JUDGMENT OF THE COURT (Fourth Chamber)

9 December 2010 *

In Case C-296/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Cassatie van België (Belgium), made by decision of 25 May 2009, received at the Court on 29 July 2009, in the proceedings

Vlaamse Gemeenschap

v

Maurits Baesen,

* Language of the case: Dutch.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and A. Prechal, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Vlaamse Gemeenschap, by W. van Eeckhoutte, advocaat,

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

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the term 'civil servants and persons treated as such' within the meaning of Article 13(2)(d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981 (OJ 1981 L 143, p. 1, 'Regulation No 1408/71').

2 The reference has been made in proceedings between Mr Baesen and Vlaamse Gemeenschap (the Flemish Community) concerning a claim for compensation for social security contributions which, it is alleged, were wrongly paid in Belgium.

Legal context

European Union legislation

3 Article 2 of Regulation No 1408/71, entitled 'Persons covered', states at paragraph 3:

'This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.'

4 Article 4 of Regulation No 1408/71, entitled 'Matters covered', provides:

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

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

…

4. This Regulation shall not apply to … or to special schemes for civil servants and persons treated as such.'

5 Article 13 of Regulation No 1408/71, entitled 'General rules', provides:

'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 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;

…

(d) civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject;

…'

National legislation

6 Pursuant to Article 1(1) of the Law of 27 June 1969 amending the Decree-law of 28 December 1944 on the social security of workers (Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders), that law applies to employees and employers linked by a contract of employment.

7 Pursuant to point 2 of Article 2(1) of the Law of 27 June 1969, the King of Belgium may, by decree deliberated on in the Ministerraad (Council of Ministers) and after obtaining the opinion of the Nationale Arbeidsraad (National Employment Council), limit, in respect of certain categories of employed persons designated by him, the application of that law to one or more of the schemes listed in Article 5 thereof.

8 Article 9(2) of the Royal Decree of 28 November 1969 implementing the Law of 27 June 1969 (Koninklijk besluit van 28 november 1969 tot uitvoering van de wet van 27 juni) provides that in the case of persons engaged under a contract of employment by the State, the provinces or the institutions responsible to the provinces, the application of the law is restricted to the schemes listed in the first subparagraph of Article 9(1) of the Royal Decree of 28 November 1969, that is to say, the compulsory health and invalidity insurance scheme, the retirement and survivors' pension scheme for employed persons and the employment services and unemployment scheme for employed persons.

9 Pursuant to point 3 of Article (1)(1) of the Law of 3 July 1967 on compensation for accidents at work, accidents occurring on the way to and from work and occupational diseases in the public sector (Wet van 3 juli 1967 betreffende de schadvergoeding voor arbeidsongevallen, voor ongevallen op de weg naar en van de werk en voor beroepsziekten in the overheidssector), the scheme established by that law applies to members of the permanent, trainee, temporary and auxiliary staff and to staff engaged under a contract of employment, who work for the administrations and other authorities of the governments of the Communities and Regions.

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

10 Mr Baesen, a Belgian national, entered the employment of Vlaamse Gemeenschap as an investment prospector in 1988. He was engaged under a contract of employment, initially for a fixed period, then subsequently for an indefinite period. He carried out his professional activities in Stockholm (Sweden).

11 On 7 October 1996, Vlaamse Gemeenschap terminated the contract of employment and paid compensation for termination equivalent to 12 months' salary. Mr Baesen brought an action before the Arbeitsgericht te Brussel (Brussels Labour Court) seeking additional compensation for termination and damages for unfair dismissal. In the course of the proceedings which ensued, inter alia in an appeal before the

Arbeidshof te Brussel (Brussels Higher Labour Court), he also claimed the amount of EUR 19 874.74 as compensation for social security contributions which he claimed were wrongly paid in Belgium.

12 Under Article 13(2)(d) of Regulation No 1408/71, civil servants and persons treated as such are subject to the legislation of the Member State to which the administration employing them is subject. Mr Baesen submits that, as his relationship with Vlaamse Gemeenschap was as an 'employed person' and not as a 'civil servant', the general rules of Regulation No 1408/71 apply to him. Consequently, the Swedish social security scheme was applicable to him and thus he should not have paid Belgian social security contributions.

13 On appeal, the Arbeidshof te Brussel held that the amounts deducted from Mr Baesen's salary had been wrongly withheld in Belgium. It considered him to be subject to the Swedish social security scheme, in application of Article 13(2)(a) of Regulation No 1408/71, which provides that a worker employed in the territory of one Member State is 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.

14 The Arbeidshof te Brussel found that Mr Baesen was associated with Vlaamse Gemeenschap by an indefinite contract and that he was, therefore, an employed person and did not enjoy the permanence of employment inherent in the status of civil servant and that, under the regulations applicable to contract staff, he was appointed to carry out particular functions but not to a position within a hierarchical structure, as is the case with civil servants.

15 On the basis of those observations, the Arbeidshof te Brussel held that, as Mr Baesen had the status of 'employed person' and not that of a 'person treated as' a civil servant

within the meaning of Article 13(2)(d) of Regulation No 1408/71, the social security scheme of the State in which his place of employment was located, namely Sweden, applied to him and that, accordingly, Belgian social security contributions had been wrongly withheld.

16 Vlaamse Gemeenschap appealed on a point of law against the decision of the Arbeidshof te Brussel. It submitted that that court had erred in law in not regarding Mr Baesen as a person treated as a civil servant for the purposes of Article 13(2)(d) of Regulation No 1408/71 and in holding that, under Article 13(2)(a) of that regulation, it was the Swedish social security scheme that was applicable.

17 On appeal, the Hof van Cassatie found it to follow from the relevant provisions of Belgian social security legislation that public sector personnel engaged by Vlaamse Gemeenschap under a contract of employment are subject partly to the Belgian social security scheme for employed persons (as regards the compulsory health and invalidity insurance scheme, the retirement and survivors' pension scheme and the employment services and unemployment scheme) and partly to a special scheme for civil servants (as regards the scheme concerning accidents at work and occupational diseases and the scheme for family allowances and annual leave).

18 The Hof van Cassatie considers it necessary to determine whether the expression 'civil servants and persons to be treated as such', as referred to in Article 13(2)(d) of Regulation No 1408/71, is defined according to the meaning given to it in the national social security scheme to which the person concerned is affiliated. Furthermore, the Hof van Cassatie also raises the question whether a person in Mr Baesen's situation, who is subject to the general social security scheme for employed persons in relation to some of the branches of social security but is subject to a special scheme for civil

servants in relation to others, is to be regarded as a person treated as a civil servant for the purposes of Article 13(2)(d) of Regulation No 1408/71.

19 In those circumstances the Hof van Cassatie decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'1. For the purposes of Article 13(2)(d) of Regulation No 1408/71, should the expression "civil servants and persons treated as such" be interpreted on the basis of the national social security scheme to which the person concerned is affiliated?

2. If the first question is answered in the affirmative, should a person who is engaged under a contract of employment by an employer in the public sector and who is subject, under the national scheme, to the social security scheme for employed persons in respect of some of the branches of social security referred to in Article 4(1) of Regulation [No 1408/71] and to a special scheme for civil servants in respect of the branches of social security referred to in Article 4(1)(e) of that regulation be regarded as a person treated as a civil servant within the meaning of Article 13(2)(d) of Regulation No 1408/71?'

Consideration of the questions referred

20 Since both the questions referred seek to ascertain what is to be understood by 'civil servants' and 'persons treated as such', as referred to in Article 13(2)(d) of Regulation No 1408/71, it is appropriate to consider them together.

21 By its questions, the national court asks, in essence, firstly, whether the meaning of 'civil servants' and 'persons treated as such', as referred to in Article 13(2)(d) of Regulation No 1408/71, is to be determined solely by reference to the national law of the Member State to which the administration employing the persons concerned is subject and, secondly, whether a person in the situation of the respondent in the main proceedings, who, in a Member State, is subject partly to the social security scheme for civil servants and partly to the social security scheme for employed persons, may thus be subject, in accordance with the provision made by Article 13(2)(d) of Regulation No 1408/71, only to the legislation of the Member State to which the administration employing him is subject.

22 It should be noted at the outset that Regulation No 1408/71 implements Article 42 EC, which provides for coordination of national social security legislation rather than harmonisation. Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, are therefore unaffected by that provision (see, in particular, Case 41/84 *Pinna* [1986] ECR 1, paragraph 20; Case C-340/94 *de Jaeck* [1997] ECR I-461, paragraph 18; and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 84).

23 As regards the persons who may rely upon the provisions on the coordination of the national social security schemes which it establishes, Regulation No 1408/71 refers to persons who are insured under those schemes (*de Jaeck*, paragraph 19).

24 Furthermore, the Court has held that the terms 'employed person' and 'self-employed person' mentioned in Articles 1(a) and 2(1) of Regulation No 1408/71 refer to the definitions given to them by Member States' social security legislation, regardless of the nature of the activity for the purposes of employment law (*de Jaeck*, paragraph 19).

25 A logical and consistent interpretation of the scope *ratione personae* of Regulation No 1408/71 and of the system of conflict of laws that it implements requires that the same type of reasoning should apply to the interpretation of the terms 'civil servants' and 'persons treated as such', as referred to in Article 13(2)(d) of Regulation No 1408/71, and that these terms should be interpreted in accordance with the meanings which national law gives them for the purpose of the application of the social security schemes of the Member States. Such an interpretation is in accordance with the general spirit of Regulation No 1408/71, which is coordination rather than harmonisation.

26 More particularly, as concerns the situation of Mr Baesen, who, according to the findings made by national court, is subject to the general social security scheme for employed persons in relation to some of the branches of social security but, for others, is subject to a special scheme for civil servants, the national court asks if such a person may be considered to be a person treated as a civil servant within the meaning of Article 13(2)(d) of Regulation No 1408/71.

27 In that regard, it should be recalled that, in accordance with Article 2(3) thereof, Regulation No 1408/71 applies to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which Regulation 1408/71 applies.

28 It is therefore the case that the classification of a person as a 'civil servant' or a 'person treated as such' is a matter solely for the law of the Member State to which the administration employing that person is subject and that it is for each Member State to determine the extent of the social protection that it wishes to grant to those categories of persons.

29 With regard to the application of Regulation No 1408/71, and more particularly Articles 2(3) and 13(2)(d) thereof, the terms 'civil servants' and 'persons treated as such' must therefore be understood as referring to persons regarded as such by the law of the Member State in which the administration employing the person concerned is situated.

30 It follows that a person in Mr Baesen's situation is not excluded from the scope of Article 13(2)(d) of Regulation No 1408/71 merely because he is subject only in part to the social security scheme for civil servants in the Member State in which the administration employing him is situated.

31 Consequently, the answer to the questions referred for a preliminary ruling is that the meaning of the terms 'civil servants' and 'persons treated as such', as referred to in Article 13(2)(d) of Regulation No 1408/71, is to be determined solely by reference to the national law of the Member State to which the administration employing the person concerned is subject and that a person in the situation of the respondent in the main proceedings, who, in a Member State, is subject partly to the social security scheme for civil servants and partly to the social security scheme for employed persons, may thus be subject, in accordance with the provision made by Article 13(2)(d) of Regulation No 1408/71, only to the legislation of the Member State to which the administration employing that person is subject.

Costs

32 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 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:

The meaning of 'civil servants' and 'persons to be treated as such', as referred to in Article 13(2)(d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981, is to be determined solely by reference to the national law of the Member State to which the administration employing the person concerned is subject and a person in the situation of the respondent in the main proceedings, who, in a Member State, is subject partly to the social security scheme for civil servants and partly to the social security scheme for employed persons, may thus be subject, in accordance with the provision made by Article 13(2)(d) of Regulation No 1408/71, only to the legislation of the Member State to which the administration employing that person is subject.

[Signatures]