JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 8 MARCH 1979 [1]

Bestuur van de Sociale Verzekeringsbank, Amsterdam v A. E. Lohmann (preliminary ruling requested by the Centrale Raad van Beroep, Utrecht)

Case 129/78

1. *Social security for migrant workers — Community rules — Schemes to which they apply — Special schemes for civil servants and persons treated as such — Exclusion*
(Regulation No 1408/71 of the Council, Arts. 1 (j) and 4 (4))

2. *Social security for migrant workers — Family allowances for dependent children of pensioners — Pension granted under special scheme for civil servants or persons treated as such — Exclusion from sphere of application of Community rules*
(Regulation No 1408/71 of the Council, Art. 77 (2) (a))

1. The fact that Article 1 (j) of Regulation No 1408/71 refers only to Article 4 (1) and (2) does not remove the significance of the limitation contained in paragraph (4) of that article, which *inter alia* excludes from the sphere of application of the regulation special schemes for civil servants and persons treated as such.

2. A pension under the legislation of one Member State only within the meaning of Article 77 (2) (a) of Regulation No 1408/71 does not include a pension granted under a special scheme for civil servants or persons treated as such.

In Case 129/78

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 proceedings pending before that court between

1 — Language of the Case: Dutch.

BESTUUR VAN DE SOCIALE VERZEKERINGSBANK [Management of the Central Social Security Institution], AMSTERDAM,

and

A. E. LOHMANN

on the interpretation of the expression "legislation" appearing in Article 1 (j) and Article 77 (2) (a) of Regulation No 1408/71 of the Council of the EEC of 14 June 1971 (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, P. Pescatore and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the 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 procedure

Mr Lohmann, who was born in 1922, was an official of the municipality of Vlaardingen and from 1 May 1971 he has been in receipt of an invalidity pension pursuant to the Algemene Burgerlijke Pensioenwet [general law on civil pensions].

On 5 April 1974 he went to live in Belgium. His daughter Erna, a student, who was born in 1955, continued to reside in the Netherlands. Lohmann applied for family allowances for this daughter for the second quarter of 1974 in pursuance of the Kinderbijslagwet voor Loontrekkenden [law on family allowances for wage-earners and persons treated as such] and the Algemene Kinderbijslagwet [general law on family allowances].

The Algemene Kinderbijslagwet contains a general scheme for family allowances payable in respect of the insured's third child and subsequent children; it should be noted that under this scheme a child of 16 to 27 who continues his studies, does not reside at the home of his parents and is maintained wholly or almost wholly at the expense of the insured counts as three children (Article 8).

The Kinderbijslagwet voor Loontrekkenden contains an insurance scheme for wage-earners and persons treated as such for the first and second child and in this respect a child in the aforesaid age group who is still studying counts as two children if he is maintained largely at the expense of the wage-earner. If the child lives away from his parents' home the right to family allowances may be derived, as if he were a first or second child, from the Kinderbijslagwet voor Loontrekkenden and for the purposes of the right to family allowances for a child assimilated to a third child reference must be made to the Algemene Kinderbijslagwet.

By a decision of 11 November 1975 the Sociale Verzekeringsbank refused the grant of family allowances requested by Mr Lohmann for his daughter Erna.

That decision, refusing to grant family allowances under the Algemene Kinderbijslagwet, was based on the fact that the respondent was not an insured person within the meaning of that law (under Article 6 (1) in order to be insured under that law a person must be either a national, or subject to tax on wages or salary in respect of work carried out within the territory, of the Kingdom) even if account is taken of the enlargement of the class of insured persons within the meaning of that law, as laid down by the Royal Decree of 18 October 1968 (Staatsblad [collection of statutes] p. 575), adopted in implementation of Article 6 (2) and (3) of the said law, as last amended by the Royal Decree of 9 April 1973 (Staatsblad p. 150), (which has in the meantime been replaced with effect from 1 October 1976 by the Royal Decree of 19 October 1976 (Staatsblad p. 557)). Consequently the possibility, which was maintained in force by the said decree, of extending the status of insured person to cover persons who have attained the age of 15, are not already insured pursuant to Article 6 (1) of the Algemene Kinderbijslagwet, who live outside the territory of the Kingdom or another Member State of the EEC, receive benefits for incapacity for work of at least 45% pursuant to compulsory insurance under the Wet op de Arbeidsongeschiktheidsverzekering (law on insurance against incapacity for work) and neither receive a similar benefit under foreign legislation nor work, was also held not to be applicable.

