Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

7 June 2012*

(Social security for migrant workers — Legislation applicable — Worker holding Netherlands nationality working, for an employer established in the Netherlands, on board dredgers flying the Netherlands flag which operate outside the territory of the European Union — Residence in the territory of another Member State — Affiliation to the Netherlands social security system)

In Case C-106/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 11 February 2011, received at the Court on 3 March 2011, in the proceedings

M.J. Bakker

v

Minister van Financiën,

THE COURT (Eighth Chamber),

composed of A. Prechal, President of the Chamber, K. Schiemann (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 1 March 2012,

after considering the observations submitted on behalf of:

— Mr Bakker, by M.H. Menger and V.J. de Groot, belastingadviseurs,

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

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

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

gives the following

* Language of the case: Dutch.

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Title II of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1) ('Regulation No 1408/71').

2 The reference has been made in proceedings between Mr Bakker and the Staatssecretaris van Financiën (State Secretary for Finance) concerning his compulsory affiliation to the Netherlands social insurance scheme for 2004.

Legal context

European Union law

3 Under Article 1(a)(i) of Regulation No 1408/71, the term 'employed person' means any person who 'is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants'.

4 Article 2(1) of Regulation No 1408/71 provides:

'This Regulation shall apply to employed or self-employed persons and to students 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 ...'

5 Article 13 of that regulation, which forms part of Title II thereof, entitled 'Determination of the legislation applicable', provides:

'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:

…

(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of the State;

…'

Netherlands law

6 Article 6 of the General Law on Old-Age Pensions (Algemene Ouderdomswet, Stb. 1956, No 281) provides:

'1. Insured persons for the purpose of the present provisions are:

(a) residents, and

(b) non-residents subject to income tax in respect of salaried occupational activities carried out in the Netherlands,

who have not yet reached the age of 65.

…'

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

7 During 2004, Mr Bakker, who has Netherlands nationality, resided in Spain and was employed on board dredgers flying the Netherlands flag for an undertaking established in Rotterdam (Netherlands). He carried out his activities mainly in the territorial seas of China and of the United Arab Emirates. The dredgers were recorded in the Netherlands maritime shipping register.

8 Mr Bakker challenged the assessment sent to him in respect of income tax and national insurance contributions for 2004 in the Netherlands. Following the dismissal by the Rechtbank te Breda (District Court, Breda) of the objection which he had raised against that assessment, Mr Bakker appealed to the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), which confirmed the decision delivered at first instance.

9 The Gerechtshof te 's-Hertogenbosch took the view that, in respect of 2004, Mr Bakker could be regarded as affiliated to the Netherlands social insurance scheme notwithstanding the fact that his activities were performed outside European Union territory. That court based its assessment on the fact that the Netherlands social security legislation had been made applicable to Mr Bakker by Regulation No 1408/71 and, more specifically, by Title II thereof. It found, in particular, that Mr Bakker worked on board seagoing vessels flying the Netherlands flag, that is to say, the flag of a Member State within the meaning of Article 13(2)(c) of that regulation. The fact that those vessels were moored during dredging activities in territorial seas outside the European Union was not conclusive, in the view of the Gerechtshof te 's-Hertogenbosch, since Article 13(2)(c) of Regulation No 1408/71 does not lay down any restriction as to the type of vessel or the location of the activities.

10 Seised of an appeal on a point of law, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) takes the view, however, that there are reasonable doubts as to the application of Title II of Regulation No 1408/71 in the present case.

11 The Hoge Raad finds that the Gerechtshof te 's-Hertogenbosch acted correctly in holding that, in the light of Netherlands law alone, Mr Bakker was not compulsorily subject to social insurance for 2004 since he did not reside in the Netherlands during that year and was also not employed there. None the less, the referring court has doubts as to the presumption, on which the Gerechtshof te 's-Hertogenbosch based its decision, that, for 2004, Mr Bakker came within the scope *ratione personae* of Regulation No 1408/71, which made it possible for Title II of that regulation to be applied to his situation.

12 In that regard, the Hoge Raad notes that the definition of 'employed person' in Article 1(a) of Regulation No 1408/71 requires the interested party to be insured, compulsorily or on an optional basis, for one or more of the contingencies referred to in that provision. Thus, it queries whether it is possible that someone in Mr Bakker's situation, who, in the light solely of national legislation, is not compulsorily insured because he does not reside in the Netherlands, may none the less have the status of an employed person within the meaning of Regulation No 1408/71 by virtue of the fact that the rules for determination of the legislation applicable, set out in Title II of that regulation, designate the legislation of that Member State as being applicable.

13 The Hoge Raad der Nederlanden takes the view that, in order to ensure the effectiveness of the provisions of Title II of Regulation No 1408/71, that question must be answered in the affirmative.

14 The Hoge Raad expresses uncertainty, however, as to whether the fact that Mr Bakker performed his activities outside the territory referred to in Article 299 EC precludes application of Title II of Regulation No 1408/71. It relies on the case-law of the Court of Justice, according to which rules of European Union law on the free movement of workers also apply to activities performed outside the territory of the European Union, so long as the employment relationship retains a sufficiently close connection with that territory (Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 14). The Hoge Raad also regards as relevant the judgment in Case 9/88 *Lopes da Veiga* [1989] ECR 2989, paragraph 17, which also concerned the situation of a seafarer, and in which the Court held that it was necessary to determine whether the employment relationship of the person concerned had a sufficiently close connection with the territory of the Netherlands.

15 The Hoge Raad notes that, during 2004, under the policy pursued by the Landelijk Instituut sociale verzekeringen (National Social Insurance Institute) in the field of social security for employed persons, Title II of Regulation No 1408/71 was made applicable to seafarers who are nationals of a Member State of the European Union or the European Economic Area and who reside in one of those States and work on board a ship which does not fly the flag of a Member State, solely on the basis that the employer was established in the Netherlands.

16 The consequence of that policy is that the insurance fund for employed persons treats workers such as Mr Bakker as being compulsorily insured even though, on the basis of the Netherlands legislation, they do not belong to such a category of insured persons. The Hoge Raad notes that that policy does not, however, provide a legal basis on which insurance contributions for employed persons may be levied.

17 In the view of the Hoge Raad, the fact that Mr Bakker is in practice deemed, by the insurance fund for employed persons, to be in the position of an insured person, at least in respect of part of the social insurance scheme in the Netherlands, as a result of which he in fact enjoys social protection for those forms of insurance, constitutes a circumstance which strengthens that connection with the Netherlands. If, by contrast, it were not possible to take account of affiliation to the social security scheme of a Member State in order to evaluate the degree of connection with the territory of the European Union, the Hoge Raad is unsure whether that affiliation is a necessary condition for the application of Regulation No 1 408/71 to activities outside the territory of the European Union. The Court's case-law (see Case 300/84 *van Roosmalen* [1986] ECR 3097; *Lopes da Veiga*; and *Aldewereld*) does not provide any certainty on that point.

18 The Hoge Raad der Nederlanden is therefore faced with the question whether, regard being had to all the circumstances of the present case, there is a sufficient connection with the territory of the European Union. If Title II of Regulation No 1408/71 applies to the case before it, the Hoge Raad presumes that Mr Bakker will then be subject to the Netherlands legislation, in accordance with Article 13(2)(c) of that regulation.

19 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Are the designation rules in Title II of Regulation … No 1408/71 applicable in a case such as the present, where an employed person with Netherlands nationality residing in Spain is employed as a seafarer by an employer established in the Netherlands, and carries out his work on board dredgers which navigate outside the territory of the [European Union] under the Netherlands flag, with the result that the legislation of the Netherlands is designated as the legislation applicable, so that consequently Netherlands national insurance contributions may be levied, whereas judging solely on the basis of the national legislation of the Netherlands he is not affiliated to the Netherlands social security scheme as a result of the fact that he does not reside in the Netherlands?

2. To what extent is it important in that regard that in the implementation of the Netherlands employed persons' insurance scheme a policy is followed by virtue of which seafarers in a case such as the present are considered by the implementing body to be insured persons on the basis of [European Union] law?'

Consideration of the questions referred

The first question

20 By its first question, the Hoge Raad asks, in essence, whether Article 13(2)(c) of Regulation No 1408/71 must be interpreted as precluding a legislative measure of a Member State from excluding from affiliation to the social security scheme of that Member State a person in the position of the applicant in the main proceedings, who holds that Member State's nationality but does not reside in it and is employed on board a dredger flying the flag of that Member State but operating outside European Union territory.

21 While the Netherlands Government and the European Commission take the view that that question should be answered in the negative, Mr Bakker is of the opposite view.

22 In that regard, it must be borne in mind that Article 13(2)(c) of Regulation No 1408/71 expressly provides that a person employed on board a vessel flying the flag of a Member State is to be subject to the legislation of the State.

23 Thus, pursuant to that provision, a person in Mr Bakker's situation is, in principle, subject to the Netherlands social security legislation, in view of the professional activity which that person carries out on board a vessel flying the Netherlands flag.

24 However, Mr Bakker has put forward two arguments contesting the application of Article 13(2)(c) of Regulation No 1408/71 to his situation.

25 Firstly, he has argued, in his written observations, that the dredgers on which he worked were not covered by the concept of 'vessel' in Article 13(2)(c) of that regulation.

26 That argument cannot be accepted, inasmuch as there is no condition laid down in that provision as to the type of 'vessel' covered. Furthermore, it is apparent from the explanations provided by the national court that those dredgers held a certificate of registration and were recorded in the maritime shipping register of the Netherlands.

