JUDGMENT OF THE COURT
13 JULY 1966[1]

Mrs J. E. Labots (née Hagenbeek) v Raad van Arbeid, Arnhem (Reference for a preliminary ruling by the Centrale Raad van Beroep, Utrecht)

Case 4/66

Summary

1. *Free movement of persons — Migrant workers — Social security measures to be adopted by the Council of the EEC — Aim*
   (EEC Treaty, Article 51)

2. *Free movement of persons — Migrant workers — Social insurance — Regulation No 3 of the Council of the EEC — Application of Netherlands legislation*
   (Regulation No 3 of the Council of the EEC, Annex G (III) (B))

1. The aim of Article 51 of the EEC Treaty is to allow the migrant worker to acquire the right to benefit for all periods of work completed by him in various Member States, without discrimination as against other workers by reason of the exercise of his right to freedom of movement.
2. The provisions of Annex G (III) (B) (b) concerning the ascertainment of the amount of benefit payable under the Netherlands law concerning general insurance for widows and orphans, applies in all cases in which Article 27 gives rise to benefit on the basis of the maintenance or recovery of rights acquired under a previous system.

In Case 4/66

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep, being the Netherlands court of last instance in social security matters, for a preliminary ruling in the action pending before that court between

MRS J. E. LABOTS (NÉE HAGENBEEK), widow of W. Labots, residing in Arnhem (Netherlands),

and

RAAD VAN ARBEID, ARNHEM,

on the interpretation of certain provisions

1 — Language of the Case: Dutch.

— of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.);

— of Regulation No 130/63 of the Council of the EEC amending certain annexes to the said Regulation No 3 and to Regulation No 4 of the Council of the EEC (Official Journal of 28 December 1963, p. 2996 et seq.);

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux and W. Strauß (Rapporteur), Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Lecourt and R. Monaco, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

It emerges from the decision referring the case to the Court and from the file transmitted by the Centrale Raad van Beroep that the following facts form the basis of the dispute before that court:

(a) The plaintiff is the widow of a worker who died in Belgium on 23 February 1963 and who had been insured:

— From 22 November 1926, for a contribution period of 599 weeks, under the Netherlands law concerning invalidity ('Invaliditeitswet') which also covers death risks; throughout this period, except for short interruptions, he worked in the Netherlands;

— From 1 July 1955 until the date of his death, with one interruption of seven years and two months, under a Belgian invalidity and life assurance scheme and throughout this entire period, including the interruption, he worked and resided in Belgium.

(b) Following the death of her husband the plaintiff in the main action made an application to the defendant, a social security institution, for a widow's pension under the Netherlands law concerning general insurance for widows and orphans ('Algemene Weduwen- en Wezenwet', hereinafter referred to as 'the AWW') which entered into general force on 1 October 1959.

(c) By decision of 22 March 1965, the defendant dismissed the abovementioned application, on the twofold ground that:

— the plaintiff's husband was not at the moment of his death insured under the AWW;

— moreover he was not insured, at that date, under Belgian legislation.

(d) The plaintiff instituted proceedings against this decision before the Raad van Beroep, Utrecht, the court of first instance in social security matters.

Immediately prior to the judgment given by the Raad van Beroep, it emerged (and is not at present disputed) that at least one of the grounds mentioned at (c) above, on which the defendant based its decision, was incorrect: in fact, the plaintiff's husband was at the moment of his death insured under Belgian law.

In these circumstances, the defendant itself, both before the Raad van Beroep and the Centrale Raad van Beroep, maintained that

its decision no longer had any valid basis and that the plaintiff's request should be granted, pursuant to Article 27 of Regulation No 3 in conjunction with Annex G (III) (b) thereto, as amended by Article 7 of Regulation No 130/63 of the EEC. At the hearing before the Centrale Raad van Beroep, the defendant's agent made the following declaration: 'I consider that the Raad van Beroep's attitude is inequitable. If a Belgian settles in the Netherlands with his wife and dies after living there for a short time, his wife is entitled to a pension under the AWW'. As a result the defendant from that time on made a payment to the applicant on account of the amount which it considered itself bound to pay under the AWW.

