# JUDGMENT OF THE COURT (Fifth Chamber)
16 December 1993 *

In Case C-28/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht Reutlingen, Germany, for a preliminary ruling in the proceedings pending before that court between

**Marie-Hélène Leguaye-Neelsen**

and

**Bundesversicherungsanstalt für Angestellte**

on the interpretation of Articles 9, 10(2) and 13(2)(d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— the defendant in the main proceedings, by Tilo Hermann, Principal Director of Administration in the Bundesversicherungsanstalt für Angestellte,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Claus-Dieter Quassowksi, Regierungsdirektor in the same ministry, acting as Agents,

— the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent, assisted by Bernd Schulte, of the Max-Planck-Institut für ausländisches und internationales Sozialrecht, Munich,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government and the Commission, represented by Dimitrios Gouloussis, Legal Adviser, acting as Agent, assisted by Bernd Schulte, at the hearing on 11 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 22 April 1993,

gives the following

## Judgment

1 By order of 19 December 1991, received at the Court on 3 February 1992, the Sozialgericht (Social Court) Reutlingen, Germany, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 9, 10(2) and 13(2)(d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the

Community, as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 That question was raised in proceedings before the Sozialgericht Reutlingen brought by Marie-Hélène Leguaye-Neelsen, a French national, against the decision of the Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Clerical Staff, hereinafter 'the BfA') refusing her reimbursement of compulsory contributions made to the statutory pension scheme between 1973 and 1977, when she was employed in Germany.

3 After her stay in Germany, Mrs Leguaye-Neelsen entered the French public service, where she now works as a teacher. Although residing in a Member State other than the Federal Republic of Germany, she is entitled, under Paragraph (C)(7)(b) of Annex VI to Regulation No 1408/71, to make voluntary contributions to the German pension scheme.

4 The BfA's refusal is based on the German legislation which does not allow employees who have paid compulsory contributions to the pension scheme the right to reimbursement of those contributions where, thereafter, they are entitled to continued voluntary insurance.

5 Those who enter the German public administration after having been subject, as employees, to compulsory insurance in Germany for less than 60 months are not entitled to continued voluntary insurance and may apply for reimbursement of the contributions they have paid.

6 The Sozialgericht Reutlingen, considering that the decision to be given in the case depended on the interpretation of Regulation No 1408/71, decided to stay the proceedings and seek a preliminary ruling from the Court of Justice on the following question:

'Are Articles 9, 10(2) and 13(2)(d) of Regulation (EEC) No 1408/71 to be interpreted as meaning that entitlement to reimbursement of contributions under national law exists even when an employee is a member of a comparable social security scheme for civil servants not under national legislation but under the legislation of another Member State?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts, the legal background, 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.

8 Rules of the kind at issue in this case must be appraised in relation not only to the provisions of Regulation No 1408/71 mentioned by the national court but also to Article 3 of that regulation. Rules of that kind apply different conditions depending on whether the person concerned enters the public administration of the State which adopted the rules or the public administration of another Member State. It is therefore necessary to consider whether, as the Commission maintains, that difference of treatment constitutes discrimination prohibited by Article 3 of Regulation No 1408/71.

9 Accordingly, the question submitted must be regarded as asking whether Articles 3, 9, 10(2) and 13(2)(d) of Regulation No 1408/71 are to be interpreted as precluding legislation of a Member State which, whilst providing for reimbursement of the contributions paid by an employee to a compulsory insurance scheme in the event of affiliation to the special social insurance scheme for civil servants in that State, excludes such reimbursement where the employee enters the public administration of another Member State.

## Applicability of Regulation No 1408/71

12 The German Government considers that Regulation No 1408/71 is not applicable to this case. The right to the reimbursement at issue derives from the fact that German civil servants, by reason of their affiliation to a special social insurance scheme, are no longer required to contribute to the statutory insurance scheme and are not entitled to continued voluntary insurance if they have paid contributions for less than 60 months. That right to reimbursement is thus a feature of the special social security scheme for German civil servants, which, by virtue of Article 4(4) of Regulation No 1408/71, falls outside the scope of that regulation.

11 As the Advocate General showed in points 9 and 10 of his Opinion, the fact that the person concerned is a civil servant is not decisive in determining the right to reimbursement. That right is granted to make up for the absence of entitlement to continued voluntary insurance which affects not only the civil servants of the Member State in question but also other categories of persons, in particular employees who are nationals of non-member countries and cease to be subject to compulsory insurance in that Member State without having paid contributions for long enough to be eligible for an old-age pension.

12 It follows that entitlement to the reimbursement at issue does not fall outside the scope of Regulation No 1408/71 by virtue of Article 4(4) thereof.

## Article 3 of Regulation No 1408/71

13 Under the German legislation, those persons who cease to be subject to compulsory insurance in that country without having acquired the right to a pension in the future do not, as a general rule, have any right to reimbursement of the compulsory contributions paid, but they may continue to pay voluntarily into the German scheme in order to acquire the right to a pension in the future. That rule applies regardless of the employee's nationality.

14 However, that legislation withholds the right to make voluntary contributions from employees who, after paying compulsory insurance contributions for less than 60 months, enter the German public administration. The right to reimbursement of the contributions paid makes up, in those circumstances, for the loss of entitlement to a pension in the future.

15 The situation of such employees is not comparable to that of those who, in the same circumstances, enter the public administration of another Member State, since the latter, unlike the former, enjoy the right to pay voluntary contributions in Germany.

16 It appears from the documents before the Court that the special rules applicable to persons who enter the German public administration, mentioned in paragraph 14, are intended to avoid duplication of insurance. However, the German legislature is not required to take account of situations where insurance is duplicated as a result of the simultaneous application of its own social security system and of a special social security scheme existing in another Member State, and there is therefore nothing to prevent the German legislature from making persons in circumstances like those of Mrs Leguaye-Neelsen subject to the scheme which is in general applicable to persons who cease to be subject to compulsory insurance.

17 It is true that employees who cease to be subject to compulsory insurance in one Member State and, as employed or self-employed persons, are subject to compulsory insurance in another Member State enjoy the right, under Article 46 of Regulation No 1408/71, to have the period of insurance completed in the first Member State taken into account in the second Member State, whereas persons in Mrs Leguaye-Neelsen's circumstances are denied the benefit of those provisions. However, that derives from the fact that, pursuant to Article 4(4) thereof, Regulation No 1408/71 does not apply to special schemes for civil servants and does not therefore require the extension to employees who enter the public administration

of another Member State of the scheme which, in the first Member State, is applicable to persons who enter the public administration in that country.

18 Therefore, the application to employees who enter the public administration of another Member State of the general scheme applicable to employees who cease to be subject to compulsory insurance does not constitute discrimination prohibited by Article 3 of Regulation No 1408/71.

## Articles 9, 10(2) and 13(2)(d) of Regulation No 1408/71

19 Nor do the other provisions of Regulation No 1408/71 mentioned in the preliminary question require there to be an entitlement to the reimbursement at issue.

20 First, Article 9(1) of Regulation No 1408/71, under which 'the provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons', concerns the conditions to which the Member States make eligibility for voluntary or optional continued insurance subject and do not relate to the conditions under which reimbursement of contributions might be possible.

21 Article 10(2) of the same regulation, which provides that 'where under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject to compulsory insurance as an employed or self-employed person under the legislation of another Member State', does not imply that the right to reimbursement is to be granted in other circumstances.

22 Finally, Article 13(2)(d) of the same regulation, according to which, subject to Articles 14 to 17, 'civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject' (French legislation in this case), cannot have the effect of undermining the situation of the person concerned under the legislation of another Member State to which he was previously subject.

23 The answer to be given to the national court must therefore be that Articles 3, 9, 10(2) and 13(2)(d) of Regulation No 1408/71 do not preclude legislation of a Member State which, whilst providing for the reimbursement of contributions paid by an employee to a compulsory insurance scheme in the event of affiliation to the special social insurance scheme for civil servants in that State, excludes such reimbursement where the employee enters the public administration in another Member State.

## Costs

24 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 (Fifth Chamber),

in answer to the question referred to it by the Sozialgericht Reutlingen, by order of 19 December 1991, hereby rules:

**Articles 3, 9, 10(2) and 13(2)(d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the**

**Community, as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983, do not preclude legislation of a Member State which, whilst providing for the reimbursement of contributions paid by an employee to a compulsory insurance scheme in the event of affiliation to the special social insurance scheme for civil servants in that State, excludes such reimbursement where the employee enters the public administration in another Member State.**

Moitinho de Almeida Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 16 December 1993.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber