

JUDGMENT OF THE COURT (Grand Chamber)

18 July 2006 *

In Case C-406/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium) made by decision of 8 September 2004, received at the Court on 23 September 2004, in the proceedings

Gérald De Cuyper

v

Office national de l'emploi,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta (Rapporteur), G. Arestis, A. Borg Barthet, M. Ilešič and J. Klučka, Judges,

* Language of the case: French.

Advocate General: L.A. Geelhoed,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2005,

after considering the observations submitted on behalf of:

- Mr De Cuyper, by A. de le Court and N. Dugardin, *avocats*,
- the Office national de l'emploi, by R. Dupont and M. Willemet, *avocats*,
- the Belgian Government, by E. Dominkovits and M. Wimmer, acting as Agents,
- the German Government, by C. Schulze-Bahr, acting as Agent,
- the French Government, by G. de Bergues and O. Christmann, acting as Agents,
- the Netherlands Government, by C. Wissels, acting as Agent,

- the United Kingdom Government, by S. Moore, Barrister,

- the Commission of the European Communities, by D. Martin and M. Condou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2006,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 17 EC and 18 EC and of Regulation (EEC) No 1408/71 of the Council 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) (hereinafter ‘Regulation No 1408/71’).

- ² The reference was made in the course of proceedings between Mr De Cuyper and the Office national de l’emploi (National Employment Office) (hereinafter ‘ONEM’) regarding the claimant’s exclusion from entitlement to unemployment allowances as from 1 April 1999.

Legal context

Community legislation

³ Article 1(a)(i) of Regulation No 1408/71 provides:

‘(a) “employed person” and “self-employed person” mean respectively:

- (i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants’.

⁴ Article 2(1) of Regulation No 1408/71 provides:

‘This Regulation shall apply to employed or self-employed persons 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 or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.’

5 Under Article 10(1) of Regulation No 1408/71:

‘Save as otherwise provided in this Regulation, invalidity, old-age or survivors’ cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.’

6 Article 69(1) of Regulation No 1408/71 provides:

‘1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

- (a) Before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired.

- (b) He must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organised therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions.

- (c) Entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.'

7 Lastly, Article 71(1) of Regulation No 1408/71 provides:

'1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

- (a) (i) A frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution.

(ii) A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense.

(b) (i) An employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution.

(ii) An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.'

National law

⁸ Article 44 of the Royal Decree of 25 November 1991 regulating unemployment (*Moniteur belge*, 31 December 1991, p. 29888), in the version in force at the time of

the facts in the main proceedings, provided that 'In order to be eligible for allowances, the unemployed person must have ceased to be in work and in receipt of remuneration for reasons beyond his control.' Articles 45 and 46 of that decree respectively specified which activities were to be regarded as constituting work and defined remuneration.

9 As set out in Article 66 of the Royal Decree:

'To be eligible for allowances, the unemployed person must have his habitual residence in Belgium and must also actually reside in Belgium.'

10 Article 89(1) and (3) of the Royal Decree in the version resulting from Article 25 of the Royal Decree of 22 November 1995 (Moniteur belge, 8 December 1995, p. 33144) provides:

'1. A wholly unemployed person of at least fifty years of age may be exempted, at his request, from Article 48(1)(2), Article 51(1), second subparagraph (3) to (6), and Articles 56 and 58 if he has received at least 312 allowance payments as a wholly unemployed person in the two years preceding that application...

...

3. By derogation from Article 45(1)(1), an unemployed person entitled to the exemption referred to in paragraphs (1) or (2) may carry on any activity relating to his own property, on his own account and without a view to a profit.'

- 11 Under that scheme, an unemployed person who had obtained an exemption from the requirement to sign on was no longer subject to the requirement of being available for work, the requirement to accept any suitable employment, to report to the relevant employment service or to participate in a monitoring scheme. He was also exempt from the requirement to register as a job-seeker. However, receipt of that allowance was incompatible with engaging in paid employment and was of a temporary nature.

The main proceedings and the question referred for a preliminary ruling

- 12 Mr De Cuyper, a Belgian national who was born in 1942, was employed in Belgium. He was granted unemployment allowances on 19 March 1997.
- 13 On 1 April 1998 he obtained dispensation, under the national legislation applicable at that time, from the obligation to submit to the local control procedures imposed on unemployed persons as a matter of course by the Royal Decree of 25 November 1991.
- 14 On 9 December 1999, he made a declaration to the institution responsible for payment of his unemployment allowances in which he described himself as 'living alone' and actually living in Belgium.
- 15 During April 2000 ONEM inspectors carried out a routine inquiry to ascertain the accuracy of the applicant's declarations. In the course of that inquiry, Mr De Cuyper admitted that he had not actually lived in Belgium since January 1999, but was

resident in France. He stated that he returned to Belgium approximately every three months, that he retained a furnished room in a Belgian commune and that he had not informed the institution responsible for the payment of his unemployment allowances of that change in his place of residence.

16 On the basis of that inquiry ONEM notified Mr De Cuyper, on 25 October 2000, of a decision refusing him unemployment allowances with effect from 1 January 1999 on the ground that, as from that date, he no longer satisfied the requirement of actual residence laid down in Article 66 of the Royal Decree of 25 November 1991. At the same time ONEM demanded repayment by the applicant of the allowances paid since that date, that is to say the equivalent in Belgian francs of EUR 12 452.78.

17 Mr De Cuyper contested that decision before the national court.

18 In those circumstances, the Tribunal du travail de Bruxelles (Labour Court, Brussels) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does the obligation actually to reside in Belgium, which under Article 66 of the Royal Decree of 25 November 1991 regulating unemployment is a condition for the award of allowances, applied to an unemployed person over 50 years of age who enjoys an exemption under Article 89 of that Royal Decree from the requirement to sign on entailing dispensation from the requirement to be available for work, amount to a fetter on the freedom of movement and residence of all European citizens under Articles 17 [EC] and 18 [EC]?’

Does the obligation of residence in the State competent to award unemployment allowances, justified in domestic law by the needs of monitoring compliance with the statutory requirements for the payment of compensation to unemployed persons, satisfy the requirement of proportionality which must be observed in the pursuit of that objective of public interest in that it constitutes a limitation on the freedom of movement and residence of all European citizens under Articles 17 [EC] and 18 [EC]?

Does that residence requirement not have the effect of discriminating between European citizens who are nationals of a Member State competent to award unemployment allowances by affording that entitlement to those who do not exercise the right of freedom of movement and residence of all European citizens under Articles 17 [EC] and 18 [EC], whilst denying it to those who do seek to exercise that right, by the deterrent effect which that restriction entails?

The question referred for a preliminary ruling

¹⁹ By the question referred, the national court is asking the Court whether Articles 17 and 18 EC, under which citizens of the European Union have the right to move and reside freely within the territory of the Member States, preclude a provision of national law which makes entitlement to an allowance such as that at issue in the main proceedings conditional on actual residence in the Member State concerned, given that that allowance is granted to unemployed persons aged over 50 who are exempt from the requirement to register as job-seekers.

²⁰ The national court categorises that allowance as ‘unemployment benefit’ and the applicant in the main proceedings as an ‘employed person’ within the meaning of Article 1(a) of Regulation No 1408/71. However, the Commission of the European

Communities submits that rather than constituting an unemployment benefit falling within the scope of Regulation No 1408/71, that allowance could constitute a pre-retirement benefit similar to that at issue in Case C-25/95 *Otte* [1996] ECR I-3745 or even a *sui generis* benefit. If that were the case, it could fall within the scope of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) as a social advantage.

- ²¹ It therefore appears necessary to ascertain at the outset the nature of the allowance in question in order to determine whether it is a social security benefit to which Regulation No 1408/71 applies.

The nature of the allowance

- ²² As far as concerns social security benefits the Court has, on several occasions, discussed the factors to be taken into consideration for the purposes of ascertaining the legal nature of such benefits. Thus, the Court has stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, *inter alia*, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14, and Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15).