The refusal to grant family allowances under the Kinderbijslagwet voor Loontrekkenden was based on the fact that Lohmann — although as a former official he was considered as a worker for the purposes of the application of that law (Article 9 (1) (a)) — did not fulfil the condition relating to residence in the Netherlands laid down by Article 17 (1). Although in pursuance of Article 1 of the Ministerial Circular of 20 December 1962, No 7140, Nederlandse Staatscourant [Official Gazette] 1962 No 251, an employed person who does not reside in the Netherlands is deemed to have his residence there if and so long as he is insured by virtue of the provisions of the Algemene Kinderbijslagwet or

provisions adopted in implementation of that law, this assimilation was contested in this case by the Verzekeringsbank on the basis of the considerations underlying its first refusal, which have been set out above.

Nor could Lohmann, according to the decision of the Verzekeringsbank, rely on Regulation No 1408/71 of the Council to claim the payment of family allowances for his daughter Erna since he did not have the status of a worker within the meaning of Article 73 nor was he receiving a pension in the sense referred to in Article 77.

Lohmann then brought proceedings contesting the decision of the Verzekeringsbank rejecting his application before the Raad van Beroep (social security court), Amsterdam. By a judgment of 20 October 1976, that court stated that Lohmann's claims were justified and quashed the disputed decision, ordering the Verzekeringsbank to adopt a fresh decision in accordance with the operative part of the judgment. In its decision the Raad van Beroep took the view that in fact from 6 April 1974 Lohmann had no longer been insured under the Algemene Kinderbijslagwet nor could he be considered as from that date as being insured under the Kinderbijslagwet voor Loontrekkenden, but that in pursuance of the provisions of Regulation No 1408/71 he must be deemed to be insured under the two Kinderbijslagwetten in question since he was on the one hand a pensioner and on the other hand a resident within the EEC both on 6 April 1974 and subsequently.

The opinion of the Raad van Beroep amounts to accepting that, as regards the family allowances which he claims, Lohmann bases his entitlement on Article 77 of Regulation No 1408/71, a provision according to which benefits shall be granted irrespective of the Member State in whose territory a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension, is residing.

The Centrale Raad van Beroep, to which the matter went on appeal, decided, by order of 13 December 1977, to use the procedure of Article 177 and then by a supplementary order of 6 June 1978 to refer the following questions to the Court of Justice of the European Communities:

"Does the fact that Article 1 (j) of Regulation No 1408/71 refers only to paragraphs (1) and (2) of Article 4 signify that the limitation contained in paragraph (4) of that article does not relate to the meaning of the term 'legislation' where the term is used elsewhere in the regulation?

In connexion with the answer to the previous question or independently thereof, must 'pension under the legislation of one Member State only' in Article 77 (2) (a) of Regulation No 1408/71 also include pensions payable under a special scheme for civil servants and persons treated as such?"

The order was received at the Court Registry on 9 June 1978.

By a letter of 7 June 1978 the Acting President of the Centrale Raad van Beroep explained the reasons which led the court to refer those questions to the Court of Justice. He puts forward four considerations:

1. On the basis of the criterion set out in Article 1 (a) (ii) of Regulation No 1408/71 a Netherlands official is "a worker" and thus a former official is included in pursuance of Article 2 (1) of

the same regulation amongst the persons to whom the regulation applies.

2. It remains to be decided whether the applicable national legislation comes within the matters covered by the regulation, which are described in Article 4. Laws such as the Netherlands laws relied on (the Algemene Kinderbijslagwet and the Kinderbijslagwet voor Loontrekkenden), allowing the grant of family allowances, come within the field defined by Article 4 (1) (h) of the regulation. The exclusion by Article 4 (4) of special schemes for civil servants cannot affect the first law but might possibly affect the second as Article 9 of that law states that a former official is regarded as a worker for the purposes of the law; however, this assimilation does not appear to create a special scheme for, even though it refers to officials as such, the result is to allow them to benefit from the family allowance scheme applicable to wage-earners.

3. These two points having been thus settled, it remains to be considered whether Lohmann can base a right to family allowances on any provision of Regulation No 1408/71. This cannot be Article 10 or Article 73 (1), which deals with the case of non-resident children, or Article 75 (1) (a), which refers to Article 73 (1). There remains Article 77 which makes it possible to grant benefits for dependent children of a pensioner whatever may be the Member State on whose territory the pensioner or his children reside; but the Verzekeringsbank maintains that whilst, in that article, the term "pension" has the broad sense set out in Article 1 (t) of the regulation, the expression "legislation" has the meaning defined in Article 1 (j), which refers to the social security schemes referred to in Article 4 (1) and (2), which does not include, under paragraph (4) of that article, the "special schemes for civil servants and persons treated as such"; the Verzekeringsbank states, however, that Lohmann's right to a pension is based on such a scheme. It might be objected to this construction that the terms of Article 1 (j) which relate to "sectors of social security and schemes for social security covered by Article 4 (1) and (2)" do not mention paragraph (4) and that there is therefore a reference to a general concept of "legislation" in the sense of Regulation No 1408/71, that is to say, including also special schemes such as those for civil servants. There are therefore two possible solutions.

