



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

30 September 2021 *

(Reference for a preliminary ruling – Regulation (EC) No 883/2004 – Article 65(2) and (5) – Scope – Wholly unemployed worker – Unemployment benefits – Worker who resides and pursues an activity as an employed person in the competent Member State – Transfer of his or her residence to another Member State – Person not actually pursuing an activity as an employed person in the competent Member State before becoming wholly unemployed – Person on sick leave and receiving, on that basis, sickness benefits paid by the competent Member State – Pursuit of an activity as an employed person – Comparable legal situations)

In Case C-285/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands), made by decision of 25 June 2020, received at the Court on 29 June 2020, in the proceedings

K

v

Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv),

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and L.S. Rossi, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv), by M. Mollee, acting as Agent,
- the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,
- the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

* Language of the case: Dutch.

- the Polish Government, by B. Majczyna, acting as Agent,
 - the European Commission, by D. Martin and F. van Schaik, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 65(2) and (5) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004').
- 2 The request has been made in proceedings between K and the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv) (Management Board of the Employee Insurance Schemes Implementing Body, Netherlands) ('the Employee Insurance Schemes Implementing Body') concerning that body's refusal to pay him unemployment benefits at the end of a period of sick leave in a Member State other than the Kingdom of the Netherlands, during which he received sickness benefits from that other Member State.

Legal context

- 3 Recitals 4 and 45 of Regulation No 883/2004 state:
 - '(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.
 - ...
 - (45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at [EU] level, the [European Union] may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that article, this Regulation does not go beyond what is necessary, in order to achieve that objective.'
- 4 Article 1 of Regulation No 883/2004, under the heading 'Definitions', provides:
 - 'For the purposes of this Regulation:
 - (a) "activity as an employed person" means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
 - ...

(f) “frontier worker” means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week;

...

(j) “residence” means the place where a person habitually resides;

...

(q) “competent institution” means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is or would be entitled to benefits if he or a member or members of his family resided in the Member State in which the institution is situated;

or

(iii) the institution designated by the competent authority of the Member State concerned;

...

(s) “competent Member State” means the Member State in which the competent institution is situated;

...’

5 Article 2 of that regulation, under the heading ‘Persons covered’, provides in its paragraph 1:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

6 Title II of that regulation, under the heading ‘Determination of the legislation applicable’, comprises Articles 11 to 16 thereof.

7 Article 11 of Regulation No 883/2004, under the heading ‘General rules’, states in its paragraph 2:

‘For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors’ pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.’

8 Title III of that regulation, under the heading ‘Special provisions concerning the various categories of benefits’, lays down, in its Chapter 6, which comprises Articles 61 to 65a of that regulation, the rules relating to unemployment benefits.

- 9 Article 65 of Regulation No 883/2004, under the heading ‘Unemployed persons who resided in a Member State other than the competent State’, provides in its paragraphs 2 and 5:

‘2. A wholly unemployed person who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself/herself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State in which he/she pursued his/her last activity as an employed or self-employed person.

An unemployed person, other than a frontier worker, who does not return to his/her Member State of residence, shall make himself/herself available to the employment services in the Member State to whose legislation he/she was last subject.

...

5. (a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.
- (b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 The appellant in the main proceedings left Turkey to settle in the Netherlands in 1979 and worked there for various employers until 2015.
- 11 From 2005, the appellant in the main proceedings lived with his family in Germany.
- 12 On 1 May 2015, he was hired by an employer in Germany.
- 13 On 24 August 2015, the appellant in the main proceedings was placed on sick leave and, since that date, has no longer actually pursued his activity.
- 14 He initially continued to receive his salary before receiving, with effect from 14 October 2015, a sickness benefit in Germany.
- 15 On 2 February 2016, the appellant in the main proceedings moved to live with his brother in the Netherlands and applied to be removed from the population register in Germany.
- 16 On 15 February 2016, his employer in Germany terminated his contract of employment.

