Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

23 April 2015 *

(Reference for a preliminary ruling — Social security for migrant workers — Regulation (EEC) No 1408/71 — Articles 13(2) and 17 — Casual work in a Member State other than the State of residence — Legislation applicable — Refusal to grant family benefits and reduction of the old-age pension by the State of residence)

In Case C-382/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Netherlands), made by decision of 1 July 2013, received at the Court on 4 July 2013, in the proceedings

C.E. Franzen,

H.D. Giesen,

F. van den Berg

v

Raad van bestuur van de Sociale verzekeringsbank,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe (Rapporteur), J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 June 2014,

after considering the observations submitted on behalf of:

— C.E. Franzen, by S. Ikiz, advocaat,

— the Raad van bestuur van de Sociale verzekeringsbank, by H. van der Most and T. Theele, acting as Agents,

— the Netherlands Government, by M. Noort, acting as Agent,

* Language of the case: Dutch.

— the United Kingdom Government, S. Brighouse, acting as Agent, and B. Kennely and J. Holmes, Barristers,

— the European Commission, by M. van Beek and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 13(2) and 17 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 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 of Articles 20 TFEU, 21 TFEU and 45 TFEU.

2 The request has been made in the course of three sets of proceedings between Ms Franzen, Mr Giesen and Mr van den Berg and the Raad van bestuur van de Sociale verzekeringsbank (Management Board of the Social Insurance Bank) ('the SVB') respectively, regarding decisions by which the SVB refused to grant Ms Franzen child benefits and reduced the partner's allowance and old-age pension, respectively, of Mr Giesen and Mr van den Berg.

Legal context

EU law

3 Article 1 of Regulation No 1408/71 states:

'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;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

...'

4 Article 2(1) of Regulation No 1408/71, entitled 'Persons covered', 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 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.'

5 Article 13 of Regulation No 1408/71, which forms part of Title II thereof, entitled 'Determination of the legislation applicable', states:

'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;

...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

6 Under Article 17 of that regulation, entitled 'Exceptions to Articles 13 to 16':

'Two or more Member States, the competent authorities of these States or the bodies designated by these authorities may by common agreement provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain categories of persons or of certain persons.'

Netherlands law

The General Law on Old-Age Pensions

7 Under Article 2 of the General Law on Old-Age Pensions (Algemene Ouderdomswet) ('the AOW'), residents within the meaning of that law are persons who live in the Netherlands.

8 According to Article 3(1) of the AOW, the place where a person lives is to be determined according to the circumstances.

9 Under Article 6(1)(a) of the AOW, insured persons, pursuant to the provisions of that law, are persons who have not yet reached retirement age and who are residents. Paragraph 3 of that article provides that, by derogation from paragraphs 1 and 2, the categories of persons insured may be extended or restricted by or by virtue of a general administrative regulation.

10 The Law of 29 April 1998 (Stb. 1998, No 267) added an Article 6a to the AOW, applicable retroactively from 1 January 1989, according to which:

'If necessary, notwithstanding Article 6 of the AOW and the provisions based thereon,

(a) persons shall be considered to be insured persons if their insurance, on the basis of this law, results from the application of the provisions of a treaty or convention or a decision of an organisation of public international law;

(b) persons shall not be considered to be insured persons if, by virtue of a treaty or convention or a decision of an organisation of public international law, the legislation of another State applies to them.'

11 Article 13(1)(a) of the AOW provides that a reduction of 2% is to be applied to the pension amounts for every calendar year during which the person entitled to the pension was not insured after the age of 15 years but before the age of 65 years.

12 Article 13(2)(a) provides that a reduction of 2% is to be applied to the gross benefit payable for every calendar year during which the spouse of the person entitled to the pension was not insured after the person entitled to the pension had reached the age of 15 years but before that person had reached the age of 65 years.

13 Under the first sentence of Article 45(1) of the AOW, as it was worded at 1 April 1985, insured persons or previously insured persons are entitled, as appropriate, subject to the conditions and in accordance with the rate to be determined by general administrative regulation, to make contributions during periods after their 15th birthday but prior to their 65th birthday in respect of which they are or were not insured.