(e) Nevertheless, the Raad van Beroep, by judgment of 26 July 1965, dismissed the plaintiff's application, in particular on the following grounds:

— Since at the time of her husband's death, the plaintiff was more than forty years old, she would have been entitled to a widow's pension under the AWW if, at that date, her husband could have been considered as insured under that law. Such was not the case, however, and the said husband moreover had at no time been covered by the AWW; these are determining factors in the case.

— Moreover, the Raad van Beroep is not aware of a rule providing that, solely by reason of the fact that a worker is insured under Belgian legislation, his widow is entitled on his death to a pension under the AWW.

In fact, this does not result from

— either the existing Netherlands-Belgian Conventions in this sphere,

— or from Regulations Nos 3 and 4 of the Council of the EEC.

— With regard, more especially, to Articles 27 and 28 of Regulation No 3, their application depends on the fact that, under national legislation, rights exist or at least could exist if certain conditions, particularly in connexion with the duration of the insurance, are complied with. But 'these provisions ... do not by themselves create a right to benefit outside the national legislation which relates to these rights', as is shown by Article 28 (1) (a): 'The institution of each of the Member States shall, in accordance with its own legislation, determine whether the person concerned satisfies the conditions for entitlement to the benefits prescribed in that legislation taking into account the aggregation of periods, as set out in the preceding Article'.

The first paragraph and subparagraph (b) of Article 7 (1) (B) of Regulation No 130/63 EEC under which

'for the purpose of applying Articles 27 and 28 [of Regulation No 3], the Netherlands institutions shall take account of the following provisions:

(a) ...

(b) for the purpose of ascertaining the amount of benefit payable under the Netherlands legislation concerning general insurance for widows and orphans [that is, under the AWW], these contribution periods or periods of payment of premiums completed before 1 October 1959 [that is to say, before the entry into force of the AWW] under the Netherlands legislation on invalidity, old-age and survivors' insurance (of wage-earners) [that is to say, the legislation under which the plaintiff's husband was insured] shall be assimilated to insurance periods completed in pursuance of the legislation first aforementioned'

moreover does help the plaintiff's interests since the aggregation which it provides for does not imply that it is from the outset established that in in principle there is, or could be, a right to benefit under the AWW.

— 'The Raad is aware that in practice the competent administrative institutions normally grant a widow's pension in cases such as the present. However this does not make it competent to annul the contested decision, since, although taken on the basis of facts which subsequently proved to be incorrect, it complies as such with the international and supranational legislation applicable in this field'. This fact 'does not in the meantime prevent the defendant from giving favourable consideration to the plaintiff's interests in accordance with the existing practice'.

(f) The applicant appealed against this judgment to the Centrale Raad van Beroep

II — Question put by the Centrale Raad van Beroep

At its hearing on 16 February 1966, the Centrale Raad van Beroep decided to submit the following question to the Court:
'Is the provision contained in Annex G (III) (b) of Regulation No 3 concerning social security for migrant workers, in the form laid down in Article 7 of Regulation No 130/63 of the EEC, only applicable when ascertaining the amount of benefit payable under the Netherlands legislation on general insurance for widows and orphans, or is it also applicable in deciding whether, under Article 27 of Regulation No 3, there exists a right to benefit payable under this Netherlands legislation?'

III — Procedure

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the Commission of the EEC submitted written observations.
The oral proceedings took place on 7 June 1966.
The Advocate-General delivered his opinion on 16 June 1966.

IV — Summary of the observations of the Commission of the EEC

The observations submitted by the Commission of the EEC may be summarized as follows:
The Commission states that essentially the question put requests the Court to decide how the AWW may be fitted into the provisions of Articles 27 and 28 of Regulation No 3 on the one hand and into Annex G (III) of the said regulation, as amended by Article 7 of Regulation No 130/63 of the EEC, on the other.
(a) The judgment which the Court gave in Case No 100/63 (*Kalsbeek née Van der Veen*): Rec. 1964, p. 1111 et seq.) set forth two principles which have to be reconciled, namely:

— First, Article 28 of Regulation No 3 only applies in the circumstances laid down in Article 27 thereof, that is to say, when the acquisition, maintenance or recovery of the right to benefit is concerned.

— Secondly, these provisions also apply to legislation which, like the AWW, does not make the amount of the benefit dependent on the length of the insurance period, but on the materialization of the risk, in this case, death.