- 17 On 16 February 2016, the appellant in the main proceedings underwent surgery in a hospital in Germany, where he stayed until 19 February 2016.
- 18 On 4 March 2016, the appellant in the main proceedings registered in the population register in the Netherlands at his brother's address.
- 19 The termination of the employment contract between the appellant in the main proceedings and his employer in Germany took effect on 15 March 2016.
- 20 On 4 April 2016, the competent German institution took the view that the appellant in the main proceedings was again fit for suitable work and therefore ceased to pay him a sickness benefit.
- 21 On 22 April 2016, the appellant in the main proceedings submitted to the Employee Insurance Schemes Implementing Body an application for unemployment benefits with effect from 4 April 2016.
- 22 By decision of 7 July 2016, the Employee Insurance Schemes Implementing Body declared that it did not have the power to rule on the appellant's entitlement to unemployment benefits.
- 23 The appellant in the main proceedings lodged a complaint against that decision, which was rejected by decision of the Employee Insurance Schemes Implementing Body of 14 September 2016. That body reiterated its view that it was not empowered to rule on the application for unemployment benefit of the person concerned. In its view, the competent Member State in that regard was the Federal Republic of Germany, as the last State of employment, given that, until 24 August 2015, the appellant in the main proceedings had actually pursued an activity as an employed person in Germany and was not a frontier worker.
- 24 The appellant in the main proceedings brought an action against that decision before the Rechtbank Overijssel (District Court, Overijssel, Netherlands), which dismissed it as unfounded. That court held that the Employee Insurance Schemes Implementing Body had acted correctly in stating that the appellant in the main proceedings was not a frontier worker and was not entitled to unemployment benefit in the Netherlands on the basis of Article 65 of Regulation No 883/2004.
- 25 The referring court, hearing an appeal against the judgment of the Rechtbank Overijssel (District Court, Overijssel), states that the parties disagree as to whether the appellant in the main proceedings can claim unemployment benefit in the Netherlands by virtue of Article 65(2) and (5) of Regulation No 883/2004.
- 26 It points out, in that regard, that the appellant in the main proceedings lived and worked in Germany and that, from 14 October 2015, he was on sick leave and received sickness benefits in Germany until 4 April 2016, the date from which he became wholly unemployed. Since the appellant in the main proceedings transferred his residence to the Netherlands on 2 February 2016, he resided, as from that date, in a Member State other than the competent Member State, within the meaning of Article 1(q) and (s) of Regulation No 883/2004, namely Germany.

- 27 According to the referring court, the dispute in the main proceedings raises the question as to whether Article 65(2) and (5) of Regulation No 883/2004 applies to a situation in which, before being wholly unemployed, the person concerned did not actually pursue an activity as an employed person in the competent Member State but was on sick leave and received, on that basis, sickness benefit paid by that Member State.
- 28 The referring court takes the view that such a situation must be regarded as a legal situation that is comparable to the pursuit of paid employment and that that question must therefore be answered in the affirmative. It notes, in that regard, that Article 11 of Regulation No 883/2004, which forms part of Title II of that regulation, treats entitlement to a sickness benefit in the same way as the pursuit of an activity as an employed person and considers that that treatment should be applied for the purposes of Article 65(2) and (5) thereof. It bases its reasoning on the fact that a logical and coherent interpretation of the concept of ‘pursuit of an activity as an employed person’ requires that that concept be interpreted in the same way in the provisions of the various titles of that regulation.
- 29 In addition, the referring court submits that the case-law established by the Court in the context of Article 71(1)(b)(ii) 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 members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), which preceded Article 65 of Regulation No 883/2004, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (‘Regulation No 1408/71’), which preceded Article 65 of Regulation No 883/2004 (judgments of 27 January 1994, *Maitland Toosey*, C-287/92, EU:C:1994:27, paragraph 13, and of 29 June 1995, *van Gestel*, C-454/93, EU:C:1995:205, paragraphs 13, 20 and 24), is relevant in this case.
- 30 It notes that, in accordance with that case-law, the only relevant factor for the application of Article 71(1)(b)(ii) of Regulation No 1408/71 is the fact that the person concerned resides in a Member State other than that to whose legislation he or she was subject during his or her last employment. Furthermore, the Court has recognised that that provision applies to a person whose employment relationship is maintained on account of leave and who therefore does not actually pursue his or her activity as an employed person (judgment of 22 September 1988, *Bergemann*, 236/87, EU:C:1988:443). The referring court infers from this that Article 65 of Regulation No 883/2004 refers not only to the actual pursuit of the last activity as an employed person, but also to a situation in which the person concerned does not actually pursue an activity. That court also considers that the reasons for which the person concerned has transferred his or her residence to a Member State other than the competent Member State are not relevant.
- 31 The referring court takes the view that that interpretation cannot be called into question by the fact that the Court has held that Article 71(1)(b)(ii) of Regulation No 1408/71 must be interpreted strictly in order, inter alia, to prevent abuse (judgment of 17 February 1977, *Di Paolo*, 76/76, EU:C:1977:32, paragraph 13). It is, moreover, consistent with the objective pursued by that provision, which is to guarantee to migrant workers unemployment benefits under the most favourable conditions (judgments of 22 September 1988, *Bergemann*, 236/87, EU:C:1988:443, paragraphs 18 and 20, and of 29 June 1995, *van Gestel*, C-454/93, EU:C:1995:205, paragraph 20). The link with the Member State of residence affords, in principle, the person concerned the best conditions for finding new employment.

