In Case 275/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [Court of last instance in social security matters], Utrecht, for a preliminary ruling in the action pending before that court between

G. F. KOKS, residing at Boxtel,

and

RAAD VAN ARBEID [Labour Council], 's-Hertogenbosch,

on the interpretation of Article 12 (1) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers and Article 13 (2) (a) 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,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

As is apparent from the order making the reference, G. F. Koks, the plaintiff in the main action, who was born on 13

January 1911 and is of Netherlands nationality, worked in the Netherlands from 1926 to 1959 mainly as a road construction worker. From 3 September 1959 to 8 August 1969 he was engaged in the same work in the Federal Republic of Germany and became affiliated to the German Rentenversicherung [Pension Insurance Scheme] in December 1959.

On 8 August 1969, Mr Koks returned to the Netherlands to work. However, his employment relationship in Germany continued to exist and contributions were paid to the German social security scheme until 20 August 1969.

On 1 December 1969, he became incapacitated for work and accordingly received benefits for that incapacity from German and Netherlands sources.

Mr Koks's wife, who was born on 2 January 1912 and is also of Netherlands nationality, worked in the Netherlands from 10 September 1962 to 12 March 1971 inclusive.

On 6 October 1975, Mr Koks applied for an old-age pension under the Netherlands Algemene Ouderdomswet [General Law on Old Age, hereinafter referred to as "the Old-Age Law"].

In accordance with the provisions of the Old-Age Law, on reaching the age of 65 a (single) person receives in principle a full pension which, however, under Article 10 (1) of that Law, is reduced by 2% for each calendar year in which the person was not insured during the period between his 15th and 65th birthdays. The uninsured calendar years, or parts thereof, are added together and any remaining part of a calendar year is disregarded for the purposes of the reduction pursuant to the Order of the Minister of Social Affairs and Public Health of 17 June 1957, issued pursuant to Article 10 (6), now Article 10 (5), of the Old-Age Law. In the case of a married couple, usually it is only the husband who is entitled to an old-age pension, on reaching the age of 65, in principle equal to the social minimum for married persons, in accordance with Article 7 of the Old-Age Law. By virtue of the provisions of Article 10 (2) (a) and (b) of the Old-Age Law, the reduction then amounts to 1% for each year in which the husband was uninsured, and 1% for each year in which the wife was uninsured.

In addition, the law in question provides for notional years of insurance for the period before 1 January 1957, the date on which it entered into force. On certain conditions, persons who before 1 January 1957 had reached the age of 15 but not the age of 65 are deemed to have been insured during the period before the date on which they completed their 15th year and 1 January 1957, as provided for by Articles 43 and 44 of that Law.

Mr Koks, the appellant in the main action and his wife satisfy the conditions for the award (in full) of the notional years of insurance before 1 January 1957.

Accordingly, it is only for the years subsequent to 1 January 1957 that it is necessary to ascertain for which periods Mr Koks and his wife were not insured under the Old-Age Law.

According to Article 2 (1) (a) of the Royal Decree of 18 October 1968 laying down a general administrative measure within the meaning of Article 6 (2) and (3) of the Old-Age Law concerning the extension and restriction of the number of persons insured, "residents who are employed outside the Netherlands and by virtue of that employment are insured under legislation on old-age and

survivors' pensions and family allowances in force in the country in which they work" and are treated as insured persons.

Earlier royal decrees contain similar provisions.

According to the case-law of the Centrale Raad van Beroep [Court of last instance in social security matters], those provisions are to be interpreted as meaning that a claimant is treated as uninsured under the Old-Age Law during the whole (calendar) months in which he was insured in another country. Therefore the appellant in the main action must be treated as uninsured under the Old-Age Law for the period from 1 December 1959 to 1 September 1969, that is to say the whole months during which he was insured under the German scheme, namely nine years and nine months.

Moreover, under Article 2 (1) (first part and subparagraph (i)) of the aforesaid Royal Decree of 18 October 1968 and the corresponding provisions of earlier royal decrees, "a married woman residing in the Kingdom of the Netherlands whose husband is not insured under subparagraphs (a), (b), (c), (d), (e), (f), (g) or (h) of this paragraph" is not regarded as insured under the Old-Age Law.

Accordingly, the appellant's wife is not regarded as having been insured under the Netherlands legislation during the same period as her husband.