4. These observations were made having regard to the fact that the Centrale Raad van Beroep is not aware of any other provisions from which Lohmann might derive rights; it has assumed that Regulation No 1408/71 is valid and not incompatible with Article 48 (4) of the Treaty (after considering the judgment in Case 152/73) and finally it has found no provision of the Treaty with which the contested decision must be held to be incompatible.

The procedure followed the normal course. In pursuance of Article 20 of the Statute of the Court of Justice of the EEC observations were submitted on behalf of the Sociale Verzekeringsbank by its President Director, K. Weernink, on behalf of the Commission of the European Communities by A. Toledano-Laredo, acting as Agent, assisted by A. Hagsma. On the proposal of the Judge-Rapporteur and having heard the views of the Advocate General, the Court by order of 25 October 1978 decided to assign the case to the Second Chamber.

II — Summary of the observations lodged in pursuance of Article 20 of the Statute of the Court of Justice

A — The *Sociale Verzekeringsbank, the appellant in the main action,* mentions the risk of confusion flowing from the legislative technique of placing in the same enactments provisions relating to different fields and in particular social security and insurance. In fact only the provisions actually concerning social security for wage-earners comes within the sphere of application of Regulation No 1408/71. Even if rules applicable to other groups of persons concerned are similar to those for genuine wage-earners, such persons can still not be assimilated to wage-earners and claim the benefit of the provisions of the EEC Treaty and Regulation No 1408/71. If such a position were to be accepted all Netherlands pensioners receiving benefits under a general law on old-age pensions would retroactively become workers within the meaning of the Treaty when they attained the age of 65 years because workers in the true sense of the term benefit from the same law. Thus with regard to the subject-matter of this action, Article 9 of the Kinderbijslagwet voor Loontrekkenden deems persons drawing a civil service pension to be "workers" within the meaning of that law. That was necessary for practical reasons of legislative technique whereas in fact benefits are financed on the one hand by the government in its capacity as the former employer of officials and on the other hand by the general insurance funds. For this reason Article 9 of the Netherlands Kinderbijslagwet voor Loontrekkenden, in so far as it considers pensioned officials as workers, is not "legislation" within the meaning of Article 1 (j) of Regulation No 1408/71. The scope of this expression, like that of other expressions used by the regulation to define the matters to which it applies, can be determined only in conjunction with the content of the provisions relating to the persons to whom it applies. Article 4 (4) is therefore an elucidation of the concept itself.

For the above reasons the reply which should be given to the first question put by the Centrale Raad van Beroep is that there are no grounds for the view that the concept of "legislation" in Article 77 (2) has a different content from that in the combined provisions of Article 1 (j) and Article 4 (4).

As regards the second question, it too should be answered in the negative. Although the expression "pensions" contained in Article 1 (t) must be taken in a very broad sense having regard to case-law, it must nevertheless be admitted that what is involved is a pension in the field of social security within the meaning of Article 51 of the Treaty and not mere benefits based on private or administrative law. It is in this sense that the regulation refers on several occasions to pensions "payable under the legislation . . .". Any other interpretation would have incalculable consequences.

In practice the second question amounts to asking whether the special schemes for civil servants come within the scope of Regulation No 1408/71 as such. In general special schemes for civil servants constitute in the various Member States such a specialized field that it is understandable that they have not been considered in a regulation of a general character such as Regulation No 1408/71 and that they do not come

within its scope either with regard to pensions or their consequences — as in this case family allowances. In support of its views the Verzekeringsbank quotes four decisions of the Court of Justice (33/65, 61/65, 14/72 and 51/73).

B — The *Commission* summarizes the facts and procedure in the main proceedings and describes the Netherlands legislation applicable to this case. With regard to the scope of that legislation, although the Centrale Raad has not put any questions on the matter, the Commission emphasizes that Lohmann, who is not subject to the two laws quoted, is excluded from the category of persons to whom the regulation applies.

