second sentence, the "previous" wage or salary which normally constitutes the basis of calculation of unemployment benefit, is, according to that regulation, the wage or salary "received" in the last employment of the worker and that it is only by way of exception and derogation that the basis of calculation of those benefits may in certain cases be the notional and not the actual wage or salary in the last employment.

3. Article 68 (1) of Regulation No 1408/71, viewed in the light of Article 51 of the Treaty and the objectives which it pursues, must be interpreted as meaning that, in the case of a frontier worker, within the meaning of Article 1 (b) of that regulation, who is wholly unemployed, the competent institution of the Member State of residence, whose national legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary, shall calculate those benefits taking into account the wage or salary received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed.

In Case 67/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht [Federal Social Court] for a preliminary ruling in the action pending before that court between

WALDEMAR FELLINGER, Rehlingen,

and

BUNDESANSTALT FÜR ARBEIT [Federal Labour Office], NUREMBERG,

on the interpretation of Article 68 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. Waldemar Fellinger, a German national, a plasterer by trade, was employed in the Federal Republic of Germany until 10 October 1974 at a gross wage which amounted to DM 3 872 in the last month of his employment (1 to 30 September 1974). From 11 October 1974 until 10 November 1974 Mr Fellinger was unemployed and received unemployment benefit calculated on the basis of a standard wage of DM 815 from the Employment Office, Saarlouis.

On 11 November 1974 Mr Fellinger took up employment as a frontier worker in Luxembourg. Having again become unemployed, he received unemployment benefit until 12 January 1975 calculated on the basis of the wages received in his last employment in the Federal Republic of Germany from the German employment office.

Between 13 January and 2 August 1975 Mr Fellinger was again employed in Luxembourg but having become unemployed as from 3 August 1975 he received from the Employment Office, Saarlouis, benefit calculated on the basis of a standard wage in the place of residence of DM 395. Having worked for a further period in Luxembourg, from 20 August to 20 November 1975, he was again unemployed after the latter date and as from 21 November 1975 he was paid benefit amounting to the same sum.

Mr Fellinger lodged an objection to the last-mentioned award with the Bundesanstalt für Arbeit in Nuremberg, founding in particular on the provisions of Article 68 (1) of Regulation No 1408/71 which provide that:

"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned has been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State".

In that regard he claimed that the first sentence of that provision applied and contended that the "last employment", which was decisive for the calculation of benefits within the meaning of the provision, was the employment which he last had in the Federal Republic of Germany and that consequently the calculation of his unemployment benefit ought to be based on the amount of the wage received in that employment.

The Bundesanstalt für Arbeit dismissed the said objection on the ground that, in this case, the words "last employment" referred to a period of employment in the Federal Republic of Germany immediately preceding the unemployment. Since Mr Fellinger had not worked in the Federal Republic of Germany but in Luxembourg before registering as unemployed on 21 November 1975, the second sentence

of Article 68 fell to be applied so that the unemployment benefit to be paid as from 21 November 1975 was to be calculated on the basis, not of the wage or salary received in the last employment in the Federal Republic of Germany, but of the normal wage or salary corresponding in the place of residence — that is to say, in the Federal Republic of Germany — to an equivalent or similar employment to his last employment in the territory of Luxembourg. Under German legislation, the wage or salary thus to be taken into consideration was that laid down by collective agreement in the place of residence of the person concerned, namely DM 9.93 per hour for a working period of 40 hours per week.

2. Proceedings contesting that decision before the Sozialgericht [Social Court] for the Saarland were dismissed by judgment of 17 February 1977. Mr Fellinger appealed to the Landessozialgericht [Regional Social Court] which, by judgment of 26 October 1977, reversed the judgment of the Sozialgericht and ordered the social security authorities to calculate the disputed unemployment benefit as from 21 November 1975 on the basis of the claimant's last employment in the Federal Republic of Germany.

The dispute having been finally brought before the Bundessozialgericht, that court found:

— that the claimant, as a frontier worker, came within the provisions of Article 71 of Regulation No 1408/71 and was thus entitled to unemployment benefit by virtue of paragraph 1 (a) (ii) of the said article;

— that the wording of Article 68 (1) of Regulation No 1408/71 regarding the calculation of unemployment benefit appeared to support the view that the wage or salary in the last employment in the country of residence was decisive irrespective of the time at which that last period of employment occurred. That conception appeared particularly appropriate in the case of frontier workers who, by virtue of Article 71 (1) (a) (ii) of the regulation are to receive benefit in accordance with the legislation of the State of the place of residence, even though they were not last employed there;

— that, however, a literal interpretation of the first sentence of Article 68 (1) raised doubts. Since Article 68 sets no limit to the period between the time of the last employment in the country of residence and the date when unemployment occurred, that interpretation had the result that the wage or salary received in the last employment would also be taken into account in calculating the unemployment benefit even if that employment were many years past. So interpreted, the first sentence of Article 68 (1) could have unfavourable effects in the case where an unemployed person was employed in the country of residence only at the start of his career and subsequently advanced in his career in another Member State; it would furthermore give rise to considerable disadvantages in Member States whose legislation on unemployment benefits did not automatically update them.

Having regard to these considerations, the Bundessozialgericht decided by order of 15 February 1979 to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"(1) In the case of an unemployed frontier worker must the competent institution of the place of residence under the first sentence of Article 68 (1) of Regulation (EEC) No

1408/71 of the Council of 14 June 1971 take into account the wage or salary in respect of his 'last employment' in the territory of that institution only if that employment was the last employment before he registered as unemployed?

(2) If Question 1 is answered in the negative: must the wage or salary in respect of the 'last employment' in the State of residence be taken into account even if, as here, that employment terminated 14 months before he last registered as unemployed?

(3) Has a person (still) been in employment of less than four weeks within the meaning of the second sentence of Article 68 (1) even if, in the territory of the State of residence, he has no employment at all or, in any event, no employment such as may be taken into account in the light of the answers to Questions 1 or 2?"

3. The order making the reference to the Court was received at the Court Registry on 25 April 1979.

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 Bundesanstalt für Arbeit, represented by its agent, Mr Montfort, and by the Commission of the European Communities represented by its Legal Adviser, Mr Koch, acting as Agent.

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

By order of 19 September 1979, made pursuant to Article 95 of the Rules of Procedure, the Court also decided to assign the case to the First Chamber.

II — Written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Bundesanstalt für Arbeit* submits that in terms of the first sentence of Article 68 (1) of Regulation (EEC) No 1408/71 unemployment benefit shall be calculated on the basis of the last employment in the territory of the State making the payment provided that that employment is in fact the very last employment before the entitlement is acquired and provided that the person concerned has been in that employment for at least four weeks. In all other cases the calculation of benefits must be made in accordance with the second sentence of Article 68 (1) of the regulation.

It is submitted that the soundness of that approach is confirmed by Article 81 of Regulation (EEC) No 574/72 under which a worker seeking unemployment benefit is obliged to submit a certified statement for the calculation of benefit, where his last occupation has not been followed for at least four weeks in the territory of the Member State where the competent social security institution is situated.

The submission of that certified statement (indicating the nature of the last occupation followed in another Member State and the branch of the economy in which that occupation was followed) is necessary because, in the case mentioned above, the calculation must be carried out in accordance with the rules in the second sentence of Article 68 (1) of Regulation (EEC) No 1408/71 and because in order to do so the competent institution must have available the information contained in the certified statement.

By "last employment" must therefore be understood the very last employment before becoming unemployed, in the country granting the benefit and for a period of at least four weeks.

The *Commission of the European Communities* observes first that in the

view of the parties to the main action and the national court the "last employment" which has to be taken into account in terms of the first sentence of Article 68 (1) is the last employment in the Federal Republic of Germany. In the questions put to the Court therefore it is sought only to establish whether the "last employment" is that immediately preceding the unemployment or may be an employment going further back in time.

That view of the issue accords with the letter of the provision cited above. It corresponds, moreover, with one of the principles of Regulation No 1408/71 whereby the competent institution of a State does not take account of wages or salaries as such received in the territory of another Member State.

However, it is appropriate to ask whether such an interpretation, when applied to wholly unemployed frontier workers, accords with the intentions of the author of the provision as well as with the legitimate interests of the unemployed persons concerned. The "last employment" in terms of the first sentence of Article 68 (1) is the last employment in time and not only the last employment in the territory of the competent Member State. In principle, the rule intends that account shall be taken of the last wage or salary actually received before unemployment.

By definition, frontier workers have their last employment before unemployment outside the territory of their State of residence. In their case it is therefore impossible to apply the first sentence of Article 68 (1) in its proper sense. Only the second sentence of that provision may then apply (if a total absence of employment in the State of residence is assimilated to employment for less than four weeks), which would lead to unemployment benefits being calculated on the basis of wage or salary levels in the State where the unemployed person resides.

Having regard to the fact that the movement of frontier workers takes place more from areas of low wages to areas of higher wages than in the reverse direction, the answer set forth above may have results which are inequitable and which do not accord with the aim pursued by the Community legislature. It is accordingly right to attempt a different approach to the problem, which approach consists in considering Article 68 in conjunction with the other provisions of Regulation No 1408/71.

Under a general rule of jurisdiction, set out in Article 13 (2) (a) of the regulation, a worker is subject to the legislation of the State in which he is employed. Article 68 is therefore founded on the idea that the unemployed person was employed in the territory of the said State immediately before he became unemployed. An exception to that rule is provided for by Article 71 (1) (a) (ii) in regard to the wholly unemployed frontier worker who receives benefits in accordance with the legislation of the Member State of residence "as though he had been subject to that legislation while last employed". That provision creates a fictitious jurisdiction in the Member State of residence in regard to the last employment immediately before the unemployment occurred. That employment is thus deemed to have been subject to the legislation of the State where the unemployed person resides, which leads to the wage or salary received in the course of that employment being regarded as if it had been received within the area of application of the said provisions. It is therefore reasonable to understand by the "territory" of the competent Member State, within the meaning of the first sentence of Article 68 (1), the area of application of the provisions of the legislation of the said State. Applied to

the present case, that means that there shall be taken into account exclusively the wage or salary which the claimant received (during a period exceeding four weeks) immediately before he became unemployed during his last employment with a Luxembourg undertaking.

This second interpretation is in line with the principle whereby account shall be taken of the last wage or salary actually received before the unemployment and has also the advantage of taking into account the level of wages or salaries in the Member State in which the unemployed person has been employed. On the other hand, it is contrary to the principle that regard is not to be had as such to wage or salary received in the territory of another Member State.

It is not possible, on the basis of the provisions currently in force, to establish which of these two principles should prevail over the other.

In these circumstances the Commission considers that the first question may be answered as follows:

"The 'last employment' within the meaning of Article 68 (1) of Regulation No 1408/71 is the employment held by the unemployed person immediately before he became unemployed."

It thereupon becomes unnecessary to answer the second question.

In regard to the third question, there are two possible answers. If it is accepted that the Community legislature intended that the principle of not taking account of wages or salaries received abroad should take precedence it would be appropriate to answer that question as follows:

"In the case of a wholly unemployed frontier worker within the meaning of Article 71 (1) (a) (ii) of Regulation No 1408/71, the competent institution of the place of residence shall, in accordance with the second sentence of Article 68 (1) of the regulation, calculate the benefits exclusively on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State."

If, on the contrary, the principle of the wage or salary actually received or of benefits granted on the basis of the level of wages paid in the State in which the unemployed person has been employed is to prevail, the answer should be the following:

"In the case of a wholly unemployed frontier worker within the meaning of Article 71 (1) (a) (ii) of Regulation No 1408/71, the competent institution of the place of residence shall, in accordance with the first sentence of Article 68 (1) of the regulation, take into account in the calculation of benefits exclusively the wage or salary in the last employment which the unemployed person had as if he had been employed in the territory of the Member State in which he resides."

III — Oral procedure

The plaintiff in the main action, represented by K. Leingärtner of the Deutscher Gewerkschaftsbund [German Federation of Trade Unions], the Bundesanstalt für Arbeit, represented by its Administrative Director, M. Müller, and the Commission of the European Communities, represented by its Legal Adviser, N. Koch, presented oral argument at the hearing on 29 November 1979.

The Advocate General delivered his opinion at the sitting on 24 January 1980.

Decision

1 By an order of 15 February 1979, which was received at the Court on 25 April 1979, the Bundessozialgericht put certain questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation 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) and, in particular, the provisions of Article 68 of that regulation.

2 Those questions have arisen in the context of a dispute between an employed person of German nationality and resident in the Federal Republic of Germany and the Federal Labour Office (Bundesanstalt für Arbeit), Nuremberg, relating to the classification of unemployment benefit due to that person by the Employment Office (Arbeitsamt), Saarlouis. It appears from the order making the reference to the Court that the worker in question worked in the Federal Republic of Germany until 10 October 1974 after which date he was unemployed and received from the Employment Office, Saarlouis, unemployment benefit calculated on the basis of the wage paid in his last employment in the Federal Republic of Germany. Having thereafter worked, with the status of a frontier worker, in the Grand Duchy of Luxembourg and having become twice unemployed he was awarded by the above-mentioned employment office unemployment benefit calculated on the basis of the wage which he would have received in the Federal Republic of Germany in an employment equivalent to that which he last had in Luxembourg. The claimant disputes the calculation applied by the German employment office to those unemployment benefits and contends that benefits ought to be paid to him on the basis of the wage received in his last employment in the Federal Republic whereas the employment office considers that the said calculation is in accordance with Article 68 (1) of Regulation No 1408/71.

3 With a view to deciding the dispute on this matter, the national court has referred the following questions to the Court for a preliminary ruling:

"(1) In the case of an unemployed frontier worker must the competent institution of the place of residence under the first sentence of Article 68 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June

1971 take into account the wage or salary in respect of his 'last employment' in the territory of that institution only if that employment was the last employment before he registered as unemployed?

(2) If Question 1 is answered in the negative: must the wage or salary in respect of the 'last employment' in the State of residence be taken into account even if, as here, that employment terminated 14 months before he last registered as unemployed?

(3) Has a person (still) been in employment of less than four weeks within the meaning of the second sentence of Article 68 (1) even if, in the territory of the State of residence, he has no employment at all or, in any event, no employment such as may be taken into account in the light of the answers to Questions 1 or 2?"

4 Since these questions are closely related it is convenient to consider them together.

5 It appears from the order making the reference to the Court that these questions have been put in regard to a frontier worker, that is to say, a worker who, in accordance with the definition given to that term by Article 1 (b) of Regulation No 1408/71, is "employed in the territory of a Member State and residing in the territory of another Member State" and for whom the competent institution for the provision of unemployment benefit is, by virtue of Article 71 (1) (a) (ii) of that regulation, that of the Member State in the territory of which the worker resides. It is therefore with regard to the special position of such a worker that there fall to be interpreted in this case the provisions of Article 68 (1) of the said regulation which reads:

"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment in the territory of another Member State."

