JUDGMENT OF THE COURT (Second Chamber)
2 May 1990 *

In Case C-293/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van Beroep (Social Security Court), Amsterdam, for a preliminary ruling in the proceedings pending before that court between

E. M. Winter-Lutzins, residing at Minden, Federal Republic of Germany,

and

Bestuur van de Sociale Verzekeringsbank (Board of Management of the Social Insurance Bank), Amsterdam, the Netherlands,

on the interpretation of Article 10(1) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, Official Journal 1983, L 230, p. 6), and in particular Point 2(a) and (f) of the part entitled 'Netherlands' in Annex VI to the regulation,

THE COURT (Second Chamber)

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

* Language of the case Dutch.

after considering the observations submitted on behalf of

the Sociale Verzekeringsbank, the defendant in the main proceedings, by B. H. ter Kuile and E. H. Pijnacker Hordijk, of the Hague and Brussels Bars;

the Kingdom of the Netherlands, by H. J. Heinemann, Deputy Secretary-General in the Ministry of Foreign Affairs, acting as Agent;

the Commission of the European Communities, by its Legal Adviser, R. D. Gouloussis, and by B. J. Drijber, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Sociale Verzekeringsbank, represented by E. H. Pijnacker Hordijk, advocate; the Kingdom of the Netherlands, represented by J. W. De Zwaan; and the Commission, represented by B. J. Drijber, at the hearing on 9 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 February 1990,

gives the following

Judgment

1 By order dated 17 August 1988, which was received at the Court on 7 October 1988, the Raad van Beroep, Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 10(1) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, Official Journal 1983, L 230, p. 6), and in particular Point 2(a) and (f) of the part entitled 'Netherlands' in Annex VI to the regulation.

2 That question arose in the context of proceedings between Mrs E. M. Winter-Lutzins, a German national, and the Bestuur van de Sociale Verzekeringsbank (hereinafter referred to as 'the Board') concerning the application of the Netherlands Law on General Old-Age Insurance, the Algemene Ouderdomswet, to the calculation of the old-age pension to which Mrs Winter-Lutzins is entitled.

3 The Algemene Ouderdomswet established a system of general old-age insurance, to which all persons residing in the Netherlands are affiliated. The amount of the old-age pension depends on the number of years of insurance completed between the recipient's 15th and 65th birthdays. The Algemene Ouderdomswet includes transitional arrangements under which years between the recipient's 15th birthday and 1 January 1957, the date on which the Algemene Ouderdomswet entered into force, may be treated as years of insurance if certain conditions are fulfilled. Without the transitional arrangements, no one could have claimed a pension under the Algemene Ouderdomswet at the full rate of 100% until the year 2007, since the pension is equivalent to 2% of the minimum salary per year of insurance.

4 One of the conditions to be fulfilled, under Article 55(1) of the Algemene Ouderdomswet, is that the recipient must have resided in the Netherlands for a period of six years after his or her 59th birthday, with or without interruptions, (hereinafter referred to as 'the six-year residence condition'), and another, under Article 56(6), is that he or she must reside in the Netherlands after his or her 65th birthday (hereinafter referred to as 'the continuing-residence condition').

5 Article 10(1) of Regulation No 1408/71 provides:

'Save as otherwise provided in this regulation, ... old-age ... benefits ... acquired under the legislation of one or more Member States shall not be subject to any reduction ... by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

6 Point 2(a) and (f) of the part entitled 'Netherlands' in Annex VI to Regulation No 1408/71 contains the following provisions concerning the application of the Netherlands legislation on general old-age insurance:

'(a) Periods of insurance before 1 January 1957 during which a recipient, not satisfying the conditions permitting him to have such periods treated as periods of insurance, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country, shall also be considered as periods of insurance completed in application of Netherlands legislation for general old-age insurance.

...

(f) The periods referred to in subparagraphs (a) and (c) shall only be taken into account for calculation of the old-age pension if the person concerned has resided for six years in the territory of one or more Member States after the age of 59 years and for as long as that person is residing in the territory of one of those Member States.'

7 It appears from the order for reference that Mrs Winter-Lutzins, who was born on 15 February 1922 in Germany, resided with her husband in the Netherlands from 1 January 1966 to 30 November 1983 and was employed there from 1973 to 1980, after which she was awarded an invalidity allowance pursuant to the Wet op de Arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work). As from 1 December 1983, Mrs Winter-Lutzins returned to live in the Federal Republic of Germany. On her 65th birthday, she was able to claim an old-age pension under the Algemene Ouderdomswet.

8 When calculating that pension, the Board applied a reduction of 56%, corresponding to 28 non-insured years, between 15 February 1937 (Mrs Winter-Lutzins's 15th birthday) and 1 January 1966 (when Mr and Mrs Winter-Lutzins came to reside in the Netherlands). The Board applied that reduction on the ground that Mrs Winter-Lutzins did not satisfy the continuing-residence condition for entitlement under the transitional arrangements.

9 Mrs Winter-Lutzins appealed against that decision to the Raad van Beroep, which considered that it must be concluded from the Court's previous decisions that Article 10(1) of Regulation No 1408/71 has the effect that a claimant may not be refused the benefit of the transitional arrangements merely on the ground that he did not reside in the Netherlands on his 65th birthday. While Annex VI does settle certain details with regard to the application of Regulation No 1408/71 to the Netherlands legislation on old-age insurance, it merely contains provisions enabling periods before 1 January 1957 to be treated as periods of insurance in the case of persons who do not satisfy the conditions laid down by Articles 55 and 56 of the Algemene Ouderdomswet for entitlement to the benefit of the transitional arrangements.

10 The Raad van Beroep therefore sought a preliminary ruling from the Court on the following question:

'Must Article 10(1) of Regulation No 1408/71 be interpreted as precluding national legislation from preventing a person from acquiring the right to the benefit of the transitional provisions laid down in national legislation merely because he is not resident in the territory of the State in which the institution responsible for payment is situated, in particular when Annex VI to the regulation lays down a specific rule enabling periods before 1 January 1957 to be treated as periods of insurance in the case of persons satisfying the prescribed conditions?'

11 Reference is made to the Report for the Hearing for a fuller account of the legal background, the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 It must first be observed that the provisions of Annex VI to Regulation No 1408/71, which were drawn up with the provisions of the Algemene Ouderdomswet specifically in mind and for the purpose of supplementing them, must be considered in the light of the system and provisions of the national legislation. Under the system of the Algemene Ouderdomswet, periods prior to 1 January

1957 in respect of which an old-age pension is awarded under Articles 55 and 56 are not periods of actual insurance, since the beneficiary does not have to pay any contributions. Residence is the sole criterion for insurance.

13 In its judgment of 25 February 1986 in Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, the Court ruled that the provisions of Regulation No 1408/71, and in particular those of Annex VI thereto, were adopted to implement Article 51 of the EEC Treaty and must be interpreted in the light of the objective of Article 51, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, which is one of the foundations of the Community.

14 Article 51 requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers by securing, *inter alia*, payment of benefits for persons resident in the territories of the Member States. The aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State.

15 Consequently, the purpose of Article 10(1) of Regulation No 1408/71 concerning the waiving of residence clauses is to guarantee the person concerned his right to social security benefits even after taking up residence in a different Member State and to promote the freedom of movement of workers, by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another. As the Court has already ruled in its judgment of 7 November 1973 in Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, if that objective is to be attained, the protection given must necessarily extend to cover benefits which, while created within the confines of a particular scheme, such as that of the Algemene Ouderdomswet, are given effect by increasing the value of the pension which would otherwise accrue to the recipient.

16 Special procedures for giving effect to that principle in the application of Netherlands legislation on general old-age insurance are laid down in Point 2 of the part entitled 'Netherlands' in Annex VI to Regulation No 1408/71. The rule contained in Article 10, whereby the application of residence clauses is set aside,

cannot be applied without restriction to a general old-age insurance scheme in which the mere fact of residence in the Netherlands is sufficient qualification for insurance purposes.

17 Consequently, Point 2(a) provides that, in the case of a person who, in accordance with subparagraph (f), has resided for six years after his or her 59th birthday in another Member State, periods before the entry into force of the Netherlands legislation are to be taken into account only if a supplementary condition is satisfied, namely that during the periods in question the person concerned resided in the Netherlands or pursued an activity as an employed person in that country. Such periods provide a sufficient link with the Netherlands scheme.

18 The application of the residence clauses cannot have the effect of preventing a recipient from having periods prior to 1 January 1957 during which he was aged over 15 years and had a link with the Netherlands treated as periods of insurance. The other effects of the residence clauses, as far as the transitional arrangements under the Algemene Ouderdomswet are concerned, are authorized by the provisions of Annex VI, which limit the scope of Article 10 in that regard.

19 By application of Article 10(1) of Regulation No 1408/71 in accordance with the rules laid down in Annex VI persons who do not satisfy the continuing-residence condition and who had no link with the Netherlands between their 15th birthday and 1 January 1957 can thus be denied the right to have that period treated as a period of insurance for the purposes of the Algemene Ouderdomswet.

20 The answer to the national court's question must therefore be that Article 10(1) of Regulation No 1408/71, properly construed, does not preclude national legislation from preventing a person from acquiring the right to the benefit of the transitional provisions laid down in national legislation merely because he is not resident in the territory of the State in which the institution responsible for payment is situated, in view of the fact that Annex VI to the regulation lays down a specific rule enabling periods before 1 January 1957 to be treated as periods of insurance in the case of persons satisfying certain conditions.

Costs

21 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings 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 question referred to it by the Raad van Beroep, Amsterdam, by order of 17 August 1988, hereby rules:

Article 10(1) of Regulation (EEC) No 1408/71, properly construed, does not preclude national legislation from preventing a person from acquiring the right to the benefit of the transitional provisions laid down in national legislation merely because he is not resident in the territory of the State in which the institution responsible for payment is situated, in view of the fact that Annex VI to the regulation lays down a specific rule enabling periods before 1 January 1957 to be treated as periods of insurance in the case of persons satisfying certain conditions.

Schockweiler Mancini O'Higgins

Delivered in open court in Luxembourg on 2 May 1990.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber