OPINION OF ADVOCATE GENERAL TESAURO

delivered on 21 September 1994 *

1. The questions referred to this Court by the Centrale Raad van Beroep (Higher Social Security Court) concern the interpretation of Articles 2 and 3 of 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, [1] and also the interpretation of Point 2 of Annex VI (J) (Netherlands) to that regulation. [2]

The national court seeks, more specifically, to establish whether the principle of equal treatment for migrant workers and national workers enshrined in Article 3(1) of Regulation (EEC) No 1408/71 is to be interpreted as meaning that a person who is not a national of the Netherlands and who has neither lived nor worked in that State during a certain period is none the less entitled in respect of that period to the same reduction in contributions as is granted to a national making voluntary insurance contributions, the former being a family member and/or surviving spouse of a migrant worker.

1 — See the version consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 — At the time when the events material to the case occurred, this provision was numbered Article 2 of Annex V(H).

2. To ensure a proper understanding of the terms of the question raised, it is necessary first of all to recapitulate the relevant national and Community legislation.

The Algemene Ouderdomswet (General old-age insurance law, hereafter 'the AOW'), which was brought into force on 1 January 1957, established a pension system under which the amount of the old-age pension is, as a rule, calculated solely on the basis of accrued insurance years. Under the AOW all nationals of the Netherlands residing there are subject to compulsory insurance, including those who are liable to pay income tax because they are employed in that State.

Apart from making provision for compulsory insurance, the AOW allows for voluntary insurance. The purpose of voluntary insurance is to permit pension entitlements to be acquired for the periods not covered by compulsory insurance. The conditions governing voluntary insurance were adopted pursuant to Article 35 of the AOW in subsequent royal decrees concerning the

payment of voluntary contributions. For our purposes here, Article 2 of the Royal Decree of 24 February 1961 and Article 3 of the Royal Decree of 22 December 1971 are of particular importance. Article 2 of the Royal Decree of 24 February 1961 provides that 'the contribution for each full calendar year within the relevant period shall be the maximum amount which an insured person can be required to pay under the Algemene Ouderdomswet for the year in question' (Article 2(1)); that is not, however, the case for a Netherlands national, whose contribution 'provided he can demonstrate to the satisfaction of the Sociale Verzekeringsbank (Social Insurance Bank) that this results in a lower amount, shall for each full calendar year be an identical percentage of his income in the calendar year in question as laid down under Article 28 of the Algemene Ouderdomswet for that year, but at least 5% of the maximum amount which an insured person can be required to pay in accordance with that law for the year in question' (Article 2(2)). Article 3 of the Royal Decree of 22 December 1971 contains provisions similar to those just cited; indeed, the only difference is that the latter decree refers also to the Algemene Weduwen-en Wezenwet (General law on insurance for widows and orphans, hereinafter 'the AWW').

It should also be borne in mind that, pursuant to Article 9 of the Royal Decree of 24 February 1961, a married woman who makes use of her right to pay voluntary contributions and who was or is married during the period covered by the payment of contributions is to be treated in respect of that period as an insured person for the purposes of the AOW, provided that she has at that time attained the age of 15 but not 65.

3. Persons insured in accordance with the AOW, whether compulsorily or voluntarily, are entitled to an old-age pension on attaining 65 years of age. The maximum amount of the pension is payable after a period of 50 years, from the 15th to the 65th year of age; a reduction of 2% is applied for every year without insurance.

As the AOW was brought into force on 1 January 1957, it was clearly impossible to be insured before that date, with the further consequence that no one could have received a full old-age pension before the year 2007. The Netherlands legislature found a solution by making transitional arrangements, contained in Articles 55 and 56 of the AOW, which allow those periods accruing between the insured person's fifteenth birthday and 1 January 1957 to be regarded as periods of insurance within the meaning of the AOW, provided that the person concerned satisfies three conditions: (a) he has lived in the

Netherlands between his fifty-ninth and sixty-fifth birthdays (the 'six years' condition); [3] (b) he is a Netherlands national or regarded as such (a condition which may not of course be relied on as against Community nationals availing themselves of freedom of movement for the purposes of Regulation No 1408/71); (c) he continues to live in the Netherlands after attaining 65 years of age (the 'present residence' condition, which however does not apply to those persons who have been continuously insured under the AOW between 1 January 1957 and the attainment of 65 years of age).

4. Taking into account the fact that the advantages of such a transitional system, based on conditions of nationality and residence, were not available to all migrant workers, the Council, with a view to avoiding any possible discrimination, inserted *ad hoc* provisions in the Community social security system. Point 2 of Annex VI (J) (Netherlands) to Regulation No 1408/71, concerning precisely the 'application of Netherlands legislation on general old-age insurance', provides:

'(a) Periods of insurance before 1 January 1957 during which a recipient, not satisfying the conditions permitting him to have such periods treated as insurance periods, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country, shall also be considered as periods of insurance completed in application of Netherlands legislation for general old-age insurance.

(...)

(c) As regards a married woman whose husband is entitled to a pension under Netherlands legislation on general old-age insurance, periods of the marriage preceding the date when she reached the age of 65 years and during which she resided in the territory of one or more Member States shall also be taken into account as insurance periods, in so far as those periods coincide with periods of insurance completed by her husband under that legislation and with those to be taken into account in pursuance of subparagraph (a).

(e) As regards a woman who has been married and whose husband has been subject to Netherlands legislation on old-age insurance, or is deemed to have completed periods of insurance

3 — This condition is however mitigated by Article 2 of a Royal Decree of 3 December 1985, according to which a person who has left the Netherlands but continues to be insured under the AOW is to be considered resident there for the purposes of the six years condition.

in pursuance of subparagraph (a), the provisions of the two preceding subparagraphs shall apply *mutatis mutandis*.

(...)'

5. I now come to the facts of the case. On 23 November 1948 Mr and Mrs Cabanis, who were both French nationals, took up residence in the Netherlands on account of Mr Cabanis' occupation. There they lived, except for the period from 20 October 1960 to 12 November 1963 (spent in France), until 15 July 1969, the date on which they returned to France for good. Mr Cabanis continued to work until 18 February 1969, that is until he reached 65 years of age, whereupon he was awarded a full pension under the AOW. On the same date his wife obtained a married person's pension under the AOW. [4]

Following Mr Cabanis's death on 7 October 1977, Mrs Cabanis-Issarte (hereafter 'the respondent') was awarded a single person's pension under the AOW with effect from 1 April 1978, which was reduced by the Bestuur van de Sociale Verzekeringsbank (Board of the SVB, hereafter 'the Social Insurance Bank') in respect of the 29 years not covered by insurance. That reduction related to the period from 13 May 1924 to 23 November 1948, that is to say from her fifteenth birthday to the date on which she took up residence in the Netherlands, and also to the period from 15 July 1969 to 13 May 1974, that is from when she returned to France for good until she attained 65 years of age.

It is precisely for the latter period (1969-1974) that the SVB gave the respondent the opportunity to acquire pension rights through voluntary insurance and fixed the relevant insurance premiums on the basis of the maximum amount payable, relying on Article 3 of the Royal Decree of 22 December 1971.

6. Considering herself entitled — under Article 3 of Regulation No 1408/71 [5] — to make the same reduced contributions as nationals, the respondent challenged the decision fixing the contributions before the Raad van Beroep (Social Security Court), Amsterdam, which upheld her appeal. The SVB appealed in its turn against that decision to the Centrale Raad van Beroep which, in order to resolve the dispute, referred the

4 — Mrs Cabanis-Issarte was covered by compulsory insurance during the periods in which she resided in the Netherlands and by voluntary insurance, in so far as she was (co-)insured for the purposes of Article 9 of the Royal Decree of 24 February 1961, for the period from 20 October 1960 to 12 November 1963, since her husband paid the voluntary contributions for the period concerned.

5 — Article 3(1) provides that: 'Subject to the special provisions of this regulation, persons resident in the territory of one of the Member States to whom this regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

following questions to the Court for a preliminary ruling:

'(1) Pursuant to Article 2 of Regulation (EEC) No 1408/71, is that regulation, including the principle of equal treatment laid down in Article 3 thereof, applicable in cases such as this to persons like the respondent:

(a) because she should be treated as an entitled person in accordance with Point 2(a) of Annex V(H) of that regulation (as that annex was numbered at the time of the contested decision)?

(b) because she should be treated as a family member or (ultimately) a survivor within the meaning of Article 2 of that regulation by virtue of the fact that — in accordance with Article 9 of the Royal Decree of 24 February 1961 at that time in force — she enjoyed insurance cover on the basis of her now deceased spouse's payment of voluntary contributions (for the period from 20 October 1960 to 12 November 1963)?

(c) because she should be treated as a family member or survivor by virtue of the circumstance, to be established, that during the last-mentioned period, but also outside it, she is covered by Point 2(e) in conjunction with Point 2(c) of the abovementioned annex?

(2) Can it be held that in cases such as this social security advantages have been lost as a result of exercising the right to freedom of movement, with the result that the aims set out in Articles 48 to 51 of the EEC Treaty have not been achieved, and if so, what are the consequences for the nationality requirement at issue in this case for the purposes of a reduction in contributions?'

Question 1

7. The point at issue is whether the principle of equal treatment for national and migrant workers, as laid down in Article 3 of Regulation No 1408/71, allows someone in the respondent's position to benefit from the reduction in contributions to which nationals are entitled.

It would be as well at this point to make it clear that the sole issue here is the amount of the contributions due, under the voluntary insurance scheme, for the period from 15 July 1969 (the date on which the respondent ceased to reside in the Netherlands) to 13 May 1974 (her 65th birthday); it is not disputed that for the period concerned the respondent is not entitled to recognition of 'notional' periods of insurance, either within the meaning of the AOW or within the meaning of Annex VI to Regulation No 1408/71. I would also point out that during the period in question neither the respondent nor her husband was resident in the Netherlands and, moreover, that the latter was not required to make contributions to the AOW since he was already in receipt of his old-age pension.

8. The national court refers to three different provisions, more specifically to Article 2 of Regulation No 1408/71 and to Points 2(a) and (e) of Annex VI(J) to the regulation, from which the right to the reduction in contributions in point might be inferred. It is self-evident that in order for the relevant provisions to be applicable, the respondent must be a person covered by Regulation No 1408/71, either as a worker or as a family member or survivor.

It is scarcely necessary to point out that in defining the persons to whom Regulation No 1408/71 applies, Article 2(1) thereof provides for two clearly differentiated classes of beneficiaries, namely workers on the one hand, and on the other the members of their families and their survivors.

9. While it is not disputed that Mrs Cabanis Issarte, never having worked in the Netherlands or any other Member State, is not a worker for the purposes of Regulation No 1408/71, it is likewise undisputed that she falls within the range of persons covered by the regulation, in her capacity as a member of the family, and later as the surviving spouse, of a migrant worker. [6]

As all the parties who submitted observations in these proceedings have pointed out at length, however, that is not enough to extend the principle of equal treatment for national and migrant workers to the respondent. As is apparent from the settled case-law of the Court, [7] whereas persons belonging to the category of workers within the meaning of the regulation can claim the right to benefits covered by the regulation as *rights of their own*, the members of a worker's family or his survivors can claim only *derived rights*, acquired through their status as family members or survivors.

6 — The concepts of 'member of the family' and 'survivor' are defined respectively in Articles 1(f) and 1(g) of the regulation.

7 — See the judgment in Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669, paragraph 7. To the same effect, see more recently the judgment in Case C-310/91 *Schmid* v *Belgian State* [1993] ECR I-3011, paragraph 12.

For the purposes of this case, therefore, it is important to ascertain, in short, whether a family member or survivor can join the voluntary insurance scheme in his or her own right or, instead, on the basis of a derived right and, in the latter case, on which provisions the right in question is based.

10. Since all persons residing in the Netherlands are covered directly and individually by the AOW, from the 15th to the 65th year of age, irrespective of sex and marital status, it is clear that entitlement to a pension is not a right acquired through status as a member of the family, or survivor, of a migrant worker, but is held in one's own right, so that joining a voluntary insurance scheme should, in principle, be open to everyone as of right.

However, the national court refers (in paragraph (b), Question 1) to the fact that during the period from 20 October 1960 to 12 November 1963 the respondent was (co-)insured under the AOW, in accordance with Article 9 of the Royal Decree of 24 February 1961, as the wife of a voluntarily insured person within the meaning of the AOW, and thus in her capacity as a member of his family.

11. Does it follow from that fact that access to voluntary insurance, with respect to the period in question, is to be regarded as constituting for the respondent a derived right to be exercised, consequently, on the same conditions as those laid down for nationals?

The answer has to be no. While it is true that in the period referred to by the national court the respondent was covered by voluntary insurance by reason of the fact that her husband had joined such an insurance scheme, hence by virtue of her status as a member of his family, it is equally true that for the period here concerned, from 15 July 1969 to 13 May 1974, she can claim no right in that capacity. During that period, the respondent's husband had in fact ceased working, was already in receipt of an old-age pension and did not even live in the Netherlands.

The respondent's ability to rely on voluntary insurance in her own right constitutes, therefore, as regards the relevant period, a right granted by Netherlands legislation to all those who wish to remain insured after they cease to be compulsorily insured which, in the respondent's case, occurred when she returned to France for good.

12. Nor, in my view, can the respondent rely on Point 2(a) and (e) of Annex VI(J) (referred to by the national court in Question 1, paragraphs (a) and (c)) in order to claim a reduction in contributions.

The fact that married women may, in certain circumstances, rely on the provisions of Annex VI to the regulation, for the purposes of recognition of insurance periods within the meaning of the AOW, is completely irrelevant to the conditions for affiliation to a voluntary insurance scheme, which are still governed by national law [8] and which, in any case, are simply not taken into consideration in the annex in question.

13. Having said that, let me observe that the aim of Point 2(a) of the annex is to ensure that the persons concerned, who do not enjoy the transitional advantages provided for by the AOW, are able to benefit from pension rights in respect of periods before 1 January 1957 which are connected with the Netherlands, from the point of view of either residence or employment.

