JUDGMENT OF THE COURT (Second Chamber)
9 July 1987 *

In Joined Cases 82 and 103/86

REFERENCES to the Court under Article 177 of the EEC Treaty by the Tribunal du travail (Labour Tribunal), Brussels, and the Cour du travail (Labour Court), Mons, for a preliminary ruling in the proceedings pending before those courts between, on the one hand,

Giancarlo Laborero (Case 82/86), plaintiff before the Tribunal du travail, Brussels,

and

Francesca Sabato (Case 103/86), appellant before the Cour du travail, Mons,

and, on the other hand,

Office de sécurité sociale d'outre-mer (OSSOM) (Overseas Social Security Office), defendant and respondent respectively,

on the interpretation 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 (Official Journal, English Special Edition 1971 (II), p. 416), as amended, in particular, by Council Regulation (EEC) No 1390/81 of 12 May 1981 extending Regulation No 1408/71 to self-employed persons and members of their families (Official Journal 1981, L 143, p. 1),

THE COURT (Second Chamber),

composed of: T. F. O'Higgins, President of Chamber, O. Due and K. Bahlmann, Judges,

* Language of the Case: French.

Advocate General: J. Mischo
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Giancarlo Laborero and Francesca Sabato, the plaintiffs in the main proceedings in Case 82/86 and Case 103/86 respectively, by D. Rossini, a trade union delegate,

the Office de sécurité sociale d'outre-mer, the defendant in the main proceedings, by its advisers, M. Waelbroeck and M. Van der Haegen, of the Brussels Bar,

the Belgian Government by R. Hoebaer, Director of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries,

the Italian Government, by L. Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislation at the Ministry of Foreign Affairs and by P. G. Ferri, Avvocato dello Stato, acting as Agent,

the Commission of the European Communities, by Mrs Wolfcarius, a member of its Legal Department,

having regard to the Report for the Hearing and further to the hearing on 19 March 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 June 1987,

gives the following

Judgment

1 By a judgment dated 3 March 1986, which was received at the Court on 18 March 1986, and by a judgment dated 25 April 1986, which was received at the Court on 30 April 1986, the Tribunal du travail, Brussels, and the Cour du travail, Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 1 (a) and (j), 2, 3 (1) and 4 (2) 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 (Official Journal, English Special Edition 1971 (II), p. 416), as amended, in particular, by Council Regulation (EEC) No 1390/81 of 12 May 1981 extending Regulation No 1408/71 to self-employed persons and members of their families (Official Journal 1981, L 143, p. 1).

2 Those questions were raised in two sets of proceedings before those national courts between, on the one hand, Giancarlo Laborero and Francesca Sabato, and, on the other hand, the Office de sécurité sociale d'outre-mer (Overseas Social Security Office), a public institution governed by Belgian law, concerning that institution's refusal to link to the Belgian consumer price index the benefits which it pays to them under the Law of 17 July 1963 on overseas social security.

3 That law, according to Article 12 thereof, establishes a voluntary scheme of old-age, survivors', sickness, invalidity and health-care insurance open to persons pursuing occupations in countries other than the Member States of the European Economic Community.

4 Chapter VI of the law regulates the adaptation of benefits to the cost of living. However, according to Article 51 of the law, the provisions of that chapter are not applicable to recipients possessing foreign nationality unless they are claiming under an insured person of Belgian nationality and reside in Belgium or unless they are nationals of a country which has entered into a reciprocal agreement by virtue of which the aforesaid provisions are rendered applicable to them.

5 Mr Laborero, an Italian national residing in Belgium, worked in the Belgian Congo from 1953. He continued to work there after the country gained its independence on 1 July 1960 and became the Republic of Zaïre. He was insured under

the overseas social security scheme established by the Law of 17 July 1963. From 1968 he worked in Belgium where he retired in 1982. For his period of employment in the Republic of Zaïre, the Overseas Social Security Office granted him, pursuant to the Law of 17 July 1963, a pension which, pursuant to Article 51 of that law, was not index-linked.

6 Considering that the refusal to grant him the benefit of index-linking constituted discrimination incompatible with Regulation No 1408/71, Mr Laborero brought the matter before the Tribunal du travail, Brussels, which referred the following question to the Court for a preliminary ruling:

'In view in particular of the second indent of Article 1 (a) (ii) ("... insured ... compulsorily or on an optional continued basis ...") and the second indent of subparagraph (iv) ("if such person has previously been compulsorily insured for the same contingency under a scheme for employed persons of the same Member State") and Article 4 (2) (dealing with general and special social security schemes, whether contributory or non-contributory), does the Belgian Law of 17 July 1963 on overseas social security, in particular the first paragraph of Article 51, come within the scope of Regulation (EEC) No 1408/71 of the Council, in particular Article 3 (1)?

If it does not come within the scope of that regulation, does the present formulation of the disputed interpretation of that Belgian legislation constitute "discrimination on grounds of nationality" referred to in the first paragraph of Article 7 of the EEC Treaty or is it contrary to the letter or spirit of Article 51 of the EEC Treaty?'

7 Mrs Sabato, likewise an Italian national residing in Belgium, is the widow of an Italian national who worked in the Republic of Zaïre from 1968 until his death in 1970. During that period he contributed to the overseas social security scheme established by the Law of 17 July 1963. The Overseas Social Security Office granted the widow a survivor's pension which, pursuant to Article 51 of the law, was not index-linked.

8 Considering that the fact that her pension was not index-linked constituted discrimination incompatible with Regulation No 1408/71 Mrs Sabato brought the matter before the Tribunal du travail, Charleroi, and then, on appeal, before the Cour du travail, Mons, which referred the following question to the Court for a preliminary ruling:

'Does the optional supplementary scheme established by the Law of 17 July 1963 for the provision of benefits in relation to an activity pursued in a completely independent country such as Zaïre fall within the scope of Regulation No 1408/71 and is Article 51 of that Law compatible with Article 51 of the Treaty of Rome?'

9 By an order of 3 October 1986 the Court joined the two cases for the purposes of the oral procedure and the judgment.

10 Reference is made to the Report for the Hearing for a fuller account of the national legislation in question, the facts of the cases before the national courts and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It must be borne in mind first of all that, under Article 3 (1) of Regulation No 1408/71, persons resident in the territory of one of the Member States to whom the regulation applies are to enjoy the same benefits under the legislation of any Member State as the nationals of that State.

12 The main purpose of the questions submitted by the national courts is therefore to enable them to determine whether the provisions of Regulation No 1408/71 are applicable to the plaintiffs in the cases before them.

13 According to Article 2 (1) of Regulation No 1408/71, the regulation applies in particular to employed or self-employed persons who are, or have been, subject to the legislation of one or more Member States and who are nationals of one of the Member States as well as to their survivors.

14 It appears from the judgments referring the questions to the Court and from the oral argument presented before it that both the Overseas Social Security Office and the Belgian Government consider that the situations of the two plaintiffs in the main proceedings do not correspond to the concept of 'worker' (or survivor of a worker), as defined in Article 1 (a) of the regulation and that the Law of 17 July 1963 cannot be regarded as 'legislation' of a Member State within the meaning of Article 1 (j) of the regulation.

The concept of 'worker'

15 In view of the optional nature of the scheme in question, reference must be made to Article 1 (a) (iv) of Regulation No 1408/71, which provides that 'worker' means, in particular, any person

'... who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:

if such person carries out an activity as an employed or self-employed person, or

...'.

16 The Belgian Government contends that the voluntary insurance scheme established by the Law of 17 July 1963 does not come under 'a social security scheme of a Member State for employed or self-employed persons', since it is an independent scheme, unconnected with the general Belgian scheme of social security and covering persons totally different from those covered by that general scheme.

17 That argument cannot be upheld. According to Article 4 (2) of Regulation No 1408/71, the regulation applies to all general and special social security schemes. A voluntary insurance scheme governing matters which fall unquestionably within those covered by the regulation, as defined in Article 4 (1), cannot thus be removed from the ambit of the regulation merely because it is independent of a general scheme or because employed persons must fulfil special conditions in order to join the scheme.

18 The Overseas Social Security Office and the Belgian Government also contend that an insured person or a person claiming under that person who, at the time when the application for benefit is made, is no longer carrying out an activity as an employed or self-employed person, cannot satisfy the condition laid down in the first indent of the provision cited above.

19 That argument cannot be accepted either. According to Article 2 (1) of Regulation No 1408/71, the regulation applies to workers who are or have been subject to the legislation of a Member State and to their survivors. It follows that the status of worker is a matter which must be determined in relation to the period in which the insured person participated in the social security scheme in question. This situation cannot be different as regards the types of insurance in question in this case since survivors' pensions cannot, by their nature, be awarded until after the cessation of the activity conferring entitlement to the pension whilst old-age pensions are meant to compensate for retirement from an occupation which normally takes place at a certain age.

20 The answer to be given to the national courts must therefore be that a person insured under a voluntary insurance scheme such as that established by the Belgian Law of 17 July 1963 who, during the period in which he participated in that insurance scheme, pursued an activity as an employed or self-employed person is to be regarded as a 'worker', and the survivor of such a person as the survivor of a worker for the purposes of Regulation No 1408/71.

Scope of application of the regulation and the concept of 'legislation of a Member State'

21 The Overseas Social Security Office and the Belgian Government point out that the scheme established by the Law of 17 July 1963 concerns exclusively periods of activity in non-member countries and contend that such a scheme cannot therefore be covered by Regulation No 1408/71 as 'legislation of a Member State'; according to its title, that regulation concerns workers moving within the Community and its territorial scope of application cannot be wider than that of the EEC Treaty whose application, according to Article 227, is limited to the territories of the Member States.

22 In reply to that argument it must be pointed out first of all that Article 1 (j) of Regulation No 1408/71 provides that the term 'legislation' means 'in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4 (1) and (2)'.

23 As the Court held in its judgment of 31 March 1977 in Case 87/76 *Bozzone* v *Office de sécurité sociale d'outre-mer* [1977] ECR 687, that definition of the term 'legislation' is very broad, covering all provisions laid down by law, regulation and administrative action by the Member States, and must be understood as covering all the national measures applicable to the matter.

24 In the light of that consideration and as the Court stated in its judgment of 23 October 1986 in Case 300/84 *van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097, the essential criterion for determining the scope of the term 'legislation' is not the place in which the occupation was pursued but the link which exists between the worker, regardless of the place in which he pursued or is pursuing his occupation, and the social security scheme in a Member State under which he has completed periods of insurance.

25 Since the decisive criterion is the affiliation of an insured person to a social security scheme of a Member State, the fact that the insurance periods completed under that scheme were completed in non-member countries is unimportant.

26 It follows that national rules such as those contained in the Belgian Law of 17 July 1963 establishing a social security scheme which is administered under the supervision of the Belgian State by a public institution governed by Belgian law, constitutes 'legislation' within the meaning of Article 1 (j) of Regulation No 1408/71 and that such a scheme is not removed from the scope of application of that regulation and in particular from the principle of equal treatment expressed in Article 3 (1) thereof merely because the benefits provided for can be based only on insurance periods completed outside the Community.

27 That conclusion does not conflict in any way with the provisions restricting the territorial scope of application of the EEC Treaty. Regulation No 1408/71 imposes requirements with regard to that scheme only in so far as the scheme produces effects within the Community.

28 The answer to be given to the national courts must therefore be that national rules such as those laid down in the Law of 17 July 1963 are covered by Regulation No 1408/71 as legislation of a Member State, even if the benefits for which they provide can be based only on periods of activity completed in non-member States, and the provisions of Regulation No 1408/71, in particular Article 3 (1), are applicable to workers who are, or have been, subject to such rules.

Costs

29 The costs incurred by the Belgian Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since the proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions submitted to it by the Tribunal du travail, Brussels, and the Cour du travail, Mons, by judgments of 3 March 1986 and 25 April 1986 respectively, hereby rules:

(1) A person insured under a voluntary insurance scheme such as that established by the Belgian Law of 17 July 1963 who, during the period in which he participated in that insurance scheme, pursued an activity as an employed or self-employed person is to be regarded as a 'worker', and the survivor of such a person is to be regarded as the survivor of a worker for the purposes of Regulation No 1408/71;

(2) National rules such as those laid down in the Law of 17 July 1963 are covered by Regulation No 1408/71 as legislation of a Member State, even if the benefits for which they provide can be based only on periods of activity completed in non-member States, and the provisions of Regulation No 1408/71, in particular Article 3 (1), are applicable to workers who are, or have been, subject to such rules.

O'Higgins Due Bahlmann

Delivered in open court in Luxembourg on 9 July 1987.

P. Heim
Registrar

T. F. O'Higgins
President of the Second Chamber