JUDGMENT OF THE COURT (Second Chamber)

9 November 2006 *

In Case C-205/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunal des affaires de sécurité sociale de Longwy (France), made by decision of 14 April 2005, received at the Court on 11 May 2005, in the proceedings

Fabien Nemec

v

Caisse régionale d'assurance maladie du Nord-Est,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Makarczyk, G. Arestis and L. Bay Larsen, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 23 March 2006,

after considering the observations submitted on behalf of:

— Mr Nemec, by M. Gamelon, avocat,

— the Caisse régionale d'assurance maladie du Nord-Est, by A. Schaf Codognet and F. Verra, avocats,

— the French Government, by G. de Bergues and C. Bergeot-Nunes, acting as Agents,

— the United Kingdom Government, by J. Stratford, acting as Agent,

— the Commission of the European Communities, by D. Martin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Article 15 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, both as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), ('Regulation No 1408/71' and 'Regulation No 574/72'), of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) and of Article 39 EC.

2 The reference has been made in the course of proceedings between Mr Nemec and the Caisse régional d'assurance maladie du Nord-Est (Regional Health Insurance Fund of the North East) ('CRAM'), on account of the latter's refusal to take account of pay earned by Mr Nemec during his employment in Belgium for the purpose of calculating the amount of the allowance provided for in the case of early cessation of occupational activity for workers exposed to asbestos ('the ACAATA').

Legal background

Community legislation

Regulation No 1408/71

3 Article 1 of Regulation No 1408/71 provides:

'For the purpose of this Regulation:

...

(t) "benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

...'

4 Article 3(1) of Regulation No 1408/71, entitled 'Equality of treatment', provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.'

5 Article 4(1) of Regulation No 1408/71 defines the scope of the regulation as follows:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.'

6 Article 4(2) of Regulation No 1408/71 provides that the regulation 'shall apply to all general and special social security schemes, whether contributory or non-contributory ...'.

7 Under Title III of Regulation No 1408/71, Chapter 4, dealing with accidents at work and occupational diseases, contains Article 58, entitled, 'Calculation of cash benefits', which provides in Article 58(1):

'The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on an average wage or salary shall determine such average wage or salary exclusively by reference to wages or salaries recorded during the periods completed under the said legislation.'

Regulation No 574/72

8 Article 15 of Regulation No 574/72 lays down the '[g]eneral rules for the aggregation of insurance periods'.

Regulation No 883/2004

9 Under Article 87(1) of Regulation No 883/2004 '[n]o rights shall be acquired pursuant to this Regulation for the period before its date of application'.

10 Article 90(1) of Regulation No 883/2004 provides that '... Regulation ... No 1408/71 shall be repealed from the date of application of this Regulation'.

11 Article 91 of Regulation No 883/2004 provides:

'This Regulation shall enter into force on the 20th day after its publication in the *Official Journal of the European Union*.

It shall apply from the date of entry into force of the Implementing Regulation.'

National legislation

12 Law No 98-1194 of 23 December 1998 on the financing of social security for 1999 (JORF of 27 December 1998, p. 19646), as amended by Law No 99-1140 of 29 December 1999 on the financing of social security for 2000 (JORF of 30 December 1999, p. 19706), ('Law No 98-1194') made specific provisions for early cessation of occupational activity for employees and former employees who were exposed to asbestos during their employment. Article 41 of Law 98-1194 provides:

'I. — An allowance for early cessation of activity shall be paid to employees and former employees of establishments manufacturing materials containing asbestos, or establishments engaged in fireproofing and heat insulation lagging with asbestos, or naval construction and repair, provided those persons have ceased all occupational activity, where they fulfil the following conditions:

1. They must work or have worked in one of the establishments referred to above which are included on a list drawn up by decree by the Ministers for Employment, Social Security and the Budget, at a time when asbestos or materials containing asbestos were manufactured or treated there;

2. They must have reached a specified age, which may vary according to the period of employment in the establishments referred to in paragraph 1, but must be at least 50 years old;

...

