REPORT FOR THE HEARING
in Case C-105/89 *

I — Facts and procedure

1. Facts and legal background

Ibrahim Buhari, the plaintiff in the main proceedings, was born in 1914 in Nigeria which at that time was a British colony. Until 1960, when Nigeria became independent, Mr Buhari was of British nationality. Since 1960 he has possessed Nigerian nationality.

From November 1937 to December 1986 he worked as a merchant in the former Belgian Congo, where he continues to live. Having paid compulsory pension contributions until the Belgian Congo became independent in 1960, Mr Buhari then applied to the Institut national d'assurances sociales pour travailleurs indépendents (National Social Insurance Institute for Self-employed Persons, hereinafter referred to as 'Inasti'), the defendant in the main proceedings, for a retirement pension.

Pursuant to Article 31(4) of Belgian Royal Decree No 72 of 10 November 1967 on retirement and survivors' pensions for self-employed persons, the King is to 'determine those cases in which such benefits are payable abroad, without prejudice to the applicable international conventions'.

Adopted in order to implement that article, Article 144(2) of the Royal Decree of 22 December 1967 laying down general rules concerning retirement and survivors' pensions for self-employed persons, (as most recently amended by Article 64(1) of the Royal Decree of 20 September 1964), provides that a retirement pension is payable abroad to beneficiaries 'residing in the territory of a country where an employed person's pension could be paid under a reciprocity agreement'.

By administrative decision of 10 November 1987, Inasti refused Mr Buhari's application on the ground that he is at present of Nigerian nationality and resides in Zaire (formerly the Belgian Congo).

Mr Buhari lodged an appeal against that decision before the Tribunal de travail (Labour Tribunal), Brussels.

With respect to his 'fractional theoretical entitlement' the Tribunal du travail, by judgment of 23 March 1989, held that the applicant was entitled to a self-employed person's retirement pension in respect of his work in the former Belgian Congo, the 18 and a half years from 1938 to 30 June 1956 being recognized for that purpose. [1]

That decision is based on Article 1 of the Belgian Royal Decree of 29 December 1967 on the rights of former colonials under the scheme for retirement and survivors' pensions for self-employed persons, which

* Language of the case: French.

1 — With respect to the period from 1 July 1956 to 30 June 1960, the Tribunal ordered that the proceedings be resumed in order to enable the applicant to produce the evidence necessary to secure recognition of that period for the grant of a pension.

provides that periods of activity as a self-employed person or assistant thereof in the former Belgian Congo before 30 June 1960 are to be taken into account with a view to the grant of such benefits.

With respect to the actual payment of the pension, the Tribunal states that, according to the Belgian national provisions, if the applicant were a Belgian or Community national his pension would be payable either in Nigeria or in Zaire; but since at present he is of Nigerian nationality, it is payable either in Belgium or anywhere else in the Community.

In those circumstances, the national court refers to various provisions of Community law, in particular the following:

(i) Article 7 of the EEC Treaty which, within the scope of application of the Treaty, prohibits all discrimination on grounds of nationality;

(ii) Articles 48(2) and (3) and 51(b) of the EEC Treaty, which provide for freedom of movement of workers and equal treatment of them in all countries of the Community, particularly in matters of social security;

(iii) Articles 1, 2 and 4 of Regulation (EEC) No 1408/71 (as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, published in Official Journal 1983 L 230, p. 8), which define the matters and persons to which that regulation applies;

(iv) Article 3 of Regulation No 1408/71, which provides that all persons resident in the territory of one of the Member States are subject to the same obligations and enjoy the same rights under the legislation of any Member State as the nationals of that State;

(v) Article 10(1) of Regulation No 1408/71 which prohibits any reduction, modification, suspension, withdrawal or confiscation of a benefit acquired under the legislation of a Member State by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated;

(vi) Articles 44 to 51 of Regulation No 1408/71, which relate to old-age and death benefits and govern the payment thereof where the worker was subject to the legislation of more than one Member State;

(vii) Articles 35 to 59 of Regulation (EEC) No 574/72 (as codified by Council Regulation No 2001/83 of 2 June 1983, published in Official Journal 1983 L 230, p. 86), which relate *inter alia* to old-age and death benefits and determine the procedures for applying the corresponding provisions of Regulation No 1408/71, namely Articles 44 to 51.

Having regard to those provisions, the Tribunal de travail, Brussels, by the same judgment of 23 March 1989, deferred its decision on the issue of the actual payment of the pension and referred the following three questions to the Court of Justice for a preliminary ruling:

(i) does the payment by a Member State of a retirement pension (in the present case a self-employed person's pension) on account of an occupation (in the present case as a colonist) previously pursued 'in a territory which at the time maintained special relations with that Member State' to a person who at the time was a national of a second State (which in the meantime has become a Member State) and is now a national of a non-member country whose territory at the time maintained special relations with the second State (which in the meantime has become a Member State) fall within the scope of Articles 1 to 4, the first subparagraph of Article 10(1) and Articles 44 to 51 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 and subsequently Articles 35 to 59 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71? And, if not:

(ii) does the refusal by a Member State to pay a social security benefit (in the present case, a self-employed person's retirement pension on account of a previous occupation as a colonist on the territory of its former colony) to a person residing 'in a territory which at the time maintained special relations with that Member State' and domiciled in another territory — which also maintained at the time special relations with a second State (which in the meantime has become a Member State) and which has become a non-member country of which he now has the nationality — on the sole ground of his present nationality and residence constitute 'discrimination on grounds of nationality' within the meaning of the first paragraph of Article 7, Article 48(2) and (3)(c) and (d), and Article 50(b)[2] of the Treaty, whether or not it is direct or indirect or based on nationality by application of formally neutral criteria which nevertheless lead to the same result, namely the putting of non-nationals at a disadvantage owing to the existence of a disproportionate obstacle? Or:

(iii) are the wording and spirit of the abovementioned Community provisions compatible with the Belgian rules at present in force in Article 144(2) of the Royal Decree of 22 December 1967 (regulating retirement and survivors' pensions for self-employed persons), as amended by Article 24 of the Royal Decree of 17 July 1972 and Article 64(1) of the Royal Decree of 24 September 1984, or upon their restrictive interpretation given by the defendant?

2. *Procedure before the Court*

The order for reference was received at the Court Registry on 3 April 1989.

Pursuant to Article 20 on the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted

2 — This should read '51(b)'.

on 14 June 1989 by Ibrahim Buhari Haji, represented by Constantin Nikis, of the Brussels Bar;

on 26 June 1989, by the Commission of the European Communities, represented by its Legal Adviser, H. Lima, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and assigned the case to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

A — *The first question*

1. Mr *Buhari* proposes that the first question be answered in the affirmative.

He claims that the Court has always adopted an extensive interpretation of the expression 'nationals of one of the Member States'. According in particular to its judgment in Case 10/78 *Belbouab* [1978] ECR 1915, that expression includes not only the present nationals of Member States but also former nationals of the founding Member States of the Community and even the former nationals of non-founding Member States if they lost their nationality after the accession of the Member State concerned to the EEC Treaty.

He adds that if a restrictive interpretation were adopted all former workers in the same situation as he would be required to establish themselves in Belgium for the pension to which they were entitled to be paid to them, which would undermine the freedom of movement for workers. Moreover, to treat that category of workers in the same way as aliens who had never had the nationality of a Member State would constitute discrimination based on nationality.

It is therefore unjustified, in Mr Buhari's view, to exclude from the scope of Regulation No 1408/71 the nationals of a non-founder Member State who lost their nationality before the State in question became a member of the Community.

2. The *Commission* is of the opinion that the question must be examined from several viewpoints.

With respect, first, to the place of exercise of the activity which gave rise to pension entitlement, it refers to the judgment of the Court in Case 87/76 *Bozzone* [1977] ECR 687. It is clear from that judgment that that is not the decisive criterion; the decisive criterion is the connection of the insured person with the social security scheme of a Member State.

Since the person concerned is entitled to a pension under, in particular, Royal Decree No 72 of 10 November 1967 on retirement and survivors' pensions for self-employed persons, his case is a matter covered by Regulation No 1408/71 as defined by Article 4 thereof in conjunction with Article 1(j).

With regard, secondly, to the present nationality of the recipient, the Commission again refers to the judgment in *Belbouab*. It states that Regulation No 1408/71 covers all periods of insurance or employment completed before the entry into force of that regulation, provided that the migrant worker was a national of one of the Member States when they were completed. Mr Buhari, who was a British subject when he completed the periods in question, is thus one of the *persons* covered by Regulation No 1408/71 by virtue of Article 2 thereof.

As regards the other provisions expressly mentioned by the national court, the Commission considers them inapplicable to Mr Buhari for the following reasons:

(i) Article 3 and the first subparagraph of Article 10(1) of Regulation No 1408/71 provide respectively for the subjection of persons residing in a Member State to the legislation of any Member State under the same conditions as the nationals thereof and to the obligation to 'export' their pensions. Those provisions refer to the present situation and not to the situation of the person concerned when he was a worker. Mr Buhari is not at present resident in the territory of a Member State;

(ii) Articles 44 to 51 of Regulation No 1408/71 are not relevant to the present case since the person concerned was subject to the legislation of only one Member State, namely Belgium. That applies also to Articles 35 to 59 of Regulation No 574/72 laying down the procedure for implementing the abovementioned provisions of Regulation No 1408/71.

The Commission therefore suggests the following answer to the first question:

'(1) The situation of a person acquiring benefits guaranteed by the legislation of a Member State in respect of work as a self-employed person in a territory which at the time had special relations with a Member State comes within the scope of Regulations Nos 1408/71 and 574/72, provided that the person concerned was a national of one of the Member States when he completed those periods of work.

(2) The pension payable under the legislation of a Member State must be paid in accordance with Articles 44 to 51 of Regulation No 1408/71 and 35 to 59 of Regulation No 574/72, provided that the person concerned has been subject to the legislation of two or more Member States.'

B — *The second and third questions*

1. Mr *Buhari* claims that his right to receive his old-age benefits is a fundamental right.

A refusal to accept that the term 'national of one of the Member States' includes former nationals of a non-founder Member State who lost the nationality of that State before

it acceded to the Community is tantamount to creating discrimination based on place of birth and residence *vis-à-vis* those who, through the vagaries of history, did not acquire a foreign nationality until after the accession of their country of origin to the EEC Treaty.

He therefore proposes the following answers to the second and third questions:

(i) 'A refusal to pay a retirement pension to a former national of a State which became a member of the EEC after his loss of the nationality of that State, on the ground of non-residence in the territory of the State where the institution responsible for payment is situated, constitutes an infringement of a fundamental human right and discrimination based on place of birth and of residence;

(ii) Article 144(2) of the Royal Decree of 22 December 1967, as amended by Article 24 of the Royal Decree of 17 July 1972 and Article 64(1) of the Royal Decree of 24 September 1984, is incompatible with the extensive interpretation which must be given to Article 2 of Regulation No 1408/71.'

2. The *Commission* refers, with respect to the second question, to the judgment in Case 1/78 *Kenny* [1978] ECR 1489, in which the Court stressed, with respect to social security, the importance of the principle laid down by Articles 7 and 48 to 51 of the EEC Treaty whereby there must be no discrimination against migrant workers. It follows that that principle is directly applicable *in the Member States* and guarantees that the conditions for entitlement to benefits are to apply without discrimination to the nationals of the Member State concerned and to those of the other Member States. According to the Commission, the rule against discrimination laid down in the Treaty is not therefore applicable in a non-member country to a national of a non-member country.

Since the circumstances of the person concerned must be assessed at the time of any discrimination, in this case the time of the refusal to pay the pension, Mr Buhari, a Nigerian national residing in Zaire, cannot invoke the Community principle of non-discrimination.

As regards the third question, the Commission emphasizes that the Belgian provisions in question provide essentially that the retirement pension is payable abroad where the person concerned resides in a country where the pension of an employed person could be paid to him under a reciprocity agreement.

It is of the opinion that, in so far as the expression 'abroad' does not include the territory of the Community, the Belgian law is not in conflict with the Community rules, since the latter do not apply to the payment of pensions in non-member countries.

The Commission therefore proposes that the second and third questions be answered as follows:

'(3) Neither the waiver of residence clauses provided for in the first subparagraph of Article 10(1) of Regulation No 1408/71 nor the principle of non-discrimination laid down in

Articles 7 and 48 to 51 of the Treaty and reiterated in Article 3(1) of Regulation No 1408/71 apply where the person acquiring the benefit does not reside in the territory of a Member State.

(4) Article 144(2) of the Royal Decree of 22 December 1967 (laying down general rules concerning retirement and survivors' pensions for self-employed persons), as amended by Article 24 of the Royal Decree of 17 July 1972 and Article 64(1) of the Royal Decree of 24 September 1984, is compatible with Community law in so far as it takes effect only outside the Community.'

M. Zuleeg
Judge-Rapporteur