



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

15 January 2015*

(Reference for a preliminary ruling — Determination of the social security legislation applicable to a worker — Regulation (EEC) No 1408/71 — Applicability — Employment of a national of a Member State at the consulate of a third State in the territory of another Member State in whose territory he resides — Vienna Convention on consular relations — Article 71(2) — National legislation according facilities, privileges and immunities to permanent residents)

In Case C-179/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Netherlands), made by decision of 9 April 2013, received at the Court on 12 April 2013, in the proceedings

Raad van bestuur van de Sociale verzekeringsbank

v

L.F. Evans,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 April 2014,

after considering the observations submitted on behalf of:

- the Raad van bestuur van de Sociale verzekeringsbank, by H. van der Most,
- Ms Evans, by N. Matt, advocaat,
- the Netherlands Government, by J. Langer, M. Bulterman and M. Gijzen, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent, assisted by A. Silva Rocha, Professor,
- the European Commission, by M. van Beek, acting as Agent,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 19 June 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 2, 3 and/or 16 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), and, in the alternative, Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).
- 2 The request has been submitted in proceedings between the Raad van bestuur van de Sociale verzekeringsbank ('the SvB') and Ms Evans, a British national, concerning the calculation of pension entitlements pertaining to the period during which she was employed by the Consulate General of the United States of America in Amsterdam (Netherlands) and enjoyed privileged status by virtue of which she was exempted, in particular, from all social security contributions and was therefore not affiliated to the Dutch social security scheme.

The legal context

International law

- 3 Article 1(1) and (3) of the Vienna Convention on Consular Relations (United Nations Treaty Series, vol. 596, p. 261, 'Vienna Convention of 1963') provides:

'1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- a. "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
...
- c. "head of consular post" means the person charged with the duty of acting in that capacity;
- d. "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
- e. "consular employee" means any person employed in the administrative or technical service of a consular post;
- f. "member of the service staff" means any person employed in the domestic service of a consular post;
- g. "members of the consular post" means consular officers, consular employees and members of the service staff;

- h. “members of the consular staff” means consular officers, other than the head of a consular post, consular employees and members of the service staff;
- i. “member of the private staff” means a person who is employed exclusively in the private service of a member of the consular post;

...

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by article 71 of the present Convention.’

4 Article 48 of the Convention, headed ‘Social security exemption’, provides:

‘1. Subject to the provisions of paragraph 3 of this article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:

- (a) that they are not nationals of or permanently resident in the receiving State; and
- (b) that they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.’

5 Article 71 of the Convention, headed ‘Nationals or permanent residents of the receiving State’, provides:

‘1. Except insofar as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privileges provided in paragraph 3 of article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families ... shall enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State. ...’

6 The Kingdom of the Netherlands deposited its instrument of ratification of the Vienna Convention of 1963 with the Secretary General of the United Nations on 17 December 1985, so that the Convention entered into force for it on 16 January 1986.

European Union legislation

Regulation No 1612/68

- 7 Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State is to enjoy, in the territory of other Member States, the same social and tax advantages as national workers.

Regulation No 1408/71

- 8 The fifth and eighth recitals in the preamble to Regulation No 1408/71 provide as follows:

‘Whereas it is necessary, within the framework of that coordination, to guarantee within the Community equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors;

...

Whereas employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom.’

- 9 Article 1(a) of Regulation No 1408/71 provides that, for the purposes of the regulation, the term ‘employed person’ means, *inter alia*, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons.

- 10 Article 2(1) of that regulation provides:

‘This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.’

- 11 Article 3(1) of that regulation provides:

‘Subject to the special provisions of this Regulation, persons 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.’

- 12 In Title II of Regulation No 1408/71 (‘Determination of the legislation applicable’), Article 13 (‘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;

...'

- 13 Article 16 of that regulation, headed 'Special rules regarding persons employed by diplomatic missions and consular posts, and auxiliary staff of the European Communities', provides:

'1. The provisions of Article 13(2)(a) shall apply to persons employed by diplomatic missions and consular posts and to the private domestic staff of agents of such missions or posts.

2. However, employed persons covered by paragraph 1 who are nationals of the Member State which is the accrediting or sending State may opt to be subject to the legislation of that State. Such right of option may be renewed at the end of each calendar year and shall not have retrospective effect.

...'

- 14 Regulation No 1408/71 was repealed with effect from 1 May 2010 by 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). However, the latter regulation is not applicable to the main proceedings.