Employees or former employees who are recognised, by virtue of the general scheme, to be suffering from an occupational disease caused by asbestos and included on a list drawn up by decree by the Ministers for Employment and Social Security shall also be entitled to the allowance for early cessation of activity from the age of 50.

The allowance for early cessation of activity may not overlap either with any income or allowance referred to in Article L. 131-2 of the Social Security Code, or with a personal old-age advantage, invalidity advantage or early retirement/early cessation of activity allowance, subject to the provisions of the following paragraph.

A differential allowance shall be paid as a supplement to an invalidity pension, reversionary advantage or personal old-age advantage covered by a special scheme referred to in Chapter I, Title I, Book VII of the Social Security Code, within the limits of the allowance calculated under the conditions laid down by this Article.

II. — The amount of the allowance shall be calculated according to the updated average gross monthly earnings in the last 12 months of the recipient's employment in respect of which, under the conditions laid down by the decree, certain periods of employment giving rise to reduced earnings shall not be taken into account. It shall be revalorised in the same way as the advantages granted in accordance with the second paragraph of Article L. 322-4 of the Employment Code.

...

The allowance shall cease to be paid when the recipient fulfils the conditions required for receipt of the full old-age pension, as defined in Articles L. 351-1 and L. 351-8 of the Social Security Code.

...'

13 Under Article 2 of Decree No 99-247 of 29 March 1999 on the allowance for early cessation of occupational activity provided for in Article 41 of the Law on the financing of social security for 1999 (JORF, of 31 March 1999, p. 4471):

'The reference pay used as a basis for determining the allowance shall be fixed in accordance with the remuneration referred to in Article L. 242-1 of the Social Security Code, earned by the person concerned in the last 12 months of his employment. That remuneration, revalorised where appropriate in accordance with the rules set out in Article R. 351-29-2 of the Social Security Code, shall be taken into account up to a limit of twice the ceiling laid down in Article L. 241-3 of the Social Security Code in force at the date on which the person concerned becomes entitled to the allowance. The reference pay shall be equal to the average monthly earnings thus determined.

The monthly amount of the allowance shall be equal to 65% of the reference pay defined in the previous paragraph, up to the ceiling provided for in Article L. 241-3 of the Social Security Code, to which shall be added 50% of the proportion of the reference pay which falls between the amount of the ceiling and twice that amount.

The minimum amount of the allowance may not be less than the minimum amount of the insurance allowance provided for in Article L. 351-3 of the Employment Code. However, the amount of the allowance thus guaranteed shall not exceed 85% of the reference pay.'

14 Article L. 242-1 of the Social Security Code provides:

'For the purpose of calculating contributions to social insurance, accidents at work and family allowances, all sums paid to workers as consideration for work or arising from employment, in particular salaries or wages, holiday pay, the amount deducted for workers' contributions, allowances, bonuses and all other financial benefits, benefits in kind and sums received directly or by way of a third party as gratuities, shall be regarded as remuneration.

...'

15 Circular No DSS/4B/99/332 of 9 June 1999 on implementation of the provision made for early cessation of occupational activity for workers exposed to asbestos sets out in detail the rules for the grant, calculation and payment of the allowance introduced for workers exposed to asbestos by the regional health insurance funds. That circular states, in particular, that, as far as concerns the method of calculating that allowance, and as regards periods of employment abroad, 'various types of case may arise. Where social security contributions have been deducted from pay under Article L. 242-1 of the Social Security Code, that pay shall be taken into account with the periods relating to it. In other cases, account shall be taken of pay earned during the last year of paid employment in France.'

The dispute in the main proceedings and the question referred for a preliminary ruling

16 Mr Nemec, a French national, born in 1954 and resident in France, worked for several years for an undertaking established there. It is common ground that during that employment he was exposed to asbestos.

17 After being dismissed in 1994, when his employer in France closed down activities in France altogether, he found a job in Belgium that same year with an undertaking established approximately 10 kilometres from his place of residence. Throughout his employment in Belgium Mr Nemec continued to reside and pay his taxes in France.

18 In 1995, the competent authority in France recognised that Mr Nemec had contracted an occupational disease because of his exposure to asbestos.

19 Following the claim submitted by Mr Nemec in March 2004, the CRAM notified him, in May of that year, of a decision to grant him the ACAATA. In accordance with the national rules in force, the amount of that allowance was calculated on the basis of the average pay earned by Mr Nemec in the last 12 months of his employment in France.

20 Mr Nemec then challenged that decision before the CRAM Conciliation Committee, claiming that the CRAM had failed to take account of the pay he had most recently earned in Belgium, which was higher than that used to calculate the ACAATA.

21 That appeal was dismissed by the Conciliation Committee, which based the decision refusing the claim on Circular No DSS/4B/99/332.

22 It was in those circumstances that Mr Nemec brought an action before the Tribunal des affaires de sécurité sociale de Longwy which decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'In refusing to take the pay earned by Mr Nemec in Belgium into account when calculating the amount of the allowance for asbestos workers granted to him pursuant to Article 41 of Law No 98-1194 of 23 December 1998, on the basis of Article 2 of the Decree implementing Law No 99-247 of 29 March 1999 and Circular DSS/4B/99 No 332 of 9 June 1999, because that pay did not give rise to the payment of social security contributions in accordance with Article L. 242-1 of the French Social Security Code, did the CRAM take, in his regard, a wrongful decision constituting an impediment to freedom of movement as laid down in Article 39 [EC], an infringement of Regulation ... No 883/2004 ... or an infringement of Article 15 of Regulation ... No 574/72?'

Admissibility of the reference for a preliminary ruling

23 The French Government submits that the reference for a preliminary ruling is inadmissible on the ground that the national court has not set out sufficiently clearly the factual and legal background to the question referred.

24 The national court's decision does not make it possible to establish whether Mr Nemec was exposed to asbestos in the course of employment in Member States other than the French Republic, and it makes only an incomplete and indirect

reference to the applicable national provisions. The French Government also maintains that the national court failed to set out either the reasons for its uncertainty regarding the interpretation of the various provisions of Community law referred to in that decision, or the link it established between those provisions and the national legislation applicable to the dispute in the main proceedings.

25 In that connection, it must be recalled that, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 4; Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, paragraph 10; and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 17).

26 The Court has likewise held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16, and the judgments in *Carbonati Apuani*, paragraph 11, and *Enirisorse*, paragraph 21).

27 In this case the Court has sufficient information to enable it to give an answer that will be of use to the national court.

28 First, the decision making the reference sets out briefly, but precisely, the facts giving rise to the dispute in the main proceedings and the relevant national legal context. It is clear that the dispute arose in the context of an application for an allowance, under the French legislation, to which the person concerned is entitled, since he undeniably fulfils the conditions governing its grant. Second, the reference sets out the reasons for the choice of the Community provisions which the national court requires to be interpreted and the link between those provisions and the national legislation applicable to the dispute.

29 In those circumstances, the arguments of the French Government cannot be accepted, so that the reference for a preliminary ruling is admissible.

The question referred for a preliminary ruling

30 The national court asks, essentially, whether the decision refusing to take account of the pay earned by Mr Nemec in Belgium for the calculation of the ACAATA constitutes an infringement of Regulation No 883/2004.

31 Under Article 91 of Regulation No 883/2004, the latter is to enter into force on the 20th day after its publication in the *Official Journal of the European Union*, but it is to apply only from the date of entry into force of the Implementing Regulation.

32 Since no regulation implementing Regulation No 883/2004 has yet been adopted, it necessarily follows that the provisions of Regulation No 1408/71 remain applicable.

33 It follows that it is appropriate to examine the question referred by the national court in the light of the latter regulation.

34 As the parties to the main proceedings, the French Government and the Commission of the European Communities have pointed out, a benefit such as the ACAATA, granted to former workers exposed to asbestos who fulfil the conditions set out in the national legislation, without any individual assessment of their personal needs, must be regarded as a social security benefit falling under Article 4(1)(e) of Regulation No 1408/71, a provision which covers benefits in respect of accidents at work and occupational diseases.

