JUDGMENT OF THE COURT (Second Chamber)

28 April 1994 *

In Case C-305/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht (Social Court), Münster, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

Albert Hoorn

and

Landesversicherungsanstalt Westfalen,

on the interpretation of Community law in relation to Article 2 of Complementary Agreement No 4 between the Federal Republic of Germany and the Kingdom of the Netherlands on the settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945, signed at the Hague on 21 December 1956 (United Nations Treaty Series, Vol. 591, p. 374),

THE COURT (Second Chamber),

composed of: C. N. Kakouris, acting as President of the Second Chamber, F. A. Schockweiler and J. L. Murray (Rapporteur), Judges,

* Language of the case: German.

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— A. Hoorn, in person, and by C. Schaeder, lawyer, Moers, Germany,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, acting as Agent,

— the Netherlands Government, by A. Bos, legal adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, legal adviser, and R. Hayder, a member of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of A. Hoorn, the German Government, the Netherlands Government, represented by T. Heukels, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by D. Gouloussis, assisted by H. Kreppel, German official seconded to the Commission's Legal Service, acting as Agents, at the hearing on 24 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,

gives the following

Judgment

1 By order of 19 June 1992 received at the Court on 20 July 1992, the Sozialgericht (Social Court), Münster, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Community law in relation to Article 2 of Complementary Agreement No 4 between the Federal Republic of Germany and the Kingdom of the Netherlands on the settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945, signed at the Hague on 21 December 1956 (United Nations Treaty Series, Vol. 591, p. 374).

2 This question was raised in the course of proceedings between Mr Hoorn, a Netherlands national, and the Landesversicherungsanstalt (Regional Insurance Office), Westfalia, to which Mr Hoorn applied for an old-age pension in respect of forced labour performed in that country during the Second World War.

3 That application was refused under Article 2(1) and (3) of the Complementary Agreement, which provides:

'1. Periods of insurance completed by Dutch nationals under the German pension insurance scheme for employees between 13 May 1940 and 1 September 1945 on the basis of paid employment shall be deemed to have been completed under the Dutch insurance system against financial consequences of invalidity, old-age and death, if the employee ceased working before 1 Sep-

tember 1945 and returned to the Netherlands by not later than 31 December 1945.

...

3. No claims may be made against the German pension insurance scheme for workers and the analogous scheme for employees on the basis of periods of insurance deemed under paragraph 1 to have been completed under the Netherlands insurance system against the financial consequences of invalidity, old-age and death.'

4 Mr Hoorn appealed against that refusal to the Sozialgericht which decided to refer to the Court the following question for a preliminary ruling:

'Is Article 2 of Complementary Agreement No 4 to the Convention between the Federal Republic of Germany and the Kingdom of the Netherlands of 29 March 1951 on the settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945 valid with the result that Netherlands forced labourers such as the applicant who had returned to the Netherlands by 31 December 1945 and between 13 May 1940 and 1 September 1945 performed forced labour in Germany, and were insured against invalidity under German law, are precluded from claiming for those periods of insurance against the German pension insurance scheme for workers?'

5 By its question the Sozialgericht is seeking to ascertain whether, under Article 2 of the Complementary Agreement, it is compatible with Community law for forced labour performed by Netherlands nationals in Germany during the Second World War to confer no entitlement under the German pension insurance scheme, but to be accounted for under the Netherlands scheme as if it had been performed in the Netherlands.

6 Mr Hoorn considers that the Complementary Agreement discriminates in breach of Community law between Netherlands and German nationals compelled to perform forced labour, and between two specific categories of Netherlands workers. Besides, he considers that the Complementary Agreement infringes Article 8 of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Official Journal 1983 L 230, p. 6; and Official Journal 1992 C 325, p. 1 — consolidated version), which lays down the conditions under which the Member States may conclude amongst themselves conventions in the field of social security.

Discrimination between Netherlands nationals and German nationals compelled to perform forced labour

7 Mr Hoorn maintains that the Complementary Agreement discriminates against Netherlands nationals on the ground that their pension entitlement under Netherlands legislation is less than that paid by the German pension insurance scheme to its own nationals who were compelled to perform forced labour in Germany during the Second World War. That discrimination is said to conflict with Article 3(1) of Regulation No 1408/71 which provides that:

'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 that State.'

8 In that connection the prohibition of discrimination laid down in Article 3 applies in accordance with its actual wording 'subject to the special provisions of this Regulation'.

9 Moreover, under the terms of Article 7(2)(c) of that Regulation, the provisions of international social security conventions set out at paragraph 28(b) of Annex III remain applicable notwithstanding the provisions of the Regulation. The above-mentioned Agreement appears amongst the conventions cited in that annex.

'*Article 7*

2. The provisions of Article 6 notwithstanding, the following shall continue to apply:

(c) the provisions of the social security conventions listed in Annex III.

Annex III

A. Provisions of social security conventions remaining applicable notwithstanding Article 6 of the Regulation (Article 7(2)(c) of the Regulation)

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(b) Articles 2 and 3 of Complementary Agreement No 4 of 21 December 1956 to the Convention of 29 March 1951 (settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945.'

10 It follows from these provisions read together that the Complementary Agreement remains fully applicable notwithstanding the adoption of Regulation No 1408/71 and that it continues to be effective in respect of all the situations which it covers, including the situation of the applicant in the main proceedings.

11 Mr Hoorn further maintains that the difference between the amounts of pension to which Netherlands and German nationals compelled to perform forced labour are entitled under their respective old-age schemes gives rise to discrimination contrary to Article 7(1) of the Treaty whereby:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

12 The alleged difference of treatment does not stem from the Complementary Agreement itself, which merely determines the law applicable to the workers concerned, without stating the scope of the benefits. Rather it arises from the fact that the Netherlands legislature laid down for the pensions for which it is responsible under the Complementary Agreement an amount different from that laid down by the German old-age insurance scheme for pensions payable by it.

13 As Community law currently stands, each Member State is free to determine the amount of the pensions to be paid by it, provided that such amount does not entail any discrimination founded on nationality. In fact, the Netherlands legislation does not accord different treatment on account of their nationality to different categories of Community nationals who were compelled to perform forced labour. It may not therefore be said to practice discrimination on the ground of nationality.

Discrimination as between two categories of Netherlands nationals

14 Mr Hoorn further argues that, in breach of the abovementioned provisions, the Complementary Agreement discriminates between two categories of Netherlands workers compelled to perform forced labour, namely

— on the one hand, those subject to Article 2 of the Complementary Agreement for whose pension the Netherlands old-age insurance scheme is responsible and

— on the other hand, workers who continued to work in Germany after 1 September 1945 or remained in that country after 31 December 1945.

15 He emphasizes that under Article 2(1) of the Complementary Agreement (see paragraph 3 above), the latter workers are excluded from the scope of the Agreement and thus, unlike workers in the first category, may claim a pension under the German old-age insurance scheme.

16 In that connection, as the Commission rightly claimed, Community law, as it currently stands, does not preclude the Member States from providing by legislation or conventions concluded with other States different pension arrangements for different categories of population. Such difference of treatment does not come within the terms of the prohibition provided for in Article 7 of the Treaty which is specifically intended to prohibit discrimination based on nationality.

Article 8 of Regulation No 1408/71

17 Mr Hoorn also claims that the Complementary Agreement infringes Article 8 of Regulation No 1408/71, which provides that:

'1. Two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation.

2. Each Member State shall notify, in accordance with the provisions of Article 97(1), any convention concluded in another Member State under the provisions of paragraph 1.'

18 In the event, the conflict with Article 8 stems from the fact that the Complementary Agreement provides for account to be taken in one Member State of work performed in another Member State, whereas the Regulation is based on the principle that a right to a pension arises in each Member State in which the person concerned has worked.

19 On a proper construction of Articles 6, 7 and 8 of Regulation No 1408/71, and the Court's case-law (judgment in Case C-23/92 *Grana-Novoa* [1993] ECR I-4505, paragraph 22), Article 8 concerns only conventions concluded between the Member States after the entry into force of the Regulation and does not therefore apply to the Complementary Agreement.

20 It therefore follows from all the foregoing that the reply to the question raised by the national court must be that, under Article 2 of the Complementary Agreement, it is compatible with Community law for forced labour performed by Netherlands nationals in Germany during the Second World War to confer no entitlement under the German pension insurance scheme, but to be accounted for under the Netherlands scheme as if it had been performed in the Netherlands.

Costs

21 The costs incurred by the German and Netherlands Governments and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Sozialgericht Münster, by order of 19 June 1992, hereby rules:

Under Article 2 of Complementary Agreement No 4 between the Federal Republic of Germany and the Kingdom of the Netherlands on the settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945, signed at the Hague on 21 December 1956, it is compatible with Community law for forced labour performed by Netherlands nationals in Germany during the Second World War to confer no entitlement under the German pension insurance scheme, but to be accounted for under the Netherlands scheme as if it had been performed in the Netherlands.

Kakouris Schockweiler Murray

Delivered in open court in Luxembourg on 28 April 1994.

R. Grass
Registrar

C. N. Kakouris
acting as President of the Chamber