JUDGMENT OF THE COURT

20 September 1994 *

In Case C-12/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep for a preliminary ruling in the proceedings pending before that court between

Bestuur van de Nieuwe Algemene Bedrijfsvereniging

and

V. A. Drake

on the validity of point 4 of Annex VI, section I (now J), 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, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

* Language of the case: Dutch.

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, by C. R. J. A. M. Brent, acting head of the Legal Service (social security) of the association known as the Gemeenschappelijk Administratiekantoor,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Greek Government, by F. P. Georgakopoulos, Assistant Legal Adviser to State Counsel, acting as Agent,

— the Council of the European Union, by Sophia Kyriakopoulou and Anna-Maria Colaert, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by M. Patakia and B.-J. Drijber, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the appellant, represented by F. W. M. Keunen, legal assistant to the Gemeenschappelijk Administratiekantoor, acting as Agent, of the Netherlands Government, represented by J. W. de Zwaan, assistant legal adviser at the Ministry of Foreign Affairs, acting as Agent, of the Council and of the Commission, represented by B.-J. Drijber and P. Altmaier, Administrator, at the hearing on 8 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 26 April 1994,

gives the following

Judgment

By order of 5 January 1993, received at the Court on 14 January 1993, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the validity of point 4 of Annex VI, section I (now J), 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, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, referred to hereinafter as 'Regulation No 1408/71 as amended').

The question was raised in proceedings between the Bestuur van de Nieuwe Algemene Bedrijfsvereniging and Mr Drake concerning the award of invalidity benefits under the Netherlands legislation.

3 In the Netherlands, compulsory invalidity insurance is the subject of two laws, the Algemene Arbeidsongeschiktheidswet of 11 December 1975 (General law on incapacity for work, Staatsblad 674, 'the AAW') and the Wet op de Arbeidsongeschiktheidsverzekering of 18 February 1966 (Law on insurance against incapacity for work, Staatsblad 84, 'the WAO').

4 The AAW, which came into force on 1 October 1976, introduced compulsory invalidity insurance for all residents of the Netherlands. Acquisition of entitlement to benefits, and their calculation, were not subject to any requirement as to the length of the periods of insurance completed. However, since 1 January 1980, Article 6(1) and (2) requires that during the year prior to the commencement of incapacity for work the insured person claiming benefits must have received income of a certain amount from or in connection with work performed in the context of employment or an occupational activity.

5 The WAO, which came into force on 1 July 1967, introduced compulsory invalidity insurance for employed persons. Under those rules, likewise, entitlement to benefits and the amount of them do not depend on the length of the periods of insurance completed. In order to qualify for benefits under that Law, however, the claimant must be subject to the relevant legislation, that is to say, he must be employed when the risk materializes. In that case, the insured is entitled to benefits only after 52 uninterrupted weeks of incapacity for work. The amount of benefit depends on the degree of invalidity and the employed person's daily remuneration, up to a certain maximum.

6 At the time of the facts on which the main action is based, when simultaneous claims were made for the two kinds of benefit, those payable under the WAO were paid only if and in so far as they exceeded that of the benefits due under the AAW. However, WAO beneficiaries who for some reason were ineligible for AAW benefits were entitled to WAO benefits in full.

7 Mr Drake, a Czech citizen who was naturalized in the Netherlands by a Law of 20 May 1975, completed insurance periods under the WAO during the period of three years and twelve days between 24 October 1968 and 5 November 1971. He was subsequently affiliated to the German invalidity insurance scheme from 30 November 1971 to 23 October 1980 because of his work in that country. According to the order making the reference, Mr Drake ceased to work and received no benefits in lieu of income in either of the two countries from 24 October 1980 to 1 July 1984.

8 By a decision of 24 March 1986 Mr Drake was recognized as suffering from invalidity under the German legislation and obtained, with effect from 1 July 1984, an invalidity pension (Erwerbsunfähigkeitsrente) on the basis of the insurance periods completed in Germany.

9 He also applied for invalidity benefits in the Netherlands on the basis of the employment he had had there previously. The competent Dutch institution, the Nieuwe Algemene Bedrijfsvereniging ('the NAB'), recognized Mr Drake's total incapacity for work within the meaning of the WAO and the AAW as from 1 July 1984 but rejected his application on the ground that as he was not employed when he became incapacitated for work he was not entitled to WAO benefits, and

that since he had had no income during the year prior to the beginning of his incapacity he was not entitled to AAW benefits either.

10 Mr Drake successfully challenged that decision in the Raad van Beroep in Amsterdam. The NAB appealed to the Centrale Raad van Beroep, which deemed it necessary before giving judgment to refer the following question to the Court of Justice for a preliminary ruling:

'Is a scheme of the kind referred to in point 4 of Annex VI (Netherlands) to Regulation (EEC) No 1408/71 (in the version in force at the material time), which can lead to the imposition pursuant to national law on a (previously) employed person within the meaning of that regulation of a further condition for the acquisition of entitlement to invalidity benefit under the legislation of a Member State (namely the receipt of income from work in the year preceding the occurrence of the invalidity), and which is inoperative in the event of the application of the national legislation to which he is still deemed to be subject on the basis of Article 45(4) of the regulation (in the version in force at the material time), compatible with the provisions of the EEC Treaty and in particular with Article 51 thereof?'

11 It is appropriate to recall that, as stated in Article 51 of the EEC Treaty,

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of

movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

12 Pursuant to that article the Council adopted Regulation No 1408/71 and Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing it, the primary purpose of which is to coordinate the various national laws on the subject in order to ensure that the free movement of workers does not result in a disadvantage for workers availing themselves of that freedom compared with those who work in a single Member State.

13 As regards invalidity benefits in particular Article 45(3) of Regulation No 1408/71 provided in the original version (OJ, English Special Edition 1971 (II), p. 416) as follows:

'Where the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materializes has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any worker who is no longer subject to that legislation shall for the purposes of this Chapter be deemed to be still so

subject at the time when the risk materializes, if at that time he is subject to the legislation of another Member State or, failing this, can establish a claim to benefits under the legislation of another Member State ...'

14 The provision was intended primarily to facilitate the co-existence of both schemes based on the acquisition of the right to benefits as a result of the materialization of the risk insured against and schemes based, on the contrary, on the cumulative acquisition of entitlement to benefits, that is to say, schemes based solely on the length of periods of insurance completed, and in principle enabled employed persons who were entitled to invalidity benefits under the legislation of another Member State to claim in addition benefits payable in the Netherlands under the WAO.

15 Subsequently, Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 (OJ 1981 L 143, p. 1) introduced Annex VI, section I (now J), point 4. As regards the application of the Netherlands legislation on insurance against incapacity for work that provision states that the competent institution is to fix the amount of cash benefits

— in accordance with the provisions of the WAO 'if, when incapacity for work or the resultant invalidity occurred, the person concerned was an employed person within the meaning of Article 1(a) of the regulation' (paragraph (a)), and

— in accordance with the provisions of the AAW 'if, when incapacity for work and the resultant invalidity occurred, the person concerned was not an employed person within the meaning of Article 1(a) of the regulation' (paragraph (b)).

By the same regulation Article 45(3) became Article 45(4).

16 Since the introduction of point 4 of Annex VI, section I (now J), only persons actually employed when the risk materializes are entitled to WAO benefits. It is no longer sufficient for them to be eligible for benefits under the legislation of another Member State. In addition, persons who are no longer employed when the risk materializes are entitled only, by virtue of point 4(b) of Annex VI, to benefits determined in accordance with the provisions of the AAW, which themselves require that they have had a certain income from or in connection with work during the year prior to the commencement of the incapacity for work.

17 It appears from the legislation at issue and the order making the reference that the national court is in doubt as to the validity of the provision in Annex VI, section I (now J), point 4, of Regulation No 1408/71 (as amended) in two respects.

18 In the first place, it considers the question whether that provision may legitimately restrict the scope of Article 45(4) of Regulation No 1408/71, as amended, inasmuch as it introduces a new factor, the status of the employed person when the incapacity arises, in order to determine pursuant to that provision under which Netherlands legislation, the WAO or the AAW, the right to benefits may be acquired.

19 Secondly, it considers the question whether it was lawful for Annex VI, section I (now J), point 4, to introduce, by referring to the Netherlands legislation, an additional condition such as the receipt of a certain amount of income from work during the year prior to the commencement of the incapacity for work, in view of the fact that such a condition is not required for the application of the national legislation to which the employed person is to be regarded as still subject for the purposes of Article 45(4) of Regulation No 1408/71, as amended.

The first part of the question

20 As regards the first part of the question, it should be emphasized that there is no hierarchy between the provisions of Regulation No 1408/71 (as amended) on the one hand, and those of Annex VI on the other. All those provisions were adopted pursuant to Article 51 of the Treaty and must therefore be interpreted together in the light of the purpose of that article, which is to facilitate the establishment of the greatest possible freedom of movement for migrant workers, a principle which is one of the foundations of the Community (see Case 293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 13, and C-282/91 *De Wit* [1993] ECR I-1221, paragraph 16).

21 The question is therefore restricted to the issue of whether the rules governing the application of the Netherlands legislation on incapacity for work laid down in section I (now J), point 4, of Annex VI to Regulation No 1408/71, as amended, are compatible with that purpose.

22 It has been established that Articles 48 to 51 of the Treaty are intended to ensure that workers do not lose, as a result of their exercising the right to freedom of movement, social security advantages granted to them by the legislation of a Member State, a result which might dissuade Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see Cases C-45/92 and C-46/92 *Lepore* and *Scamuffa* [1993] ECR I-6497, paragraph 21).

23 That is not the case as regards point 4 of section I (now J) of Annex VI to Regulation No 1408/71 as amended.

24 A person who has worked exclusively in the Netherlands and has ceased to work before the materialization of the insured risk is in the same situation as a person who avails himself of the right to freedom of movement and who was previously subject to both a scheme based on risk and a scheme based on the progressive constitution of rights. The situation in which someone like Mr Drake finds himself is therefore not attributable to his having relied on free movement of workers, which is guaranteed by Article 48, but is the result of his having ceased to work before the commencement of the incapacity.

25 In those circumstances, the rules governing the application of Netherlands legislation on incapacity for work laid down by Annex VI, section I (now J), point 4(a), of Regulation No 1408/71 as amended are not incompatible with Articles 48 to 51 of the Treaty.

The second part of the question

26 As regards the second part of the question raised by the national court, which concerns the lawfulness of the introduction of a supplementary condition, such as income from work of a certain amount during the year prior to the commencement of the incapacity for work, it is sufficient to note that the Court has consistently held that Article 51 of the Treaty and Regulation No 1408/71 provide only for the aggregation of insurance periods completed in different Member States and do not regulate the conditions under which those insurance periods are constituted. The conditions governing the right or obligation to become a member of a social security scheme are therefore a matter to be determined by the legislation of each Member State, provided that there is no discrimination in that regard between

the nationals of the host Member State and those of other Member States (see Case C-349/87 *Paraschi* [1991] I-4501, paragraph 15).

27 It follows that Community law does not preclude the national legislature from altering the conditions for granting benefits for incapacity for work, even if it makes them more strict, provided that the new requirements do not give rise to overt or disguised discrimination between Community workers.

28 The income requirement laid down by the Netherlands legislature as a condition for entitlement to AAW benefits constitutes an objective requirement which applies to its own nationals and to those of other Member States alike. Consequently, its introduction as a requirement for the grant of Netherlands benefits for incapacity for work is compatible with Community law.

29 In the light of those considerations the reply to the question must be that consideration of it has not revealed any factor capable of affecting the validity of point 4 of Annex VI, section I (now J) of Regulation No 1408/71, as amended.

Costs

30 The costs incurred by the Governments of the Netherlands and Greece, by the Council of the European Union and by the Commission of the European Communities, who have submitted observations to the Court, are not recoverable.

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.

On those grounds,

THE COURT,

in answer to the question referred to it by the Centrale Raad van Beroep by order of 5 January 1993, hereby rules:

Consideration of the question raised has not revealed any factors capable of affecting the validity of point 4 of Annex VI, section I (now J) 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, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983.

Due Moitinho de Almeida Diez de Velasco

Edward Kakouris Rodríguez Iglesias

Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 20 September 1994.

R. Grass O. Due

Registrar President