JUDGMENT OF THE COURT
21 February 1991 *

In Case C-245/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep (Court of last instance in social security matters), Utrecht (Netherlands), for a preliminary ruling in the proceedings pending before that court between

H. C. M. Daalmeijer

and

Bestuur van de Sociale Verzekeringsbank,

on the interpretation of Article 13(2)(d) 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 it stands following Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, F. Grévisse and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: J. A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of

the Sociale Verzekeringsbank, by B. H. ter Kuile and E. H. Pijnacker Hordijk, of the Hague Bar and the Brussels Bar,

* Language of the case: Dutch.

the Netherlands Government, by E. F. Jacobs, Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

the Danish Government, by J. Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by R. Barents, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral observations submitted by the Sociale Verzekeringsbank, by the Netherlands Government, represented by J. W. De Zwann, acting as Agent, and by the Commission, at the hearing on 16 May 1990,

after hearing the Opinion of the Advocate General at the sitting on 14 June 1990,

gives the following

Judgment

1 By order of 31 August 1988, which was received at the Court on 2 September 1988, the Centrale Raad van Beroep, Utrecht, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation 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, as it stands following Council Regulation No 2001/83 of 2 June 1983.

2 Those questions were raised in a dispute between Mr Daalmeijer and the Sociale Verzekeringsbank concerning the calculation of his old-age pension.

3 Mr Daalmeijer, a Netherlands national, was last employed in Belgrade as a civil servant in the Netherlands Ministry of Defence between August 1969 and 1 May 1974. He had previously performed the same function in France, Belgium and the Netherlands. Since May 1974 he has been in receipt of a pension under the Uitkeringswet Gewezen Militairen (Law on Allowances for Former Members of the Armed Forces) and, since 5 October 1982, when he reached the age of 65, he has been in receipt of an old-age pension under the Netherlands Algemene Ouderdomswet (General Old-age Law).

4 By decision of the Sociale Verzekeringsbank of 23 March 1983, that old-age pension was reduced by an amount corresponding to the periods (eight and 15 years) when Mr Daalmeijer and his wife were deemed not to have been insured for the purposes of the aforesaid Netherlands law, on the ground that they were not then residing in the Netherlands.

5 That decision was partly annulled by an order of the Raad van Beroep (Social Security Court), Amsterdam, against which Mr Daalmeijer lodged an appeal on the ground that it acknowledged the legality of the reduction in respect of the period from 1 May 1974 to 5 October 1982 in which he and his wife had resided in France.

6 That reduction was based on Article 6(1) of the Old-age Law, according to which:

'An insured person for the purposes of this Law is a person who has reached the age of 15 and has not yet reached the age of 65 provided that:

(a) he is a Netherlands resident;

(b) he is not a Netherlands resident but is subject to income tax by reason of his employment within the Netherlands.'

7 The Centrale Raad van Beroep, hearing the appeal, stayed the proceedings pending a ruling from the Court of Justice on the following questions:

'(1) Is a (former) official under Article 13(2)(d) of Regulation (EEC) No 1408/71 subject to the legislation of the Member State in whose service he was last employed, even if he and his wife have gone to live in the territory of another Member State, where neither of them has carried on real and actual activities for the purposes of Article 13(2) and where they are also not otherwise subject to the legislation of that other Member State by virtue of that provision?

(2) If Question 1 is answered in the affirmative, can residence requirements such as those laid down in Article 6(1)(a) of the Netherlands Algemene Ouderdomswet be applied to the person concerned in respect of the period during which he (and his wife) have resided in a Member State other than the State in whose service he was last employed, where he could be considered by virtue of national law to have continued to live during his last period of employment?

(3) If Question 1 is answered in the negative and/or Question 2 is answered in the affirmative, what would the answer be if the person referred to in Question 1 received a benefit from the Netherlands during the period in which he was residing in the territory of a Member State other than the Netherlands in connection with the termination of his last employment in the service of the Netherlands (a benefit which by virtue of national law did not result in his being insured under the Old-age Law)?'

