Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

17 January 2012*

(Social security for migrant workers — Regulation (EEC) No 1408/71 — Worker employed on gas-drilling platform on the continental shelf adjacent to the Netherlands — Compulsory insurance — Refusal to pay invalidity benefit)

In Case C-347/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (Netherlands), made by decision of 5 July 2010, received at the Court on 8 July 2010, in the proceedings

A. Salemink

v

Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann (Rapporteur), E. Juhász, G. Arestis, D. Šváby and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 June 2011,

after considering the observations submitted on behalf of:

— Mr Salemink, by R.E. Zalm, jurist,

— the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, by I. Eijkhout, acting as Agent,

— the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

— the Greek Government, by S. Vodina, E.-M. Mamouna and G. Karipsiadis, acting as Agents,

— the Spanish Government, initially by B. Plaza Cruz, and subsequently by S. Centeno Huerta, acting as Agents,

— the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

* Language of the case: Dutch.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 39 EC and 299 EC, and of Titles I and II 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 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1, 'Regulation No 1408/71').

2 The reference has been made in proceedings between Mr Salemink, a Netherlands national who had worked on a gas-drilling platform on the continental shelf adjacent to the Netherlands and resident in Spain, and the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Agency), concerning its refusal to grant Mr Salemink invalidity benefit.

Legal context

International law

3 The United Nations Convention on the Law of the Sea, signed at Montego Bay (Jamaica) on 10 December 1982, which entered into force on 16 November 1994, was ratified by the Kingdom of the Netherlands on 28 June 1996 and was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1, the 'Convention on the Law of the Sea'), provides at Article 60 thereof, entitled 'Artificial islands, installations and structures in the exclusive economic zone', as follows:

'1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorise and regulate the construction, operation and use of:

(a) artificial islands;

(b) installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

…'

4 Article 77 of the Convention on the Law of the Sea, entitled 'Rights of the coastal State over the continental shelf', provides:

'1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

…'

5 Article 80 of that convention, entitled ‘Artificial islands, installations and structures on the continental shelf’, provides:

‘Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.’

European Union (‘EU’) legislation

6 Article 13 of Regulation No 1408/71, entitled ‘General rules’, provides:

‘1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…’

National legislation

7 Article 3 of the Law on sickness insurance (Ziektewet, or the ‘ZW’) provides:

‘1. An “employee” means a natural person under the age of 65 years who is employed in a position governed by private law or public law.

2. A person who works outside the Netherlands is not regarded as an employee unless that person resides in the Netherlands and the employer also has its place of business or is established in the Netherlands.’

8 The Law on work and income according to capacity for work (Wet werk en inkomen naar arbeidsvermogen, the ‘WIA’), which entered into force on 1 January 2006, provides, at paragraph 7(1) thereof, that ‘Every employee must be insured’.

9 Pursuant to Article 8(1) of the WIA, ‘for the purposes of the present Law, an employee is defined as an employee within the meaning of the [ZW], with the exception of employees covered by Article 4(1)(g) of that Law’.

10 It is apparent from Article 18(1) and (2) of the WIA that the option of voluntary insurance is open to a person below the age of 65 who does not fall within the definition of an employee under Article 3(2) and (5) of the ZW, whose compulsory insurance has ended, who is resident outside the Netherlands and who, immediately after the compulsory insurance has ended, has an employment contract for a maximum term of five years with an employer who is resident or established in the Netherlands.

11 Under Article 47(1) of the WIA, an insured person who becomes ill is entitled to incapacity benefit if the waiting time has expired, the incapacity for work is total and long-term, and there are no grounds for excluding him.

12 Article 3 of the Law relating to Employment in Extraction Industries in the North Sea (Wet arbeid Mijnbouw Noordzee) provides:

'1. This Article applies to workers who are not insured under the [ZW] or by virtue of any corresponding statutory scheme of a Member State of the European Union, and whose contract of employment is governed by the Dutch law on contracts of employment, or at least the binding provisions thereof.

2. A worker who is unable through illness to perform the work agreed is entitled to the remuneration provided for under Article 629(1) of Book 7 of the Civil Code for 104 weeks, even if his contract of employment ended during that period.'

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

13 Mr Salemink, a Netherlands national, worked, as from 1996, as a nurse and, in part, as a radiographer, on a gas-drilling platform of the company Nederlandse Aardolie Maatschappij. The platform in question is located outside the Netherlands' territorial waters, on the continental shelf adjacent to the Netherlands, approximately 80 km from its coast.

14 On 10 September 2004, Mr Salemink moved his residence to Spain.

15 Before he left for Spain, Mr Salemink was covered by compulsory insurance pursuant to the ZW, Article 3(2) of which provides that a person who works outside the Netherlands is not regarded as an employee unless that person resides in the Netherlands and his employer also has its place of business or is established in the Netherlands.

16 After his move to Spain, Mr Salemink no longer satisfied the residence condition laid down in Article 3(2) and, therefore, he was excluded from the compulsory insurance, in particular from insurance against incapacity for work.