The difficulty is that, to be able to apply such legislation, it is unnecessary to have recourse to other legislation so that the conditions of Article 27 are not complied with. Consequently, 'Article 28 may only be applied if another situation is discovered in which account must necessarily be taken of affiliation under other legislation, and that will only happen if the risk, in the present case death, occurs while the insured is no longer affiliated under the Netherlands legislation but under the legislation of another country', in this case under the Belgian legislation. In other words, it is only possible to apply Articles 27 and 28 to an insurance based on risk if it is admitted that affiliation to the system of the other country at the time when the event insured against occurs, is equivaalent to affiliation to the said insurance. One may then talk of the 'maintenance' of the right of the person concerned, that is to say, of the right arising from his prior affiliation under the legislation of the country providing the insurance based on risk.
(b) In the opinion of the Commission, the judgment in the Case of *Kalsbeek (née Van der Veen)*, together with Regulation No 130/63, cannot be interpreted to mean that the assimilation of the former Netherlands system to that of the AWW is limited to the case where there is simultaneous or successive affiliation to the two systems. Moreover this would be illogical as it was precisely for migrant workers that the said assimilation was provided; in fact, workers who have never left the Netherlands did not require it.
It would moreover be contrary to the spirit of the said judgment that a worker should lose his right by the sole fact that he has worked in another Member State.
(c) If the social security institutions of the Netherlands did not apply Regulation No 3 to cases such as the present one, the persons concerned would only receive a very small pension under the previous Netherlands legislation. That legislation was modified

several times in order to increase the benefits for which it made provision. It would have undergone other amendments for this purpose had it not been replaced by the system of the AWW.
Finally, the Commission considers that the provisions of Annex G (III) (b) of Regulation No 3 as amended by Article 7 (1) (B) (b) of Regulation No 130/63 of the EEC are also applicable since the question is whether on the basis of Article 27 of Regulation No 3 there is a right to benefit under the AWW.

Grounds of judgment

The question put by the Centrale Raad van Beroep

The point of the preliminary question raised by the Centrale Raad van Beroep is whether the provisions of Annex G (III) (B) (b) of Regulation No 3 of the Council of the EEC, in its amended form set forth in Article 7 of Regulation No 130/63/EEC of the Council, are only applicable for calculating the amount of benefit due under the AWW or are also applicable in deciding whether the person concerned fulfils the requisite conditions for entitlement to the benefits provided for by the said legislation.

The provision referred to reads as follows:

'For the purpose of applying Articles 27 and 28 of the Regulation, the Netherlands institutions shall take account of the following provisions:

(a) ...

(b) for the purpose of ascertaining the amount of benefit payable under the Netherlands legislation concerning general insurance for widows and orphans, those continuation periods or periods of payment of premiums completed before 1 October 1959 under the Netherlands legislation on invalidity, old-age and survivors' insurance (of wage-earners) shall be assimilated to insurance periods completed in pursuance of the legislation first aforementioned.

Having regard to the circumstance that the AWW, a scheme of insurance based on the materialization of the risk, is not concerned for its application with insurance periods on which the right to benefit or the amount of benefit payable are based, this extract cannot be interpreted in isolation. In order to interpret it, it should be related to Articles 27 and 28 of Regulation No 3 which for the purpose of applying it was inserted in Annex G.

The said articles like the entire system of which they form part have as their basis, their framework and their bounds Articles 48 to 51 of the Treaty, which are aimed at securing freedom of movement for workers. Under Article 51, Regulation No 3 must 'secure' for migrant workers 'aggregation, for the purpose of acquiring and

maintaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'.

The aim of this provision is to allow the migrant worker to acquire the right to benefit for all periods of work completed by him in various Member States, without discrimination as against other workers by reason of the exercise of his right to freedom of movement. The interpretation of Articles 27 and 28 of Regulation No 3 and of the Annexes relating thereto is inseparable from this basic aim. These provisions would not guarantee the free movement of workers if, merely by exercising this freedom, they were to lose their entitlement to social security acquired in the countries in which they have worked.

It is clear from Article 27 (1) of Regulation No 3 that 'where an insured person has been successively or alternately subject to the legislation of two or more Member States, the insurance periods and assimilated periods completed under the legislation of each of the Member States shall be aggregated', 'for the acquisition, maintenance or recovery of the right to benefit'. In the present case, it is of prime importance to bear in mind the concept of recovery of the right to benefit. The Court has already ruled that Articles 27 and 28 are applicable to legislation which, like the AWW, does not make the amount of benefit dependent on the length of insurance period. It is clear from Article 27 that the migrant worker who enforces his rights under various national legislative systems is entitled to retain and recover benefits payable in respect of the periods of work successively or alternately completed, whatever the legal provisions of each of the Member States may be.

It emerges moreover from the file transmitted by the Centrale Raad that the question raised refers to the case of a worker, who, after having been subject to the Netherlands social security system, was affiliated to the social security system of another Member State at the point when the AWW entered into force, so that this latter law would still have applied to him, if he had not been a migrant worker.

Although the said regulations and Article 51 of the Treaty, read together, imply that it is impossible for a worker to be deprived of his entitlement to social security because he moves within the Community, it does not by any means follow from this that he must of necessity succeed, by the mere interplay of various national legislative systems in succession to one another, in obtaining a higher aggregate sum in benefits than would accrue to him under Article 28 (3).

Since the migrant worker's position is governed by the provisions of Articles 27 and 28, Annex G (III) (B) (b) should be interpreted in the light of the foregoing considerations. Although this provision appears to relate only to establishing the amount of benefit, it nevertheless remains the fact that it was adopted not only with a view to the application of Article 28, which refers to the calculation of the amount of benefits, but also, and expressly, with a view to the application of

Article 27, which only relates to the acquisition of rights. This defect may be explained in the first place by the fact that Regulation No 3 distinguishes much less clearly than the wording of the preliminary question supposes between the acquisition of the right to benefit and the ascertainment of the amount of benefit. Moreover account must be taken of the supplementary nature of the provisions of Annex G; on the basis of the supposedly clear application of Articles 27 and 28 to the AWW, those provisions are limited to extending the concept of insurance periods under the AWW to the periods completed under the previous insurance system. Implementing provisions, such as Annex G, cannot derogate from the principal provisions which they are intended to supplement. Consequently, these provisions cannot form a basis for denying the acquisition in accordance with Article 27 of a right to benefit under the AWW.

Furthermore, there would be discrimination against the survivors of a worker who was successively subject to Netherlands legislation prior to the AWW and to the legislation of another Member State, but who was not regarded as insured under the AWW, on the ground that he had died at a time when he was residing and working in that other State.

The reply to the Centrale Raad van Beroep must be that the provisions of Annex G (III) (B) (b) concerning the ascertainment of the amount of benefit payable under the AWW applies in all cases in which Article 27 gives rise to a right to benefit on the basis of the maintenance or recovery of rights acquired under a previous system.

Costs

The costs incurred by the Commission of the EEC which 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 on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the EEC;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 48 to 51 and 177;
Having regard to the Protocol on the Statue of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 3 of the Council of the EEC concerning social

security for migrant workers, especially Articles 27 and 28 and Annex G (III) (B) (b);
Having regard to Regulation No 130/63/EEC of the Council of the EEC, amending in particular certain annexes to the said Regulation No 3, and especially Article 7 (1) (B) (b);
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Centrale Raad van Beroep by a decision of that court of 16 February 1966, hereby rules:

1. **The provisions of Annex G (III) (B) (b) to Regulation No 3 are also applicable in deciding whether there is, in accordance with Article 27 of Regulation No 3, a right to benefit under the General Widows' and Orphans' Insurance Law of the Netherlands;**

2. **The decision on costs in the present proceedings is a matter for the Centrale Raad van Beroep.**

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 13 July 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 16 JUNE 1966[1]

Mr President,
Members of the Court,

Among the many requests for an interpretation of Regulation No 3 brought before you by the Centrale Raad van Beroep, the case on which I must today deliver my opinion is certainly one of the most delicate. It concerns the conditions for the application of Articles 27 and 28 of this Regulation and of Annex G thereto to the Algemene Weduwen- en Wezenwet (AWW), the Netherlands law concerning general insurance for widows and orphans. This law provides for insurance against risk, which renders neither the right to a pension nor its amount dependent on the duration of the insurance, and under which the necessary (and sufficient) condition for the widow to acquire the right is that the worker resided in the

1 — Translated from the French.