JUDGMENT OF THE COURT (First Chamber)
27 January 1994 *

In Case C-287/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before him between

Alison Maitland Toosey

and

Chief Adjudication Officer

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 amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

* Language of the case: English.

THE COURT (First Chamber),

composed of: D.A.O. Edward, President of the Chamber, R. Joliet and G.C. Rodríguez Iglesias (Rapporteur), Judges,

Advocate General: C.O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs Toosey, by the Disability Law and Advisory Centre and M. Allan, Barrister,

— the United Kingdom, by J.E. Collins, of the Treasury Solicitor's Department, acting as Agent, and N. Paines, Barrister,

— the Commission of the European Communities, by N. Khan, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom and the Commission at the hearing on 23 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1993,

gives the following

Judgment

1 By order of 5 June 1992, which was received at the Court on 30 June 1992, the Social Security Commissioner (United Kingdom) referred for a preliminary rulingunder Article 177 of the EEC Treaty a number of 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 amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 Those questions arose in the course of proceedings between Mrs A.M. Toosey and the Chief Adjudication Officer regarding Mrs Toosey's entitlement to invalidity benefit.

3 Mrs Toosey, who is a British national, worked in the United Kingdom in the period 1964 to 1965. She has not worked in the United Kingdom since 1965. In 1973, for reasons connected with her husband's work, she moved with her family to Belgium where she worked from the end of 1974 to 18 March 1982.

4 She ceased working in March 1982 as a result of spastic hemiplegia, which has confined her to a wheelchair. In October 1983 the family moved from Belgium to France, and returned to the United Kingdom in July 1985.

5 On 19 December 1986 Mrs Toosey applied in the United Kingdom for severe disablement allowance ('SDA') pursuant to section 36 of the Social Security Act 1975.

6 That application was rejected by the King's Lynn social security appeal tribunal on the ground that, although Mrs Toosey satisfied the conditions as to presence in Great Britain, she did not satisfy the conditions relating to residence set out in Regulation 3 of the Social Security (Severe Disablement Allowance) Regulations 1984 since she had not been resident in Great Britain for 10 of the 20 years preceding her application for SDA.

7 Mrs Toosey, however, contends that she is entitled to receive SDA by virtue of Regulation No 1408/71. She argues that her case is governed by Article 39(5) of that regulation, in the version applicable prior to the entry into force of Council Regulation (EEC) No 1248/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal 1992 L 136, p. 7), as she is one of the persons to whom the provisions of Article 71(1)(b)(ii) apply. She claims that she is not a frontier worker but rather a wholly unemployed worker returning to the Member State in which she resides and hence entitled to receive benefits in the United Kingdom in accordance with the legislation of that Member State.

8 The Social Security Commissioner, to whom Mrs Toosey appealed against the decision of the King's Lynn social security appeal tribunal, referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the first sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 to be interpreted as applying to a worker who

(a) resides and works in Member State A (of which she is a national),

(b) subsequently moves with her family to Member State B where she resides for 10 years, works and suffers incapacity for work followed by invalidity,

(c) subsequently moves with her family to Member State C where she resides for two years but does not work (owing to her invalidity) and

(d) finally takes up residence again in Member State A, where she does not work or register for employment (owing to her invalidity)?

If the answer to Question (1) is in the affirmative,

(2) how is a national court or tribunal to determine whether a claim by a worker in the circumstances described in Question (1) ("the Claimant") for invalidity benefit should be directed to the institution of the Member State designated by Article 39(1) of the Regulation or the institution of the Member State designated by Article 39(5) of the Regulation, read in conjunction with the first sentence of Article 71(1)(b)(ii): -

(a) Does Article 39(1) only apply where the Claimant has remained within the territory of the Member State in which she was last employed?

(b) In what circumstances can the Claimant apply for benefit from the institution of the Member State designated by Article 39(5) of the Regulation?

(c) Can the Claimant choose to which institution to address the claim?

(3) Are the words "in accordance with the legislation which it administers" in Article 39(5) to be interpreted as including conditions of entitlement to a non-contributory benefit, based on presence or residence in a Member State, which are contained in such legislation?

(4) If the answer to Question (3) is in the affirmative, is Article 38 of Regulation No 1408/71 to be interpreted as requiring the competent institution of a Member State, whose legislation makes the right to benefit conditional upon the completion of a period of residence, to treat periods of the Claimant's residence in other Member States as though they were periods of residence completed in that Member State?

If the answer to Question (1) is negative,

(5) must the competent institution of a Member State, whose legislation makes the right to benefit conditional upon the completion of a period of residence, treat periods of the Claimant's residence in other Member States as though they were periods of residence completed in that Member State?

If the answers to Questions (1) and (5) are negative and the Claimant is obliged to make a claim for benefit under Article 39(1) to Member State B,

(6) does the competent institution of Member State A have any obligation towards the Claimant? In particular, is the competent institution of Member State A obliged

(a) to pursue a claim submitted by the Claimant in accordance with Article 35(1) of Regulation No 574/72; and/or

(b) to pay benefit to the Claimant according to its rules, and to reimburse itself later from such funds as are made available by Member State B?'

The first question

9 Article 13(1) of Regulation No 1408/71 provides that persons to whom that regulation applies are in principle subject only to the legislation of a single Member State. By virtue of Article 13(2)(a) any person employed in the territory of a Member State is subject to the legislation of that State.

10 Applying that principle, Article 39(1) of Regulation No 1408/71 provides, with regard to invalidity benefit, that the competent Member State is the State 'whose legislation was applicable at the time when incapacity for work followed by invalidity occurred'.

11 Article 39(5), however, provides that it is the State of residence which is competent with respect to 'a wholly unemployed worker to whom the provisions of Article 71(1)(a)(ii) and of the first sentence of Article 71(1)(b)(ii) apply'.

12 The first sentence of Article 71(1)(b)(ii) provides that '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...'.

13 It follows both from the title of the section in Regulation No 1408/71 of which Article 71 constitutes the sole article, and from the case-law of the Court, that the factor that determines whether Article 71 applies at all is the residence of the person concerned in a Member State other than that to whose legislation he was subject during his last employment (see the judgments in Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315, paragraphs 17 and 21, in Case 128/83 *Caisse Primaire d'Assurance Maladie de Rouen* v *Guyot* [1984] ECR 3507, paragraph 9, and in Case 236/87 *Bergemann* v *Bundesanstalt für Arbeit* [1988] ECR 5125).

14 It follows that the first sentence of Article 71(1)(b)(ii) does not apply to a worker in the position of Mrs Toosey who, as the question referred to the Court makes clear, was resident in the State of employment (Belgium) when the incapacity for work followed by invalidity occurred.

15 Contrary to Mrs Toosey's contention, this interpretation of Article 71 does not have the effect of depriving the provision in question of all meaning with regard to workers other than frontier workers.

16 It follows from the judgment in *Di Paolo*, cited above, that that provision also covers workers, other than seasonal workers, who, although employed in another Member State, continue to reside in the country of their habitual residence, with which they retain close connections and where the centre of their day-to-day interests lies.

17 The first question in the reference must for that reason be answered in the negative.

The second, third, fourth and fifth questions

18 The second, third and fourth questions, having been put only in the event of an affirmative answer to the first question, do not call for a reply.

19 The fifth question was put in the event of the first question being answered in the negative. However, the terms of that question, identical to those of the fourth, show that it presupposes that the answer to the question whether invalidity benefit can be claimed against the State of residence (in this case the United Kingdom) depends on the interpretation of the legislation of that Member State.

20 It follows from the reply to the first question that, by virtue of the provisions of Regulation No 1408/71, the competent State for the payment of invalidity benefit is the State whose legislation was applicable at the time when the incapacity for work followed by invalidity occurred (in this case, Belgium). For that reason, it is unnecessary to reply to the fifth question.

The sixth question

21 In his sixth question, the Social Security Commissioner seeks to determine the obligations of the institutions of the State of residence in respect of a claimant to whom invalidity benefit is due from the State of last employment.

22 It follows from Article 86 of Regulation No 1408/71 and from Article 35 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6) that when a claimant submits a claim to the institution of the State of residence, that institution is required to forward it to the institution of the competent Member State, that is to say, the State whose legislation was applicable at the time when incapacity for work followed by invalidity occurred.

23 On the other hand, and in contrast to the system laid down with respect to other benefits (see, for example, Articles 36 and 63 of Regulation No 1408/71), there is no provision in Regulation No 1408/71 which requires the institutions of the State of residence to pay invalidity benefit to a claimant, even if the competent State is required to make reimbursement, subject to the application of Article 114 of Regulation No 574/72 in the case of a dispute between the relevant institutions.

24 However, Community law does not in any way prohibit the institution of the State of residence from assisting a claimant in the submission of a claim to the institution of the competent State.

25 The answer to the sixth question must therefore be that under Article 86 of Regulation No 1408/71 and Article 35 of Regulation No 574/72 the institution of the State of residence is required to forward a claim for invalidity benefit submitted to it to the competent institution of the State of last employment; it is not, on the other hand, required to pay such benefit to the claimant.

Costs

26 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (First Chamber),

in answer to the questions referred to it by the Social Security Commissioner by order of 5 July 1992, hereby rules:

1. The first sentence of Article 71(1)(b)(ii) 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 amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as meaning that it does not apply to a worker who:

(a) resides and works in Member State A (of which he is a national);

(b) subsequently moves with his family to Member State B where he resides for 10 years, works and suffers incapacity for work followed by invalidity;

(c) subsequently moves with his family to Member State C where he resides for two years but does not work (owing to his invalidity) and;

(d) finally takes up residence again in Member State A, where he does not work or register for employment (owing to his invalidity);

2. Under Article 86 of Regulation No 1408/71 and Article 35 of Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, the institution of the State of residence is required to forward a claim for invalidity benefit submitted to it to the competent institution of the State of last employment; it is not, on the other hand, required to pay such benefit to the claimant.

Edward Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 27 January 1994.

J.-G. Giraud
Registrar

D.A.O. Edward
President of the First Chamber