

JUDGMENT OF THE COURT (Third Chamber)

6 July 2006<sup>\*</sup>

In Case C-154/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank te Amsterdam (Netherlands), made by decision of 4 April 2005, received at the Court on 6 April 2005, in the proceedings

**J.J. Kersbergen-Lap,**

**D. Dams-Schipper**

v

**Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen,**

<sup>\*</sup> Language of the case: Dutch.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, J.-P. Puissochet (Rapporteur), A. Borg Barthet and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,  
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mrs J.J. Kersbergen-Lap,
  
- the Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen, by I.F. Pardaán, acting as Agent,
  
- the Netherlands Government, by H.G. Sevenster, acting as Agent,
  
- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the United Kingdom Government, by S. Nwaokolo, acting as Agent, and E. Sharpston QC,
  
- the Commission of the European Communities, by D. Martin and P. van Nuffel, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 4(2a), Article 10a and Annex IIa of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1) ('Regulation No 1408/71').

2 The reference was made in two sets of proceedings brought, firstly, by Mrs Kersbergen-Lap and, secondly, by Mrs Dams-Schipper, against the Raad van Bestuur (Management Board) of the Uitvoeringsinstituut Werknemersverzekingen

(body entrusted with implementation of employee insurance contributions) ('the UWV') concerning the latter's refusal to grant them, outside the Netherlands, a benefit under the *Wet arbeidsongeschiktheidsvoorziening jonggehandicapten*, Stb. 1997, No 177 (law on provision of incapacity benefit to disabled young people) of 24 April 1997 ('the *Wajong*').

## Legal context

### *Community legislation*

3 Article 1 of Regulation No 1408/71 provides:

'For the purpose of this regulation:

(a) "employed person" and "self-employed person" mean respectively:

- (i) 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 or self-employed persons or by a special scheme for civil servants;

...'

4 Article 2(1) of Regulation No 1408/71, which defines the persons covered by the regulation, states:

‘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 ... as well as to the members of their families and their survivors.’

5 Article 4 of Regulation No 1408/71, headed ‘Matters covered’, provides:

‘(1) This regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

...

(2) This regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

(2a) This regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h), or

(b) solely as specific protection for the disabled.

...

(4) This regulation shall not apply to social ... assistance ...

...'

- 6 With regard to the special non-contributory benefits referred to in Article 4(2a) of Regulation No 1408/71, Article 10a(1) of that regulation provides:

‘Notwithstanding the provisions of Article 10 and Title III, persons to whom this regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.’

- 7 Under section J of Annex IIa, incapacity benefits granted to disabled young people in the Netherlands under the Wajong are classified as special non-contributory benefits.

### *National legislation*

- 8 The Netherlands has various forms of insurance against incapacity for work.
- 9 The Wet op de arbeidsongeschiktheidsverzekering of 18 February 1966 (Law on insurance against incapacity for work, Stb. 1966, No 84) (‘the WAO’) insures employees against the risk of loss of salary as a consequence of long-term incapacity for work. That insurance is funded by contributions payable by employers in respect of the salary paid by them to their employees. To qualify for a benefit under the WAO, an employee must be insured at the time when incapacity for work arises.

- 10 Further, until 1 January 1998, the Algemene Arbeidsongeschiktheidswet of 11 December 1975 (Law providing for general insurance against incapacity for work, Stb. 1975, No 674) ('the AAW') established compulsory general insurance for the whole of the population against the financial consequences of long-term incapacity for work.
- 11 With effect from 1 January 1998, the AAW was replaced, first, with regard to the self-employed, by the Wet arbeidsongeschiktheids-verzekering zelfstandigen of 24 April 1997 (Law on insurance against incapacity for work for the self-employed, Stb. 1997, No 176) and, second, by the Wajong, aimed at protecting disabled young people against the financial consequences of long-term incapacity for work.
- 12 The Wajong provides for the payment of a minimum benefit to young persons who are already suffering from total or partial long-term incapacity for work before joining the labour market. Disabled young people are defined as residents who on their 17th birthday were already incapable of work or who, if they become incapacitated subsequently, have studied for at least six months during the year immediately preceding the day when their incapacity for work arose. The benefit cannot be received before the 18th birthday.
- 13 The amount of benefit payable under the Wajong depends on the rate of incapacity and may be up to 70% of the minimum legal wage in the case of total incapacity for work. Entitlement to that benefit is not made dependent on payment of a premium or a contribution. Nor is it means-tested, although it may be reduced if paid work is undertaken or where that benefit is paid in addition to other work-incapacity benefits.



14 The Wajong benefit is paid out of the Arbeidsongeschiktheidsfonds jonggehandicapten (Fund for disabled young people incapacitated for work) and, under Article 64(a) of the Wajong, is financed from public funds.

15 By contrast with the position under the AAW, which did not impose any restriction, the Wajong benefit is subject to an export restriction. Article 17(1) of the Wajong provides that 'entitlement to work-incapacity benefit shall end ... on the first day of the month following that in which the disabled young person took up residence outside the Netherlands'.

16 However, Article 17(7) of the Wajong authorises the UWV to derogate from that provision where the ending of entitlement to the benefit would lead to an 'unacceptable degree of unfairness'. In a decision on policy rules with regard to the continuing payment of the Wajong benefit to a recipient outside the Netherlands (Beleidsregels voortzetting Wajong-uitkering buiten Nederland, Stcrt. 2003, No 84), which entered into force on 2 May 2003, the Raad van Bestuur of the UWV stated that that concept of 'unacceptable degree of unfairness' relates to a situation in which, firstly, a disabled young person has compelling reasons for taking up residence outside the Netherlands and, secondly, he is likely to suffer an appreciable disadvantage if the benefit is no longer paid. Overriding reasons are deemed to include medical treatment of a certain duration, acceptance of work with some prospect of reintegration and the need for a disabled young person to follow persons on whom he is dependent where they are required to reside outside the Netherlands.

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

17 Mrs Kersbergen-Lap, born on 15 January 1964, and Mrs Dams-Schipper, born on 19 January 1970, suffer from long-term incapacity for work estimated at between 80%

and 100%. They were granted work-incapacity benefit prior to 1998 under the AAW. As at 1 January 1998, that benefit was converted into a benefit under the Wajong. In 2002, Mrs Kersbergen-Lap and Mrs Dams-Schipper took up residence in France and Germany respectively. After they had moved, the UWV withdrew the benefit from both of them.

- 18 Mrs Kersbergen-Lap and Mrs Dams-Schipper lodged complaints against those decisions. In both cases, the Raad van Bestuur of the UWV declared the complaints unfounded and stated that neither of the parties could invoke an ‘unacceptable degree of unfairness’.
- 19 Mrs Kersbergen-Lap and Mrs Dams-Schipper both challenged those decisions before the Rechtbank te Amsterdam (District Court, Amsterdam).
- 20 That court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must a benefit under the Wajong, listed in Annex IIA to Regulation No 1408/71, be deemed to be a special non-contributory benefit, as referred to in Article 4(2a) of that regulation, with the result that only the coordinating provision introduced by Article 10a of Regulation No 1408/71 must be applied to persons such as the applicants in the main proceedings and the Wajong benefit cannot therefore be paid to any person residing outside the Netherlands?’

**The question referred for a preliminary ruling**

- 21 The referring court alone can determine the subject-matter of the questions it proposes to refer to the Court. It is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see, to that effect, Case C-220/95 *Van den Boogaard* [1997] ECR I-1147, paragraph 16; Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 11; Case C-159/97 *Castelletti* [1999] ECR I-1597, paragraph 14; and Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 34).
- 22 At the end of the observations submitted on behalf of Mrs Kersbergen-Lap, further questions were put to the Court, in addition to those that were the subject of the national court's order for reference, and these were supplemented by additional questions in her supplementary observations. In view of the matters set out in the preceding paragraph, it is not necessary to examine such questions, which go beyond the scope of that referred by the national court.
- 23 By its question, the national court asks, in essence, whether the Wajong benefit for disabled young people, which is listed in Annex IIa to Regulation No 1408/71, constitutes a special non-contributory benefit, as referred to in Article 4(2a) of that regulation, with the result that the position of individuals such as the applicants in the main proceedings is governed exclusively by the coordinating regime introduced by Article 10a of the regulation and whether, as a consequence, that benefit can be paid only to persons normally resident in the Netherlands.

- 24 The applicants in the main proceedings fall within the scope *ratione personae* of Regulation No 1408/71 in that they were subject to a social security scheme in the Netherlands and, as insured persons, would be eligible for work-incapacity benefit if they were resident in that Member State (see, by analogy, *inter alia*, Case 182/78 *Pierik* [1979] ECR 1977, paragraph 4, and Case C-215/90 *Twomey* [1992] ECR I-1823, paragraph 13).
- 25 The provisions in Article 10a of Regulation No 1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. That provision can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation No 1408/71, that is, benefits which are both special and non-contributory and are listed in Annex IIa to that regulation (see, to that effect, Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 21).
- 26 As stated in paragraph 7 above, the benefit under the Wajong is included in the list of special non-contributory benefits referred to in Article 4(2a) of Regulation No 1408/71, to which Annex IIa to that regulation applies.
- 27 It therefore remains to be examined, firstly, whether the benefit in question is special in nature and is intended to provide supplementary, substitute or ancillary cover against the risks covered by one or more of the branches of social security referred to in Article 4(1) of Regulation No 1408/71 and, secondly, whether such a benefit is non-contributory.

*Whether the Wajong benefit is special in nature*

## Arguments of the parties

28 For the UWV, all the governments which submitted observations and the Commission of the European Communities, the special benefits which fall under Article 4(2a) of Regulation No 1408/71 are hybrid benefits.

29 According to those parties, with the exception of the United Kingdom Government, which did not come to any specific conclusion as to the status to be attributed to them, the Wajong benefit displays the typical characteristics of hybrid benefits. It is akin, on the one hand, to social security, in that it benefits as of right, in accordance with the award criteria applicable in that field, persons who must deal with a contingency (incapacity for work) that is normally covered by social security benefits, and, on the other, to social assistance, in the sense that it is not dependent on periods of work or contributions and it is intended to relieve need by guaranteeing a minimum subsistence income to disabled young people. Such a benefit is always closely linked to the socio-economic situation of the country concerned and its amount, since it is calculated on the basis of the minimum wage in the Netherlands, takes account of the standard of living in that Member State.

## Findings of the Court

30 A special benefit within the meaning of Article 4(2a) of Regulation No 1408/71 is defined by its purpose. It must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and

fixed by legislation setting objective criteria (see Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 25, and case-law cited).

- 31 As was pointed out by the Netherlands Government, the Wajong benefit is a replacement allowance intended for those who do not satisfy the conditions of insurance for obtaining invalidity benefit under Article 4(1)(b) of Regulation No 1408/71. By guaranteeing a minimum income to a socially disadvantaged group (disabled young people), the Wajong benefit is by its nature social assistance justified on economic and social grounds. Moreover, it is granted according to objective criteria defined by law.
- 32 With regard to the fact that the benefit at issue in the main proceedings is granted without any means test or needs assessment being carried out, as was pointed out by the Commission, the majority of disabled young people would not have sufficient means of subsistence if they did not receive that benefit.
- 33 Further, that benefit is closely linked to the socio-economic situation in the Netherlands since it is based on the minimum wage and the standard of living in that Member State. The Court has in the past accepted that the grant of benefits closely linked with the social environment may be made subject to a condition of residence in the State of the competent institution (see, to that effect, Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 16; Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 42; and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 32).
- 34 It follows that a benefit under the Wajong must be classified as a special benefit within the meaning of Regulation No 1408/71.

*Whether the Wajong benefit is non-contributory in nature*

35 For the UWV, all the governments which submitted observations and the Commission, the Wajong benefit is not contributory in nature.

36 The relevant determining criterion is how the benefit concerned is actually financed (see, to that effect, *Jauch*, paragraphs 32 and 33). The Court must consider whether that financing comes directly or indirectly from social contributions or from public resources.

37 The resources necessary for financing the Wajong benefit are provided by the Treasury and therefore from public funds. Moreover, the grant of that benefit is not conditional upon the recipient also being eligible for another contributory social security benefit. Given the category to which those recipients belong, nor is the benefit therefore financed indirectly through contributions.

38 Consequently, it is established that the benefit under the Wajong must be regarded as being non-contributory in nature within the meaning of Article 4(2a) of Regulation No 1408/71.

*Whether an acquired right is infringed*

Arguments of the parties

39 It is argued on Mrs Kersbergen-Lap's behalf that the fact that benefits under Article 10a of Regulation No 1408/71 are non-exportable may not be relied upon against those who were in receipt of benefit before 1998 under the AAW. That would infringe an acquired right.

- 40 When the Wajong entered into force in 1998 and the Wajong benefit was listed as a special non-contributory benefit in Annex IIa to Regulation No 1408/71, the applicants in the main proceedings were in receipt of a benefit for disabled young people under the AAW which was not subject to any restriction as to its exportability.

### Findings of the Court

- 41 There is no need to ascertain whether the Wajong benefit was in fact intended to ensure the continuation of the AAW benefit under another name, since a person in the same position as the applicants in the main proceedings cannot, contrary to Mrs Kersbergen-Lap's assertions, rely on the principle of the maintenance of acquired rights in order to be entitled to the benefit at issue in the main proceedings, notwithstanding the fact that such a person has taken up residence outside the Netherlands.
- 42 Whilst the principle of legal certainty precludes a regulation from being applied retroactively, irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, the same principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained (Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 7). If the new law is thus valid only for the future, it also applies, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, Case 96/77 *Bauche and Delquignies* [1978] ECR 383, paragraph 48; Case 125/77 *Koninklijke Scholten-Honig and De Bijenkorf* [1978] ECR 1991, paragraph 37; Case 40/79 *P. v Commission* [1981] ECR 361, paragraph 12; Case 270/84 *Licata v Economic and Social Committee* [1986] ECR 2305, paragraph 31; and Case C-28/00 *Kauer* [2002] ECR I-1343, paragraph 20).



- 43 The Wajong entered into force and was listed in Annex IIa to Regulation No 1408/71 before the applicants in the main proceedings moved outside the Netherlands. In the absence of any transitional provision to the contrary, in particular in Council Regulation (EC) No 1223/98 of 4 June 1998 amending Regulation No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ 1998 L 168, p. 1), the legal effects (whether or not the Wajong benefit may be exported) which came about as a result of that factual situation (taking up residence outside the Netherlands) must, therefore, be examined in the light of the rules applicable when that factual situation arose and, therefore, in the light of the new provisions.
- 44 The answer to the question referred must therefore be that a benefit under the Wajong must be regarded as a special non-contributory benefit, as referred to in Article 4(2a) of Regulation No 1408/71, with the result that only the coordinating provision in Article 10a of that regulation must be applied and that benefit cannot be paid to any person residing outside the Netherlands.

## Costs

- 45 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 (Third Chamber) hereby rules:

**A benefit under the Wet arbeidsongeschiktheidsvoorziening jonggehandicapten of 24 April 1997 (law on provision of incapacity benefit to disabled young people) must be regarded as a special non-contributory benefit, as referred to in Article 4(2a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999, with the result that only the coordinating provision in Article 10a of that regulation must be applied and that benefit cannot be paid to any person residing outside the Netherlands.**

[Signatures]