JUDGMENT OF THE COURT (Fifth Chamber)

26 October 1995 *

In Case C-481/93,

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

R. Moscato

and

Bestuur van de Nieuwe Algemene Bedrijfsvereniging

on the interpretation of Article 13(2)(a) and Article 39(1) and (5) of 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 members of 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),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, P. Jann and L. Sevón, Judges,

Advocate General: A. M. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, by C. R. J. A. M. Brent, Director of the Administration and Legal Affairs Section of the 'Gemeenschappelijk Administratiekantoor', acting as Agent,

— the Commission of the European Communities, by M. Patakia and B. J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, represented by F. W. M. Keunen, Legal Assistant to the 'Gemeenschappelijk Administratiekantoor', and of the Commission, represented by B. J. Drijber, at the hearing on 4 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 27 June 1995,

gives the following

Judgment

1 By order of 15 October 1992, received at the Court on 28 December 1993, the Arrondissementsrechtbank (District Court), Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Article 13(2)(a) and Article 39(1) and (5) of 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 members of 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, hereinafter 'Regulation No 1408/71').

2 Those questions were raised in proceedings between Mr Moscato and the Nieuwe Algemene Bedrijfsvereniging (New General Occupations and Trades Association; hereinafter 'the NAB') concerning the award of benefits for incapacity for work.

3 During 1979 and 1980, Mr Moscato, who is an Italian national, worked for six months in Belgium as a miner. Subsequently, whilst still resident in Belgium, he was employed from 10 March 1981 until 28 February 1985 by Sphinx NV at Maastricht. That employment relationship was terminated due to restructuring of the undertaking, whereupon Mr Moscato, as a former frontier worker, received

unemployment benefit from 28 February 1985 until 13 November 1987 payable by the competent Belgian institution, pursuant to Article 71(1)(a)(ii) of Regulation No 1408/71.

4 From 13 November 1987, Mr Moscato worked as a temporary worker at the Chesswick works at Roermond (Netherlands).

5 On 9 February 1988, Mr Moscato stopped working on account of psychological problems. With effect from that date until 8 February 1989, he received sickness benefits under the Ziektewet (Law on Sickness Benefits, hereinafter 'the ZW'), payable by the NAB, which is responsible for implementing that legislation.

6 In May 1989, the NAB notified Mr Moscato that it had decided that, as from 9 February 1989, it would not grant him benefits for incapacity for work under the Algemene Arbeidsongeschiktheidswet of 11 December 1975 (General Law on Incapacity for Work, *Staatsblad* 674, hereinafter 'the AAW') or under the Wet op de Arbeidsongeschiktheidsverzekering of 18 February 1966 (Law on Insurance against Incapacity for Work, *Staatsblad* 84, hereinafter 'the WAO').

7 That decision was based on the fact that, on 13 November 1987 — the date on which Mr Moscato commenced his last employment in the Netherlands — his state of health made the onset of incapacity for work within a period of less than six months plainly foreseeable.

8 The AAW, which came into force on 1 October 1976, applies in principle to residents and non-residents under 65 years of age who are subject to income tax in respect of paid employment in the Netherlands.

9 The WAO, which came into force on 1 July 1967, governs compulsory social insurance against incapacity for work for employed persons under 65 years of age and persons treated as such.

10 If an AAW benefit overlaps with a WAO benefit, only the WAO benefit is paid, unless the AAW benefit is higher, in which case the AAW benefit is paid by way of differential supplement (Article 36a of the AAW).

11 In refusing to award Mr Moscato benefits under the AAW or the WAO, the NAB relied on Article 21(1) (opening words) and (c) of the AAW and Article 30(1) (opening words) and (b) of the WAO.

12 Those provisions allow the occupational insurance association to leave out of account — wholly or in part, temporarily or permanently — incapacity for work arising within a period of six months from the time when the insurance cover became effective where the claimant's state of health at that time clearly ought to have made the onset of incapacity for work in the next six months foreseeable.

13 Mr Moscato appealed against the NAB's refusal to the Arrondissementsrechtbank, Amsterdam, which took the view that the dispute raised issues concerning the

interpretation of Article 13(2)(a) and Article 39(1) and (5) of Regulation No 1408/71, particularly in view of a number of judgments given by the Court of Justice concerning the determination of the legislation applicable pursuant to the provisions of Title II of Regulation No 1408/71. The judgments in question were given in Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, Case C-140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387, Case C-245/88 *Daalmeijer* v *Bestuur van de Sociale Verzekeringsbank* [1991] ECR I-555 and Case 58/87 *Rebmann* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3467.

14 The Arrondissementsrechtbank, Amsterdam, therefore decided to refer the following questions to the Court of Justice for a preliminary ruling:

1. In the light *inter alia* of the *Rebmann* judgment, must Article 13(2)(a) of Council Regulation (EEC) No 1408/71 be interpreted to the effect that in the period during which the plaintiff was in receipt of unemployment benefit in Belgium he was subject to Netherlands legislation?

2. If the answer to Question 1 is in the affirmative, does Article 39(5) of Regulation No 1408/71, in the light *inter alia* of the *Noij* and *Daalmeijer* judgments, preclude the assumption that the plaintiff remained subject to Netherlands legislation on invalidity benefit, given that he was a long-term unemployed frontier worker receiving unemployment benefit from the institution in his country of residence?

3. In the light *inter alia* of the principle of freedom of movement for workers underlying Regulation No 1408/71, does Article 39(1) of Regulation

No 1408/71 preclude the application to the plaintiff of a risk-selection provision as set out in Article 30(1)(b) of the WAO and Article 21(1)(c) of the AAW?