14 Under that same provision, as it was worded at 1 January 1990, insured persons or previously insured persons may be insured voluntarily, as appropriate, subject to the conditions and in accordance with the rate to be determined by general administrative regulation or by the provisions implementing that regulation, during periods after their 15th birthday but prior to their 65th birthday in respect of which they are not or were not insured.

The General Law on Child Benefits

15 Article 2 and Article 3(1) of the General Law on Child Benefits (Algemene Kinderbijslagwet) ('the AKW') are identical in content to Article 2 and Article 3(1) of the AOW.

16 Under Article 6(1)(a) of the AKW, insured persons, pursuant to the provisions of that law, are persons who are residents.

17 Article 6a(b) of the AKW provides that, if necessary, notwithstanding Article 6 of the AKW and the provisions based thereon, persons will not be considered to be insured persons if, by virtue of a treaty or convention or a decision of an organisation of public international law, the legislation of another State applies to them.

The Decree on the extension or restriction of the category of persons insured in respect of national insurance

18 During the periods at issue in the disputes in the main proceedings, several successive decrees on the extension or restriction of the category of persons insured in respect of social insurance (Besluit uitbreiding en beperking kring verzekerden volksverzekering) ('the BUB') were adopted pursuant to

Article 6(3) of the AOW and the AKW. Consequently, the Decree of 19 October 1976 (Stb. 557) ('the 1976 BUB'), the Decree of 3 May 1989 (Stb. 164) ('the 1989 BUB') and the Decree of 24 December 1998 (Stb. 746) ('the 1999 BUB') were applicable to the circumstances at issue in the cases in the main proceedings.

19 Under Article 2(1)(a) of the 1976 BUB, the following persons are not insured persons within the meaning, inter alia, of the AOW: residents who are engaged in gainful employment outside the Kingdom of the Netherlands and who, with regard to that employment, are insured under a foreign statutory scheme concerning benefits for old age and death and also concerning child allowances in force in the country in which they work.

20 The 1976 BUB was replaced by the 1989 BUB, Article 10(1) of which, in the version applicable from 1 July 1989 to 1 January 1992, provided that 'the following persons are not insured under the social security scheme: residents who work exclusively outside the Netherlands'. In respect of the period from 1 January 1992 to 1 January 1997, that same provision of the 1989 BUB provided that 'the following persons are not insured under the social security scheme: residents who, for a continuous period of at least three months, work exclusively outside the Netherlands'. According to the wording applicable from 1 January 1997 to 1 January 1999, Article 10(1) of the 1989 BUB provided that 'the following persons are not insured under the social security scheme: residents who, for a continuous period of at least three months, work exclusively outside the Netherlands, unless that work is carried out by virtue of an employment relationship with an employer who lives or is established in the Netherlands'.

21 On 1 January 1999, the 1989 BUB was replaced by the 1999 BUB. Article 12 of the latter provides that 'persons who live in the Netherlands and who, for a continuous period of at least three months, work exclusively outside the Netherlands, are not insured under the social security scheme unless that work is carried out exclusively by virtue of an employment relationship with an employer who lives or is established in the Netherlands'.

22 The 1989 BUB and the 1999 BUB both contained a hardship clause, in Articles 25 and 24 respectively, which empowered the SVB, within the framework laid down by the 1989 BUB, to derogate in certain cases from the other provisions of that decree in order to remedy an unacceptable degree of unfairness which might arise from the insurance obligation or the exclusion therefrom by virtue of that decree, or in the framework of the 1989 BUB, not to apply articles of that decree or even to derogate from them to the extent that their application, in the light of the importance of the extension and reduction of insured persons, would lead to an unacceptable degree of unfairness arising exclusively from the insurance obligation or the exclusion therefrom by virtue of the second decree.