32 Since it took the view that the case before it raises questions which cannot be resolved without reasonable doubt, the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Article 65(2) and (5) of Regulation ... No 883/2004 be interpreted as meaning that a wholly unemployed person who has transferred his place of residence from the competent Member State to another Member State while receiving a benefit as referred to in Article 11(2) of [that regulation], and/or before his employment relationship has been terminated, is entitled to unemployment benefit under the legislation of the Member State in which he resides?
- (2) Are the reasons for which the unemployed person has transferred his residence to a Member State other than the competent Member State, for example, on family grounds, relevant in that regard?’

Consideration of the questions referred

The first question

- 33 At the outset, it should be borne in mind that Article 65(2) of Regulation No 883/2004 provides that a wholly unemployed person who, during his or her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State is required to make himself or herself available to the employment services in the Member State of residence.
- 34 Article 65(5)(a) of that regulation states that the unemployed person referred to in the first and second sentences of paragraph 2 of that article is to receive benefits in accordance with the legislation of the Member State of residence as if he or she had been subject to that legislation during his or her last activity as an employed or self-employed person. Those benefits are to be provided by the institution of the place of residence.
- 35 In the present case, it is apparent from the request for a preliminary ruling that the first question must be understood as asking, in essence, whether Article 65(2) and (5) of Regulation No 883/2004 must be interpreted as applying to a situation in which, before being wholly unemployed, the person concerned resided in a Member State other than the competent Member State and was not actually employed, but was on sick leave and received, on that basis, sickness benefits paid by the competent Member State.
- 36 It follows that, in order to provide the referring court with a useful answer, it is necessary to determine whether the words ‘during his/her last activity as an employed ... person’ set out in Article 65(2) and (5) of Regulation No 883/2004 refer exclusively to the actual pursuit by the person concerned of an activity as an employed person in the competent Member State or whether those words also relate to a situation in which that person does not actually pursue an activity as an employed person, but receives sickness benefits paid by that Member State.
- 37 In that regard, it must be held that, contrary to the views expressed by the referring court and the submissions of the Czech and Polish Governments, paragraphs 2 and 5 of Article 65 of Regulation No 883/2004, which appear in Title III of that regulation, cannot be interpreted in the light of

Article 11(2) thereof, in so far as it is expressly stated in the wording of that provision, referred to in paragraph 7 of the present judgment, that it applies for the purposes of Title II of that regulation.

- 38 The words ‘during his/her last activity as an employed ... person’ set out in Article 65(2) and (5) of Regulation No 883/2004 must, by contrast, be interpreted in the light of Article 1(a) of that regulation. That latter provision defines, for the purposes of that regulation, the concept of ‘activity as an employed person’ as being ‘any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists’.
- 39 It follows that a situation in which the person concerned is not actually employed in the competent Member State, but is on sick leave and therefore receives, on that basis, sickness benefits paid by that Member State, may be regarded as a legal situation comparable to that of a person who pursues an activity as an employed person and, therefore, comes within the scope of Article 65(2) and (5) of Regulation No 883/2004 if, in accordance with the national law of the competent Member State, entitlement to such benefits is treated in the same way as the pursuit of an activity as an employed person.
- 40 Consequently, the answer to the first question is that Article 65(2) and (5) of Regulation No 883/2004 must be interpreted as applying to a situation in which, before being wholly unemployed, the person concerned resided in a Member State other than the competent Member State and was not actually employed but was on sick leave and received, on that basis, sickness benefits paid by the competent Member State, provided, however, that, in accordance with the national law of the competent Member State, entitlement to such benefits is treated in the same way as the pursuit of an activity as an employed person.

The second question

- 41 By its second question, the referring court asks whether Article 65(2) and (5) of Regulation No 883/2004 must be interpreted as meaning that the reasons, in particular of a family nature, for which the person concerned has transferred his or her residence to a Member State other than the competent Member State are relevant for the purposes of the application of that provision.
- 42 It should be noted that it is not apparent from the wording of that provision, as set out in paragraphs 33 and 34 of the present judgment, that the reasons for the transfer of residence of the person concerned are of any significance in that regard. It should be borne in mind that, according to recitals 4 and 45 of Regulation No 883/2004, the purpose of that regulation is to coordinate the social security systems of Member States in order to guarantee that the right to free movement of persons can be exercised effectively. That regulation modernised and simplified the rules contained in Regulation No 1408/71, while retaining the same objective as the latter (judgment of 21 March 2018, *Klein Schiphorst*, C-551/16, EU:C:2018:200, paragraph 31).
- 43 It follows from settled case-law established in the context of Article 71 of Regulation No 1408/71, which is, in the light of the foregoing, capable of being applied in the context of Article 65 of Regulation No 883/2004 in so far as that provision replaced that Article 71, that the latter seeks to create, for unemployed persons residing in a Member State other than the competent Member State, the most favourable conditions for seeking new employment (judgments of

22 September 1988, *Bergemann*, 236/87, EU:C:1988:443, paragraph 18; of 8 July 1992, *Knoch*, C-102/91, EU:C:1992:303, paragraph 14; and of 29 June 1995, *van Gestel*, C-454/93, EU:C:1995:205, paragraph 20).

- 44 If, therefore, Article 65(2) and (5) of Regulation No 883/2004 were to be interpreted as being applicable only to persons who have transferred their residence for certain reasons, such as family reasons, this would have the effect of limiting the scope of application of that provision, and, thus, of making it more difficult for the persons concerned to seek employment in the Member State of residence, where they are presumed to benefit from the conditions most favourable for seeking new employment, particularly as such a transfer is generally based on a variety of reasons. Such an interpretation would, therefore, be contrary to the objective pursued by that provision.
- 45 Consequently, the answer to the second question is that Article 65(2) and (5) of Regulation No 883/2004 must be interpreted as meaning that the reasons, in particular of a family nature, for which the person concerned has transferred his or her residence to a Member State other than the competent Member State do not have to be taken into account for the purposes of applying that provision.

Costs

- 46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

- 1. Article 65(2) and (5) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as applying to a situation in which, before being wholly unemployed, the person concerned resided in a Member State other than the competent Member State and was not actually employed but was on sick leave and received, on that basis, sickness benefits paid by the competent Member State, provided, however, that, in accordance with the national law of the competent Member State, entitlement to such benefits is treated in the same way as the pursuit of an activity as an employed person.**
- 2. Article 65(2) and (5) of Regulation No 883/2004, as amended by Regulation No 465/2012, must be interpreted as meaning that the reasons, in particular of a family nature, for which the person concerned has transferred his or her residence to a Member State other than the competent Member State do not have to be taken into account for the purposes of applying that provision.**

[Signatures]