That provision, which certainly cannot be interpreted in such a way as to extend the range of persons covered by the regulation, is not therefore applicable to a person who, like the respondent, [9] is not a worker within the meaning of Regulation No 1408/71. Moreover, that provision relates solely to insurance periods before 1 January 1957, whereas what is under consideration here is the amount of the contributions for the period from 1969 to 1974.

14. Finally, nor can Point 2(e) of the annex be interpreted as allowing the respondent to make the reduced contributions at issue simply because she was married to a person subject to the Netherlands old-age insurance legislation.

In the period to be taken into account the respondent's husband was not obliged to make contributions under Netherlands legislation, as is instead required by the wording of Point 2(e) which refers back to Point 2(c). In any event, moreover, the respondent would be unable to take advantage of those provisions, since, as I have already said, she has access to voluntary insurance in her own right and not by virtue of a right granted to

8 — I would refer in this connection to the judgment in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, in which the Court held that a married woman could not, under Point 2(c) of Annex VI, claim the right to be affiliated to a voluntary insurance scheme after the expiry of the time-limit fixed in that respect by the AOW.

9 — The respondent has, however, benefited from the application of that provision in so far as it attaches to Point 2(c) of the annex. The period from 1948 (when she settled with her husband in the Netherlands) to 1 January 1957 (the date on which the AOW was brought into force) was in fact recognized as an insurance period for the purposes of the AOW.

her in her capacity as a member of the family and/or surviving spouse of a migrant worker.

15. Consequently, the foregoing observations lead me to conclude that neither Article 2 of Regulation No 1408/71, nor Point 2 of Annex VI(J), permit a person in the respondent's circumstances to take advantage of the reduction in contributions accorded to nationals under the voluntary insurance scheme.

Question 2

16. In the second question the Court is asked to establish, essentially, whether the treatment of Mrs Cabanis Issarte is compatible with the principle of freedom of movement for persons, and in particular with Articles 48 and 51 of the Treaty.

Let me note first that, according to the settled case-law of the Court, 'the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'. [10] Such a result might dissuade Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [11] From that point of view, the Court has, for example, stated that there would be discrimination if the national legislature were to define the conditions for the acquisition or retention of the right to benefits in such a way that they can in fact be fulfilled only by workers of the Member State concerned. [12]

17. That is plainly not the case here, since the respondent has never exercised directly the right to freedom of movement, that is to say in the capacity of a worker, as she has never worked in the Netherlands or in any other Member State.

It is true that in *Spruyt* [13] the Court considered that an obstacle could arise for a married woman wishing to accompany her husband in moving to another Member State, out of the fact that the application of Point 2(a) in conjunction with Point 2(e) of Annex VI prevented periods of residence in the Netherlands before marriage from being taken into account, thus creating a discriminatory difference in treatment contrary to the fundamental principle of freedom of

10 — Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, paragraph 19.

11 — To that effect, see most recently Case C-12/93 *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* v *Drake* [1994] ECR I-4337, paragraph 22.

12 — To that effect, see *inter alia* Case C-349/87 *Paraschi* v *Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 23.

13 — Cited above at footnote 10, paragraph 25.

movement, between men and single women on the one hand and married women on the other.

It should however be noted that the case before the Court is quite different, in that the issue is not a refusal to recognize insurance periods completed, before the AOW was brought into force, by a married woman who was actually resident in the Netherlands during the relevant period, but simply the conditions for affiliation to the voluntary insurance scheme in respect of a period subsequent not only to the entry into force of the AOW but also to the spouse's attainment of pensionable age.

18. Admittedly, the Court may wonder whether, if the respondent's husband had known, at the time when he settled in the Netherlands, what her present situation would be, that knowledge would have induced him to waive his right to freedom of movement.

However, I do not believe that the question can seriously be expressed in those terms, taking account, moreover, of the special features of the insurance system concerned. As the Commission has pointed out, that system is based on the principle of solidarity, hence the fact that only nationals with a very modest income or none at all may join the voluntary insurance scheme and receive a full pension, paying minimal contributions equal to just 5% of the maximum contribution payable. That also explains why the Netherlands legislature decided to restrict the opportunity to make reduced contributions to its own nationals, a restriction which, needless to say, by virtue of Point 2 of Annex VI(J) to Regulation No 1408/71 does not apply to those who are workers within the meaning of the regulation.

19. In the light of the foregoing considerations, therefore, I propose that the Court answer the questions referred by the national court as follows:

(1) Article 3(1) of Regulation (EEC) No 1408/71 is to be interpreted as not precluding the application of national legislation which restricts the right to a reduction in contributions paid under a voluntary insurance scheme to nationals and persons who are workers within the meaning of the regulation.

(2) The objective pursued by Articles 48 and 51 of the Treaty is not jeopardized by national legislation of the kind at issue.