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

23 The applicants in the main proceedings are all Netherlands nationals and are resident in the Netherlands.

The case of Ms Franzen

24 Ms Franzen, who was born in 1965, received child benefits in the Netherlands under the AKW for her daughter who was born in 1995 and whom she was bringing up alone. In November 2002, she informed the SVB that, since 1 January 2001, she had been working in Germany for 20 hours per week as a hairdresser. Since Ms Franzen's earnings from that employment were very low, she was not covered by any statutory social insurance scheme, apart from the German statutory scheme against accidents (Unfallversicherung), and was not entitled to cover under any other German social security scheme. By decision of 25 February 2003, the SVB withdrew her entitlement to child benefits from 1 October 2002.

25 The SVB states in its observations before the Court that, by letter dated 21 September 2003, Ms Franzen applied under Article 24 of the 1999 BUB for her exclusion from social insurance cover to be removed. By decision of 15 March 2004, the SVB rejected that application on the ground that Ms Franzen was not insured either under EU law or under Netherlands law. However, in its notification decision of 15 March 2004, the SVB indicates having suggested that Ms Franzen request the competent German institution to make her subject exclusively to Netherlands legislation in accordance with Article 17 of Regulation No 1408/71. It claims Ms Franzen did not act on that suggestion.

26 On 30 January 2006, Ms Franzen applied again for child benefits, which the SVB granted to her by decision of 27 March 2006, with effect from the first quarter of 2006.

27 By letter of 5 June 2007, an application was made on behalf of Ms Franzen for child benefits to be awarded to her with effect from the fourth quarter of 2002. By decision of 5 July 2007, the SVB determined that, as of the first quarter of 2006, Ms Franzen was no longer entitled to child benefits, but it decided not to reclaim the sums unduly paid. By decision of 16 November 2007, the objection lodged by Ms Franzen against that decision was declared unfounded and her application for a review of that decision was also rejected.

28 On 6 February 2008, while Ms Franzen's appeal against that decision was still pending, the SVB adopted a new decision amending the grounds for its decision of 16 November 2007, stating that the requests for child benefits had been rejected on the ground that, under Article 13(2) of Regulation No 1408/71, German legislation alone applied to Ms Franzen, thereby precluding the application of Netherlands social insurance.

29 By judgment of 5 August 2008, the Rechtbank Maastricht declared the appeals against the decisions of 16 November 2007 and 6 February 2008 to be unfounded. Ms Franzen lodged an appeal before the Centrale Raad van Beroep and the parties to the proceedings before that court dispute whether Ms Franzen was insured under the AKW from 1 October 2002 by reason of her residency in the Netherlands.

Mr Giesen's case

30 Mr Giesen's wife, who was born in 1947, worked in Germany in the course of 1970 and again from 19 May 1988 to 12 May 1993 as a 'geringfügig Beschäftigte', namely a person in minor employment. More specifically, she was a sales assistant in a clothing store and worked under an on-call contract for a limited number of hours per month not exceeding two or three days per month.

31 On 22 September 2006, Mr Giesen submitted an application for an old-age pension and a partner's allowance under the AOW, which the SVB granted by decision of 3 October 2007. However, the partner's allowance was reduced by 16% given that, during the period when she was working in Germany, Mr Giesen's wife had not been insured under any social insurance scheme in the Netherlands. Mr Giesen lodged an objection against that decision to the extent that it reduced the partner's allowance. By decision of 20 May 2008, that objection was dismissed as unfounded.

32 By judgment of 13 October 2008, the Rechtbank Roermond dismissed the appeal against the decision of 20 May 2008 as unfounded. That court held that Mr Giesen's wife was not covered by Netherlands legislation, since it had not been established that she had not worked in Germany for more than three months. The dispute between the parties to the main proceedings before the referring court, to which Mr Giesen appealed, concerns whether, from 19 May 1988 to 31 December 1992, Mr Giesen's wife was insured under the AOW by reason of her residency in the Netherlands.