35 As regards the subject-matter of the dispute in the main proceedings, that is to say, the detailed rules for calculating the amount of the ACAATA, which is determined on the basis of the recipient's remuneration, the CRAM, the French Government and the United Kingdom Government take the view that the refusal to take account of pay earned abroad and which has not given rise to the payment of social security contributions under the legislation of the Member State in which the institution responsible for granting that allowance is situated is in accordance with Article 58 of Regulation No 1408/71.

36 The Court has already held, as regards a provision drafted in terms essentially identical to those in Article 58, that such a provision does not merely determine the legislation applicable for fixing the reference period for average pay, but that its purpose is also to determine the remuneration which the competent institution must take into account in order to determine the average pay over a given period, which, according to the applicable national legislation, serves as a basis for the calculation of cash benefits (see, to that effect, Case 268/78 *Pennartz* [1979] ECR 2411, paragraphs 8 and 9).

37 However, Article 58 of Regulation No 1408/71, as indeed all the provisions of that regulation, must be interpreted in the light of Article 42 EC (see, to that effect, Case C-406/93 *Reichling* [1994] ECR I-4061, paragraph 21, and Case C-251/94 *Lafuente Nieto* [1996] ECR I-4187, paragraphs 33 and 38).

38 The objective pursued by that provision, which aims to facilitate freedom of movement for workers, entails in particular that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the EC Treaty (see *Reichling*, paragraph 24; *Lafuente Nieto*, paragraphs 33 and 38; Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* [1997] ECR I-5501, paragraph 20; and Case C-153/97 *Grajera Rodríguez* [1998] ECR I-8645, paragraph 17).

39 It is common ground that national legislation such as that at issue in the main proceedings is likely to put migrant workers at a disadvantage as compared with workers who have worked in only one Member State.

40 Under such legislation, a migrant worker like Mr Nemec finds that the method of calculating the ACAATA in his case is based on pay which he earned more than 10 years ago, accordingly bearing no relation to his current situation, whereas for his colleagues, who continued to work in France, it is their last effective pay which is taken into account. Such a worker therefore suffers a reduction in the amount of benefit that he would have received had he not exercised his right to free movement.

41 The obligation not to put migrant workers who have availed themselves of their right to free movement at a disadvantage does not mean, however, that Article 58(1) of Regulation No 1408/71, by not allowing the pay earned in another Member State to be taken into account for the calculation of cash benefits, must be regarded as contrary to the objective set down in Article 42 EC. That obligation merely implies that those benefits must be the same for the migrant worker as they would have been if he had not availed himself of his right to free movement (see, to that effect, *Lafuente Nieto*, paragraph 39; *Naranjo Arjona and Others*, paragraph 21; and *Grajera Rodriguez*, paragraph 18).

42 Therefore, in circumstances such as those at issue in the main proceedings, although account is to be taken, under Article 58(1) of Regulation No 1408/71, only of the pay earned in the Member State in which the competent institution is situated, the amount of that pay must be updated and revalorised so as to correspond to the pay the person concerned might reasonably have been able to earn had he continued to work in the Member State in question (see, to that effect, *Lafuente Nieto*, paragraph 40; *Naranjo Arjona and Others*, paragraph 22; and *Grajera Rodríguez*, paragraph 19).

43 Therefore, the answer to the question referred must be that Article 58(1) of Regulation No 1408/71, interpreted in accordance with the objective set out in Article 42 EC, requires that, in a situation such as that in the main proceedings, calculation of the 'average wage or salary', within the meaning of the first of those two provisions, takes into account the pay that the person concerned could reasonably have earned, given his subsequent employment record, had he continued to work in the Member State in which the competent institution is situated.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that

court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 58(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, interpreted in accordance with the objective set out in Article 42 EC, requires that, in a situation such as that in the main proceedings, calculation of the 'average wage or salary', within the meaning of the first of those two provisions, takes into account the pay that the person concerned could reasonably have earned, given his subsequent employment record, had he continued to work in the Member State in which the competent institution is situated.

[Signatures]