- 23 In the case in the main proceedings, as regards whether the benefit is granted without any individual and discretionary assessment of personal needs, it must be pointed out that grant of the allowance at issue is subject to conditions which are exhaustively listed in Article 44 et seq. of the Royal Decree of 25 November 1991, the competent authorities having no discretion with regard to that grant. Admittedly, the level of the allowance can vary according to the personal circumstances of the unemployed person. However, apart from the fact that that aspect concerns the procedure for calculating the allowance, this is an objective and legally defined criterion which gives entitlement to the benefit without the competent authority being able to take other personal circumstances into consideration. The grant of the allowance therefore does not depend on an individual assessment of the claimant's personal needs, which is a characteristic feature of social assistance (see Case C-66/92 *Acciardi* [1993] ECR I-4567, paragraph 15).
- 24 As regards the requirement that the benefit in question must concern one of the risks expressly listed in Article 4(1) of Regulation No 1408/71, that is satisfied in so far as the allowance covers the risk linked to involuntary loss of employment although the worker retains his capacity for work.
- 25 The Court has already held that, in order to be categorised as social security benefits, benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits (see, to that effect, Case 171/82 *Valentini* [1983] ECR 2157, paragraph 13).
- 26 In the light of the foregoing, the allowance at issue in the main proceedings must be examined in order to establish whether it should be regarded as an unemployment benefit.

27 As regards its purpose, that allowance is aimed at enabling the workers concerned to provide for themselves following an involuntary loss of employment when they still have the capacity for work. In order to distinguish between different categories of social security benefits, 'the risk covered' by each benefit must also be taken into consideration. Thus an unemployment benefit covers the risk associated with the loss of revenue suffered by a worker following the loss of his employment although he is still able to work. A benefit granted if that risk materialises, namely loss of employment, and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment must be regarded as constituting an unemployment benefit.

28 As regards determination of the amount of the allowance paid to Mr De Cuyper, the basis of calculation used by the Belgian employment services is identical to that used in respect of all unemployed persons, the allowance being calculated according to the rules laid down in Article 114 et seq. of the Royal Decree of 25 November 1991. Those rules provide for a basic amount, fixed at 40% of average daily remuneration, which is increased by an adaptation supplement, fixed at 15% of that remuneration. That amount is deemed to take into account the unemployed person's specific personal circumstances, as predetermined by law.

29 Lastly, as regards the conditions for granting the benefit, it must be borne in mind that, as ONEM stated at the hearing, Mr De Cuyper is subject to the same conditions as other workers seeking an unemployment allowance. In particular, in order to obtain the allowance, in addition to the fact that he must have ceased to be in work and in receipt of remuneration for reasons beyond his control, a worker must furnish proof of 624 days worked, or days treated as such, during the 36 months preceding his application for the allowance and his employment must have given rise to the payment of social security contributions to be taken into account for the purpose of calculation of the amount of that allowance.

- 30 Moreover, the allowance at issue in the main proceedings is an allowance which is subject to the Belgian statutory unemployment benefits scheme. The fact that an unemployed person in a situation such as that of Mr De Cuyper is exempt from the requirement to register as a job-seeker and consequently from the requirement of being available for work in no way affects the fundamental characteristics of the allowance as set out in paragraphs 27 and 28 of this judgment.
- 31 Furthermore, the obtaining of that exemption does not mean that the unemployed person is exempt from the requirement to remain available to the employment services inasmuch as, even if he does not have to register as a job-seeker or accept any suitable employment, he must still remain available to those services so that his employment and family situation can be monitored.
- 32 In those circumstances, the Commission's view that the allowance received by Mr De Cuyper is either a pre-retirement benefit, similar to that at issue in the case giving rise to the ruling in *Otte*, or a *sui generis* benefit cannot be accepted.
- 33 The proceedings in *Otte* concerned an adaptation allowance, granted in the form of a non-compulsory subsidy to mineworkers over a certain age who had become unemployed as a result of the restructuring of the German coal-mine industry, from the time at which they were laid off until they attained retirement age, and receipt of that benefit was compatible with engaging in paid employment.

- 34 It must thus be concluded that a benefit such as that received by Mr De Cuyper, the grant of which is not of a discretionary nature and which is intended to cover the risk linked to involuntary loss of employment where the worker retains his capacity for work, must be regarded as an unemployment allowance that falls within the scope of Regulation No 1408/71 even if, under a national provision, the recipient is exempt from registering as a job-seeker.

Article 18 EC

- 35 Under Article 18 EC, '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

- 36 According to that wording, the right to reside within the territory of the Member States which is conferred directly on every citizen of the Union by Article 18 EC is not unconditional. It is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect (Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 31 and 32).

- 37 To that effect it is necessary first of all to examine Regulation No 1408/71. According to Article 10 thereof, unless the regulation provides otherwise, 'invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is

situated'. The list in that article does not include unemployment benefits. It follows that that provision does not preclude the legislation of a Member State from making entitlement to an unemployment allowance conditional on residence in the territory of that State.

38 In that regard, Regulation No 1408/71 provides for only two situations in which the competent Member State is required to allow recipients of an unemployment allowance to reside in the territory of another Member State while retaining their entitlement to it. Firstly, there is the situation provided for in Article 69 of the regulation, allowing unemployed persons who go to a Member State other than the competent State 'in order to seek employment there' to retain their entitlement to unemployment benefit. Secondly, there is the situation referred to in Article 71 of that regulation, relating to unemployed persons who, during their last employment, were residing in the territory of a Member State other than the competent State. It is clear from the order for reference that a situation such as that of Mr De Cuyper is not covered by either of those articles.

39 It is established that national legislation such as that in this case which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18 EC on every citizen of the Union (see, to that effect, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 31, and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19).

40 Such a restriction can be justified, with regard to Community law, only if it is based on objective considerations of public interest independent of the nationality of the

persons concerned and proportionate to the legitimate objective of the national provisions.

- 41 In the present case, the enactment of a residence clause reflects the need to monitor the employment and family situation of unemployed persons. That clause allows ONEM inspectors to check whether the situation of a recipient of the unemployment allowance has undergone changes which may have an effect on the benefit granted. That justification is accordingly based on objective considerations of public interest independent of the nationality of the persons concerned.
- 42 A measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it.
- 43 The justification given by the Belgian authorities for the existence, in the present case, of a residence clause is the need for ONEM inspectors to monitor compliance with the legal requirements laid down for retention of entitlement to the unemployment allowance. Thus it must *inter alia* allow those inspectors to check whether the situation of a person who has declared that he is living alone and unemployed has undergone changes which may have an effect on the benefit granted.
- 44 So far as concerns, in the main proceedings, the possibility of less restrictive monitoring measures, such as those mentioned by Mr De Cuyper, it has not been established that they would have been capable of ensuring the attainment of the objective pursued.

45 Thus, the effectiveness of monitoring arrangements which, like those introduced in this case, are aimed at checking the family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant has not declared is dependent to a large extent on the fact that the monitoring is unexpected and carried out on the spot, since the competent services have to be able to check whether the information provided by the unemployed person corresponds to the true situation. In that regard it must be pointed out that the monitoring to be carried out as far as concerns unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits.

46 It follows that less restrictive measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective.

47 Accordingly, it must be found that the obligation to reside in the Member State in which the institution responsible for payment is situated, which is justified in domestic law by the need to monitor compliance with the statutory conditions governing the compensation paid to unemployed persons, satisfies the requirement of proportionality.

48 In view of the foregoing considerations, the answer to the question referred must be that freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause, such as that applied in the case in the main proceedings, which is imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit.

Costs

- ⁴⁹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Grand Chamber) hereby rules:

Freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause, such as that applied in the case in the main proceedings, which is imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit.

[Signatures]