JUDGMENT OF THE COURT (Third Chamber)
10 July 1986 *

In Case 60/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van Beroep [Social Security Court], 's-Hertogenbosch (Netherlands), for a preliminary ruling in the proceedings pending before that court between

M. E. S. van Vermoolen, née Luijten,

and

Raad van Arbeid [Labour Council], Breda,

on the interpretation of the provisions 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, as extended to self-employed persons by Council Regulation (EEC) No 1390/81 (Official Journal 1981, L 143, p. 1),

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
egistrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

the Netherlands Governmment, by I. Verkade, Secretary General of the Ministry of Foreign Affairs, and

* Language of the Case: Dutch.

the Commission of the European Communities, by J. Griesmar, a member of its Legal Department, acting as Agent, and F. Herbert, advocate,

after hearing the Opinion of the Advocate General delivered at the sitting on 27 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By order of 13 February 1985 which was received at the Court on 5 March 1985, the Raad van Beroep [Social Security Court], 's-Hertogenbosch, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 13 (2) (b) of Regulation 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, as extended to self-employed persons by Council Regulation No 1390/81.

2 That question arose in a dispute between Mrs van Vermoolen, née Luijten, the plaintiff in the main proceedings, and the Raad van Arbeid, Breda, the competent social security institution, the defendant in the main proceedings. As is clear from the order for reference and the documents before the Court, the plaintiff, who is a Netherlands national, resided in the Netherlands with her husband who, from July 1982 to 1 November 1983, ran a restaurant as a self-employed person in Belgium whilst continuing to reside in the Netherlands. After her child was born in February 1983, the plaintiff was paid family allowances in respect of the second quarter of 1983 by the defendant; the latter subsequently demanded repayment of those allowances on the ground that the plaintiff was not insured under the Algemene Kinderbijslagwet [General Law on Family Allowances] on 1 April 1983.

The reason given by the defendant was that the plaintiff's husband, who resided in the Netherlands, although not excluded from insurance under the Algemene Kinderbijslagwet, was affiliated to the Belgian Institut national d'assurances sociales pour travailleurs indépendants [National Social Security Institution for Self-Employed Persons] and was therefore entitled to claim family allowances in Belgium.

3 Having regard to the provisions of the relevant national legislation, the Raad van Beroep considered that the answer to the question whether the plaintiff was wrongly paid family allowances for the second quarter of 1983 depended on whether her husband was insured under the Algemene Kinderbijslagwet on 1 April 1983. In that regard, the Raad van Beroep found that the plaintiff's husband was not excluded from insurance under that law by any provision of Netherlands law but that, by virtue of Article 13 (1) in conjunction with Article 13 (2) (b) of Regulation No 1408/71, only the Belgian legislation was applicable to him.

4 In those circumstances the Raad van Beroep referred the following question to the Court for a preliminary ruling:

'Where the legislation of a given Member State is determined to be the legislation applicable to a self-employed worker pursuant to Article 13 (2) (b) of Regulation No 1408/71, does this mean that the self-employed worker cannot simultaneously be regarded, by virtue of another Member State's national law alone, as insured under the legislation of that other Member State concerning family allowances, with the result that the operation of Community law deprives him or his spouse of family allowances to which he or she is entitled under the national legislation of that other Member State alone?'

5 The Netherlands Government observes that Regulation No 1408/71 expressly provides in Article 13 (1) of Title II that, subject to Article 14 c, persons to whom the regulation applies are to be subject to the legislation of a single Member State only and the legislation applicable is to be determined in accordance with the provisions of Title II, as the Court confirmed in its judgment of 23 September 1982 in Case 267/81 (*Kuijpers* [1982] ECR 3027); Regulation No 1390/81 extended that provision to self-employed persons by amending Article 13 (1) and (2) of Regulation No 1408/71 accordingly.

6 According to the Netherlands Government, the principle that rights acquired under national legislation cannot be affected by the operation of Community law applies only to rights acquired under national legislation which is applicable by virtue of Title II of Regulation No 1408/71 and not under national legislation which has not been determined as applicable by virtue of that title.

7 The Netherlands Government therefore maintains that the effect of determining that a given Member State's legislation is the legislation applicable to a self-employed person on the basis of Article 13 (2) (b) is that that person cannot simultaneously be regarded, by virtue of another Member State's national law alone, as insured under the legislation of that other Member State concerning family allowances.

8 The Commission refers to the purpose of the provisions set out in Title II of Regulation No 1408/71, which, it emphasizes, is to prevent more than one national legislative system from being applicable by precluding the simultaneous application of a national legislative system other than that determined by those provisions.

9 With regard to the question of conflicts between rights acquired under national law and the rules of Community law, the Commission emphasizes that the principle of the inviolability of rights acquired under national law has been recognized by the Court as applying only to the substantive rules governing coordination which are set out in Titles I and III of Regulation No1408/71. The Commission contends that no conflict can arise between the rules of Community law and nationally-acquired rights. Such a conflict could arise only if the national law under consideration were applicable, and that depends on the conflict rule itself, which is the rule contained in Title II of Regulation No 1408/71.

10 The Commission therefore considers that a situation in which rights acquired under the national legislation of a Member State are impaired could be envisaged only if the legal position of the person concerned in the event of the application of Regulation No 1408/71 were compared with his legal position in the absence of that regulation. In the Commission's view, the Court has never taken that approach. Regulation No 1408/71, which was adopted in order to give effect to

Article 51 of the EEC Treaty, forms an integral part of the body of rules which, in each Member State, bring together provisions of national and Community law. According to the Commission, the only effect of the Court's case-law on 'acquired rights' is that a person who can avail himself of the rights provided for by national legislation without having to rely on Community law (for instance, without recourse to aggregation or to the neutralization of requirements relating to nationality or residence) may not be deprived of his rights by the operation of Community law.

11 In the Commission's view, therefore, it follows from Article 13 (1) of Regulation No 1408/71 that where, according to the criteria laid down by the Community legislature, the legislation of a Member State is held to be applicable, any concomitant application of the legislation of another Member State is excluded.

12 It must be borne in mind that, according to a consistent line of decisions of the Court, the aim of the provisions of Title II of Regulations Nos 3/58 and 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation.

13 That principle, which was applied by the Court in relation to Regulation No 3/58, is expressed in Title II ('determination of the legislation applicable') of Regulation No 1408/71, which provides in Article 13 (1), as amended by Regulation No 1390/81, that 'persons to whom this regulation applies shall be subject to the legislation of a single Member State only' and that that legislation 'shall be determined in accordance with the provisions of this Title'.

14 The provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned. As the Court pointed out

in its judgments of 23 September 1982 in Case 267/81 (*Kuijpers*, cited above), and Case 275/81 (*Kocks* [1982] ECR 3013), 'the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable' since they are 'under an obligation to comply with the provisions of Community law in force' (see the judgment of 12 June 1986 in Case 302/84 *Ten Holder* [1986] ECR 1821).

15 That rule is not at variance with the Court's decisions (see, in particular, the judgment of 21 October 1975 in Case 24/75 *Petroni* [1975] ECR 1149) to the effect that the application of Regulation No 1408/71 cannot entail the loss of rights acquired exclusively under national legislation. That principle applies not to the rules for determining the legislation applicable but to the rules of Community law on the overlapping of benefits provided for by different national legislative systems. It cannot therefore have the effect, contrary to Article 13 (1) of Regulation No 1408/71, of causing a person to be insured over the same period under the legislation of more than one Member State.

16 The answer to the question submitted by the Raad van Beroep must therefore be that the effect of determining that a given Member State's legislation is the legislation applicable to a self-employed person pursuant to Article 13 (2) (b) of Regulation No 1408/71, as amended by Council Regulation No 1390/81, is that only that legislation is applicable to him.

Costs

17 The costs incurred by the Netherlands Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings 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 (Third Chamber),

in answer to the questions referred to it by the Raad van Beroep, 's-Hertogenbosch, by order of 13 February 1985, hereby rules:

The effect of determining that a given Member State's legislation is the legislation applicable to a self-employed person pursuant to Article 13 (2) (b) of Regulation No 1408/71, as amended by Council Regulation No 1390/81, is that only that legislation is applicable to him.

Everling Galmot Kakouris

Delivered in open court in Luxembourg on 10 July 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber