Judgment of the Court of 20 April 1999

Herman Nijhuis v Bestuur van het Landelijk instituut sociale verzekeringen. - Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands

Social security - Incapacity for work - Special scheme for civil servants - Point 4(a) of Section J of Annex VI to Regulation (EEC) No 1408/71 - Articles 48 and 51 of the EC Treaty

Case C-360/97

European Court reports 1999 Page I-01919

In Case C-360/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Herman Nijhuis

and

Bestuur van het Landelijk Instituut Sociale Verzekeringen

"on the interpretation of Point 4(a) of Section J 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 members of their families moving within the Community, and of Point 2(b) of Section J of Annex 2 to Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as adapted by Annex I, Part VIII, 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, L. Sevón and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Cosmas,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted:

- by Mr Nijhuis,

- on behalf of the Bestuur van het Landelijk Instituut Sociale Verzekeringen, by C.J.R.A.M. Brent, Administrator of the Gemeenschappelijk Administratie Kantoor (GAK) Nederland BV, acting as Agent,

- on behalf of the Netherlands Government, by A. Bos, Legal Adviser to the Ministry of Foreign Affairs, acting as Agent,

- on behalf of the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Nijhuis; the Bestuur van het Landelijk Instituut Sociale Verzekeringen, represented by F.W.M. Keunen, Legal Assistant with the Gemeenschappelijk Administratie Kantoor (GAK) Nederland BV, acting as Agent; the Netherlands Government, represented by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Government of the United Kingdom, represented by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, assisted by S. Moore, Barrister; and the Commission, represented by P.J. Kuijper, at the hearing on 1 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 2 February 1999,

gives the following

Judgment

Grounds

1 By order of 24 September 1997, received at the Court on 22 October 1997, the Centrale Raad van Beroep (Higher Social Security Court) referred for a preliminary ruling under Article 177 of the EC Treaty two questions concerning the interpretation of Point 4(a) of Section J 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 members of their families moving within the Community, and of Point 2(b) of Section J of Annex 2 to Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No

1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as adapted by Annex I, Part VIII, 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) (hereinafter `Regulation No 1408/71' and `Regulation No 574/72' respectively).

2 Those questions have arisen in proceedings between Mr Nijhuis, a Netherlands national, and the Bestuur van het Landelijk Instituut Sociale Verzekeringen (Board of the National Institute for Social Security) (`the LISV') concerning Mr Nijhuis's entitlement to an invalidity pension.

The national legislation

3 At the material time in the case in the main proceedings, civil servants in the Netherlands and persons treated as such were insured under the Algemene Burgerlijke Pensioenwet (General Law on Civil Pensions) of 6 January 1966 (hereinafter `the ABPW'). Under this scheme, workers were entitled to receive invalidity benefits only if they were insured under the ABPW when the incapacity for work arose.

4 The Wet op de Arbeidsongeschiktheidsverzekering (Law relating to Insurance against Incapacity for Work) of 18 February 1966 (`the WAO'), which entered into force on 1 July 1967, insures all workers against the financial repercussions of invalidity. To be entitled to invalidity benefit under the WAO, the person concerned must have been insured when the incapacity for work arose and must have been continuously incapacitated for work for 52 weeks. The amount of the benefit is not based on the length of the periods of insurance but depends on, inter alia, the degree of incapacity for work.

5 Under Article 6 of the WAO, civil servants and military personnel are excluded from the scope of that Law. Such persons have, however, been covered, since 1 October 1976, by the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work) of 11 December 1975 (hereinafter `the AAW'), which applies to all residents.

The Community legislation

6 Article 4(4) of Regulation No 1408/71 provides that that regulation does not apply to special schemes for civil servants and persons treated as such.

7 Article 40 of Regulation No 1408/71 governs the award of invalidity benefits to workers who have been successively subject to two types of legislation: on the one hand, legislation such as the WAO and AAW, mentioned in Annex IV to Regulation No 1408/71 as belonging to the legislation referred to in Article 37(1) thereof under which the amounts of invalidity benefits are independent of the length of periods of insurance (hereinafter `Type A legislation'), and, on the other hand, legislation, such as the German legislation applied in the case in the main proceedings, under which the amounts of benefits depend on the length of the periods of insurance (hereinafter `Type B legislation').

8 Under Article 40(1) of Regulation No 1408/71, benefits are calculated in accordance with the provisions of Chapter 3, entitled `Old age and death (pensions)', of Title III of that regulation, and in particular Article 46 thereof. Article 46(2) provides for a calculation pro rata temporis, where appropriate, under each type of legislation to which the person concerned was subject, including, therefore, the legislation under which the amount of the invalidity benefits is independent of the length of the periods of insurance.

9 Furthermore, Article 45(4) of Regulation No 1408/71, in the version in force at the material time in the case in the main proceedings, designed specifically to resolve the difficulties in respect of aggregation of periods of insurance resulting from the application of Type A legislation, provides:

`Where the legislation of a Member State which makes the granting of benefits conditional upon an employed person being subject to its legislation at the time when the risk materialises has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any employed person who is no longer subject to that legislation shall for the purposes of this chapter, be deemed to be still so subject at the time when the risk materialises, if at that time he is subject to the legislation of another Member State or, failing this, can establish a claim to benefits under the legislation of another Member State. However, this latter condition shall be deemed to be satisfied in the case referred to in Article 48(1).'

10 Point 4(a) of Section J of Annex VI to Regulation No 1408/71 provides as follows:

`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),

- insurance periods completed after the age of 15 under the law of 11 December 1975 on incapacity for work (AAW), provided that they do not coincide with insurance periods completed by the person concerned under the abovementioned law of 18 February 1966 (WAO), and

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

11 It also follows from Point 2(b) of Section J of Annex 2 to Regulation No 574/72 that the competent institution, under Netherlands legislation, for the purposes of granting invalidity benefits is the Bestuur van de Nieuwe Algemene Bedrijfsvereniging (Board of the New General Professional and Trade Association) (hereinafter `the

NAB') where employed and self-employed workers are not entitled, without application of the regulation, to benefits under Netherlands legislation alone.

12 Finally, it should be pointed out that on 29 June 1998 the Council adopted Regulation (EC) No 1606/98 amending Regulations No 1408/71 and No 574/72 with a view to extending them to cover special schemes for civil servants (OJ 1998 L 209, p. 1). In order, as indicated in the eighth and ninth recitals in its preamble, `to take into account the unique characteristics of these special schemes', that regulation introduces provisions derogating from the normal rules on aggregation of periods and determination of the applicable legislation.

13 Thus, in regard to the award of pension rights, the new Articles 43a(2) and 51a(2), featuring respectively in the chapter entitled `Invalidity' and the chapter entitled `Old age and death (pensions)' in Title III of Regulation No 1408/71, as amended by Regulation No 1606/98, provide in identical terms as follows:

`However, if the legislation of a Member State makes the acquisition, liquidation, retention or recovery of the rights to benefits under a special scheme for civil servants subject to the condition that all periods of insurance have been completed under one or more special schemes for civil servants in that Member State, or are regarded by the legislation of that Member State as equivalent to such periods, account shall be taken only of the periods which can be recognised under the legislation in that Member State.

If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for the receipt of these benefits, these periods shall be taken into account for the granting of the benefits under the general scheme or, failing that, the scheme applicable to manual or clerical workers, as the case may be.'

14 With regard to the award of pension rights under a special scheme for civil servants, Article 51a also refers to, inter alia, the provisions of Article 45(5) of Regulation No 1408/71, as amended by Regulation No 1606/98 (which corresponds, in substance, to the version of Article 45(4) of Regulation No 1408/71 in force at the material time in the case in the main proceedings), and to the provisions of Article 46 of Regulation No 1408/71.

The dispute in the main proceedings

15 Mr Nijhuis worked in the Netherlands from 15 October 1968 until 1 October 1973 as a scientific research assistant with the Netherlands Organisation for Research in the Field of Pure Science in The Hague, and from 1 August 1973 until 1 April 1974 as a teacher employed by Ons Middelbaar Onderwijs in Tilburg. During those periods he was insured, inter alia against the risk of invalidity, under the ABPW. Mr Nijhuis did not work in the Netherlands outside the periods mentioned.

16 Mr Nijhuis subsequently worked in Germany as a scientific research assistant with a research institute and was insured there from 1 April 1974 until 1 April 1988 pursuant to the Angestelltenversicherungsgesetz (Law on the Insurance for Clerical Staff).

17 Following an incapacity for work which arose on 29 March 1988, the Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Clerical Staff), by decision of 4 September 1989, awarded the plaintiff in the main proceedings an invalidity pension as from 9 November 1988. That benefit was awarded without taking into account the periods of insurance completed in the Netherlands.

18 Mr Nijhuis applied for an invalidity benefit to the Algemeen Burgerlijk Pensioenfonds (General Civil Service Pension Fund, hereinafter `the ABPF'), which, by a decision of 22 May 1990, rejected his application on the ground that he had not been insured under Netherlands legislation when his incapacity for work arose and that Regulation No 1408/71 did not apply in respect of special schemes for civil servants, who were excluded from its material scope by virtue of Article 4(4) thereof.

19 Mr Nijhuis thereupon made the same application to the NAB, which was responsible for granting invalidity benefits under the WAO and the AAW and to the rights and obligations of which the LISV succeeded in 1997.

20 By decision of 31 January 1990, the NAB rejected the application for benefit on the ground that, at the time when his incapacity for work arose, Mr Nijhuis was not insured under the WAO or under the AAW and could not rely on Article 45 of Regulation No 1408/71 as a basis for claiming the Netherlands benefits, on the ground that he had not been subject to the Netherlands schemes as an employed or self-employed person.

21 By judgment of 28 February 1992, the Raad van Beroep te Amsterdam (Appeal Court, Amsterdam) dismissed the appeal lodged by Mr Nijhuis against the decision by the NAB rejecting his application. Mr Nijhuis appealed to the Centrale Raad van Beroep.

22 That court was unsure whether, bearing in mind the Court's recent case-law (see, in particular, Case C-227/94 Olivieri-Coenen v Bestuur van de Nieuwe Algemene Bedrijfsvereniging [1995] ECR I-3301, Case C-443/93 Vougioukas v IKA [1995] ECR I-4033, and Case C-248/96 Grahame and Hollanders v Bestuur van de Nieuwe Algemene Bedrijfsvereniging [1997] ECR I-6407), the refusal by the NAB was in accordance with Community law. More specifically, it wondered whether, having regard in particular to Articles 48 and 51 of the EC Treaty, Point 4(a) of Section J of Annex VI to Regulation No 1408/71 did not, per se, oblige the competent Netherlands institution to take account of the period completed under the ABPW. The Centrale Raad van Beroep was also unsure as to the determination of the competent Netherlands institution for the purposes, should the case arise, of payment of the invalidity pension to Mr Nijhuis.

23 In those circumstances, the Centrale Raad van Beroep decided to stay proceedings and refer the following questions to the Court:

`1. When applying Article 46(2) in conjunction with Article 45(4) of Regulation (EEC) No 1408/71, and on the basis of Articles 48 and 51 of the EC Treaty, is Point 4(a) of Section J of Annex VI to Regulation No 1408/71 (in the version in force at the material time) to be interpreted as meaning that, in the case of a person who has

worked exclusively in the Netherlands in the period from 15 October 1968 to 1 April 1974 and who was insured throughout that period against invalidity under a special scheme for civil servants, that period should also be taken into account in accordance with that section of the annex when determining invalidity benefits?

2. If so, is the competent institution for the determination of benefits on the basis of those periods the institution referred to in Point 2(b) of Section J of Annex 2 to Regulation (EEC) No 574/72 or is it the competent institution under national law in regard to invalidity insurance for civil servants, notwithstanding the fact that the latter institution is not referred to in the said annex?'

24 It should be noted at the outset that, as the parties to the main proceedings and the Commission pointed out at the hearing, Mr Nijhuis has, since 25 October 1998, the date on which Regulation No 1606/98 entered into force, and thus after the reference to the Court in the present case was made, been in receipt of a pro rata benefit under the WAO, with the result that the scope of the questions referred by the national court should be limited to the period before that regulation entered into force.

The first question

25 By its first question, the Centrale Raad van Beroep is in substance asking whether Point 4(a) of Section J of Annex VI to Regulation No 1408/71 must be construed as requiring the competent Netherlands institution, to which an application for a pro rata invalidity benefit has been made by a worker who has suffered an incapacity for work which arose in another Member State, to treat the periods of insurance completed by that worker in the Netherlands after 1 July 1967 under a special scheme for civil servants as if they were periods of insurance completed under the WAO.

26 Basing themselves in particular on the judgments in Olivieri-Coenen, Vougioukas and Grahame and Hollanders, cited above, Mr Nijhuis and the Commission submit that, in the absence, prior to the entry into force of Regulation No 1606/98, of coordination measures applicable to the special schemes for civil servants, Articles 48 and 51 of the Treaty required the competent Netherlands institution to take account of periods of insurance completed under the ABPW for the purpose of granting a pro rata benefit, that benefit to be calculated by applying by analogy the provisions of Regulation No 1408/71, in the version in force at that time, in regard to the award of pension rights.

