JUDGMENT OF THE COURT (Fifth Chamber)
29 June 1988 *

In Case 58/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht for a preliminary ruling in the proceedings pending before that Court between

Josef Rebmann, retired, residing in Kleinblittersdorf, (Federal Republic of Germany)

and

Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Clerical Staff), established in Berlin

on the interpretation of Article 71 of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and their families moving within the Community (Official Journal 1983, L 230, p. 8),

THE COURT (Fifth Chamber),

composed of: G. Bosco, President of Chamber, U. Everling, Y. Galmot, R. Joliet and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

the Bundesversicherungsanstalt für Angestellte, the defendant in the main proceedings, by Tilo Herrmann;

* Language of the Case: German.

the Government of Italy, by Pier Giorgio Ferri;

the Netherlands Government, by E. F. Jacobs;

the Commission of the European Communities, by Jürgen Grunwald;

having regard to the Report for the Hearing and further to the hearing on 10 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 May 1988,

gives the following

Judgment

1 By an order of 21 January 1987, which was received at the Court on 25 February 1987, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 71 (1) (a) (ii) of amended Council Regulation 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 (Official Journal 1983, L 230, p. 8), in order to determine the competent institution for taking into account, for the purpose of calculating pension rights, periods of full unemployment completed by a frontier worker.

2 This question arose in the context of proceedings between Mr Josef Rebmann and the Bundesversicherungsanstalt für Angestellte.

3 The main proceedings relate to the taking into consideration of a frontier worker's period of full unemployment for the purpose of the calculation of a pension. The plaintiff in the main proceedings, Josef Rebmann, was born in 1920, lives in Kleinblittersdorf (Federal Republic of Germany), is of German nationality and has

always resided in Germany. From 1 August 1959 to 30 June 1972 he worked in France as a frontier worker and, during that period, paid contributions to the French social security scheme. He then became wholly unemployed and the French employment services, to which he applied, referred him to the Saarbrücken employment office which paid him benefit in pursuance of the Arbeitsförderungsgesetz (Employment Assistance Law) from 13 July 1972 to 31 July 1974. Subsequently, Mr Rebmann was subject to the German social security scheme, in accordance with that country's legislation, after finding employment there.

4 Since December 1980 Mr Rebmann has been in receipt of a pension under the French social security scheme and, by a decision of 10 December 1980 of the Bundesversicherungsanstalt für Angestellte, Mr Rebmann was granted a general disability pension, in the calculation of which, however, the period of unemployment from July 1972 to July 1974 was not taken into account. According to the order making the reference, the complaint, the action and the appeal brought by Mr Rebmann against that decision were dismissed on the grounds that a period of unemployment constitutes an interrupting period within the meaning of Paragraph 36 (1) (3) of the Angestelltenversicherungsgesetz (Insurance Law for Clerical Staff, hereinafter called the 'AVG'), only when it interrupts a period of employment governed by the German social security scheme, that the interrupting periods are deemed in such a case to take the place of a German contribution period, so that only the interruption of a German contribution period can give rise to an interrupting period.

5 Mr Rebmann appealed on a point of law to the Bundessozialgericht, claiming a breach of the provisions of Paragraph 36 of the AVG in conjunction with Article 71 (1) (a) (ii) of Council Regulation No 1408/71. According to the appellant, Mr Rebmann, no account was taken of the fact that, under the aforementioned provision of Community law, on becoming wholly unemployed, he was entitled to claim benefits only in his State of residence and was obliged to make himself available to the employment authorities of that State. It followed that it was likewise for the State of residence to take into account, in calculating pension rights, periods of unemployment completed by him and to treat him as if he had been subject to the legislation of that State during his last employment before he became unemployed. Otherwise, his pension rights would be adversely affected merely because under Community law he was able to spend periods of unemployment only in his State of residence.

6 Since it considered that the proceedings involved an interpretation of the Community legislation in question, the Bundessozialgericht referred the following question to the Court of Justice for a preliminary ruling:

'Which institution, that of the State of residence or that of the State of employment, is competent to take into consideration for the purpose of determining pension rights, periods of full unemployment of a frontier worker who was obliged under Article 71 (1) (a) (ii) of Regulation No 1408/71 to claim benefits in his State of residence and to report to the employment authorities of that State?

In particular:

(a) Does it follow from Article 71 (1) (a) (ii) of Regulation No 1408/71 that periods of full unemployment spent by a frontier worker in his State of residence are also to be taken into account under that State's pension legislation as if that legislation had applied to him during his last employment?

or

(b) Are a frontier worker's periods of full employment to be taken into account under the pensions legislation of the State of employment as if the legislation of that State had applied to him while he was wholly unemployed?

or

(c) Is a frontier worker entitled to choose whether he wishes periods of full unemployment to be taken into account for the purposes of determining pension rights by the institution of the State of residence or the institutions of the State of employment?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In its question, the national court essentially asks whether, in calculating pension rights, periods of full unemployment spent by a frontier worker must be taken into account under the legislation relating to pension rights of the State of residence or of the State of employment, or whether the frontier worker has the right to choose between those two attachments.