However, since she worked in the Netherlands from 10 September 1962 to 12 March 1971 inclusive, on the assumption that she is a worker within the meaning of the regulations on social security, and on the basis of the provisions of Article 12 (1) of Regulation No 3, she should be regarded as having been insured under the Old-Age Law from 10 September 1962 to 1 September 1969. She would then be considered as having been uninsured from 1 December 1959 to 10 September 1962, with the result that the percentage deductible in her case would be 2% and not 9% (the percentage deductible in her husband's case).

In the dispute between Mr Koks and the Raad van Arbeid [Labour Council], the Centrale Raad van Beroep takes the view that although the case-law of the Court of Justice, as set out in the judgment of the Court of 24 April 1980 in Case 110/79 *Coonan* [ECR] 1445, is to the effect that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch thereof, a different view might be taken in this case since it concerns provisions of Community law and of national law which have as their purpose to define the scope of national social security schemes with respect to one another.

Against that background and with a view to resolving the problem of a conflict between the provisions of Community law and the provisions of national law relating to the definition of the scope of national social security schemes the Centrale Raad van Beroep referred the following question to the Court of Justice for a preliminary ruling:

"Must the rule (as set forth in Article 12 (1) of Regulation No 3 and Article 13 (2) (a) of Regulation No 1408/71) according to which a worker employed in the territory of a Member State is subject to the legislation of that State be interpreted as meaning that a national provision of a Member State is incompatible with that rule in providing that a married woman who resides in

that Member State (and who is a worker within the meaning of Regulation No 3 and Regulation No 1408/71), whose husband is not insured for the purposes of an old-age pension because he is so insured under the legislation of another Member State, is not insured for such purposes either, even if she has resided in the territory of the first-mentioned Member State and been employed there?"

The order making the reference was received at the Court Registry on 19 October 1981.

By order of 24 March 1982, the Court, after establishing that no Member State or institution of the Communities, being a party to the proceedings, has requested that the case be decided in plenary session, assigned the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Raad van Arbeid, the respondent in the main action, represented by its President, A. P. A. Riemen, and by the Commission of the European Communities, represented by J. Amphoux, action as Agent, assisted by Auke Haagsma.

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

In nevertheless requested the Raad van Arbeid to inform it before 23 April 1982, orally in the event of its participation in the oral procedure, or otherwise in writing, whether or not the wife of the appellant in the main action paid contributions under the Old-Age Law in respect of the period in which she worked, namely from 10 September 1962 to 12 March 1971 inclusive.

The Raad van Arbeid replied to that question within the prescribed period.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

1. The *Raad van Arbeid* observes that by adopting the Old-Age Law, the legislature intended to establish an old-age pension scheme for the entire population, that is to say for everyone residing in the country. However, it points out, it was also considered necessary to extend the insurance scheme to non-residents who were pursuing activities as employed persons in the Netherlands and thus, in keeping with a rule generally recognized at international level, an employed person is insured under the legislation of the country in which he works. It adds that the effect of the above rule has been however to exclude from the scope of the general old-age pension scheme all residents who pursue activities as employed persons in another country and are on that account insured in that country and that, in such a case, the spouses of such persons are also excluded from the insurance scheme. The Netherlands legislature took the view that the workers concerned and the members of their family were fully covered by the legislation of the country in which they worked.

However, the Raad van Arbeid emphasizes that the Netherlands legislature considered that the parallel acquisition fo rights under the Netherlands general old-age pension scheme by a non-

resident's wife who works in the Netherlands and is on that account insured under the Old-Age Law must depend on the existence of a convention with the other country. On that point, it refers by way of example to Annex V J 2 (c) and (e) to Regulation No 1408/71.

It points out that on the basis of the Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal L 6 of 10 January 1979, p. 24), the measures needed to amend the Old-Age Law with a view to abolishing inequalities in the treatment accorded to men and women are at present being drafted.

In the opinion of the Raad van Arbeid a provision by virtue of which a wife who is residing and is pursuing an activity as an employed person in the Netherlands is covered, together with her husband who is also residing in the Netherlands but works in another Member State, by the social security legislation of the latter State because the husband works there, is not incompatible with Article 12 (1) of Regulation No 3 or with Article 13 (2) (a) of Regulation No 1408/71.

Although it does not for the time being propose to consider the precise significance of the words "are applicable", the Raad van Arbeid maintains that the exclusion of married women is linked not to the place of her residence or her work or to the place in which her employer is established but to the fact that her husband works in another country and is on that account insured and deemed to be subject, together with the members of his family, to the legislation of that other Member State.

If, according to the Raad van Arbeid, the view were taken that a woman, in the aforementioned circumstances, could not be excluded from insurance cover under the Old-Age Law, it would be particularly difficult to ensure its application in view of the fact that the scheme introduced by the Old-Age Law is still in force. In the case of married couples, only the husband is, as a general rule, obliged to pay contributions. In principle, only he is entitled to a pension and the amount of the pension takes his marital status into account.

According to the Raad van Arbeit, that exclusion does not constitute an obstacle, in the proper sense of the word to the free movement of workers within the meaning of Article 3 (c) of the EEC Treaty.

However, it acknowledges that it is necessary to regard that exclusion as contrary to the principle of equal treatment but it recalls that the directive in question has not yet been transposed into Netherlands law.

2. In its observations, the *Commission* recalls the facts as set out in the order making the reference and outlines the Netherlands legislation applicable before proceeding to analyse the relevant provisions of Community law.

In that regard, the Commission takes the view that Article 4 of Regulation No 3 which provides that the social security scheme for migrant workers is applicable "to employed persons or those treated as such who are or have been covered by the legislation of one or more Member States or are stateless or refugees residing in the territory of one of the Member States and to members of their families and their survivors" and Article (2) (1) of Regulation No 1408/71 which contains a similar provision leave national legislatures at liberty to determine which persons are subject to

national schemes and, accordingly, to the regulation itself.

The fact that Regulation No 1408/71 contains a definition of the term "worker" in Article 1 (a) is immaterial in view of the fact that the Member States retain the power to determine which persons are affiliated, and under what circumstances, to the social security schemes which classify them as workers. The Commission recalls that as far as those matters are concerned the Court reached the same conclusions in its judgment of 24 April 1980 in Case 110/79 *Coonan* [1980] ECR 445.

The Commission observes that the two regulations in question both contain in Title II certain provisions concerning the national legislation applicable.

The Commission refers to Article 12 of Regulation No 3 and Article 13 (2) (a) of Regulation No 1408/71 which provides that, subject to certain exceptions which are inapplicable in this case, workers (or those treated as such) employed in the territory of a Member State are governed by the legislation of that State even if they reside in the territory of another Member State.

Finally the Commission draws attention to Council Directive No 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security which applies, by virtue of Article 1, to statutory schemes which provide protection for old age. The Commission stresses the obligation which that directive has imposed on Member States to comply with the principle of equal treatment thus laid down by abolishing any provision conflicting therewith and in particular with "the scope of the schemes and the conditions of access thereto".

The Commission therefore considers that the Netherlands legislation, and in particular the Old-Age Law, according to which married women are not insured, unless their husbands are insured under that Law, is contrary to the directive in question and must be amended within a period expiring on 22 December 1984 since the directive was notified on 22 December 1978.

However, the Commission takes the view that at present the provisions relating to overlapping, set out in the Order on the extension and restriction of the number of persons insured under the Netherlands legislation, which lead to a situation where a married woman living and working in the Netherlands is not insured under the Old-Age Law if her husband works abroad and is insured there, are not contrary to Community law.

The Commission relies upon the judgment of the Court in Case 110/79 *Coonan*, according to which it is for the legislatures of the Member States to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch thereof.

Furthermore, the Commission observes that the legislation to be applied in the present case should have been determined on the basis of Article 12 of Regulation No 3 and Article 13 (2) (a) of Regulation No 1408/71.

It is quite proper therefore for the claimant to be subject to the legislation of the State on whose territory he works, in accordance with the Netherlands legislation applicable. The same holds true for the claimant's wife who, according to Article 12 of Regulation No 3, was subject to the Netherlands legislation during the period in which she worked in that country, from 10 September 1962 to 12 March 1971. Accordingly, in order to ascertain whether she was actually insured during that period it is necessary to determine whether she satisfied the conditions laid down by that legislation, which is not the case since her husband was working and was insured in Germany during the period in question.

That being so, the Commission is of the opinion that the Netherlands legislation does not exceed any of the limits applied to it by Community law as regards the determination of the conditions for affiliation to the Netherlands social security scheme.

That legislation is not contrary to the prohibition of discrimination on grounds of nationality or to the provisions set out in Title II of Regulation No 3 and Regulation No 1408/71 since it contains a provision the purpose of which is to render operative not that legislation but rather the legislation of another Member State. Moreover, it is not contrary to the prohibition of discrimination between men and women laid down by Directive No 79/7/EEC because the period for implementing the directive has not yet expired.

The Commission is therefore of the opinion that since the Netherlands legislation in question has as its sole purpose to establish the conditions for affiliation to a national social security scheme, its aim is not the same as that of Title II of Community Regulations No 3 and No 1408/71 and, in view of the fact that the legislation does not overstep the limits set out by any provision of Community law, it may not be considered as being contrary to Community law.

The Commission therefore proposes that the question referred to the Court by the Centrale Raad van Beroep should be answered as follows:

1. Regulation No 3 of the Council concerning social security for migrant workers and, in particular, Articles 4, 8, 12 and 13 thereof, as well as Regulation No 1408/71 and in particular Articles 1 (a), 3, 13 and 14 thereof, must be interpreted as meaning that it is for the legislature of each Member State to lay down the conditions creating the right to benefit from a social security scheme or branch thereof or the obligation to become affiliated thereto, on condition that no distinction is drawn between nationals of the Member State in question and those of other Member States and that there is no incompatibility with any provision of Community law.

2. Until the expiry of the period laid down by Article 8 of Council Directive No 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a legislative provision of a Member State to the effect that a married woman living in the said Member State is not insured for the purposes of an old-age pension unless her husband is insured in that State is not incompatible with the aforesaid provisions.

III — Answer to the question put by the Court

It is clear from the answer given by the Raad van Arbeid to the question put to it by the Court that on 5 February 1976 the Raad van Arbeid was informed by the person who was Mrs Koks's employer at the time that Mrs Koks worked for him from 15 September 1962 to 12 March 1971 inclusive.

As regards the question whether any deductions had been made from her salary under the Old-Age Law and the Algemene Weduwen en Wezenwet [General Law on Widows and Orphans], the aforesaid employer requested the Raad van Arbeid to contact the income tax inspectorate for 's-Hertogenbosch since it was practically impossible for him to supply from his own archives the information required in view of the fact that a considerable time had elapsed since the period in question (Mr Koks worked in Germany from 3 September 1959 to 20 September 1969).

The Raad van Arbeid therefore contacted the authorities in question which on 1 April replied as follows:

"In reply to your letter of 16 February 1976, reference RU/AOW/H, No HT. 86574/6, I should like to make the following remarks.

The periods in question, prior to 1 January 1976, can no longer be checked in view of the fact that G. F. Koks and his wife were not insured. In the light of the downward adjustments made by the 'Beperkte Registratie' [Restricted Affiliation] Department of the Sociale Verzekeringsbank [Social Insurance Bank], it may in general be assumed that Mr and Mrs Koks were not insured in this country between 1 January 1963 and 31 December 1966 inclusive, for the purposes of affiliation. From 1 January 1967 to 20 September 1969, the couple were not insured. The contributions deducted from his wife's salary were repaid to Mr Koks. The amount refunded may be broken down as follows: for the period from 1 January 1967 to 31 December 1967: HFL 239; for the period from 1 January 1968 to 31 December 1968: HFL 274; and for the period from 1 January 1969 to 20 September 1969. HFL 58. Repayment was effected by setting off those sums against the contributions payable by the husband.

In 1969, Mr Koks was asked to pay a contribution *pro rata temporis*.

From 20 September 1969 to the present day, Mr and Mrs Koks have in fact been insured in this country for the purposes of affiliation. I am no longer able to establish whether the contributions paid under the Old-Age Law and the General Law on Widows and Orphans, which were deducted at source during the periods preceding 1 January 1967, were refunded.

I hope this information is sufficient for your purposes."

In connection with the question put to it, moreover, the Raad van Arbeid feels obliged to point out that it would not have taken the initiative in raising that aspect of the matter if the contributions had not been repaid.

The Centrale Raad van Beroep, Utrecht, considers that the payment or non-payment of contributions has no bearing on the answer to the question whether a person is to be regarded as being affiliated to an insurance scheme.

The Raad van Arbeid is none the less of the opinion that where contributions have been unduly paid, the Sociale Verzekeringsbank, Amsterdam, allows, if necessary the person concerned to treat such contributions as voluntary contributions, with all the implications which evidently result therefrom as regards the pension attributable to him.

IV — Oral procedure

The Commission of the European Communities, represented by A. Haagsma, presented oral argument at the sitting on 6 May 1982.

The Advocate General delivered his opinion at the sitting on 17 June 1982.

Decision

1 By order of 29 September 1981, which was received at the Court Registry on 19 October 1981, the Centrale Raad van Beroep [Court of last instance in social security matters] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 12 (1) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561) and Article 13 (2) (a) 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) in order to determine whether certain provisions of the Netherlands legislation on pensions are compatible with Community law.

2 The question was raised in connection with a dispute between the Raad van Arbeid [Labour Council] 's-Hertogenbosch and a Netherlands national, the appellant in the main action, whose pension was reduced under the Netherlands legislation.

3 The appellant in the main action worked in the Netherlands from 1926 to 1959 mainly as a road construction worker. From 3 September 1959 to 8 August 1969 he was engaged in the same work in the Federal Republic of Germany. As from 8 August 1969, he took up employment again in the Netherlands for four months until he became incapacitated for work. He received benefits on account of his disability from Netherlands and German sources. His wife, who is also a Netherlands national, worked in the Netherlands from 1962 to 1971.

4 In 1976, on reaching the age of 65, he received on old-age pension the amount of which was however reduced by 18% under the national legislation in question.

5 Under the legislation in force in the Netherlands, the Algemene Ouderdomswet [General Law on Old Age, hereinafter referred to as "the Old-Age Law"] of 31 May 1956 and its implementing decrees, an old-age pension is in principle granted to insured persons who have reached the age of 65. The category of insured persons includes persons residing in the Netherlands but not persons who reside there because they have a contract of employment and are accordingly insured under the provisions of foreign legislation. Similarly, a married woman residing in the Netherlands whose husband is not insured under the provisions of the relevant Netherlands legislation is not regarded as insured. In general, married women are not entitled, as such, to an old-age pension. However, a married man is entitled to a higher pension than a single person. Provision is also made for the pension to be reduced by 1% for each full calendar year in which the married male beneficiary was not insured between the ages of 15 and 65 years. The same reduction applied to the beneficiary's wife for each calendar year, within the same age bracket, in which she was not insured.

6 Under that legislation, the appellant's pension was reduced, initially by 9% of the total amount in respect of the period of nine years in which he was insured in the Federal Republic of Germany and, subsequently, by 9% of the same amount on the ground that his wife had not been insured during the same period.

7 Since the problem of the compatibility of that legislation with Community law and, in particular, with Regulations Nos 3 and 1408/71, was raised, the Centrale Raad van Beroep stayed the proceedings and referred to the Court the following question:

"Must the rule (as set forth in Article 12 (1) of Regulation No 3 and Article 13 (2) (a) of Regulation No 1408/71) according to which a worker employed in the territory of a Member State is subject to the legislation of that State be interpreted as meaning that a national provision of a Member State is incompatible with that rule in providing that a married woman who resides in that Member State and whose husband is not insured for the

purposes of an old-age pension because he is so insured under the legislation of another Member State, is not insured for such purposes either, even if she has resided in the territory of the first-mentioned Member State and has been employed there?"

8 It is necessary to observe that Article 12 of Regulation No 3 as well as Article 13 (2) (a) of Regulation No 1408/71 both lay down, in virtually identical terms, the principle that a worker is subject throughout the period of his employment to the legislation of the Member State in whose territory he works.

9 However, the Court has already pointed out, in its judgment of 24 April 1980 in Case 110/79 *Coonan* [1980] ECR 1445, that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme.

10 It must however be emphasized that although the Member States are at liberty to adopt rules in respect of questions relating to social security schemes, they are none the less under an obligation to comply with the provisions of Community law in force.

11 Apart from Council Directive No 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6 p. 24) which allows the Member States a period of six years in which to implement the necessary provisions, there is no rule of Community law precluding the Member States from making the right of either spouse to derive benefits under a social security scheme dependent on the affiliation of the other spouse to the same scheme.

12 Consequently, under Community law as it stands at present, a national provision of a Member State which provides that a married woman residing in that Member State whose husband is not insured there for the purposes of an old-age pension because he is so insured under the legislation of another Member State, is not insured for those purposes either, if she has resided in

the territory of the first-mentioned Member State and has been employed there, is not incompatible with the provisions of Community law in force.

Costs

13 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions submitted to it by the Centrale Raad van Beroep by order of 29 September 1981, hereby rules:

A national provision of a Member State which provides that a married woman residing in that Member State whose husband is not insured there for the purposes of an old-age pension because he is so insured under the legislation of another Member State, is not insured for those purposes either, even if she has resided in the territory of the first-mentioned Member State and has been employed there, is not incompatible with the provisions of Community law in force.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 23 September 1982.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Second Chamber