Mr van den Berg's case

33 Mr van den Berg, who was born in 1943, worked in Germany from 25 June to 24 July 1972 and from 1 January 1990 to 31 December 1994. It is apparent from the order for reference that Mr van den Berg did not work every day, but only for brief periods of time. As his earnings were too low, he was not able to be considered as subject to pay social security contributions in Germany. On 17 January 2008, Mr van den Berg submitted an application for an old-age pension under the AOW. By decision of 1 August 2008, the SVB awarded him that pension, but a reduction of 14% was applied taking into account the fact that, for more than seven years, Mr van den Berg was uninsured in the Netherlands. By decision of 25 November 2008, his objection to that decision was declared to be in part well founded and the reduction was set at 10%.

34 By judgment of 19 October 2009, the Rechtbank Maastricht dismissed the appeal brought against the decision of 25 November 2008 as unfounded. Mr van den Berg brought an appeal against that judgment before the referring court, in which the parties to the main proceedings dispute whether, from 1 January 1990 to 31 December 1994, Mr van den Berg was insured under the AOW since he was resident in the Netherlands.

Considerations generally applicable to all three cases

35 The Centrale Raad van Beroep takes the view that, during the periods at issue, the parties to the main proceedings could be considered to be employed persons within the meaning of Article 2 of Regulation No 1408/71, read in conjunction with Article 1(a) thereof, and that the AOW and the AKW fall within the scope *ratione materiae* of that regulation.

36 However, the question might arise as to whether, during the periods at issue, the parties to the main proceedings were subject to German legislation by virtue of Article 13(2)(a) of Regulation No 1408/71 and, if so, whether the exclusive operation of that provision means that Netherlands legislation was not applicable. In this context, the referring court cites *Kits van Heijningen* (C-2/89, EU:C:1990:183), which concerned part-time work, and asks whether that case-law also applies to on-call contracts.

37 The referring court notes that, in the present cases, it is not disputed that the parties were not insured under German legislation in respect of their employment, with the exception of their compulsory contributions to the German statutory insurance against accidents, with the result that they were not entitled to claim an old-age pension or family benefits, as appropriate. It also points out that, during the period from 1 July 1989 to 31 December 1992, Mr Giesen's wife and, during the periods relevant to them, Mr van den Berg and Ms Franzen must be considered as not being insured under the AOW and the AKW. In order to determine whether EU law precludes such exclusion, an interpretation is required of the provisions of EU law relating to freedom of movement for workers (Article 45 TFEU) and freedom of movement for EU citizens (Articles 20 TFEU and 21 TFEU).

38 In those circumstances the Centrale Raad van Beroep decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Must Article 13(2), introductory sentence and subparagraph (a), of Regulation No 1408/71 be interpreted as meaning that a resident of a Member State who comes within the scope of that regulation and who for not more than two or three days per month is employed in the territory of another Member State on the basis of an on-call contract, is on that ground subject there to the social security legislation of the State of employment?

(b) If Question 1(a) is answered in the affirmative, does the subjection to the social security legislation of the State of employment apply both on the days on which the employment activities are performed and on the days on which those activities are not performed and, if so, how long does that subjection continue after the final employment activities have in fact been carried out?

(2) Does Article 13(2), introductory sentence and subparagraph (a), in conjunction with Article 13(1), of Regulation No 1408/71 preclude a migrant worker to whom the social security legislation of the State of employment applies from being regarded, by virtue of national legislation of the State of residence, as an insured person under the AOW in the latter State?

(3) (a) Must EU law, in particular the provisions concerning freedom of movement for workers and/or citizens of the Union, be interpreted as precluding, in the circumstances of the present cases, the application of a national provision such as Article 6a of the AOW and/or the AKW, under which a migrant worker residing in the Netherlands is excluded there from insurance cover under the AOW and/or the AKW on the ground that he is subject exclusively to German social security legislation, even in circumstances where that worker as a "geringfügig Beschäftigte" (person in minor employment) is excluded in Germany from insurance cover for the purposes of "Altersrente" (old-age pension) and is not entitled to "Kindergeld" (child benefits)?

(b) Is it significant, for the purposes of the answer to Question 3(a), that it was possible to take out voluntary insurance under the AOW or to request the SVB to conclude an agreement as referred to in Article 17 of Regulation No 1408/71?'