9 The existence of a choice between the two attachments cannot be accepted. As the Court pointed out in its judgment of 12 June 1986 in Case 1/85 *Miethe* [1986] ECR 1837, such a solution would run counter to the sense of Regulation No 1408/71 which, according to the fifth recital in its preamble, is intended to coordinate national systems of social security legislation within the framework of the freedom of movement of workers who are nationals of Member States. In the context of that coordination, which is intended to establish the criteria for the application of the various national systems and to distribute the burdens between the various national systems, the determination of the relevant applicable legislation cannot depend on a choice made by the beneficiary.

10 As regards the reply to be given, it should first be noted, as all the participants in the proceedings before the Court concede, that Regulation No 1408/71 contains no provision which explicitly states under which national law and by the competent authority of which State periods of full unemployment must be taken into account for the purpose of calculating pension rights in the case of a frontier worker.

11 In the absence of a specific provision in Regulation No 1408/71, the solution must be sought in the general spirit and intendment of the regulation, since it is designed to govern exhaustively the system of social security laid down in Article 51 of the EEC Treaty as regards the free movement of workers.

12 As appears from the preamble to Regulation No 1408/71, the rules relating to coordination adopted with a view to the application of Article 51 of the EEC Treaty, seek to secure within the Community, first, equality of treatment for all nationals of the Member States with regard to the various national laws and, secondly, the provision of social security benefits to workers, whatever may be their place of work or residence.

13 As regards the particular case of frontier workers, Regulation No 1408/71 sought to realize those objectives by providing in Article 13 (2) (a) that their situation should be governed in principle by the legislation of the State of employment. To that general rule of attachment exceptions are provided in Article 25 (2) for sickness or maternity benefits, in Article 39 for invalidity benefit, and in Article 71 for unemployment benefit.

14 Those specific attachments to the social security system of the State of residence are based on considerations of social policy and practical efficacy. More particularly, the provision contained in Article 71, which makes the State of residence liable to pay unemployment benefit, is concerned to avoid the practical drawbacks which a frontier worker would suffer by being attached to the State of employment. His obligation to make and keep himself available to the employment services may in fact be performed more easily in the State of residence. Moreover, the authorities of that State are in a better position to pay unemployment benefit, by ensuring that the person concerned satisfies the conditions for the receipt of the benefit, at the same time facilitating his return to employment.

15 It thus appears that Regulation No 1408/71 derogates from the general rule of attachment to the State of employment only in specific situations and on grounds of practicality and efficacy which render attachment to the State of residence more appropriate and more in conformity with the interests of frontier workers.

16 To extend such derogations to situations which are not expressly provided for could be contemplated only if those situations were closely connected with those mentioned in Regulation No 1408/71 and an extension was dictated by identical considerations.

17 That cannot, however, apply to the taking into account of periods of full unemployment for the purpose of calculating pension rights.

18 The objective laid down by Article 51 of the Treaty consists in ensuring the aggregation of all periods of working activity, to which periods of involuntary unemployment in respect of which benefit is paid must be assimilated (see judgment of 9 July 1975 in Case 20/75 *D'Amico* [1975] ECR 891), whilst securing to migrant workers the taking into consideration of all their rights, whatever may be the country in which they were acquired.

19 No consideration based on the necessities inherent in the realization of that objective requires a derogation from the general rule of attachment laid down by Article 13 (2) (a) of Regulation No 1408/71 and it does not appear that considerations analogous to those which govern the specific cases of attachment provided for in the regulation may be relied on to justify derogation. Accordingly, in the absence of a specific provision, the taking into account of a frontier worker's periods of full unemployment for the purpose of calculating pension rights falls under the general rule which causes the situation of frontier workers to be governed in principle by the law of the State of employment. It is moreover in that State that the frontier worker will normally have acquired pension rights which the periods in question may supplement. On the other hand, it is not certain that, in the State of residence, the frontier worker will have been able to acquire such rights, which will in particular be the case when he has never pursued there any activities subject to affiliation to a social security scheme.

20 The reply to be given to the question put by the national court should therefore be that Council Regulation No 1408/71 must be interpreted as meaning that periods of full unemployment completed by a frontier worker who, under Article 71 (1) (a) (ii) of Regulation No 1408/71, received unemployment benefit in accordance with the legislative provisions of the Member State in whose territory he resided must be taken into account in determining pension rights under the legislation of the Member State in which he worked immediately before becoming unemployed.

Costs

21 The costs incurred by the Government of the Netherlands, the Government of Italy and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that Court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundessozialgericht by order of 21 January 1987, hereby rules:

Council Regulation No 1408/71 of 14 June 1971, as amended, on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Communities must be interpreted as meaning that the periods of full unemployment completed by a frontier worker who, under Article 71 (1) (a) (ii) of Regulation No 1408/71, received unemployment benefit in accordance with the legislative provisions of the Member State in whose territory he resided must be taken into account as regards pension rights in accordance with the legislation of the State in which he worked immediately before becoming unemployed.

Bosco Everling

Galmot Joliet Schockweiler

Delivered in open Court in Luxembourg on 29 June 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the Fifth Chamber