With regard to the questions referred to the Court the Commission states that the expression "legislation" refers at the most to rules coming within the material scope of Regulation 1408/71 as defined by Article 4 (1) to (4) of that regulation. As special schemes for civil servants are excluded by paragraph (4) a person entitled to a pension to which the regulation is not applicable cannot rely on Article 77 (2) (a) to deduce the existence of rights to which he is entitled. Moreover the regulation itself contains no provision which directly creates rights to family allowances.

In conclusion the Commission is of the opinion that the answers to be given to the questions put by the Centrale Raad van Beroep should be answered as follows:

"1. The expression 'legislation' defined in Article 1 (j) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 does not include schemes which are excluded from the scope of the said regulation in pursuance of Article 4...

2. In Article 77 (2) (a) of the said regulation the expression 'pension under the legislation of one Member State only' is not to be taken as including a pension under a special scheme for civil servants."

III — Oral procedure

The hearing took place on 7 December 1978. The Commission developed the arguments put forward in its written observations.

The Advocate General delivered his opinion at the hearing on 15 February 1979.

Decision

1 By an order dated 6 June 1978, which reached the Court on 9 June, the Centrale Raad van Beroep [Court of last instance in social security matters] decided to refer two questions to the Court in the context of proceedings pending before it. Those proceedings involved a Netherlands national, a former local official in the Netherlands, who since 1 May 1978 had been drawing an invalidity pension in pursuance of the Netherlands law on

pensions for officials. The person concerned moved to Belgium and then asked the competent Netherlands institution to grant him family allowances in respect of a daughter who had remained in the Netherlands. He received a negative answer since according to the institution the residence condition prescribed by Article 17 (1) of the law on family allowances for children of wage-earners and persons treated as such was not fulfilled. The Centrale Raad van Beroep thereupon decided to refer the following questions to the Court:

"Does the fact that Article 1 (j) of Regulation No 1408/71 refers only to paragraphs (1) and (2) of Article 4 signify that the limitation contained in paragraph (4) of that article does not relate to the meaning of the term 'legislation' where the term is used elsewhere in the regulation?

In connexion with the answer to the previous question or independently thereof, must 'pension under the legislation of one Member State only' in Article 77 (2) (a) of Regulation No 1408/71 also include pensions payable under a special scheme for civil servants and persons treated as such?"

First Question

2 Under Article 1 (j) of Regulation No 1408/71, the expression "legislation" means all the laws, regulations and other provisions and all other present or future implementing measures of each Member State relating to the sectors of social security and schemes for social security covered by Article 4 (1) and (2) of the said regulation. Reference is thus made to the positive definition of the material scope of the regulation.

3 The absence of an express reference in Article 1 (j) to Article 4 (4) is explained by the fact that there was no need to define negatively the material scope of the regulation by repeating the express exclusion of special schemes for civil servants and persons treated as such. Moreover that exclusion is only the logical consequence of Article 48 (4) of the Treaty which excludes "employment in the public service" from the application of the provisions relating to freedom of movement for workers within the Community.

4 The answer to be given to the first question put by the Centrale Raad van Beroep should therefore be that the fact that Article 1 (j) of Regulation No 1408/71 refers only to Article 4 (1) and (2) does not remove the significance of the limitation contained in paragraph (4) of that article.

Second Question

5 Article 77 (2) (a) of Regulation No 1408/71 uses the concept of "a pension under the legislation of one Member State only". The expression "legislation" used in that provision has the scope defined in Article 1 (j) of the regulation as explained in answer to the first question.

6 The answer to be given to the second question of the Centrale Raad van Beroep should therefore be that a pension under the legislation of one Member State only within the meaning of Article 77 (2) (a) of Regulation No 1408/71 does not include a pension granted under a special scheme for civil servants or persons treated as such.

Costs

7 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 Centrale Raad van Beroep, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Centrale Raad van Beroep (Utrecht) by orders of 13 December 1977 and 6 June 1978, hereby rules:

1. **The fact that Article 1 (j) of Regulation No 1408/71 refers only to Article 4 (1) and (2) does not remove the significance of the limitation contained in paragraph (4) of that article.**

2. **A "pension under the legislation of one Member State only" within the meaning of Article 77 (2) (a) of Regulation No 1408/71 does not include a pension granted under a special scheme for civil servants or persons treated as such.**

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 8 March 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

1. The preliminary questions which give rise to the present case concern the scope of Regulation (EEC) No 1408/71 (on social security for migrant workers) in relation to family allowances for the dependent children of a pensioner, a former civil servant of a Member State. In the main action the person concerned is a Netherlands national, Mr Lohmann,

1 — Translated from the Italian.