JUDGMENT OF THE COURT (Fourth Chamber)

1 October 2009 *

In Case C-3/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Nivelles (Belgium), made by decision of 18 December 2007, received at the Court on 8 January 2008, in the proceedings

Ketty Leyman

v

Institut national d'assurance maladie-invalidité (INAMI),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: French.

Advocate General: M. Poiares Maduro,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 17 December 2008,

after considering the observations submitted on behalf of:

— Ms Leyman, by E. Piret, avocat,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

— the United Kingdom Government, by V. Jackson, acting as Agent, and by T. Ward, Barrister,

— the Council of the European Union, by M. Veiga and D. Canga Fano, acting as Agents,

— the Commission of the European Communities, by M. van Hoof and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns Article 40(3) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2004 L 117, p. 1; 'Regulation No 1408/71'), and the compatibility with Community law of certain aspects of Belgian legislation on invalidity benefits.

2 The reference was made in proceedings between Ms Leyman, a Belgian national, and the Institut national d'assurance maladie-invalidité (INAMI) (Belgian National Institute for sickness and invalidity insurance) regarding the date with effect from which she is entitled to receive invalidity benefit.

Legal context

Community legislation

3 Article 13 of Regulation No 1408/71 states:

'1. Subject to Articles 14c and 14f, 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 Articles 14 to 17:

(a) a person 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 or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…'

4 Article 37 of Regulation No 1408/71 provides:

‘1. An employed person or a self-employed person who has been successively or alternately subject to the legislation of two or more Member States and who has completed periods of insurance exclusively under legislation according to which the amount of invalidity benefits is independent of the duration of periods of insurance shall receive benefits in accordance with Article 39. This Article shall not affect pension increases or supplements in respect of children, granted in accordance with Chapter 8.

2. Annex IV, part A, lists legislations of the kind mentioned in paragraph 1 which are in force in the territory of each of the Member States concerned.’

5 Article 40 of Regulation No 1408/71 reads as follows:

‘1. An employed person or a self-employed person who has been successively or alternately subject to the legislation of two or more Member States, of which at least one is not of the type referred to in Article 37(1), shall receive benefits under the provisions of Chapter 3, which shall apply *mutatis mutandis*, taking into account the provisions of paragraph 4.

2. However, an employed or self-employed person who suffers incapacity to work leading to invalidity while subject to a legislation listed in Annex IV, part A, shall receive benefits in accordance with the provisions of Article 37(1) on the following conditions:

— that he satisfies the conditions of that legislation or other legislations of the same type, taking account where appropriate of Article 38, but without having recourse to periods of insurance completed under legislations not listed in Annex IV, part A, and

— that he does not satisfy the conditions required for the acquisition of the right to invalidity benefits under a legislation not listed in Annex IV, part A, and

— that he does not assert any claims to old-age benefits, account being taken of the second sentence of Article 44(2).

3. (a) For the purpose of determining the right to benefits under the legislation of a Member State, listed in Annex IV, part A, which makes the granting of invalidity

benefits conditional upon the person concerned having received cash sickness benefits or having been incapable [of] work during a specified period, where an employed person or a self-employed person who has been subject to that legislation suffers incapacity to work leading to invalidity while subject to the legislation of another Member State, account shall be taken of the following, without prejudice to Article 37(1):

(i) any period during which, in respect of that incapacity to work, he has, under the legislation of the second Member State, received cash sickness benefits, or, in lieu thereof, continued to receive a wage or salary;

(ii) any period during which, in respect of the invalidity which followed that incapacity to work, he has received benefits within the meaning of this Chapter 2 and of Chapter 3 that follows, of the Regulation granted in respect of invalidity under the legislation of the second Member State.

as if it were a period during which cash sickness benefits were paid to him under the legislation of the first Member State or during which he was incapable [of] working within the meaning of that legislation.

(b) The right to invalidity benefits under the legislation of the first Member State shall be acquired either upon expiry of the preliminary period of compensation for sickness, as required by that legislation, or upon expiry of the preliminary period of incapacity to work as required by that legislation, but not before:

(i) the date of acquisition of the right to invalidity benefits referred to in subparagraph (a)(ii) under the legislation of the second Member State,

or

(ii) the day following the last day on which the person concerned is entitled to cash sickness benefits under the legislation of the second Member State.

4. A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislation of these States on conditions relating to the degree of invalidity is acknowledged in Annex V.'

6 Annex IV, part A, to Regulation No 1408/71 refers to the general invalidity scheme as one of the forms of legislation in force of the type covered by Article 37(1) of that regulation, but does not refer to the Luxembourg scheme.

7 Annex V to that regulation acknowledges that there is concordance between the Belgian general invalidity scheme and the Grand Duchy of Luxembourg's manual workers' and clerical staff invalidity scheme with regard to the conditions governing the degree of invalidity.

The Belgian and Luxembourg legislation

8 Under Article 87 of the Belgian Law of 14 July 1994 on compulsory medical care and sickness benefit insurance (loi du 14 juillet 1994, relative à l'assurance obligatoire soins de santé et indemnités) ('the Law of 1994'):

'A beneficiary… who is incapable of work …, shall receive an allowance called "the primary incapacity allowance" for each working day over a period of one year running from the starting date of his incapacity to work.'

9 Article 93 of the Law of 1994 states:

'If the incapacity to work extends beyond the primary incapacity period, for each working day of the incapacity to work …, an allowance called "invalidity allowance" shall be paid.'

10 Under Belgian law, invalidity benefits are independent of the duration of the periods of insurance of the person concerned.

11 Under Luxembourg law, where invalidity is immediately recognised as definitive or permanent, the right to an invalidity pension is acquired as soon as professional activity ceases. The amount of the invalidity allowance is based on the duration of the period of insurance.

12 The Belgian-Luxembourg Agreement on Social Security for Frontier Workers and Final Protocol (la convention belgo-luxembourgeoise sur la sécurité sociale des travailleurs frontaliers et protocole final), signed at Arlon on 24 March 1994 and ratified by the Law of 28 April 1995, (*Moniteur belge* of 7 June 1995, p. 16139), provides, for frontier workers only, for payment of Belgian invalidity benefit before the end of the period of primary incapacity.

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

13 Ms Leyman was employed in Belgium from 1971 until 2003. Since 1999, she has been living in Luxembourg and, since August 2003, has been subject to the Luxembourg social security system.

14 On 8 July 2005, Ms Leyman was found to be incapable of work by the competent Luxembourg authorities for the period from 8 July 2005 until 29 February 2012, the date when she becomes entitled to an old-age pension. She was therefore granted an invalidity allowance in respect of the periods of insurance completed in Luxembourg. The monthly amount of the allowance granted by the Luxembourg institution is EUR 322.83.

15 Having received an application from Ms Leyman for payment of invalidity allowances in respect of the periods of insurance completed in Belgium, the INAMI, by decision of 23 June 2006, granted that allowance in the monthly amount of EUR 737.10 with effect from 8 July 2006, in accordance, in the view of that institute, with Article 40(3)(b) of Regulation No 1408/71 and Article 93 of the Law of 1994.

16 Ms Leyman brought an appeal before the referring court against the decision of the INAMI, requesting that the payment of the invalidity allowance thus granted to her be made with effect from 8 July 2005.

17 It is in those circumstances that the Tribunal de travail de Nivelles decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are Article 40(3)(b) of Regulation … No 1408/71 and Article 93 of the [Law of 1994] contrary to Article 18 of the EC Treaty in that, where a worker lives and works in a type A country (in this case, Belgium) and moves to a type B country (in this case, the Grand Duchy of Luxembourg), they do not permit, during the first year of incapacity to work, the grant of an allowance that takes into account the length of time worked and the period of contribution in the type A country (Belgium)?

2. Are Article 40(3)(b) of Regulation … No 1408/71 and Article 93 of the [Law of 1994] contrary to Article 18 of the EC Treaty in that, where a worker lives and works in a type A country (in this case, Belgium) and moves to a type B country (in this case, the Grand Duchy of Luxembourg), they give rise to discrimination to the detriment of a worker exercising her right of free movement in not permitting the grant to her, during the first year of incapacity to work, of an allowance that takes into account the length of time worked and the period of contribution in the type A country (Belgium)?'

The questions referred

18 As a preliminary point, it is appropriate to note that, although the questions referred by the national court make reference to Article 18 EC, a situation such as that in the main proceedings concerns Articles 39 EC and 42 EC.

19 It is apparent both from the order for reference and from the observations submitted to the Court that Ms Leyman moved to Luxembourg to take up employment there.

20 According to settled case-law, Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to freedom of movement for workers (see Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 66, and Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 61).

21 In those circumstances, the questions referred must be understood as asking, essentially, whether Articles 39 EC and 42 EC are to be interpreted as precluding a condition such as that laid down in Article 93 of the Law of 1994, in compliance with Article 40(3)(b) of Regulation No 1408/71, in that it results in a situation where a person such as Ms Leyman, who, after having lived and worked in Belgium — a Member State whose legislation is of type A — moved to another Member State, whose legislation is of type B, being deprived of any allowance paid by the competent institution of the first Member State for the first year of incapacity to work and in that it thus creates discrimination to the detriment of a worker who exercises his right to freedom of movement.

22 In that regard, it must be noted at the outset that Regulation No 1408/71, with a view to coordinating the invalidity insurance schemes of the Member States, draws a distinction according to whether a worker has been subject only to legislation under which the amount of benefits is independent of the periods of insurance ('type A' legislation) — the situation referred to in Articles 37 to 39 of that regulation — or whether he has been subject either only to legislation under which the amount of benefits depends on that period ('type B' legislation), or to both types of legislation, the situation referred to in Article 40 of that regulation.

23 Workers who are in the situation referred to in Article 40 of Regulation No 1408/71 receive invalidity benefits in accordance with the provisions of that regulation concerning old age and death, which are applicable by analogy.

24 Although the system laid down for workers in the situation covered by Articles 37 to 39 of Regulation No 1408/71 implies, so far as relevant to the present case, that only one Member State is to determine, in accordance with its legal order, the entitlement to invalidity benefits and is to pay them, the system laid down for workers in the situation covered by Article 40 of that regulation implies, in principle, that the invalidity benefits must be paid having regard to all the different legislation to which the worker is subject and, if appropriate, that that worker receives from each Member State concerned invalidity benefit calculated, in accordance with the rules set out in Article 46 of that regulation, on the basis of the periods of insurance completed under its legislation.

25 In the main proceedings, since the applicant has been subject to type A legislation, that is to say, the Belgian invalidity insurance scheme, and to type B legislation, that is to say, the Luxembourg invalidity insurance scheme, calculations have been carried out and payment has been made, in accordance with Article 46 of Regulation No 1408/71, by the competent authorities in Belgium and Luxembourg, who were able to determine the monthly amount of invalidity benefit due from each of them which, moreover, is not disputed by the parties to the main proceedings.

26 Nevertheless, those authorities do not agree as regards the date from which the invalidity benefit due in Belgium should be paid.

The Belgian sickness-invalidity insurance scheme and the primary incapacity allowance

27 It is apparent from the order for reference and from the observations submitted to the Court, in particular by the Belgian Government, that the system in force in Belgium organises sickness insurance and invalidity insurance under a single scheme, so that a worker who has become incapable of work first comes under a scheme for temporary incapacity then, only after a certain period, comes under a scheme intended to cover total or partial long-term, or definitive, incapacity.

28 In particular, in Belgium, a worker who is incapable of work is first covered by a sickness insurance scheme for one year, during which time he receives a 'primary incapacity' allowance. Subsequently, that is to say, after the end of that period, if the worker is still incapable of work, he is subject to an invalidity insurance scheme and receives an invalidity allowance.

29 That system therefore does not draw a distinction with regard to the worker's incapacity as between temporary incapacity, such as illness, on the one hand, and definitive incapacity, such as invalidity, on the other. Temporary incapacity and invalidity are distinguished only by the fact that the latter constitutes a prolongation beyond a period of one year of the worker's incapacity.

30 Conversely, the Luxembourg system distinguishes between sickness insurance and invalidity insurance so that, if the worker is deemed to be temporarily incapable of work, he is covered by the sickness insurance scheme which entitles him to sickness allowances, whereas if he is deemed to be definitively or permanently incapable of work, he is covered by an invalidity insurance scheme which entitles him to invalidity allowances.

31 It follows that, in systems where sickness insurance and invalidity insurance are combined, such as the Belgian system, there is no provision for the recognition of invalidity without there first being a period of incapacity and, consequently, that recognition granted in another Member State, such as the Grand Duchy of Luxembourg, presents difficulties in the coordination of the social security systems where, as in the main proceedings, payments must be made under the different systems by application of the rules in Articles 40 and 46 of Regulation No 1408/71.

32 Although, under the Luxembourg legislation, the right to invalidity allowance is acquired from the first day of incapacity to work, payment of that allowance does not begin, under application of the Belgian legislation, until one year has expired, during which time a worker resident in Belgium who is incapable of work receives a primary incapacity allowance.

33 In such situations, the competent authorities in Belgium take the view that Article 40(3)(b) of Regulation No 1408/71 must be interpreted as meaning that the right to Belgian invalidity benefit is acquired after expiry of the period of primary incapacity of one year. In addition, those authorities do not grant workers any allowance in respect of that incapacity.

Article 40(3)(b) of Regulation No 1408/71

34 Article 40(3) of Regulation No 1408/71 covers the situation of a worker who was subject in a Member State to type A legislation, which makes the grant of invalidity benefits subject to the condition that, for a specified period, the worker has received cash sickness benefits or has been incapable of work, where that worker suffers from incapacity to work leading to invalidity while subject to the legislation of another Member State.

35 The coordination provided for by Article 40(5) requires, firstly, that account must be taken of any period during which, in respect of that incapacity to work, he has, under the legislation of the second Member State, received either cash sickness benefits, or continued to receive a wage or salary, or invalidity benefits which followed that incapacity to work, as if it were a period during which cash sickness benefits were paid to him under the legislation of the first Member State or during which he was incapable of working within the meaning of that legislation (Article 40(3)(a) of Regulation No 1408/71).

36 Secondly, it requires that the right to invalidity benefits under the legislation of the first Member State be acquired either upon expiry of the preliminary period of compensation for sickness or upon expiry of the preliminary period of incapacity to work, as required by that legislation, but not before the date of acquisition of the right to invalidity benefits which followed the incapacity to work under the legislation of the second Member State, or the day following the last day on which the person concerned is entitled to cash sickness benefits under the legislation of the second Member State (Article 40(3)(b) of that regulation).

37 Thus there are two different types of rules for coordination.

38 On the one hand, the rule laid down in Article 40(3)(a) of Regulation No 1408/71 merges and groups the events which occurred in the periods completed under the legislation of the second Member State in order to establish whether the conditions set by the legislation of the first Member State for acquisition of the right to invalidity benefits are met.

39 On the other hand, the rule set out in Article 40(3)(b) of Regulation No 1408/71 fixes a time-limit for the acquisition of the right to invalidity benefits in the first Member State

by recognising, in particular, that that State may make the grant of those benefits subject to the expiry of an initial period during which the person concerned has either been incapable of work or has received cash sickness benefits, which entitlement the Belgian legislature has used by providing, in Article 93 of the Law of 1994, for the expiry of a period of primary incapacity of one year before the right to such benefits is acquired.

Freedom of movement for workers

40 As regards freedom of movement for workers, Article 42 EC leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 42 EC (see Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 12, and Case C-165/91 *van Munster* [1994] ECR I-4661, paragraph 18).

41 It is not, however, in dispute that the aim of Article 39 EC would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22, and *van Munster*, paragraph 27).

42 In the present case, although Articles 87 and 93 of the Law of 1994 do not draw a distinction between workers who have exercised their right to freedom of movement and those who have not done so, application of those articles nevertheless causes a disadvantage for the first year for workers who are in a situation such as that of the applicant in the main proceedings compared with workers who are also definitively or permanently incapable of work but who have not exercised their right to freedom of movement.

43 Although the latter workers have the right to primary incapacity allowance in Belgium, Ms Leyman has the right neither to that allowance nor to another analogous allowance in Luxembourg, having regard to the fact that she already receives invalidity benefit in that Member State.

44 In addition, since payment of the invalidity allowance in respect of the periods of work completed and contributions paid in Belgium does not begin until the period of one year's primary incapacity has elapsed, application of Articles 87 and 93 of the Law of 1994 as advocated by the Belgian competent authorities means that workers who are in a situation such as that of Ms Leyman have paid social contributions on which there is no return so far as the first year of incapacity is concerned.

45 The Court has already held, in this respect, that the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, even where its application is less favourable, such legislation is still compatible with Articles 39 EC and 43 EC if it does not place the worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return (see Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51, and Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34).

46 In a situation such as that in the main proceedings, if application of Articles 87 and 93 of the Law of 1994 as advocated by the competent authorities in Belgium leads to a refusal to grant, for the first year of incapacity, any benefit to a worker who has exercised his right to freedom of movement, it must be held that such an application is contrary to Community law, given that, firstly, it places that worker at a disadvantage in relation to those who are in the same situation of definitive incapacity to work but who have not

exercised their right of freedom of movement and, secondly, it results in payment of social contributions on which there is no return.

47 It must also be borne in mind that since, in accordance with Article 40(4) of Regulation No 1408/71, provided that the concordance between the Belgian general invalidity scheme and the Luxembourg scheme on conditions relating to the degree of invalidity is acknowledged in Annex V of Regulation No 1408/71, a decision taken by the competent authorities in Luxembourg concerning that degree of invalidity is to be binding on the competent authorities in Belgium.

48 In the present case, application of the national legislation at issue in the main proceedings to a migrant worker in the same way as to a non-migrant worker gives rise to unforeseen consequences, hardly compatible with the aim of Article 39 EC and attributable to the very fact that the migrant worker's entitlement to invalidity benefits are governed by two different bodies of legislation, as is apparent from paragraphs 28 to 33 of this judgment (see, by analogy, *van Munster*, paragraph 30).

49 Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 10 EC requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 39 EC (see *van Munster*, paragraph 32).

50 In the light of all the foregoing, the answer to the questions referred is that Article 39 EC must be interpreted as precluding application by the competent authorities of a Member State of national legislation which, in accordance with Article 40(3)(b) of Regulation No 1408/71, makes acquisition of the right to invalidity benefits subject to the condition that a period of primary incapacity of one year has elapsed, where such application has the result that a migrant worker has paid into the social security scheme of that Member State contributions on which there is no return and is therefore at a disadvantage by comparison with a non-migrant worker.

Costs

51 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 (Fourth Chamber) hereby rules:

Article 39 EC must be interpreted as precluding application by the competent authorities of a Member State of national legislation which, in accordance with Article 40(3)(b) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, makes acquisition of the right to invalidity benefits subject to the condition that a period of primary incapacity of one year has elapsed, where such application has the result that a migrant worker has paid into the social security scheme of that Member State contributions on which there is no return and is therefore at a disadvantage by comparison with a non-migrant worker.

[Signatures]