27 According to Mr Nijhuis and the Commission, it is not in dispute that, if Mr Nijhuis had not exercised his right as a worker to move freely, but had worked only in the Netherlands, he would have been entitled to Netherlands invalidity benefits the calculation of which would have been independent of the length of the periods of insurance (Type A legislation). By having exercised his right of free movement, Mr Nijhuis did not receive any Netherlands benefit for the period before Regulation No 1606/98 entered into force and received from Germany only a benefit calculated pro rata temporis (Type B legislation).

28 On this point it should be observed, as the Court noted in paragraph 30 of its judgment in Vougioukas, cited above, that, in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council is required, under Article 51 thereof, to set up a system to enable migrant workers to overcome obstacles with which they might be confronted through differences between national social security rules.

29 With specific regard to the special schemes for civil servants or persons treated as such, the Community legislature discharged that obligation only when it adopted Regulation No 1606/98, which entered into force on 25 October 1998, thereby leaving, for the preceding period, a substantial void in the Community coordination of social security schemes.

30 It is important, however, to bear in mind that the Council enjoys a wide discretion in regard to the choice of the most appropriate measures for achieving the result envisaged in Article 51 of the Treaty. Consequently, national bodies to which applications for social security benefits under a special scheme for civil servants or persons treated as such have been made directly under Articles 48 and 51 of the Treaty, before measures to coordinate such schemes have been adopted at Community level cannot be required to apply by analogy the provisions of Regulation No 1408/71 laid down for the social security schemes coming within its material scope. The position could be different only if it were possible to overcome the negative consequences which national legislation has for workers who have exercised their right of free movement without having recourse to Community coordination measures.

31 Such was the position in the Vougioukas case, cited above, which was concerned with certain national rules which were discriminatory in so far as they had the effect of setting aside recognition of periods of insurance solely on the ground that those periods had been completed in a Member State other than that in question. Those rules, which established a difference in treatment as between workers who had not exercised their right of free movement and migrant workers, to the detriment of the latter, could be disapplied without there being any need to have recourse, for the purpose of resolving the dispute pending before the national court, to coordination rules which the Council alone is empowered to adopt.

32 In contrast, in the case in the main proceedings here, which concerns the award of an invalidity benefit under a special scheme in a Member State for civil servants or persons treated as such, which, moreover, exhibits the characteristics of Type A legislation, for an incapacity for work which arose in another Member State, in which Type B legislation applies generally to employed persons, it is essential to have recourse to coordination techniques regulating the relations between the national schemes in point, techniques which it is specifically for the Council to select, in accordance with Article 51 of the Treaty. It should be added here that, as may be seen from paragraphs 12 and 13 of the present judgment, the Council adopted, in Regulation No 1606/98, rules which differ from those hitherto employed in regard to the aggregation of periods of insurance.

33 As regards the judgments in Olivieri-Coenen and Grahame and Hollanders, cited above, although these were also concerned with the award of invalidity benefits under Netherlands legislation, the reference made to them has no relevance in the present case. Those judgments deal with the taking into account of periods of employment and periods treated as such completed in the Netherlands prior to 1 January 1967, the date on which the WAO entered into force, whereas the taking of such factors into account was expressly provided for in Point 4(a) of Section I of Annex V to Regulation No 1408/71, as it applied on 1 February 1982, in Olivieri-Coenen, and in Point 4(a), third indent, of Section J of Annex VI to Regulation No 1408/71 in Grahame and Hollanders. As the LISV and the Netherlands Government have pointed out, in the main proceedings the periods of employment completed by Mr Nijhuis in the Netherlands were between 15 October 1968 and 1 April 1974.

34 The answer to the first question must therefore be that Point 4(a) of Section J of Annex VI to Regulation No 1408/71 must be interpreted as not requiring the competent Netherlands institution, to which an application for a pro rata invalidity benefit has been made by a worker who has suffered an incapacity for work which arose in another Member State, to treat the periods of insurance completed by that worker in the Netherlands after 1 July 1967 under a special scheme for civil servants as if they were periods of insurance completed under the WAO.

The second question

35 In view of the answer to the first question, it is unnecessary to reply to the second question.

Decision on costs

Costs

36 The costs incurred by the Governments of the Netherlands and the United Kingdom and by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 24 September 1997, hereby rules:

Point 4(a) of Section J 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 members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as adapted by Annex I, Part VIII, to the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, must be interpreted as not requiring the competent Netherlands institution, to which an application for a pro rata invalidity benefit has been made by a worker who has suffered an incapacity for work which arose in another Member State, to treat the periods of insurance completed by that worker in the Netherlands after 1 July 1967 under a special scheme for civil servants as if they were periods of insurance completed under the Wet op de Arbeidsongeschiktheidsverzekering of 18 February 1966.