Netherlands law

- 15 Article 6(1) of the General Law on old-age pensions (Algemene Ouderdomswet, Staatsblad 1956, no 281, 'the AOW') provides that, in particular, residents of the Netherlands are insured under the Netherlands' social security scheme. Article 6(3) provides that 'the category of insured persons may be extended or restricted by or pursuant to a general administrative measure, by way of derogation from paragraphs 1 and 2'.
- 16 Pursuant to Article 6(3) of the AOW, in 1976, 1989 and 1998 the Netherlands authorities adopted several decrees extending and restricting the category of insured persons in respect of social security.
- 17 Pursuant to these decrees extending and restricting the category of insured persons in respect of social security, consular agents and employees, including members of the administrative staff, are not insured in respect of social security unless they are Netherlands nationals or, according to the decrees in force since 1 July 1989, unless they are permanently resident in the Netherlands.
- 18 With regard to this status of permanent resident, the Netherlands authorities initially considered that consular employees, within the meaning of Article 1(e) of the Vienna Convention of 1963, residing in the Netherlands but of foreign nationality could not be classified as permanent residents within the meaning of Articles 1(3) and 71 of the Vienna Convention of 1963 and were consequently eligible for the preferential regime provided for in Article 48 of that convention.
- 19 With effect from 1 August 1987, the Netherlands authorities altered their assessment and adopted the view that locally recruited staff who had been resident in the Netherlands for more than a year on the date of their recruitment should be regarded as permanent residents, so that they were excluded from the preferential regime provided for in the Vienna Convention of 1963. In order to avoid undermining legal positions already acquired, the authorities decided that this change should not affect persons who were already working at a consular post before 1 August 1987. However, in the course of 1999, the Netherlands Ministry of Foreign Affairs gave these people who had already been working at a consulate or embassy in the Netherlands before 1 August 1987 the option of choosing, by 15 December 1999, to be covered by the Dutch social security scheme.

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

- 20 Ms Evans, a British national, worked in the United Kingdom from 1972 to 1973 then, that same year, settled in the Netherlands, where she was employed first by various undertakings and then, until April 1980, at the Consulate General of the United Kingdom in Rotterdam, the Netherlands.
- 21 Since 17 November 1980, she has worked at the Consulate General of the United States of America in Amsterdam, as a member of the administrative and technical staff within the meaning of Article 1(1)(e) of the Vienna Convention of 1963, and, since taking up her duties there, has been covered by a health insurance policy taken out by her employer with a Dutch private insurance company.
- 22 Taking the view that Ms Evans could not be regarded as a permanent resident of the Netherlands within the meaning of Article 1(3) of the Vienna Convention of 1963, the Ministry of Foreign Affairs granted her, when she took up her duties, the privileged status provided for by the Vienna Convention of 1963, which in particular entailed exemption from most taxes and social security contributions. Accordingly, Ms Evans has not been affiliated to any branch of social security since that date.
- 23 In 1999, the Netherlands authorities asked Ms Evans to make the choice referred to in paragraph 19 of this judgment between retaining her privileged status and in future becoming affiliated to the general Dutch social security scheme. On 5 December of that year, she opted to retain this status in the following terms: ‘I wish to retain my privileged status, which means that I am not insured under the Netherlands’ social security scheme and therefore have no entitlement to the cover it provides.’
- 24 In 2008, Ms Evans asked the Svb to provide details of her periods of insurance under the AOW for the purpose of calculating her future pension. On 27 March 2008, the Svb informed her that, in its view, she had been insured with it during the period from 1973 to 1980, but not during the period during which she had been employed at the Consulate General of the United States of America. The Svb based this view on the fact that Regulation No 1408/71 was not applicable to her because the United States was not a Member State of the European Union and because, under Netherlands legislation — the only legislation applicable in such a situation — consular agents and members of the administrative staff did not have social security cover unless they were Netherlands nationals.
- 25 Ms Evans then lodged an objection against the decision of the Svb; her objection was declared unfounded, and she brought an action before the Rechtbank Amsterdam (Amsterdam District Court) against that ruling. By judgment of 15 March 2011, the Rechtbank held that Ms Evans should be regarded as having been insured under the AOW from 18 November 1980 to 12 March 2008, on the grounds that Article 3 of Regulation No 1408/71 required Ms Evans’s British nationality to be equated with Netherlands nationality, with reference to the judgment in *Boukhalfa* (C-214/94, EU:C:1996:174). The Rechtbank also held that Ms Evans should be regarded as a permanent resident and that this was not affected by the fact that she had privileged status.
- 26 The SVB appealed against that judgment to the Centrale Raad van Beroep (Higher Social Security Court).
- 27 In considering whether, in a situation such as that at issue in the main proceedings, direct or indirect discrimination on grounds of nationality exists and, in the alternative, whether, if there is indirect discrimination, it is justified, the Centrale Raad van Beroep decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
1. Must Article 2 and/or Article 16 of Regulation No 1408/71 be construed as meaning that a person like Ms Evans, who is a national of a Member State, who exercised her right of freedom of movement for workers, to whom the social security legislation of the Netherlands was applicable

and who then went to work as a member of the service staff of the Consulate General of the United States of America in the Netherlands, from the commencement of such work no longer falls under the personal scope of Regulation No 1408/71?