27 Secondly, at the hearing, Mr Bakker put forward the argument that Article 13(2)(c) of Regulation No 1408/71 does not apply to his situation in view of the fact that the dredgers in question operated principally in the territorial seas of China and of the United Arab Emirates. Under Article 2(1) of the United Nations Convention on the Law of the Sea, signed at Montego Bay (Jamaica) on 10 December 1982, which entered into force on 16 November 1994, was ratified by the Kingdom of the Netherlands on 28 June 1996 and was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1), the sovereignty of a coastal State extends, beyond its land territory and internal waters, to an adjacent belt of sea, described as the territorial sea. Consequently, in Mr Bakker's submission, the professional activities carried out on board the dredgers in question come under the jurisdiction of the coastal States and not under that of the flag Member State, namely the Kingdom of the Netherlands.

28 It should be noted, in this regard, that it follows from the case-law of the Court that the mere fact that a worker's activities are performed outside the territory of the European Union is not sufficient to exclude the application of the European Union rules on the free movement of workers, as long as the

employment relationship retains a sufficiently close link with the territory of the European Union. In a case such as that here at issue in the main proceedings, a link of that kind can be found in the fact, confirmed by the Hoge Raad, that Mr Bakker works on board a vessel registered in the Netherlands for an undertaking established in that Member State (see to that effect, *Lopes da Veiga*, paragraph 17, and *Aldewereld*, paragraph 14).

29 Furthermore, neither respect for the sovereignty of the coastal State nor the United Nations Convention on the Law of the Sea requires that a worker in Mr Bakker's situation be deprived of the benefit of the social insurance provided for, in accordance with Regulation No 1408/71, by the Member State whose flag the vessel flies, when that vessel is located in the territorial waters of a State other than that Member State.

30 Accordingly, the second argument put forward by Mr Bakker cannot be accepted.

31 For its part, the Hoge Raad expresses doubts as to whether Article 13(2)(c) of Regulation No 1408/71 can apply in so far as Mr Bakker does not come within the scope *ratione personae* of that regulation by virtue of the fact that he is not compulsorily subject to general social insurance in the Netherlands, as he does not reside there.

32 It must be noted in this regard that the sole purpose of Article 13(2)(c) of Regulation No 1408/71 is to determine the national legislation applicable to persons employed on board a vessel flying the flag of a Member State. As such, the provision is not intended 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. It is for the legislation of each Member State to lay down those conditions (see Case C-347/10 *Salemink* [2012] ECR, paragraph 38).

33 However, although Member States retain the power to organise the conditions of affiliation to their social security schemes, they must none the less, when exercising that power, comply with European Union law. In particular, those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom that legislation applies pursuant to Regulation No 1408/71 (see, to that effect, Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, and *Salemink*, paragraphs 39 and 40).

34 Article 13(2)(c) of Regulation No 1408/71 expressly provides that a person employed on board a vessel flying the flag of a Member State is to be subject to the legislation of that State. That provision would not be complied with if the residence condition laid down by the legislation of the Member State concerned for affiliation to the insurance scheme for which it provides could be relied on against the persons referred to in Article 13(2)(c) (see, to that effect, *Kits van Heijningen*, paragraph 21, and *Salemink*, paragraph 41).

35 Consequently, the effect of Article 13(2)(c) of Regulation No 1408/71 is that a provision of the applicable national legislation pursuant to which cover by the social security scheme established by that legislation is conditional on residence in the Member State concerned may not be relied on against the persons referred to in Article 13(2)(c) of that regulation (see, to that effect, *Kits van Heijningen*, paragraph 22).

36 It follows from the decision making the reference that that approach has been *de facto* transposed in the policy of the Landelijk Instituut sociale verzekeringen, which treats persons in Mr Bakker's situation as being subject to that scheme.

37 Having regard to all of the foregoing, the answer to the first question is that Article 13(2)(c) of Regulation No 1408/71 must be interpreted as precluding a legislative measure of a Member State from excluding, from affiliation to the social security scheme of that Member State, a person in the position of the applicant in the main proceedings, who holds that Member State's nationality but does not reside in it and is employed on board a dredger flying the flag of that Member State and operating outside the territory of the European Union.

The second question

38 Having regard to the answer given to the first question, it is not necessary to answer the second question.

Costs

39 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 (Eighth Chamber) hereby rules:

Article 13(2)(c) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999, must be interpreted as precluding a legislative measure of a Member State from excluding, from affiliation to the social security scheme of that Member State, a person in the position of the applicant in the main proceedings, who holds that Member State's nationality but does not reside in it and is employed on board a dredger flying the flag of that Member State and operating outside the territory of the European Union.

[Signatures]