The relevant Community legislation

15 With a view to coordinating invalidity-benefit schemes in the Member States, Regulation No 1408/71 draws a distinction depending on whether the employed or self-employed person has been subject exclusively to 'type A' legislation or to one, at least, legislation of 'type B' (Articles 37 to 43).

16 Under type A legislation, the amount of invalidity benefits is independent of the duration of periods of insurance (Articles 37 to 39). National type A legislation in relation to invalidity is listed in Annex IV to the Regulation.

17 Under type B legislation, on the other hand, the amount of invalidity benefits depends on the duration of periods of insurance (Article 40).

18 If a worker has been subject exclusively to type A legislation, the institution of the Member State whose legislation was applicable at the time when incapacity for

work followed by invalidity occurred, determines, in accordance with that legislation, whether the person concerned satisfies the conditions governing entitlement to benefits (Article 39(1)).

19 Where that legislation makes the acquisition, retention or recovery of the right to benefit conditional upon the completion of periods of insurance or residence, the competent institution must apply the aggregation rules laid down by Article 38 of the Regulation.

20 So, the periods of insurance or residence completed under the different legislative regimes to which the worker has been subject are aggregated and taken into account, to the extent necessary, as if they were periods completed under the legislation administered by the institution responsible for paying the benefit.

21 Furthermore, a person who satisfies the conditions laid down by the legislation referred to above obtains benefits exclusively from the competent institution, so that overlapping benefits accruing under type A national legislation governing the payment of invalidity benefits, and the complications which might arise, are avoided (Article 39(2)).

The relevant facts in the present case

22 In the present case, the file in the main proceedings made available to the Court shows that Mr Moscato was subject, for invalidity purposes, exclusively to

Netherlands and Belgian legislation, which, according to Annex IV to Regulation No 1408/71, are both type A legislation.

23 On 9 February 1988, the date on which Mr Moscato's incapacity for work followed by invalidity arose, he was subject to the legislation of the Netherlands by reason of the fact that he was employed there at the time.

24 From those circumstances it follows, first, that payment of the invalidity benefits to which Mr Moscato may claim entitlement is governed by Articles 38 and 39 of Regulation No 1408/71 and, secondly, that Netherlands legislation is the only legislation applicable as regards the payment of those benefits to Mr Moscato, pursuant to Article 39(1) and (2).

25 In view of the foregoing, it is appropriate to consider the third question raised by the national court before considering the first two questions.

The third question

26 The essence of the national court's third question is to clarify the implications, for the competent institution, of the abovementioned provisions of Regulation No 1408/71 and of the principle of freedom of movement for workers, where, as in this case, the legislation administered by that institution entitles it not to take account — wholly or in part, temporarily or permanently — of incapacity for

work arising within a period of six months following the time when the worker's insurance cover became effective if, at that time, his state of health made it foreseeable that incapacity for work would occur in the next six months.

27 First of all, it should be noted that Article 51 of the Treaty entrusts the Council with the task of adopting such measures in the field of social security as are necessary to provide freedom of movement for workers. The provisions of Regulation No 1408/71 must therefore be interpreted in the light of that objective (see, in particular, Case C-406/93 *Reichling* v *INAMI* [1994] ECR I-4061, paragraph 21).

28 The rule on the aggregation of insurance, residence or employment periods, laid down by Article 51(a) of the Treaty and as implemented, in particular, by Article 38(1) of Regulation No 1408/71 in relation to invalidity insurance, constitutes one of the basic principles governing Community coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State. Such a consequence might in practice discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see, in particular, the judgment in Case C-165/91 *Van Munster* v *Rijksdienst voor Pensionen* [1994] ECR I-4661, paragraph 27).

29 Consequently, where the legislation of the competent Member State makes the grant of invalidity benefits subject to the condition that at the time when the

insurance cover became effective the claimant's state of health must not have been such as to make it foreseeable that incapacity for work followed by invalidity would shortly occur, the competent institution must, in accordance with Article 38(1) of Regulation No 1408/71, also take into account periods of insurance completed by the claimant under the legislation of another Member State, as if those periods had been completed under the legislation which it administers.

30 So, Article 38(1) of Regulation No 1408/71 prevents the competent institution from treating the effective date of insurance cover under the legislation which it administers as the commencement date for the periods of insurance to be taken into account for the purposes of the payment of invalidity benefits.

31 In the light of the foregoing considerations, the reply to the third question is that Article 38(1) of Regulation No 1408/71 is to be interpreted as meaning that, where the applicable legislation of a Member State makes the grant of invalidity benefits subject, *inter alia*, to the condition that at the time of his joining the scheme established by that legislation the worker's state of health must not have been such as to make it foreseeable that incapacity for work followed by invalidity would occur in the near future, the competent institution must also take into account periods of insurance completed by that worker under the legislation of another Member State, as if those periods had been completed under the legislation which it administers.

The first and second questions

32 In the light of the reply given to the third question, there is no need to reply to the first two questions submitted by the national court.

Costs

33 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 questions referred to it by the Arrondissementsrechtbank, Amsterdam, by order of 15 October 1992, hereby rules:

Article 38(1) of 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 members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, is to be interpreted as meaning that, where the applicable legislation of a Member State makes the grant of invalidity benefits subject, *inter alia*, to the condition that at the time of his joining the scheme established by that legislation the worker's state of health must not have been such as to make it foreseeable that incapacity for work followed by invalidity would occur in the near future, the competent institution must also take into account periods of

insurance completed by that worker under the legislation of another Member State, as if those periods had been completed under the legislation which it administers.

Edward Moitinho de Almeida

Gulmann Jann Sevón

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass
Registrar

D. A. O. Edward
President of the Fifth Chamber