6 These provisions occur amongst the "common provisions" of Chapter 6 of Title III of the regulation, relating to "unemployment", and are of general application and do not relate to particular situations peculiar to certain categories of worker. They clearly refer to the ordinary case of the worker who is normally employed in the territory of the competent State in which he is residing or staying and they provide, in the second sentence, the special rule there laid down only for the exceptional case in which that worker has been in his last employment in the territory of the said State "for less than four weeks". In the form in which they are drawn up these provisions do not therefore allow of a definition of the criteria of calculation applicable to unemployment benefit due to a frontier worker who, since he resides in a Member State different from that in which he is employed, can never, by very reason of his status as a frontier worker, be employed in the territory of the State which provides his unemployment benefit. The application of the said provisions to such a worker would produce the result that, since by definition he is in the position contemplated by the second sentence of Article 68 (1), the rules which that provision lays down by way of an exception would normally be applied to him and he would never be able to receive unemployment benefit based on the wage or salary actually received in his last employment. Such treatment in regard to unemployment benefit would place him in an unfavourable situation compared with workers in general, for whom the State of employment where they reside or stay is normally the competent State and would, moreover, conflict with the requirements of the free movement of workers. Since daily movements often take place from countries with low wages to countries with higher wages the fact that unemployment benefit paid to frontier workers could never be calculated on the basis of the higher wages would in fact be such as to discourage those movements and thus the mobility of workers within the Community.

7 In these circumstances, the system of rules applicable to frontier workers where the legislation of the competent Member State provides that unemployment benefit is to be calculated on the basis of the previous wage or salary must be elicited from Article 68 (1) of Regulation No 1408/71 in the light of the general principle underlying both that provision and the regulation as a whole. In that regard, it is appropriate to emphasize, first, that, as appears from the ninth recital in the preamble thereto, Regulation

No 1408/71 "in order to secure mobility of labour under improved conditions", seeks to ensure the worker without employment of "the unemployment benefit provided for by the legislation of the Member State to which he was last subject". Such an objective clearly implies that in Regulation No 1408/71 unemployment benefit is regarded in such a manner as not to impede the mobility of workers, including frontier workers, and to that end seeks to ensure that the persons concerned receive benefits which take account so far as possible of the conditions of employment, and in particular of the remuneration, which they enjoyed under the legislation of the Member State of last employment. Moreover it appears from the first sentence of Article 68 (1) that, apart from the special case contemplated in the second sentence, the "previous" wage or salary which normally constitutes the basis of calculation of unemployment benefit, is, according to that regulation, the wage or salary "received" in the last employment of the worker and that it is only by way of exception and derogation that the basis of calculation of those benefits may in certain cases be the notional and not the actual wage or salary in the last employment.

8 Having regard to all these factors, it follows that Article 68 (1) of Regulation No 1408/71 is founded on the general principle that the previous wage or salary to be used in calculating unemployment benefit is normally the wage or salary actually received by the worker in the last employment held by him immediately before his becoming unemployed. Such a principle accords not only with the demands of free movement of workers laid down in Article 51 of the Treaty but also with the requirement underlying Regulation No 1408/71 of granting workers unemployment benefit proportional to the conditions of remuneration which they enjoyed at the time of their becoming unemployed.

9 For these reasons, the appropriate answer to the questions put is that Article 68 (1) of Regulation No 1408/71, viewed in the light of Article 51 of the Treaty and the objectives which it pursues, must be interpreted as meaning that, in the case of a frontier worker, within the meaning of Article 1 (b) of that regulation, who is wholly unemployed, the competent institution of the Member State of residence, whose national legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary, shall calculate those benefits taking into account the wage or salary received by the worker in the last employment held by him in the Member

State in which he was engaged immediately prior to his becoming unemployed.

Costs

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 action are concerned, in the nature of 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 (First Chamber),

in answer to the questions referred to it by the Bundessozialgericht by order of 15 February 1979, hereby rules:

Article 68 (1) of Regulation No 1408/71, viewed in the light of Article 51 of the Treaty and the objectives which it pursues, must be interpreted as meaning that, in the case of a frontier worker, within the meaning of Article 1 (b) of that regulation, who is wholly unemployed, the competent institution of the Member State of residence, whose national legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary, shall calculate those benefits taking into account the wage or salary received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 28 February 1980.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber