

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Cour du Travail, Liège, by judgment of that court of 8 September 1978, hereby rules:

Article 4 (4) of Regulation (EEC) No 1408/71 must be interpreted as referring also to special schemes such as that referred to in Article 1 (4) of the Belgian Royal Decree of 27 June 1969 laying down the conditions under which a scheme of national recognition entitles an employed person to an early retirement pension without reduction.

Mertens de Wilmars

O'Keeffe

Bosco

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte

Registrar

J. Mertens de Wilmars

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS
DELIVERED ON 29 MAY 1979¹

*Mr President,
Members of the Court,*

The case which is at present before this Court forms a parallel to the *Gillard* case on which this Court delivered judgment in plenary session on 6 July 1978 [1978]

ECR 166 *et seq.*, following my opinion of 15 June of the same year, [1978] ECR 1669 *et seq.*

Mr Gillard, a Belgian citizen who had worked in France, claimed from the competent French sickness insurance

¹ — Translated from the French.

fund, on the basis of the French legal provisions, an early old-age pension without reduction granted to certain employed persons who were former prisoners of war. Mr Gillard satisfied all the conditions laid down by the provisions except one: he was Belgian. When his claim met with a refusal he brought legal proceedings against the fund.

The Cour d'Appel, Nancy, before whom legal proceedings were finally brought, asked the Court of Justice whether Article 4 (4) of Regulation (EEC) No 1408/71, pursuant to which that regulation is not to apply to "benefit schemes for victims of war or its consequences", must be interpreted as meaning that benefits which are not strictly in the nature of compensation and are payable to those workers who were victims of the war only in so far as it detrimentally affects their acquisition of old-age pension rights or similar rights, such as the old-age benefits instituted by the law in question, are also excluded. If the question had been answered in the negative it would have involved the annulment of the decision of refusal as contrary to the principle of equality of treatment between nationals and nationals of the other Member States enshrined, as regards social security matters, in Article 3 (1) of Regulation No 1408/71.

However, this Court held that Article 4 (4) of Regulation No 1408/71 must be interpreted as meaning that the regulation does not apply to the social security benefits in question. As a result of that judgment, the Cour d'Appel, Nancy, dismissed Mr Gillard's action on 17 January 1979.

Mr Even, a Frenchman residing in Belgium, is claiming an early worker's retirement pension without reduction from the competent Belgian social security institution, the Office National

des Pensions pour Travailleurs Salariés, on the basis of Article 1 (4) of the Belgian Royal Decree of 27 June 1969 laying down the conditions in which those persons entitled to the benefit of a scheme of national recognition are entitled to such a benefit. Mr Even satisfies all the conditions laid down by that decree except one: he is French. Moreover, he is in receipt of a war service invalidity pension which is granted to him by France and which undoubtedly comes within a benefit scheme for victims of war or its consequences within the meaning of Regulation No 1408/71.

In this case too, the social security institution did not grant the request made and Mr Even brought legal proceedings.

The Cour du Travail, Liège, before which an appeal was brought, has referred to this Court for a preliminary ruling three questions which are reproduced in the Report for the Hearing and which amount in substance to the problem raised in the *Gillard* case.

(1) The first question concerns the interpretation of the concept of benefits for victims of war or its consequences within the meaning of Article 4 (4) of Regulation No 1408/71 of the Council.

Pursuant to that provision, those benefits are excluded from the substantive field of application of Regulation No 1408/71. It follows that the principle of equality of treatment between nationals and nationals of the other Member States which prohibits any discrimination based on nationality does not apply to benefits for victims of war or its consequences.

In contrast to the Commission's suggestion I do not consider it possible to regard those benefits as social security

benefits which are indeed excluded from Regulation No 1408/71 but which, on the contrary, do not escape the general prohibition on discrimination laid down in Article 7 of the Treaty. Such a result would be in direct conflict with the intention of the authors of Regulation No 1408/71 who intended, pursuant to Article 51 of the Treaty, to provide *in the field of social security* freedom of movement for persons and equality of treatment between Community nationals. Generally speaking I consider in fact that the social security benefits are exhaustively enumerated in Regulation No 1408/71.

In the judgment in the *Gillard* case this Court held that "the fact that a provision ... [introducing a social security benefit] is or is not inserted in ... social security legislation is not by itself decisive in determining that the benefit referred to in the above provision is a social security benefit within the meaning of Regulation No 1408/71" (Paragraph 11 of the decision).

Just as in the *Gillard* case, I consider that a benefit of the kind at issue in this case is not only in form but also in substance a social security benefit, more especially an early old-age pension without reduction. Such a pension is a typical old-age benefit within the meaning of Article 4 (1) (c) of the regulation.

Moreover, the national rules in question were adopted for the purpose of the acquisition of and entitlement to the right to old-age benefits and of calculating the amount of benefit; these expressions are used in Article 51 of the

Treaty and in Articles 45 and 46 of Regulation No 1408/71.

It is therefore possible to deduce from the judgment in the *Gillard* case that the fact that a benefit is in substance a social security benefit within the meaning of Regulation No 1408/71 is not sufficient to bring it within the field of application of that regulation. In fact this Court held that "the distinction between benefits which are excluded from the field of application of Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant" (Paragraph 12 of the decision).

Applying this criterion to the case of benefits for victims of war, Paragraph 13 of the judgment of this Court in that case continues by stating that a benefit exhibits this characteristic if its essential purpose is to provide for persons fulfilling certain conditions linked to their status of victims of war a testimony of national gratitude for the hardships endured and thus to grant them a *quid pro quo* for the services which they have rendered.

It will be for the Belgian court to compare the interpretation given by this Court of the concept of benefit for victims of war or its consequences with the national provisions at issue in order to see whether those provisions correspond to the Community definition. As this Court has on many occasions indicated, "within the framework of proceedings under Article 177, it is not for the Court of Justice to interpret national law and assess its effects" (judgment of 3 February 1977, *Luigi Benedetti v Munari Fratelli s.a.s.*, [1977] ECR 163 at 182, Paragraph 25 of the decision).

As to whether Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community might be applicable, it seems to me that this possibility should be firmly dismissed.

The Commission considers that the concept of social advantage within the meaning of Article 7 of the regulation might, in view of the broad interpretation given to it by this Court, give rise to wider entitlement than that of a social security benefit and thus extend to early old-age pensions without reduction granted to war invalids.

Even if proposed for admirable social ends, this belated reclassification cannot be justified. A benefit of the kind at issue is in substance a social security benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71 since it takes the form of the acquisition of a right to old-age pension and the calculation of that pension. It is excluded from the field of application of Regulation No 1408/71 only because it is considered as coming within a scheme *for victims of war* within the meaning of Article 4 (4) of that regulation.

Moreover, Regulation No 1612/68 covers solely the social advantages to which the status of a worker or member of his family gives entitlement. However, the advantage in question is granted to workers only if they are in receipt of a war service invalidity pension. The status of worker, although necessary, is therefore insufficient for the grant of the early pension without reduction. For this purpose the condition *since qua non* is

the status of being in receipt of a war service pension.

It seems to me that to treat a social security benefit in the same way as a social advantage is to make an unfortunate mistake and that the regulations should not be distorted. Mr Even does not claim that his reduced pension is insufficient: he asks for a full pension as *a right* and not as social relief or assistance. This Court itself held in its judgment in the *Defrenne* case of 25 May 1971, [1971] ECR 445 *et seq.*, that the provisions of Article 119 relating to that aspect of the pursuit of employment which is formed by remuneration could not be applied to a retirement benefit. As Mr Advocate General Dutheillet de Lamothe pointed out in his opinion in the above-mentioned case, [1971] ECR 460, it is difficult to separate the schemes of retirement pension, even special ones, from the general system of social security into which they are integrated. Moreover, if it is desired, as I do, to observe strictly the fundamental principle of equality of treatment, to permit the field of application of Regulation No 1612/68 to encroach upon that of Regulation No 1408/71 would in many cases be to run the risk of sacrificing the main consideration for a secondary one.

Retirement pensions under the general scheme or special social security schemes do not therefore constitute one of the advantages referred to by Regulation No 1612/68. In any case I consider that a statement to the contrary would justify the Court's adopting a viewpoint whilst giving judgment in plenary session.

(2) If, as I suggest to this Court, it considers that a national provision of the kind at issue in the main action

introduces a benefit for victims of war within the meaning of Article 4 (4) of Regulation No 1408/71 as interpreted by this Court, the second and third questions submitted by the Cour du Travail, Liège, become purposeless.

In the alternative, it would be necessary to reply to the second question referred to this Court by the national court that Regulation No 1408/71 does not contain specific provisions limiting the application of the principle of equality of treatment as regards old-age pensions.

(3) If it were in addition necessary to adopt a viewpoint on the third question, the reply seems to me to follow clearly from the case-law of this Court, in particular from the judgment in the *Hirardin* case of 8 April 1976, [1976] ECR 553, according to which no discrimination based on nationality,

which is prohibited, as regards freedom of movement for workers, by Article 48 (2) of the Treaty and re-enacted in Article 3 (1) of Regulation No 1408/71 as regards social security for migrant workers, may be applied to the worker concerned who must therefore, if he fulfils the other conditions to which the grant of the benefit is subject, receive that benefit in the same conditions as a national worker.

I shall conclude by adding, together with the representative of the Office National des Pensions pour Travailleurs Salariés, that the only solution to the unfair situation in which persons such as Mr Even and Mr Gillard find themselves in the present state of Community law is the conclusion of a bilateral reciprocal convention between the Member States concerned.

I propose that this Court should rule that although benefits the essential purpose of which is to offer to persons who satisfy certain conditions linked to their status of victims of war a testimony of national recognition for the hardships which they have endured and thus to grant them a *quid pro quo* for the services which they have rendered come, in form and in substance, within social security, they must be regarded as benefits for victims of war or its consequences within the meaning of Article 4 (4) of Regulation No 1408/71.