JUDGMENT OF THE COURT (Third Chamber)

7 July 2005 *

In Case C-227/03,

REFERENCE under Article 234 EC for a preliminary ruling from the Rechtbank te Amsterdam (Netherlands), made by decision of 21 May 2003, received at the Court on 26 May 2003, in the proceedings

A.J. van Pommeren-Bourgondiën

v

Raad van bestuur van de Sociale verzekeringsbank,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet (Rapporteur), S. von Bahr, U. Lõhmus and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 9 December 2004,

after considering the observations submitted on behalf of:

— A.J. van Pommeren-Bourgondiën, by P. de Casparis, advocaat,

— the Raad van bestuur van de Sociale verzekeringsbank, by G. Vonk, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and C. Wissels, acting as Agents,

— the Belgian Government, by A. Snoecx and M. Wimmer, acting as Agents,

— the Greek Government, by M. Apessos, D. Kalogiros and I. Pouli, acting as Agents,

— the Commission of the European Communities, by D. Martin, H. van Vliet and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 39 EC and Article 13 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 amended by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2) ('Regulation No 1408/71').

2 That reference was made in proceedings between Mrs van Pommeren-Bourgondiën and the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank; 'SVB') regarding the latter's refusal to continue her compulsory insurance in respect of certain branches of social security on the ground that she no longer resided in the Netherlands.

Relevant provisions

Community law

3 Under Article 4(1) of Regulation No 1408/71, that regulation

'... shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits ...;

(c) old-age benefits;

(d) survivors' benefits;

...

(g) unemployment benefits;

(h) family benefits.'

4 Title II (Articles 13 to 17a) of that regulation, headed 'Determination of the legislation applicable', governs conflicts.

5 Under Article 13 of Regulation No 1408/71:

'1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to the provisions of Articles 14 to 17:

(a) a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State ...

...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him ..., shall be subject to the legislation of the Member State in whose territory he resides.'

6 Under Article 10b of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ 1972 L 74, p. 1), in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1):

'The date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of Regulation [No 1408/71] shall be determined in accordance with that legislation. ...'

7 Under Article 15 of Regulation No 1408/71:

'1. The provisions of Articles 13 and 14d shall not apply to voluntary insurance or optional continued insurance unless, in respect of one of the branches referred to in Article 4, there exists in any Member State only a voluntary scheme of insurance.

2. Where application of the legislations of two or more Member States entails overlapping of insurance:

— under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme;

— under two or more voluntary or optional continued insurance schemes, the person concerned may join only the voluntary or optional continued insurance scheme for which he has opted.

3. However, in respect of invalidity, old age and death (pensions), the person concerned may join the voluntary or optional continued insurance scheme of a Member State, even if he is compulsorily subject to the legislation of another Member State, to the extent that such overlapping is explicitly or implicitly admitted in the first Member State.'

National legislation

8 The Kingdom of the Netherlands draws a distinction between two types of social security, namely the 'general social security scheme' and the 'social security scheme for employed persons'.

9 The general social security scheme covers the following laws:

— Law on the general scheme for family benefits (Algemene Kinderbijslagwet; 'AKW');

— Law on the general scheme for survivors' pensions (Algemene Nabestaandenwet; 'ANW');

— Law on the general scheme for old-age pensions (Algemene Ouderdomswet; 'AOW');

— Law on the general scheme for special medical expenses cover (Algemene wet bijzondere ziektekosten; 'AWBZ').

10 The social security scheme for employed persons is covered by the following social security laws:

— Law on the sickness scheme (Ziektewet; 'ZW');

— Law on sickness funds (Ziekenfondswet; 'ZFW');

— Law on the unemployment scheme (Werkloosheidswet; 'WW');

— Law on insurance against incapacity for work (Arbeidsongeschiktheidsverzekering; 'WAO').

11 As regards the general social security scheme, the Netherlands legislation initially provided for a scheme under which persons residing outside the Netherlands who were entitled to certain long-term benefits in the Netherlands were compulsorily insured under certain conditions.

12 Article 8 of the Netherlands decree on the extension and restriction of the category of persons insured in respect of national insurance (Besluit uitbreidung en beperking kring verzekerden volksverzekeringen) of 3 May 1989 provided:

'1. A person who has transferred his residence outside the Netherlands and who, on the date of his departure, was entitled to:

(a) a benefit under the WAO ...

...

— shall be insured under national insurance.

2. A person who does not reside in the Netherlands and who is entitled to a benefit ... referred to in paragraph 1, shall be insured under national insurance where that right stems from compulsory insurance under national insurance or from voluntary insurance under Article 45 of the AOW and Article 63 of the ANW, and provided that that benefit ... is at least equal to 35% of the minimum wage.'

13 The decree of 24 December 1998, which came into force on 1 January 1999, repealed the decree of 3 May 1989. Article 26 of the decree of 24 December 1998 provided that Article 8 of the old decree remained in force for a transitional period until 1 January 2000. On that date, compulsory insurance under some branches of social security came to an end.

14 Persons who no longer had to be compulsory insured as from 1 January 2000 were able, however, to be voluntarily insured on the basis of Article 2(1) of the decree of 2 January 1990 (Besluit inzake vrijwillige verzekering). Under that article, that option is exercisable for one year after termination of the compulsory insurance. A simple declaration to the Sociale verzekeringsbank (the social security institution) suffices to continue cover.

15 Article 35 of the AOW provides:

'1. A person who was previously insured and who is aged 15 or over may be insured voluntarily, provided that he has not reached the age of 65, during a maximum period of 10 years commencing on the day after the date on which the compulsory insurance came to an end. ...

3. The maximum period of 10 years referred to in subparagraph 1 shall not apply to: ... a person who was previously insured, is aged 50 on the date on which the compulsory insurance came to an end, does not reside in the Netherlands and is entitled to the payment of:

(i) a benefit under the Law on insurance against incapacity for work (WAO) ...'

16 Under Article 63 of the ANW:

'1. A person who was previously insured may be insured voluntarily, under conditions to be determined by administrative regulation or by the provisions

implementing that regulation, during periods after his 15th birthday but prior to his 65th birthday in respect of which he is not insured.

2. The conditions referred to in the first subparagraph shall include concurrent exercise of the option, referred to in Article 45 of the General law on old-age benefit, to be insured voluntarily.'

17 Compulsory insurance continues, however, in respect of some branches of social security. Article 27 of the decree of 24 December 1998 retains the obligation to be insured under the AKW until the youngest child has reached the age of 18. Article 7 of that decree provides that a person is insured under the AWBZ if he does not reside in the Netherlands, is insured under the ZFW and, pursuant to a regulation of the Council of the European Union, may claim benefits in the State in which he resides which are paid to him from the sickness fund insurance budget.

18 The following conditions apply to the requirement to be insured under the social security scheme for employed persons, in particular as regards the WAO, the ZW and the WW:

— Article 20 of the ZW provides that that law covers workers as defined therein. Article 8 defines 'worker' for the purposes of the ZW as a person who receives a benefit by virtue of compulsory insurance under the WAO.

— Article 8 of the WW provides that employed persons who have become incapacitated for work while employed retain their status as employed person.

— Benefits paid under the WAO and those to which employed persons residing abroad may be entitled under the ZW are not cumulative.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 Mrs van Pommeren-Bourgondiën, who has Netherlands nationality, resides in Belgium but worked in the Netherlands for her entire working life. Since 1997 she has received invalidity benefit under the WAO at the highest rate under the invalidity benefit scheme.

20 Mrs van Pommeren-Bourgondiën was informed that as from 1 January 2000 she was no longer compulsorily subject to some Netherlands social security schemes, namely the AOW, the ANW and the AKW, on the ground that she was not resident in the Netherlands. She was also informed that, for that reason, a contribution to the general social security schemes would no longer be deducted from her benefits under the WAO as from 1 January 2000, but that she was able to be insured voluntarily under the AOW and the ANW by making an application to the social security institution.

21 Mrs van Pommeren-Bourgondiën challenged the termination of her compulsory insurance with that institution. The latter confirmed its view by letter of 28 August 2000.

22 The applicant then entered an objection with that institution. When the institution failed to respond, she brought an action before the Rechtbank te Amsterdam.

23 In the view of that court, contrary to the claims of the Netherlands Government, the conditions in the AOW and the ANW relating to insurance, and in particular the level of the contribution, differ according to whether the insurance is compulsory or voluntary. In the case of compulsory insurance under the AOW and the ANW, the contribution is calculated on the taxable income arising in the Netherlands, whereas in the case of voluntary insurance it is calculated on taxable income worldwide.

24 Moreover, it considers that concurrent application of compulsory and optional schemes could make it impossible for the insured person to comply with the requirement laid down in Regulation No 1408/71 to be insured through a single social security institution.

25 In those circumstances, the Rechtbank te Amsterdam decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Does Article 13(2)(f) of Regulation No 1408/71 preclude legislation of a Member State under which a person who has ceased all occupational activity in its territory remains insured under that legislation only if he continues to reside there, whilst that person remains compulsorily insured under the legislation of that Member State in respect of certain other branches of social security irrespective of his place of residence?

(2) Is it material to the reply to the first question that under the legislation of that Member State the person has the option of being voluntarily insured in respect of a number of branches of social security, without such voluntary insurance being conditional on his remaining resident in that Member State?

If the answer to Question 1 is negative, the following question is referred in the alternative:

(3) In a situation such as that described above, is Article 39 EC to be interpreted as meaning that the replacement of compulsory insurance with voluntary insurance is incompatible with that article where cessation of compulsory insurance is brought about by the introduction of a residence requirement?'

The questions referred for a preliminary ruling

26 By its questions, which should be dealt with together, the national court asks, essentially, whether the provisions of the Article 39 EC or those of Article 13(2)(f) of Regulation No 1408/71 preclude a Member State from applying legislation pursuant to which a person who has ceased all occupational activity in its territory remains compulsorily insured in respect of some branches of social security only if he continues to reside there, whilst that person remains compulsorily insured under the legislation of that Member State in respect of certain other branches of social security irrespective of his place of residence, given that he is still able to be insured on an optional basis when he is no longer compulsorily insured.

Observations submitted to the Court

27 The Commission of the European Communities, the Belgian Government and the Greek Government take the view that the Netherlands legislation is incompatible with Article 13(1) of Regulation No 1408/71, which provides that the persons to whom it applies are to be subject to the legislation of a single Member State only.

28 They consider that if the Netherlands legislation ceases to apply in part to Mrs van Pommeren-Bourgondiën, then, pursuant to Article 13(2)(f) of Regulation No 1408/71, the legislation of the Member State of residence should apply in respect of the branches of social security which are no longer covered by compulsory insurance. Accordingly, Mrs van Pommeren-Bourgondiën finds herself in a situation in which she is dependent on the social security legislation of two Member States, in breach of Article 13(1) of that regulation.

29 The Commission observes, further, that Article 13(2)(f) of Regulation No 1408/71 does not preclude the legislation of a Member State from making continued residence there a condition of the right of a person who has ceased all occupational activity in that State to remain subject to its legislation (Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 51). As a result, the Netherlands authorities could have quite legitimately stopped applying their legislation in its entirety to the applicant, but they could not continue her compulsory insurance in respect of some branches of Netherlands social security and cancel it in respect of others.

30 The Netherlands Government and the SVB take the view, on the contrary, that Article 13(2)(f) of Regulation No 1408/71 does not preclude the legislation of a Member State from compulsorily insuring the person concerned only against part of the risks covered by its social security system, as long as it does not discriminate between nationals and non-nationals, and to the extent that that person is able to be insured on an optional basis to cover the other risks, under the same social security system.

31 Moreover, the national court, the Commission and the Greek Government state that the less favourable conditions apply to voluntary insurance than to compulsory insurance. That situation, which is liable to have a greater effect on nationals of

other Member States than on Netherlands nationals, is discriminatory and contrary to Articles 12 EC and 39 EC.

32 However, the Netherlands Government submits that the conditions relating to voluntary insurance are the same as or indeed more favourable than those of compulsory insurance.

The Court's answer

33 The sole purpose of Article 13(2) of Regulation No 1408/71 is to determine the national legislation applicable to persons who are in one of the situations referred to in subparagraphs (a) to (f) of that provision. It is not intended 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. It is for the legislature of each Member State to lay down those conditions, including those concerning termination of insurance (Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 19, and *Kuusijärvi*, cited above, paragraph 29).

34 Furthermore, the provisions of Title II of Regulation No 1408/71, of which Article 13 forms part, are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (*Kits van Heijningen,* cited above, paragraph 12, and *Kuusijärvi*, cited above, paragraph 28).

35 It follows from Article 13(2)(f) of Regulation No 1408/71, however, that the legislation of the Member State of residence applies only if no other legislation is applicable and, in particular, only if the legislation to which the person concerned had previously been subject ceases to be applicable to him (Case C-347/98 *Commission* v *Belgium* [2001] ECR I-3327, paragraphs 28 and 29). Accordingly, if compulsory social security ceases in a Member State, the provision cited above provides for insurance in the Member State of residence.

36 In the case in the main proceedings, those provisions do not prevent the Netherlands legislation from continuing to apply to Mrs van Pommeren-Bourgondiën. Her previous insurance may, having regard to the view taken by the Court in *Commission* v *Belgium*, cited above, continue to be subject to the Netherlands social security system. The fact that a part of that insurance becomes optional does not prohibit such continued insurance within the compulsory insurance system.

37 That is why, moreover, the Netherlands legislation gives non-resident persons the opportunity, after they have ceased all occupational activity in the Netherlands, to remain insured on an optional basis, under the legislation of that Member State, in respect of the branches for which they are no longer compulsorily insured.

38 The principle that a single social security system is to apply, as laid down in Article 13(1) of Regulation No 1408/71, is not therefore called into question by the application of the Netherlands legislation at issue in the main proceedings.

39 However, although Member States retain the power to organise their social security schemes, they must none the less, when exercising that power, comply with Community law and, in particular, the provisions of the EC Treaty on freedom of

movement for workers (Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33). Thus the optional system of insurance for non-residents must be compatible with Article 39 EC.

40 The residence requirement set by the Netherlands legislature as a condition for continuing to qualify for compulsory insurance in respect of some branches of social security is therefore compatible with Article 39 EC only if the conditions relating to voluntary insurance for non-residents are not less favourable than the conditions relating to compulsory insurance, for the same branches of social security, which residents obtain.

41 However, according to the order for reference, pursuant to the new Netherlands legislation, non-residents are no longer entitled, even voluntarily, to be insured under the scheme for family benefit, except in part and for a transitional period. The only non-residents who retain an entitlement to family benefit are those who acquired it under the previous system of compulsory insurance. Their ability to be insured is lost for good when their youngest child reaches the age of 18. Therefore non-residents are treated less favourably than residents as regards those benefits.

42 In addition, the national court maintains, as was stated in paragraph 23 of this judgment, that the level of the contributions is not the same in relation to compulsory insurance for residents and optional insurance for non-residents.

43 Finally, the low affiliation rate for voluntary insurance schemes for non-residents whose compulsory insurance was terminated appears to indicate that voluntary insurance is not attractive and that non-residents must be encountering difficulties in that regard.

44 It follows from the foregoing that the Netherlands legislation in question in the main proceedings places non-residents in a less favourable position than residents with regard to their social security cover in the Netherlands, and therefore undermines the principle of free movement secured by Article 39 EC.

45 Consequently, the answer to the national court must be that Article 39 EC precludes legislation of a Member State pursuant to which a person who has ceased all occupational activity in its territory remains compulsorily insured in respect of some branches of social security only if he continues to reside there, whilst that person remains compulsorily insured under the legislation of that Member State in respect of certain other branches of social security even if his residence is in another Member State, in circumstances where the conditions relating to voluntary insurance, in respect of the branches for which compulsory insurance has ceased, are less favourable than those relating to compulsory insurance.

Costs

46 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 39 EC precludes legislation of a Member State pursuant to which a person who has ceased all occupational activity in its territory remains compulsorily insured in respect of some branches of social security only if he continues to reside there, whilst that person remains compulsorily insured under the legislation of that Member State in respect of certain other branches of social security even if his residence is in another Member State, in circumstances where the conditions relating to voluntary insurance, in respect of the branches for which compulsory insurance has ceased, are less favourable than those relating to compulsory insurance.

[Signatures]