JUDGMENT OF THE COURT (First Chamber)
13 November 1997 *

In Case C-248/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arrondissementsrechtbank, Amsterdam, for a preliminary ruling in the proceedings pending before that court between

R. O. J. Grahame,

L. M. Hollanders

and

Bestuur van de Nieuwe Algemene Bedrijfsvereniging

on the interpretation and validity of Part J, point 4(a), of Annex VI to 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 their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and as adapted by Part VIII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), and of Part J, point 4(c), of Annex VI to Regulation No 1408/71, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, P. Jann and L. Sevón, Judges,

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

after considering the written observations submitted on behalf of:

— Mr Hollanders,

— the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, by C. R. J. A. M. Brent, Head of the Complaints and Appeals Section of the Gemeenschappelijk Administratie Kantoor (GAK) Nederland BV, acting as Agent,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Council of the European Union, by G. Houttuin and F. Anton, of its Legal Service, acting as Agents, and

— the Commission of the European Communities, by B. J. Drijber, of its Legal Service, acting as Agent,

having regard to the report for the hearing,

after hearing the oral observations of Mr Hollanders; of the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, represented by W. Bel, Legal Assistant in the Gemeenschappelijk Administratie Kantoor (GAK) Nederland BV; of the Netherlands Government, represented by M. A. Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by A. de Bourgoing, Chargé de Mission in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; of the Council, represented by G. Houttuin; and of the Commission, represented by B. J. Drijber, at the hearing on 29 May 1997,

after hearing the Opinion of the Advocate General at the sitting on 17 July 1997,

gives the following

Judgment

1 By judgment of 16 July 1996, received at the Court on 22 July 1996, the Arrondissementsrechtbank (District Court), Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty several questions on the interpretation and validity of Part J, point 4(a), of Annex VI to 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 their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and as adapted by Part VIII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), and of Part J, point 4(c), of Annex VI to Regulation No 1408/71, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7).

2 Those questions were raised in proceedings brought by Mr Grahame and Mr Hollanders against the Bestuur van de Nieuwe Algemene Bedrijfsvereniging

(hereinafter 'the Bedrijfsvereniging') concerning the calculation of invalidity benefits under the Wet op de Arbeidsongeschiktheidsverzekering (Law on Insurance against Incapacity for Work, hereinafter 'the WAO').

3 Article 3 of the WAO insures all persons in an employment relationship under private or public law against the financial consequences of invalidity. Article 6(1) provides that, for the purposes of the WAO, the work relationship of a person who is fulfilling an obligation imposed on him by law or arising out of an undertaking other than a contract of employment, entered into by him *vis-à-vis* the public authorities for the purposes of national defence or the maintenance of law and order and protection of civilians is not to be regarded as employment.

4 In order to be eligible for invalidity benefit under the WAO, an employed person must have been insured at the time when his incapacity for work occurred and must have remained unfit for work for a continuous period of more than 52 weeks. The amount of benefit payable under the WAO, without reference to Community law, is not related to the duration of periods of insurance but depends on the degree of incapacity for work and the final salary received before the incapacity for work occurred, subject to indexation.

5 From 1957 to 1970, Mr Grahame, a Netherlands national, worked in the Netherlands. He performed his compulsory military service there from 2 December 1959 to 7 May 1960 and thereafter, until 1 May 1961, in the former Netherlands New Guinea.

6 Subsequently, Mr Grahame lived and was employed in Germany where, in October 1989, he became unfit to work and received sickness benefit until 19 July 1991.

7 By decision of 18 October 1993 the Bedrijfsvereniging awarded Mr Grahame a pro rata WAO benefit, with effect from 20 July 1991, based on a degree of incapacity for work of 80-100%. The Netherlands institution calculated the amount payable on the basis that Mr Grahame had been insured for slightly more than 19 years, of which approximately five had been completed in the Netherlands.

8 Mr Grahame challenges that calculation on the ground that account was not taken of his periods of military service with the Netherlands armed forces.

9 Mr Hollanders, also a Netherlands national, performed his compulsory military service in the Netherlands from 10 June 1953 to 16 May 1955 and remained an enlisted member of the armed forces until 11 February 1958. From 1960 he worked in Luxembourg, where he became unfit for work in 1991.