If not:

2. (a) Must Article 3 of Regulation No 1408/71 and/or Article 7(2) of Regulation No 1612/68 be construed as meaning that the application of privileged status to Ms Evans, which in this case consists inter alia of not being compulsorily insured for the purposes of social security and of not paying contributions in that regard, should be considered a sufficient justification for discriminating on grounds of nationality?
- (b) What significance must be attached in that regard to the fact that in December 1999, Ms Evans, when asked, opted for the continuation of the privileged status?

Consideration of the questions referred

The first question

- 28 In its first question, the referring court asks, in substance, whether Article 2 of Regulation No 1408/71, read in conjunction with Article 16 of that regulation, may be construed as meaning that, for the period during which a national of a Member State has been employed at a consular post of a third State within the territory of a Member State of which he is not a national but within whose territory he resides, that national may be regarded by that Member State as not being subject to the legislation of a Member State, within the meaning of that provision, and, therefore, excluded from the scope of Regulation No 1408/71.
- 29 It should be observed at the outset that, pursuant to Article 2(1) of Regulation No 1408/71, the regulation applies to employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States.
- 30 In the case at issue, it is common ground that Ms Evans is a national of a Member State and that, during the period at issue, she was not affiliated to any branch of the social security of a Member State from the time when she took up her duties at the Consulate General of the United States of America.
- 31 It is accordingly necessary to assess whether a person in a situation such as that of Ms Evans, namely a person employed at a consular post of a third State within the territory of a Member State of which she is not a national but within whose territory she resides, must be regarded as subject to the legislation of that Member State within the meaning of Article 2(1) of Regulation No 1408/71.
- 32 In doing so, it must be observed that a situation such as that at issue in the main proceedings differs from that which gave rise to the judgment in *Boukhalfa* (EU:C:1996:174) referred to by the referring court, in that the case which gave rise to that judgment concerned a national of a Member State employed by the embassy of a Member State within the territory of a third State.
- 33 It should also be recalled, first, that EU law does not, in principle, affect the competence of the Member States to regulate their social security systems (see, to that effect, judgment in *Salgado González*, C-282/11, EU:C:2013:86, paragraph 35 and the case-law cited).

- 34 In the absence of harmonisation at EU level, it is, in principle, for the legislation of each Member State 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 (see, to that effect, judgment in *van Pommeren-Bourgon diën*, C-227/03, EU:C:2005:431, paragraph 33, and *Bakker*, C-106/11, EU:C:2012:328, paragraph 32).
- 35 Second, EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions (see, to that effect, judgment in *Racke*, C-162/96, EU:C:1998:293, paragraphs 45 and 46, and *Kadi et Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291).
- 36 As the Advocate General observed in point 52 of his Opinion, the idea of being ‘subject to the legislation of a Member State’, as referred to in Article 2 of Regulation No 1408/71, ought to be interpreted in the light of the relevant rules of customary international law (see, by analogy, judgment in *Salemink*, C-347/10, EU:C:2012:17, paragraph 31), namely the Vienna Convention of 1963, which codifies the law of consular relations and states principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions (see judgment of the International Court of Justice of 24 May 1980, case concerning the diplomatic and consular staff of the United States of America in Tehran (*United States of America v Iran*), *Reports of Judgements, Advisory Opinions and Orders* 1980, p. 3, paragraph 45).
- 37 As regards the social security scheme applicable to consular staff, Article 48 of the Vienna Convention of 1963 provides that members of the consular post, with respect to services rendered by them for the sending State, are in principle exempt from social security provisions which may be in force in the receiving State, while Article 71(2) of the Convention qualifies this by providing that members of the consular post who are nationals of or permanently resident in the receiving State are to enjoy facilities, privileges and immunities in so far as these are granted to them by the receiving State.
- 38 In the case at issue, it emerges from the order for reference that, until 1 August 1987, Netherlands legislation provided that consular officers and agents who were not Netherlands nationals did not have social insurance and that, after that date, consular officers and agents who were permanent residents of the Netherlands were insured there, while laying down arrangements whereby staff who had taken up their duties before 1 August 1987 could opt out, thus remaining uninsured under the Netherlands’ social insurance scheme, an option of which Ms Evans availed herself.
- 39 It follows that the Kingdom of the Netherlands intended to take advantage of the option afforded to it by Article 71(2) of the Vienna Convention of 1963 of exempting certain staff at consular posts, such as Ms Evans, from the Netherlands social security scheme.
- 40 Accordingly, in view of the above, it should be held that, in a situation such as that of Ms Evans, a member of staff of a consular post is not, for the duration of the period in which he is employed by the consular post of a third State, subject to the social security legislation of the Member State concerned, within the meaning of Article 2 of Regulation No 1408/71, and, therefore, does not fall within the scope of that regulation.
- 41 This finding cannot be called into question by Article 16 of Regulation No 1408/71 read in the light of the relevant provisions of the Vienna Convention of 1963.
- 42 In this regard, Ms Evans argues that she is subject to Netherlands legislation pursuant to Article 16(1), which provides that the provisions of Article 13(2)(a) of that regulation apply to members of the service staff of diplomatic missions or consular posts and to the private domestic staff of agents of such missions or posts.

- 43 In this context it is important to note that the aim of Article 13(2)(a) of Regulation No 1408/71 is not to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme. As is apparent from the case-law cited in paragraph 34 of the present judgment, it is for the legislation of each Member State to lay down these conditions (judgments in *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 19, and *Salemink*, EU:C:2012:17, paragraph 38 and the case-law cited).
- 44 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. As the referring court observes, the Court of Justice has held that the conditions creating the right or the obligation to become affiliated to a social security scheme may not have the effect of excluding from the scope of national legislation persons to whom that legislation applies pursuant to Regulation No 1408/71 (judgments in *Salemink*, EU:C:2012:17, paragraph 40, and *Bakker*, EU:C:2012:328, paragraph 33). Consequently, the effect of Article 13(2)(a) of Regulation No 1408/71 is that a provision of the applicable national legislation pursuant to which cover by the social security scheme established by that legislation is conditional on residence in the Member State concerned may not be relied on against the persons referred to in that provision (see, to that effect, judgments in *Salemink*, EU:C:2012:17, paragraph 45, and *Bakker*, EU:C:2012:328, paragraph 35 and the case-law cited).
- 45 However, this case-law cannot have the effect of causing the affiliation of a worker to the social security scheme of a Member State within the meaning of Regulation No 1408/71 to be determined autonomously by that regulation independently of the national legislation governing such affiliation.
- 46 With regard, more particularly, to the members of the service staff of diplomatic missions and consular posts referred to in Article 16 of Regulation No 1408/71, it should be held that this article, like Article 13(2)(a) of this regulation, as is clearly apparent from the heading of Title II of this regulation and the wording of Article 16, merely determines the national legislation applicable. Article 16 does not, however, lay down the conditions creating the right or the obligation to become affiliated to a social security scheme; those conditions should be determined by the legislation of each Member State in the light of the international law applicable.
- 47 Thus neither Article 13(2)(a) of Regulation No 1408/71 nor Article 16 thereof have the effect of conferring on nationals of Member States employed at consular posts of a third State who, like Ms Evans, are not subject to the social security legislation of a Member State, within the meaning of Article 2 of this regulation, a right of affiliation to the social security scheme of a Member State or of imposing on them an obligation to become affiliated to such a scheme.
- 48 As the Vienna Convention of 1963 does not require compulsory affiliation of members of the consular post who are permanent residents of the receiving State to a social security scheme of that State, such an interpretation accords with the requirements of that convention.
- 49 Having regard to the foregoing, the answer to the first question is that Article 2 of Regulation No 1408/71, read in conjunction with Article 16 of that regulation, should be construed as meaning that, for the period during which a national of a Member State has been employed at a consular post of a third State within the territory of a Member State of which he is not a national but within whose territory he resides, that national is not subject to the legislation of a Member State, within the meaning of that provision, if, under the legislation of his Member State of residence, adopted pursuant to Article 71(2) of the Vienna Convention of 1963, he is not affiliated to the national social security scheme.

The second question

- 50 Given the answer to the first question, there is no need to answer the second question.

Costs

- ⁵¹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Article 2 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, read in conjunction with Article 16 of that regulation, should be construed as meaning that, for the period during which a national of a Member State has been employed at a consular post of a third State within the territory of a Member State of which he is not a national but within whose territory he resides, that national is not subject to the legislation of a Member State within the meaning of this provision if, by virtue of the legislation of his Member State of residence, adopted pursuant to Article 71(2) of the Vienna Convention on consular relations, concluded at Vienna on 24 April 1963, he is not affiliated to the national social security scheme.

[Signatures]