OPINION OF ADVOCATE GENERAL LENZ

delivered on 9 July 1992 *

Mr President,
Members of the Court,

A — Introduction

1. The request for a preliminary ruling before the Court was referred by the Tribunal du Travail (Labour Court), Brussels. It relates to the applicability from the point of view of Community law of the Belgian rules on the use of languages in court proceedings.

2. The applicant in the main proceedings is a Belgian national. He applied for a retirement pension from a Belgian institution in respect of periods of employment in Belgium, Office National des Pensions (ONP) [National Pensions Office], the defendant in the main proceedings, refused to grant him the pension. He brought an action against that decision refusing him a pension by originating application drawn up in French. According to the national procedural rules, he should have brought those proceedings in Dutch, as a result of which the national court was bound to declare the application void of its own motion under the national legislation.

3. The national court wishes to establish for the purposes of determining the proceedings whether Article 2 of Regulation (EEC) No 1408/71 [1] is to be interpreted as meaning that that regulation — in particular and/or only Article 84(4) thereof — applies to workers who have been subjected to the legislation of only one Member State, namely the legislation of the State of which they are nationals and in whose territory they have resided and worked.

4. Secondly, it wishes to establish whether Article 3 of Regulation No 1408/71 is to be interpreted as prohibiting discrimination both for and against nationals of a Member State in relation to nationals of other Member States who have established themselves in the territory of the State in question.

5. Thirdly, it asks whether Article 48(1) and Article 51 of the EEC Treaty must be interpreted as meaning that the free movement of workers must be secured, not only as between the Member States of the Community, but also within those States, with the result that measures adopted to establish free movement, in particular Article 84(4) of Regulation No 1408/71, also apply to workers who avail themselves of the right to free movement by residing successively within a single Member State of which they are nationals in several judicial districts in which different legal rules apply, in particular as regards the language of originating applications in the courts having jurisdiction to hear actions in the fields covered by Article 4 of Regulation No 1408/71.

* Original language: German.

1 — In the version in Council Regulation (EEC) No 2001/83 of 2 June 1983 OJ 1983 L 230, p. 6.

6. I would refer to the Report of the Judge-Rapporteur for the wording of the questions and the abovementioned provisions of secondary Community legislation and of the national law.

7. In its observations on the request for a preliminary ruling, the defendant in the main proceedings stated that it rejected the pension application on the ground of the principle of the single career in view of the applicant's pension rights under the insurance scheme of officials of the European Communities. That statement by the applicant constitutes, in that party's submission, a connecting factor showing that there is a Community aspect to the applicant's career.

8. It appears from case-file of the national court, which the Court asked to be forwarded to it, that the applicant worked for 29 years at the Council of the European Communities.

9. I would refer to the Report of the Judge-Rapporteur for further details of the facts, the applicable legislation and the arguments of the parties.

B — Appraisal

10. In order to answer the national court's questions, it is necessary first to ascertain whether Community law applies to circumstances such as those underlying the main proceedings.

11. The national court mentions that the national legislation might impede the free movement of workers within the territory of Belgium. It therefore asks whether provisions of Community law do not have primacy over national provisions.

12. According to the *national court*, the situation in question is purely internal. Consequently, the legal position has first to be considered on the basis of that description of the situation.

13. In the Community legal system there is a principle that Community law does not apply to purely internal situations, and that nationals cannot demand equal treatment with Community nationals from other Member States. [2] On the other hand, nationals may indeed rely on provisions of Community law where their situation involves a specifically Community aspect. [3] Generally, such situations extend beyond frontiers, whether owing to the acquisition of a situation protected by Community law or to the exercise of acquired rights.

2 — See the judgments in Case 175/78 *Saunders* [1979] ECR 1129, in Case 180/83 *Moser* v *Land Baden-Württemberg* [1984] ECR 2539, in Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 251 and in Joined Cases 35 and 36/82 *Morson and Jhanjan* v *Netherlands* [1982] ECR 3723.

3 — See, for example, the judgments in Case 115/78 *Knoors* v *Staatssekretär für Wirtschaft* [1979] ECR 399, in Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, in Case 354/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, in Case 254/84 *De Jong* v *Sociale Verzekeringsbank* [1986] ECR 671 and in Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391.

14. It can be stated that a Community national need not necessarily have exercised his right to free movement as a worker in the context of his working life in order to fall within a situation governed by Community law. Nevertheless, the situations in question invariably involve a transfrontier element. [4]

15. In its written observations, the Commission takes the view that in order for Community law to be applicable it does not necessarily mean that the worker has to have exercised his right to free movement, but there has to be a 'European aspect'. There is no such 'European aspect' in this case, according to the facts set out by the *national court*. The question is therefore focused on whether Article 84(4) of Regulation No 1408/71 is nevertheless applicable, and if so under what conditions. It is therefore necessary to interpret that provision within the context of the regulation.

16. The starting point should be the legal basis and aims of Regulation No 1408/71. Article 51 of the EEC Treaty, the legal basis of the regulation, reads as follows:

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States'.

17. Rights for individuals cannot be derived directly from Article 51 of the EEC Treaty. On the contrary, measures to implement that article have been necessary in order to create directly applicable rights.

18. On the basis of that article, the Council adopted Regulation No 1408/71, whose preamble contains the following recitals:

'Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that *the Regulation applies to all nationals of Member States* [5] insured under social security schemes for employed persons;

Whereas the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute

4 — See footnote 3.

5 — My emphasis.

towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community firstly *equality of treatment for all nationals of Member States* under the various national legislations and secondly social security benefits for workers and their dependants regardless of their place of employment or of residence.'

19. The interpretation of individual articles of the regulation cannot be divorced from that definition of its aims.

20. The scope *ratione personae* of the regulation is defined by Article 2(1) as follows:

'This Regulation shall *apply 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* ...'. [6]

21. Entirely isolated from its context, that provision could be understood (within the scope *ratione materiae* of the regulation, as defined in Article 4) as a legal basis allowing the regulation to be relied upon in all internal situations. However, that would not be warranted. Regulation No 1408/71 is simply a coordinating regulation which has no bearing on the structure of insurance relationships. [7]

22. It is neither necessary nor justified to bring into application a rule of Community law in social insurance situations exclusively governed by domestic law. So long as there is no legal basis under Community law enabling rules of Community law to come into play, recourse to provisions of Community law constitutes unlawful interference with the powers of the Member States and hence with the division of powers as between the Community and the Member States.

23. Those considerations should be taken into account in defining the scope *ratione personae* of Regulation No 1408/71. This is why a transfrontier or a European factor is required in the situation in question in order for the Community regulation to be applicable. That Community factor may vary according to the circumstances and according to the benefit claimed. In the case of, for instance, a claim for family benefits, [8] the determining criteria may differ from those applicable where the claim is for a pension. [9]

24. As far as concerns the applicability of Article 84(4) of Regulation No 1408/71, the Court has already defined the criteria in the

6 — My emphasis.

7 — Judgments in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611 and in Case C-245/88 *Daalmeijer* [1991] ECR I-555.

8 — Judgment in Case 313/86 *Lenoir* [1988] ECR 5391.

9 — Judgments in Case 254/84 *De Jong* [1986] ECR 671 and in Case 284/84 *Spruyt* [1986] ECR 685.

judgment in *Maris*. [10] The Court held as follows in that judgment:

'Nevertheless it must be pointed out that Article 84(4) only applies to claims submitted by persons to whom Regulation No 1408/71 applies and to the documents produced in support of their rights and does not apply to the general procedure, which remains governed by the domestic laws of each State.' [11]

25. The Court went on to state in the judgment in *Maris* that

'It must further be stressed that *Article 84(4) is only applicable for the benefit of workers who have moved* between two or more Member States and of their dependants and, furthermore, that the provision in question only relates to the procedures for the implementation of Community rules in the field of social security and thus to the exclusion of other disputes in which a worker may possibly be involved.' [12]

26. According to the national court's description in the judgment for reference of the situation on which it has to rule, *the applicant never moved* between two or more Member States; neither can it be seen what provisions of Community law on social security are applicable in this case. Consequently the applicant does not fall within the scope *ratione personae* of Regulation No 1408/71 and accordingly cannot rely on Article 84(4) of that regulation.

27. The answer to be given to the national court should therefore be that, in the absence of a Community factor, Article 84(4), in conjunction with Article 2, of Regulation No 1408/71 is not applicable to workers who are subject solely to the legislation of the Member State of which they are nationals and in whose territory they have resided and worked; that Article 3 of that regulation does not allow nationals of a Member State to claim equal treatment with migrant workers; and lastly that the provisions of Community law adopted for the purposes of establishing free movement of workers do not apply to domestic situations or to administrative provisions which hamper free movement within the territory of a single State.

28. *II* — The only question which arises relates to how the Court should deal with the fact, *which was raised by the defendant in the main proceedings*, that the applicant has pension rights under the insurance scheme for officials of the European Communities on account of the fact — which is apparent from the documents forwarded by the national court — that he worked for

10 — Judgment in Case 55/77 *Maris* v *Rijksdienst voor Werknemerspensioenen* [1977] ECR 2327.

11 — See paragraphs 6 to 14.

12 — *Ibid*, my emphasis.

29 years at the Council of the European Communities.

29. It seems clear to me that the Court cannot simply ignore that factor or not take notice of it. If that were so, it would not have been necessary to ask the parties to the main proceedings for explanations. If they are entitled to give explanations, those explanations ought also to be taken into account. Any other manner of proceeding would be contrary to the principle of the right to a fair hearing, which the Court, too, has to respect.

30. It is for that reason that the Court took account of the defendant's remark concerning the Communities' insurance scheme, and asked the national court to forward the case-file.

31. However, the fact that the Court should take cognizance of that factor does not mean that it has to make that factor the basis for its decision. The Court is bound, on the one hand, by the national court's reference for a preliminary ruling and, on the other, by its Rules of Procedure. The national court's reference for a preliminary ruling does not mention the fact — which may be relevant from the point of view of Community law — that the applicant has pension rights under the insurance scheme for officials of the European Communities, where he worked for 29 years. However, only that fact makes the questions comprehensible; without it, it is impossible to understand the national court's questions. The United Kingdom has drawn attention to that difficulty in its observations.

32. On the other hand, it must be held that, if the national court does not mention a fact, those authorized to express their views in the preliminary ruling procedure cannot make observations on it. As the Court has to base its judgment in preliminary ruling proceedings only on the facts on which the parties authorized to intervene have been able to submit observations, the facts notified by the defendant in the main proceedings and supplemented by the case-file cannot serve as the basis for the Court's judgment. To proceed otherwise would also infringe the principle of the right to a fair hearing.

33. Therefore the fact in question should be disregarded in answering the national court's questions.

Costs

34. Since the 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.

35. Costs cannot be awarded to the Kingdom of Belgium and the United Kingdom.

C — Conclusion

36. I therefore propose that the Court should reply to the national court's questions as follows:

(1) In the absence of a Community aspect, Article 84(4), in conjunction with Article 2, of Regulation (EEC) No 1408/71 is not applicable to workers subject to the legislation of only one Member State of which they are nationals and in whose territory they have resided and worked.

(2) Article 3 of Regulation No 1408/71 requires migrant workers to be treated equally to national workers. It does not permit nationals to claim equal treatment in relation to migrant workers.

(3) The provisions of Community law for the establishment of the free movement of workers apply only in order to establish freedom of movement between Member States. They are not applicable to domestic situations or to administrative provisions hampering freedom of movement in the territory of one State.