17 With effect from 4 October 2004, Mr Salemink was allowed to take out voluntary insurance, which was, however, subsequently terminated, since the premiums had not been paid. Mr Salemink's later attempts, during 2006, to be allowed to take out voluntary insurance were unsuccessful because the applications were made late.

18 After reporting sick on 24 October 2006, on 11 September 2007 Mr Salemink applied for incapacity benefit pursuant to the WIA, as from 24 October 2008.

19 That application was refused by the Uitvoeringsinstituut werknemersverzekeringen (the Employee Insurance Agency, 'the UWV') on the ground that, on the date on which he had become incapacitated for work, namely, on 24 October 2006, Mr Salemink was not compulsorily insured. Since Mr Salemink had resided outside the Netherlands since 10 September 2004, the UWV took the view that he was no longer compulsorily insured as from that date.

20 Before the Rechtbank Amsterdam, Mr Salemink submitted that he was eligible for invalidity benefit on the basis of Regulation No 1408/71, which, in his submission, is applicable in the continental shelf adjacent to the Netherlands, which should be regarded as part of Netherlands territory.

21 In that connection, Mr Salemink relies on the policy of the Sociale Verzekeringsbank (the Social Insurance Agency, the 'SVB') with effect from 1 January 2006, which is based upon Case C-60/93 *Aldewereld* [1994] ECR I-2991, and which regards employees working on the continental shelf adjacent to the Netherlands as being covered by the Netherlands' social insurance.

22 The national court describes that policy as follows:

‘The SVB assumes that Title II of... Regulation [No 1408/71] is applicable if an employee is resident in Community territory but works outside Community territory for an employer established within the Community. Here the SVB derives from the [grounds of the judgment] of the Court of Justice … in Case 237/83 *Prodest* [1984] ECR 3153 and *Aldewereld* the condition that, immediately prior to the work performed outside the Community, the employee must be insured in the Member State in which his employer is established or that the employee is insured under the national legislation of that Member State while performing the work outside the Community. If either of these conditions is satisfied, the SVB assumes that the legislation of the Member State of the employer is deemed to be applicable during the period in which work is performed outside the Community.’

23 However, the UWV took the position that, after his move to Spain, Mr Salemink no longer satisfied the conditions for affiliation to the compulsory insurance scheme.

24 The national court expresses doubts as to whether the scope of Regulation No 1408/71 may extend to the continental shelf in question. It enquires whether a distinction ought to be made between, on the one hand, the territory in which a Member State is sovereign and, on the other, the territory in which it is authorised to exercise limited sovereign rights but is also entitled to refrain from exercising those rights — which, in the national court’s view, the Netherlands has done on the continental shelf in respect of social security legislation. Thus, the question is whether a Member State is at liberty, within the functional jurisdiction exercised by it on the continental shelf, to treat employees working on that continental shelf differently from those working within the territory of that State.

25 The national court accepts that the UWV’s refusal may be incompatible with the principle of the freedom of movement for workers, having regard to the fact that Mr Salemink has lost an advantage which he enjoyed while resident in the Netherlands. However, the national court is uncertain whether that incompatibility might be mitigated by the fact that Mr Salemink was in a position to take out voluntary insurance and availed himself of that possibility.

26 In conclusion, the national court points out that the residence condition laid down in Article 3(2) of the ZW is a problematic criterion in that it may potentially lead to discrimination on grounds of nationality.

27 In those circumstances, the Rechtbank Amsterdam decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the rules forming part of European Community law which are designed to bring about free[dom of] movement for workers, in particular the rules set out in Titles I and II of Regulation (EEC) No 1408/71 as well as in Articles 39 and 299 of the EC Treaty … preclude an employee, working outside Netherlands territory on a fixed installation on the [continental shelf adjacent to the Netherlands] for an employer established in the Netherlands, from being in a position in which he is not insured under national statutory employee insurance solely on the ground that he is not resident in the Netherlands but in another Member State (in this case, Spain), even if he has Netherlands nationality and can also avail of the option to take out voluntary insurance under essentially the same conditions as those which apply to compulsory insurance?’

The question referred for a preliminary ruling

28 By its question the national court asks, in essence, whether the provisions of Regulation No 1408/71 and Article 39 EC must be interpreted as precluding an employee, working on a fixed installation on the continental shelf adjacent to a Member State, from being in a position in which he is not compulsorily insured under national statutory employee insurance in that Member State solely on the ground that he is not resident there but in another Member State.

29 In that connection, under Article 13(2)(a) of Regulation No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State.

30 However, whether Article 13(2)(a) of Regulation No 1408/71, and EU law in general, is applicable in a case such as that in the main proceedings is disputed by both the Netherlands Government and the UWV since the professional activity in question is carried out on a gas-drilling platform on the continental shelf adjacent to the Netherlands, outside the Netherlands' territorial waters. The Netherlands Government and the UWV submit in that connection that the territorial scope of Regulation No 1408/71 is restricted to the national territory. The national court is also uncertain whether EU law is applicable to the continental shelf in question.

31 In that regard, reference must be made to the rules and principles of international law relating to the legal regime applicable to the continental shelf.

32 In its judgment of 20 February 1969 (the so-called North Sea Continental Shelf cases, *Reports*, 1969, p. 3, paragraph 19), the International Court of Justice had to rule on the rights of the coastal State in respect of the area of the continental shelf constituting a natural prolongation of its land territory under the sea. It held that such rights exist *ipso facto* and *ab initio* by virtue of the State's sovereignty over the land and by extension of that sovereignty in the form of the exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources.

33 It follows from Article 77 of the Convention on the Law of the Sea that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. Those rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without its express consent.

34 In accordance with Article 80 of the Convention on the Law of the Sea, in conjunction with Article 60 thereof, the coastal State has the exclusive right to construct the artificial islands, installations and structures on the continental shelf, to authorise them and to regulate their construction, operation and use. The coastal State has exclusive jurisdiction over such artificial islands, installations and structures.

35 Since a Member State has sovereignty over the continental shelf adjacent to it — albeit functional and limited sovereignty (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 59) — work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law (see, to that effect, Case C-37/00 *Weber* [2002] ECR I-2013, paragraph 36, and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 117).

36 A Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.

37 Since it has been established that EU law, and in particular Regulation No 1408/71, is applicable to the continental shelf adjacent to a Member State, it is necessary to examine whether that regulation and the provisions of the EC Treaty on freedom of movement for workers preclude a person in Mr Salemink's situation from being excluded from the compulsory insurance scheme after transferring his residence to Spain.

38 In that regard, the sole purpose of Article 13(2)(a) of Regulation No 1408/71 is to determine the national legislation applicable to persons employed in the territory of a Member State. As such, the provision is not intended to lay down the conditions creating the right or the obligation to become

affiliated to a social security scheme or to a particular branch under such a scheme. As the Court has stated on several occasions in its case-law, it is for the legislation of each Member State to lay down those conditions (see, inter alia, Case 275/81 *Koks* v *Raad van Arbeid* [1982] ECR 3013, and C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 33).

39 However, although Member States retain the power to organise the conditions of affiliation to their social security schemes, they must none the less, when exercising that power, comply with EU law and, in particular, the Treaty provisions on freedom of movement for workers (see, to that effect, Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, and Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33).

40 Consequently, those conditions may not have the effect of excluding from the scope of national legislation, such as that at issue in the main proceedings, persons to whom that legislation applies pursuant to Regulation No 1408/71 and the compulsory insurance schemes must be compatible with the provisions of Article 39 EC (see, to that effect, *Kits van Heijningen*, paragraph 20, and *van Pommeren-Bourgondiën*, paragraph 39).

41 Article 13(2)(a) of Regulation No 1408/71 expressly provides that a person employed in the territory of one Member State is to be subject to the legislation of that State 'even if he resides in the territory of another Member State'. That provision would not be complied with if the residence condition laid down by the legislation of the Member State in whose territory the person is employed for affiliation to the compulsory insurance scheme which it establishes could be relied on against the persons referred to in Article 13(2)(a). With regard to those persons, the effect of that provision is to replace the residence condition with a condition based on employment in the territory of the Member State concerned (see *Kits van Heijningen*, paragraph 21).

42 Thus, national legislation, such as that at issue in the main proceedings, which lays down that it is the residence criterion which determines whether or not an employee working on a gas-drilling platform on the continental shelf adjacent to a Member State may benefit from compulsory insurance in that Member State is contrary to Article 13(2)(a) of Regulation No 1408/71.

43 Moreover, it must be found that such national legislation places non-resident workers, such as Mr Salemink, in a less favourable position than resident workers with regard to their social security cover in the Netherlands, and therefore undermines the principle of freedom of movement secured by Article 39 EC.

44 Even though the Court, in paragraph 40 of *van Pommeren-Bourgondiën*, did not rule out that the residence requirement — as a condition for continuing to qualify for compulsory insurance in respect of some branches of social security — might be compatible with Article 39 EC, the option of taking out voluntary insurance open to Mr Salemink cannot invalidate the finding in paragraph 43 above. The steps which non-resident workers wishing to take out voluntary insurance must take on their own initiative, and the constraints associated with such insurance, such as complying with time-limits for applying for insurance, are factors which place non-resident workers — who have the option only of voluntary insurance — in a less favourable position than resident workers, who are covered by compulsory insurance.

45 Consequently, the answer to the question referred is that Article 13(2)(a) of Regulation No 1408/71 and Article 39 EC must be interpreted as precluding an employee, working on a fixed installation on the continental shelf adjacent to a Member State, from being in a position in which he is not compulsorily insured under national statutory employee insurance in that Member State solely on the ground that he is not resident there but in another Member State.

Costs

46 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 (Grand Chamber) hereby rules:

Article 13(2)(a) 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, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, and Article 39 EC must be interpreted as precluding an employee, working on a fixed installation on the continental shelf adjacent to a Member State, from being in a position in which he is not compulsorily insured under national statutory employee insurance in that Member State solely on the ground that he is not resident there but in another Member State.

[Signatures]