JUDGMENT OF THE COURT
OF 7 JUNE 1973 [1]

C. J. Walder
v Bestuur der Sociale Verzekeringsbank
(preliminary ruling requested by the Centrale Raad van Beroep)

Case 82/72

Social security for migrant workers — Community system of regulations — Replacement of social security Conventions between Member States — Mandatory nature
(Regulation No 3 of the Council, Article 5, Article 6 (2); Regulation No 1408/71 of the Council — Article 6 and Article 7)

Under Articles 5 and 6 of Regulation No 3, that Regulation replaced the provisions of social security Conventions concluded between Member States. This rule is mandatory in nature and allows of no exceptions, save for those cases expressly stipulated in the Regulation. The fact that such Conventions are more advantageous to persons covered by Regulation No 3 than the Regulation itself is not sufficient to justify an exception to this rule. Articles 6 and 7 of Regulation No 1408/71 of the Council, by virtue of their content and purpose, are analagous in scope and effect to Articles 5 and 6 of Regulation No 3.

In Case 82/72

Reference to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep at Utrecht for a preliminary ruling in the action pending before that court between

C. J. WALDER, permanently resident in Brussels,

and

BESTUUR DER SOCIALE VERZEKERINGSBANK, having its seat in Amsterdam,

on the interpretation of Council Regulation No 3 'concerning social security for migrant workers' and of Council Regulation No 1408 of 14 June 1971, 'relating to the application of social security systems to wage-earners and their families moving within the Community',

1 — Language of the Case: Dutch.

THE COURT

composed of: R. Lecourt, President, R. Monaco (Rapporteur) and P. Pescatore, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen and A. Mackenzie Stuart, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. By a decision dated 30 March 1972, the Sociale Verzekeringsbank in Amsterdam granted to Mr. C. J. Walder, a Dutch national, born in 1905 and permanently resident in Belgium, an old-age pension, commencing from 1 January 1970, at the rate of 4 % of the old-age pension which an unmarried beneficiary could receive under the 'algemene Ouderdomswet' (General Old-Age Insurance Law) (hereinafter called 'AOW').

In giving its reasons for its decision, the Sociale Verzekeringsbank found that Mr Walder, although permanently resident in Belgium since 1954 and despite the fact that neither he nor his wife had been insured under the AOW, benefited as a worker within the meaning of Article 4 (1) of Council Regulation No 3 concerning social security for migrant workers, from the provisions of Articles 27 and 28, taken together with Annex G, III, B (a) of the same Regulation, which entitled him to a pension under the AOW provided that he could establish as insurance periods within the meaning of that Law 'contribution periods or premium payment periods completed before 1 January 1957, under the legislation relating to the invalidity, old age and survivors' insurance scheme for workers operating in the Netherlands'. Mr Walder having completed before 1 January 1957, a period of 75 weeks, rounded up to two years, his old-age pension was fixed by the Sociale Verzekeringsbank at the amount abovementioned, having regard to Article 10 (4) of the AOW.

In his appeal against this decision to the Raad van Beroep of Amsterdam, Mr Walder claimed that he would be entitled to a higher pension (33·6 % of the pension due to a married beneficiary) if, instead of the abovementioned Regulation No 3, the Convention of 29 August 1947 (as amended on 4 November 1957) between Belgium and the Netherlands, relating to the application of the national social insurance legislation of the two countries, were applied. According to

that Convention and to the agreement relating to it, not only would there be taken into account periods of employment in the Netherlands (Regulation No 3, Annex G, III, B (a)) but also periods of residence in the Netherlands on the part of the beneficiary and his wife, if any, completed before 1 January 1957.

The Raad van Beroep having dismissed this application on 29 May 1972, Mr Walder lodged an appeal with the Centrale Raad van Beroep in Utrecht. That court, by an order dated 14 December 1972, and lodged with the Court Registry on 21 December 1972, decided to suspend judgment and refer the following questions to the Court for a preliminary ruling:

'How are the provisions contained in Articles 5 and 6 and in Annex D of Regulation No 3 to be interpreted?

(a) as regards persons covered by Regulation No 3, do the provisions of that Regulation replace the provisions of social security Conventions concluded between Member States which are not mentioned in Article 6 (1) (a) and (b), 6 (2) (a) and (b) or Annex D, even when the application of the Conventions is more favourable to persons entitled to social security benefits than the application of the abovementioned Regulation?

(b) if not, what are the criteria for ascertaining which of the two pieces of legislation, the Convention or the Regulation, would produce a more favourable result in a particular case? In such a case, must there be taken into consideration what is ultimately paid *de facto* to the beneficiary in the other Member States?

(c) In this connection, how are Articles 6 and 7 and Annex II of Regulation No 1408/71 to be interpreted?'

2. The Commission of the European Communities, represented by its legal advisers Robert C. Fischer and Jan Gijssels, acting as agents, assisted by Miss Marie-José Jonczy, submitted written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice.

After hearing the report of the Judge Rapporteur and the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The oral observations of the Commission were made at the hearing on 8 May 1973.

The Sociale Verzekeringsbank lodged observations for the purposes of the oral procedure on 26 April 1973, stating that it was not in a position to appear at the public hearing on 8 May 1973.

The Advocate-General presented his opinion at the hearing on 23 May 1973.

II — Observations submitted by the Commission and by the Sociale Verzekeringsbank

The observations submitted by the Commission and by the Sociale Verzekeringsbank may be summarized as follows:

A — The Commission explains firstly the origin of the legislation material to the present case. It recalls that the invalidity and old-age insurance scheme for wage-earners was replaced in the Netherlands, as from 1 January 1957, by a general old-age insurance scheme applicable to all residents (AOW).

Since the level of pensions paid under the invalidity and old-age insurance scheme was low, the AOW laid down transitional provisions under which — according to the statements supplied by the Sociale Verzekeringsbank — periods prior to 1 January 1957 would be considered, commencing with the 15th

year of age and ending with the said date, as insurance periods, no matter in what country the person concerned had resided during these periods.

In general the advantage of these provisions accrued to nationals of the Netherlands provided that the persons concerned had resided, if only intermittently, for six years in the Netherlands after having attained the age of 59 years.

Provisions establishing the application of this transitional system were inserted on 4 November 1957 in the Convention between Belgium and the Netherlands of 29 August 1947 and included in Annex D of Regulation No 3 of 1958. However they were not included in the body of Regulation No 3, so that the benefit of the said system was confined to Belgo-Dutch relations.

Since the application of this system entailed administrative and legal complications, the Belgian and Dutch governments proposed in May 1962, that Annex D of Regulation No 3 should be amended. The provisions of the Convention between Belgium and the Netherlands relating to the application of the transitional system were deleted and all workers who had been employed in the Netherlands were made subject to the same system, namely that laid down in Articles 27 and 28 of the said Regulation.

However, in order to compensate for any loss of rights in course of acquisition, Regulation No 3 was supplemented in 1963 by the addition to Annex G, III, of provisions (Section B) which laid down that, for the purposes of the application of Articles 27 and 28 of the Regulation, contribution and premium payment periods completed before 1 January 1957 under the invalidity and old-age insurance legislation of the Netherlands were deemed to be insurance periods within the meaning of the AOW. Thus, in respect of periods completed before 1 January 1957, the more favourable system of calculation under the AOW took the place of the calculation under the invalidity and old-age insurance scheme for wage-earners.

Finally, Council Regulation No 1408/71 (OJ L 149 of 1971) which was made in the context of an overall revision of Regulations 3 and 4, incorporated in its Annex V, F, 2, several provisions of the Convention between Belgium and the Netherlands, and in particular those whereby periods of residence completed in a Member State were deemed to be periods of residence completed in the Netherlands.

The Commission recognizes that, since 1962, Regulation No 3 has, in certain cases where the Netherlands old-age pensions legislation has applied, reduced the benefits to which workers covered by the bilateral agreements concluded between Belgium and the Netherlands were entitled. Referring, on this point, to the first question the Commission examines Article 5 (a) and Article 6 (2) (e) of Regulation No 3.

In its opinion these Articles are perfectly clear and leave no doubt as to their mandatory nature. The system laid down under Regulation No 3 replaces that under the Conventions concluded between Member States, except on those matters covered by the provisions of such Conventions and which are included in Annex D of the Regulation.

Article 6 (2) (e) does not state the criteria governing the listing of the provisions of a bilateral Convention in Annex D. There are no grounds for inferring, either from this provision or from the following paragraph the existence of an obligation on the part of two Member States or of the Council to list such provisions even if to do so would benefit workers.

Having observed that, in view of the wording of Articles 6 and 7 of Regulation No 1408/71 and that of Articles 5 and 6 of Regulation No 3, the same interpretation must be given to the two Regulations on the point at issue, the Commission submits that the first

and third questions should be answered as follows:

'Regulation No 3 lays down in mandatory form the principle by which it replaces, within the area of its application, the bilateral Conventions concluded between Member States. The only exception to this principle concerns the provisions of the bilateral Conventions mentioned in Annex D of Regulation No 3. However, the Regulation establishes no criteria for listing such provisions in the Annex nor does it impose any obligation to do so on Member States.

The same applies to Regulation No 1408/71, Article 6 of which establishes the same principle and Article 7 of which provides the same exception as regards the provisions of the social security Conventions mentioned in Annex II of the Regulation.'

The answer to the first question being in the affirmative, the Commission considers that the second question does not require an answer.

B — In a statement submitted for the purposes of the oral procedure, the Sociale Verzekeringsbank replies, firstly, to the wirtten observations of the Commission by explaining the scope of the transitional system of the AOW and by pointing out that in any case the bilateral Convention between Belgium and the Netherlands remained in force in its entirety as regards persons not covered by Regulations Nos 3 and 1408/71. It further observes that, having regard to Articles 7 and 48 (2) of the EEC Treaty and to Article 8 of Regulation No 3, it perhaps ought to be conceded that nationals of Member States other than the Netherlands and Belgium should also benefit from the advantages resulting from the said bilateral Convention. (now see also Article 3 (3) of Regulation No 1408/71).

Grounds of judgment

1 By order dated 14 December 1972, filed in the Court Registry on 21 December 1972, the Centrale Raad van Beroep asked for a preliminary ruling, under Article 177 of the EEC Treaty on questions concerning the interpretation of Council Regulation No 3 on social security for migrant workers, and also of Regulation No 1408/71 relating to the application of social security systems for wage-earners and their families moving within the Community.

2 By the first question the Court is asked to say whether Articles 5 and 6 of Regulation No 3 must be interpreted as meaning that the Regulation replaces social security Conventions concluded between Member States which are not mentioned in Article 6 (1) and (2) or in Annex D, even though persons entitled to benefit would derive greater advantage from the application of such Conventions than from the said Regulation.

3 The same problem is put to the Court by the third question concerning the interpretation of Articles 6 and 7 and Annex II of Regulation No 1408/71.

4 Article 5 of Regulation No 3 provides:

'Save as otherwise expressly stated herein, the provisions of this Regulation shall, in respect of persons covered by the Regulation, replace the provisions of:

(a) the social security Conventions concluded between two or more Member States exclusively and the supplementary agreements thereto;'

5 Article 6 (2) of that Regulation states:

'The provisions of this Regulation notwithstanding, the following shall continue to apply:

. . . . . .

(e) such other provisions of social security Conventions as are listed in Annex D to this Regulation.'

6 It is clear from these provisions that the principle that the provisions of social security Conventions concluded between Member States are replaced by Regulation No 3 is mandatory in nature and does not allow of exceptions save for the cases expressly stipulated by the Regulation.

7 The fact that social security Conventions concluded between Member States are more advantageous to persons covered by Regulation No 3 than the Regulation itself is therefore not sufficient to justify an exception to this principle unless such Conventions are expressly preserved by the Regulation.

8 Consequently, the answer to the first question must be that, according to Articles 5 and 6 of Regulation No 3, that Regulation replaces, in respect of the persons covered by it, social security Conventions concluded between Member States which are not mentioned in Article 6 or in Annex D thereof, even if the application of the Conventions is more advantageous to persons entitled to benefits than the said Regulation.

9 The same answer must be given to the third question, as Articles 6 and 7 of Council Regulation No 1408/71, by virtue of their content and their purpose, are analagous in their scope and effect to Articles 5 and 6 of Regulation No 3.

10 The second question therefore does not require an answer.

Costs

11 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as their 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 national court, the decision on costs is a matter for that court.

On these grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers;
Having regard to Regulation No 1408 of the Council relating to the application of social security systems to wage-earners and their families moving within the Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Centrale Raad van Beroep by order of that court dated 14 December 1972, hereby rules:

Regulations Nos 3 and 1408/71 of the Council replace, in respect of persons covered by them, the social security Conventions concluded between Member States which are not mentioned in Articles 6 and 7 or in Annexes D and II of the said Regulations respectively, even if the application of the Conventions is more advantageous to persons entitled to benefits than the said Regulations.

Lecourt Monaco Pescatore Donner Mertens de Wilmars
Kutscher Ó Dálaigh Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 7 June 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 23 MAY 1973 [1]

Mr President,
Members of the Court,

The Centrale Raad van Beroep, a Dutch court of last resort having jurisdiction in social security matters, has, by an order dated 14 December 1972, referred the following questions for a preliminary ruling:

How are the provisions contained in Articles 5 and 6 and in Annex D of Regulation No 3 to be interpreted?

(a) As regards persons covered by Regulation No 3, do the provisions of that Regulation replace the provisions of social security Conventions concluded between Member States which are not mentioned in Article 6 (1) (a) and (b), 6 (2) (a) and (b) or Annex D, even when the application of the Conventions is more favourable to persons entitled to social security benefits than the application of the abovementioned Regulation?

(b) If not, what are the criteria for ascertaining which of the two pieces of legislation, the Convention or the Regulation, would produce a more favourable result in a particular case? In such a case, must there be taken into consideration what is ultimately paid *de facto* to the

1 — Translated from the German.