10 By decision of 22 March 1994 the Bedrijfsvereniging awarded him a WAO benefit, with effect from 17 June 1992, based on a degree of incapacity for work of 80-100%. In calculating the pro rata benefit payable, the Bedrijfsvereniging took account of a total period of insurance of approximately 35 years, of which just over four had been completed in the Netherlands.

11 Mr Hollanders challenges that decision on the ground that account was not taken of his periods of compulsory military service and as an enlisted member of the armed forces.

12 In both cases, the Bedrijfsvereniging considered that the periods spent by the persons concerned in the armed forces could not be treated as paid employment for the purposes of Part J, point 4(a), of Annex VI to Regulation No 1408/71 in the case of Mr Grahame and Part J, point 4(c), of Annex VI to Regulation No 1408/71, as amended by Regulation No 1248/92, in the case of Mr Hollanders.

13 By applications dated 8 December 1993 and 24 April 1994, Mr Grahame and Mr Hollanders brought proceedings before the Arrondissementsrechtbank, Amsterdam, challenging those decisions; that court considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 48 and 51 of the EC Treaty to be interpreted as meaning that the provisions of point 4(a) or 4(c), depending on the relevant time, of Part J of Annex VI to Regulation No 1408/71 are incompatible with those articles in so far as no account is taken of certain periods of work when calculating a pro rata benefit for migrant workers under the WAO?

(2) Is point 4(a) or 4(c), depending on the relevant time, of Part J of Annex VI to Regulation No 1408/71, as they stood on 20 July 1991 and 17 June 1992 respectively, to be interpreted as meaning that periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967 include:

(a) periods during which the person concerned was performing his compulsory military service under the Netherlands legislation;

(b) periods during which the person concerned was an enlisted member of the Netherlands armed forces and in that capacity came under a special statutory insurance scheme against incapacity for work for civil servants and persons treated as such?

(3) Is the answer to question 2 different if the periods during which the person concerned was performing his compulsory military service under the Netherlands legislation were completed within or outside the territory of the European Union (at that time, the European Community)?'

14 Article 40 of Regulation No 1408/71 governs the payment of invalidity benefits to employed and self-employed persons who have been successively subject to two types of legislation: on the one hand, legislation such as the Netherlands legislation in the present case, which is listed in Annex IV to the regulation as one of the types of legislation referred to by Article 37(1) under which the amount of invalidity benefits is independent of the duration of periods of insurance (hereinafter 'type A legislation') and, on the other, legislation such as the German or Luxembourg legislation in the present case, under which the amount of invalidity benefits depends on the duration of periods of insurance (hereinafter 'type B legislation').

15 According to Article 40(1), in those circumstances benefits are to be calculated under the provisions of Chapter 3, 'Old Age and Death (Pensions)', of the regulation, in particular Article 46 thereof. Article 46(2) provides that, where appropriate, a pro rata calculation must be made in accordance with the duration of the periods completed under the legislation of each Member State to which the person concerned has been subject including, therefore, legislation under which the amount of invalidity benefits is independent of the duration of periods of insurance.

16 As regards the Netherlands legislation, in a case such as that of Mr Grahame, reference must also be made to the version of Part J (Netherlands), point 4(a), of Annex VI to Regulation No 1408/71 in force on 20 July 1991; in a case such as that of Mr Hollanders, reference must be made to the version of Part J, point 4(c), of Annex VI to Regulation No 1408/71, as amended by Regulation No 1248/92, in force on 17 June 1992.

17 Part J (Netherlands), point 4(a), of Annex VI to Regulation No 1408/71 provides:

'For the purpose of applying Article 46(2) of the Regulation, Netherlands institutions will respect the following provisions:

(a) If, when incapacity for work or the resultant invalidity occurred, the person concerned was an employed person within the meaning of Article 1(a) of the Regulation, the competent institution shall fix the amount of cash benefits in accordance with the provisions of the Law of 18 February 1966 on insurance against incapacity for work (WAO), taking account of:

— insurance periods completed under the abovementioned Law of 18 February 1966 (WAO),

...

— periods of paid work and equivalent periods completed in the Netherlands before 1 July 1967.'

18 Part J (Netherlands), point 4(c), of Annex VI to Regulation No 1408/71 as amended by Regulation No 1248/92 provides:

'(c) In the calculation of the benefits awarded in accordance with the abovementioned Law of 18 February 1966 (WAO) or in accordance with the abovementioned Law of 11 December 1975 (AAW), the Dutch institutions shall take account of:

— periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967,

— periods of insurance completed under the abovementioned law of 18 February 1966 (WAO), ...'.

The second question

19 By its second question, which should be considered first, the national court is, in essence, asking whether Part J, point 4(a), of Annex VI to Regulation No 1408/71 and Part J, point 4(c), of Annex VI to that regulation, as amended by Regulation No 1248/92, are to be interpreted as meaning that periods of compulsory or enlisted military service completed with the Netherlands armed forces before 1 July 1967 constitute 'periods of paid work' or of 'paid employment', or 'equivalent periods' or 'periods treated as such', completed in the Netherlands before that date.

20 According to the Bedrijfsvereniging and the Netherlands Government, in order to determine whether the periods at issue constitute 'periods of paid work' or of 'paid employment', or 'equivalent periods' or 'periods treated as such', within the meaning of the aforementioned provisions, it is necessary to ascertain whether they can be classified as such under Netherlands law and, in particular, the WAO. Persons performing compulsory military service and enlisted members of the armed forces in the Netherlands are not considered to be in paid employment for the purposes of Article 3 of the WAO.

21 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which it is part (see, in particular, Case C-340/94 *De Jaeck* v *Staatssecretaris van Financiën* [1997] ECR I-461, paragraph 17).

22 In that respect, as is apparent from paragraphs 4 and 14 above, if Mr Grahame and Mr Hollanders had worked exclusively in the Netherlands, they would have been entitled to the full amount of benefit payable under the WAO, which is type A legislation.

23 In accordance with Article 40(1) of Regulation No 1408/71, the fact that the applicants in the main proceedings were subject successively to type A and type B legislation (because they exercised their right to freedom of movement for workers under the Treaty) means that the provisions of Chapter 3, 'Old Age and Death (Pensions)', of Title III of the regulation and, where appropriate, the rules relating to aggregation and pro rata calculations set out in Article 46(2) must be applied in calculating the invalidity benefits payable under the Netherlands legislation.

24 As the Bedrijfsvereniging, the Netherlands Government and the Commission have observed, the relevant provisions of Annex VI were introduced specifically in order to ensure that, when calculating a pro rata benefit under the WAO in accordance with Article 46(2) of Regulation No 1408/71, the competent institution should take account not only of periods of insurance completed under the WAO, but also of all periods of paid employment and other periods treated as such completed in the Netherlands before 1 July 1967, when the WAO entered into force.

25 Furthermore, Article 1(s) of Regulation No 1408/71 makes it clear that '"periods of employment" and "periods of self-employment" mean periods so defined or recognized by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or of self-employment'. It is not disputed that the term 'periods of employment' in Article 1(s), in distinction to the 'periods of self-employment' referred to in the same provision, corresponds to the term 'periods of paid work' or of 'paid employment' in Annex VI, Part J, point 4(a) or (c) as appropriate. In the German language version, moreover, the same phrase is used in both provisions.

26 Although activities performed for the purpose of national defence are excluded from the scope of Article 3 of the WAO, it is none the less clear from the case-file that, under the Netherlands legislation pursuant to which they were performed, such periods of activity are treated as periods of employment for social security purposes. Persons performing compulsory military service and enlisted members

of the armed forces are covered by special provisions on insurance against 'incapacity for work'; that implies, at the very least, that the Netherlands legislation treats their military activity as a 'period of employment' for the purposes of social security and, more specifically, insurance against incapacity for work. Furthermore, the wording of point 4(a) or (c), as appropriate, of Part J of Annex VI does not imply that the periods of employment in question must fall within the specific definition of work relationships covered by the WAO.

27 For the purpose of applying the relevant provisions of Annex VI, it remains to be determined whether periods of compulsory or enlisted military service are to be classified as 'periods of work' or of 'paid employment', or 'equivalent periods' or 'periods treated as such', or on the contrary as periods of work other than paid employment.

28 The Court has held that, in the scheme of the Treaty, civil servants are regarded as employed persons (Case C-71/93 *Van Poucke* v *Instituut voor de Sociale Verzekeringen der Zelfstandigen and Algemene Sociale Kas voor Zelfstandigen* [1994] ECR I-1101, paragraph 17).

29 The same must hold true of enlisted members of the armed forces, in view of the relationship of subordination in the context of which they perform their military duties, in consideration for which they are paid.

30 The same interpretation must prevail, for the purpose of applying the relevant provisions of Annex VI, in respect of persons performing compulsory military service. Although performance of such service does not, in principle, entitle the person to pay in the strict sense of the word, the fact that the duties are also performed in the context of a relationship of subordination does not, in any event, mean that such a period of activity can be classified as a period of work other than paid employment; it is, rather, a ground for regarding it at the very least as a period equivalent to or to be treated as a period of paid employment, as is possible under the wording of Part J, point 4(a) or (c) as appropriate, of Annex VI to the regulation.

31 It must be added that it is only for the purposes of determining the applicable social security legislation that the last sentence of Article 13(2)(e) of Regulation No 1408/71 uses a different criterion, linked to the nature of the previous activity, by expressly providing that a person called up or recalled for service in the armed forces or for civilian service is to retain his previous status of employed or self-employed person.

32 Finally, it must be observed, the derogation in Article 48(4) of the EC Treaty does not apply to the present case since that provision merely enables Member States to exclude nationals of other Member States from access to certain posts in the civil service (Case C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033, paragraph 19).

33 The answer to the second question must therefore be that Part J, point 4(a), of Annex VI to Regulation No 1408/71 and Part J, point 4(c), of Annex VI to the same regulation, as amended by Regulation No 1248/92, are to be interpreted as meaning that periods of compulsory or enlisted military service completed with the Netherlands armed forces before 1 July 1967 constitute 'periods of paid work' or of 'paid employment', or 'equivalent periods' or 'periods treated as such', completed in the Netherlands before that date.

The first question

34 In view of the answer to the second question, there is no need to answer the first question.

The third question

35 By its third question, the national court essentially asks whether periods of military service completed in the former Netherlands New Guinea are to be considered as having been completed in the Netherlands for the purposes of Part J, point 4(a), of Annex VI to Regulation No 1408/71.

36 In that respect, it is sufficient to note that the former Netherlands New Guinea, where Mr Grahame performed his compulsory military service from 8 May 1960 to 1 May 1961, was a Netherlands overseas territory, included in Annex IV to the EEC Treaty as one of the countries and overseas territories to which the provisions of Part IV of the Treaty applied. The periods of work in question were consequently sufficiently closely linked to the territory of the Netherlands to satisfy the condition in point 4(a) of Annex VI, Part J, that they were completed in the Netherlands.

37 The answer to the third question must therefore be that periods of military service completed in the former Netherlands New Guinea must be regarded as having been completed in the Netherlands for the purposes of Part J, point 4(a), of Annex VI to Regulation No 1408/71.

Costs

38 The costs incurred by the Netherlands and French Governments, the Council of the European Union 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 proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, Amsterdam, by judgment of 16 July 1996, hereby rules:

1. **Part J, point 4(a), of Annex VI to 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 their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and as adapted by Part VIII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, and Part J, point 4(c), of Annex VI to that regulation, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, are to be interpreted as meaning that periods of compulsory or enlisted military service completed with the Netherlands armed forces before 1 July 1967 constitute 'periods of paid work' or of 'paid employment', or 'equivalent periods' or 'periods treated as such', completed in the Netherlands before that date.**

2. **Periods of military service completed in the former Netherlands New Guinea must be regarded as having been completed in the Netherlands for the purposes of Part J, point 4(a), of Annex VI to Regulation No 1408/71.**

Wathelet Jann Sevón

Delivered in open court in Luxembourg on 13 November 1997.

R. Grass M. Wathelet

Registrar President of the First Chamber