question.

6 In fact that provision permits the aggregation, on the one hand, of insurance periods within the meaning of Article 1 (r) and, on the other hand, of ordinary periods of employment defined or recognized as such in a Member State other than that in which the competent institution is established.

7 In the latter case the wording of Article 67 (1) indicates that periods of employment shall be aggregated only if they would have been counted as insurance periods had they been completed under the legislation of the competent State.

8 On the other hand, that condition does not apply to the aggregation of insurance periods within the meaning of Article 1 (r) of the regulation.

9 Furthermore, it is clear from Article 1 (r) of the regulation that, in order to ascertain whether a period of employment may be assimilated to a period of insurance for the purposes of the application of the rule concerning aggregation set out in Article 67 (1), reference must be made to the legislation under which such period was completed.

10 It is thus apparent from the foregoing considerations that a period of employment completed under the legislation of a Member State other than that in which the competent institution is established, and defined or recognized as an insurance period under that legislation, is not subject to the condition laid down in Article 67 (1) *in fine* of Regulation No 1408/71.

Costs

11 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

12 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 national court, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question submitted to it by the Belgian Cour de Cassation by judgment of 19 September 1977, hereby rules:

A period of employment completed under the legislation of a Member State other than that in which the competent institution is established, and defined or recognized as an insurance period under that legislation, is not subject to the condition laid down in Article 67 (1) *in fine* of Regulation No 1408/71.

Sørensen Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 15 March 1978.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 9 MARCH 1978 [1]

Mr President,
Members of the Court,

1. The question raised by the Belgian Cour de Cassation is expressly stated to relate exclusively to Article 67 (1) of Regulation No 1408/71 of the Council of 14 June 1971. The request submitted to the Court of Justice is in substance for an interpretation of the scope of the condition which appears at the end of paragraph (1).

1 — Translated from the Italian