8 Reference is made to the Report for the Hearing for a fuller account of the Netherlands legislation, the relevant provisions of Community law and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In its first and second questions, the national court seeks in substance to ascertain whether, pursuant to Article 13(2)(d) of Regulation No 1408/71, the legislation of a Member State and in particular the residence requirements which it lays down for affiliation to the social security scheme is applicable to a person who has definitively stopped working for the administration of that Member State and gone to reside with his spouse in another Member State in which he has no occupation and is not covered by a social security scheme in any other capacity.

10 It must be emphasized in that regard that under Article 13(1) of Regulation No 1408/71 and without prejudice to certain provisions applicable to mariners, the persons to whom that regulation applies are subject to the legislation of a single Member State only. That legislation is determined in accordance with the provisions of Title II of that regulation.

11 Mr Daalmeijer does fall within the scope of Regulation No 1408/71 since Article 2(3) of that regulation provides that it 'shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this regulation applies.'

12 However, it should be noted that none of the provisions of Title II of Regulation No 1408/71 is applicable in this case. Mr Daalmeijer is not in one of the situations referred to in Article 13(2)(a), (b), (c) and (e), or in Articles 14 to 17. As for Article 13(2)(d), according to which, without prejudice to Articles 14 to 17, 'civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject', it does not apply to persons who have definitively ceased to carry on any professional or trade activity.

13 The latter provision is designed to resolve conflicts of legislation which may arise where, over the same period, the place of residence and the place of employment are not situated in the same Member State. Such conflicts can no longer arise in the case of workers who have definitively ceased to carry on any professional or trade activity.

14 It follows that the residence requirements laid down for affiliation to the national social security scheme may be applied in a case such as this, unlike cases where the legislation of a Member State is applicable as a result of a conflict rule in Article 13(2) of Regulation No 1408/71 (see the judgment of 3 May 1990 in Case C-2/89 *Sociale Verzekeringsbank* v *Kits van Heijningen* [1990] ECR I-1755).

15 In that regard, it should be borne in mind that, as the Court has consistently held, it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, which include the conditions governing the cessation of affiliation, provided always that in that connection there is no discrimination between nationals of the host State and nationals of the other Member States (see, *inter alia*, the judgment of 24 September 1986 in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, at paragraph 12).

16 Nor does Regulation No 1408/71 contain any provision whose application, whether directly or by analogy, would make it possible to set aside a residence requirement of that kind.

17 In the light of the foregoing considerations, the answer to Questions 1 and 2 must be that Article 13(2)(d) of Regulation No 1408/71 is not applicable to a person who has definitively stopped working for the administration of a Member State and has then gone to reside with his spouse in another Member State in which he has no occupation and is not covered by a social security scheme in any other capacity.

18 With regard to Question 3, it must be pointed out that the question whether a person is to be regarded as insured under a social security scheme by reason of the fact that he is in receipt of a benefit linked to the termination of his last employment is governed by the conditions for affiliation to that scheme and, consequently, by the applicable national legislation.

19 The answer to Question 3 must therefore be that in a situation such as that envisaged in Question 1, it is for the applicable national legislation to determine whether the fact that the person concerned is in receipt of a benefit linked to the termination of his last employment confers on him the status of a compulsorily insured person.

Costs

20 The costs incurred by the Netherlands Government, the Danish Government and the Commission of the European Communities, which have submitted observations

to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds

THE COURT,

in answer to the questions referred to it by the Centrale Raad van Beroep, Utrecht, by order of 31 August 1988, hereby rules:

(1) Article 13(2)(d) 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, as it stands following Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), is not applicable to a person who has definitively stopped working for the administration of a Member State and has then gone to reside with his spouse in another Member State in which he has no occupation and is not covered by a social security scheme in any other capacity.

(2) In a situation such as that envisaged in Question 1, it is for the applicable national legislation to determine whether the fact that the person concerned is in receipt of a benefit linked to the termination of his last employment confers on him the status of a compulsorily insured person.

Due Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Kakouris Grévisse Zuleeg

Delivered in open court in Luxembourg on 21 February 1991.

J-G. Giraud
Registrar

O. Due
President