Consideration of the questions referred

The first question

39 By its first question, the referring court asks, in essence, whether Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a resident of a Member State who comes within the scope of that regulation and who works for a few days each month on the basis of an on-call contract in the territory of another Member State is subject to the social security legislation of the State of employment and, if so, whether that subjection also continues on the days that no employment activities are performed.

40 The Court points out that Regulation No 1408/71 establishes a system for the coordination of national social security schemes and lays down, in Title II, rules governing the determination of the legislation to be applied to employed persons moving within the European Union (see, inter alia, to that effect, judgment in *Wencel*, C-589/10, EU:C:2013:303, paragraph 45).

41 The objective of the provisions of Title II is to ensure, in particular, that the persons concerned are subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid the complications which may result from that situation (see judgments in *Ten Holder*, 302/84, EU:C:1986:242, paragraph 19; *Luijten*, 60/85, EU:C:1986:307, paragraph 12; *Bosmann*, C-352/06, EU:C:2008:290, paragraph 16; and *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339, paragraph 41).

42 The single State principle is expressed, in particular, in Article 13(1) of Regulation No 1408/71 which provides that a worker to whom that legislation applies shall be subject to the legislation of a single Member State only (see judgments in *Ten Holder*, 302/84, EU:C:1986:242, paragraph 20; |*A* , 60/85, EU:C:1986:307, paragraph 13; and *Bosmann*, C-352/06, EU:C:2008:290, paragraph 16).

43 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. The effect of determining that a given Member State's legislation is the legislation applicable to a worker pursuant to that provision is that only the legislation of that Member State is applicable to him (see judgments in *Ten Holder*, 302/84, EU:C:1986:242, paragraph 23, and *Bosmann*, C-352/06, EU:C:2008:290, paragraph 17).

44 In its judgment in *Kits van Heijningen* (C-2/89, EU:C:1990:183, paragraph 10), which concerned part-time employment of two hours per day twice per week, the Court held that there is nothing in Article 1(a) or Article 2(1) of Regulation No 1408/71 which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities. Consequently, a person must be considered to be covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1) of that regulation.

45 By question 1(a), the referring court seeks to determine whether the case-law following the judgment in *Kits van Heijningen* (C-2/89, EU:C:1990:183) is applicable to a situation such as that of Mr Giesen's wife who worked only two or three days per month in Germany. As for the cases of Ms Franzen and Mr van den Berg, the referring court considers it as established that they were employed in Germany and that the Federal Republic of Germany was the competent Member State during the periods at issue in relation to those two persons.

46 In that regard, since it is apparent from the case-law cited in paragraph 44 above that the amount of time devoted to the employment is irrelevant in determining whether Regulation No 1408/71 is applicable to the person concerned, it must be held that a person who is employed for two or three days per month and who satisfies the conditions laid down in Article 1(a) and Article 2(1) of Regulation No 1408/71, namely that that person is, as an employee, subject to the legislation of one or more Member States and is a national of one of the Member States, will fall within the scope of application of that regulation. Under Article 13(2)(a) of that regulation, such a person is subject to the legislation of the Member State in whose territory he is employed.

47 The referring court further asks whether, under Article 13(2)(a) of Regulation No 1408/71, the legislation of the Member State of employment is applicable not only on the days on which the employment activities are performed, but also on the days on which those activities are not performed.

48 The answer to that question can also be deduced from the judgment in *Kits van Heijningen* (C-2/89, EU:C:1990:183). In paragraph 14 of that judgment, the Court held that Article 13(2)(a) of Regulation No 1408/71 makes no distinction between full-time and part-time employment. Moreover, the objective which that provision pursues would be frustrated if it were to be considered that the legislation of the Member State in question was applicable only during the periods when the person concerned pursued his activity, and not during those periods when he did not.

49 The Court concluded that Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a person covered by that regulation who is employed part-time in the territory of a Member State is subject to the legislation of that State both on the days on which he pursues that activity and on the days on which he does not (judgment *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 15).

50 The same considerations apply to casual employment such as that in the main proceedings. It should be made clear that the legislation of the Member State of employment continues to be applicable for as long as the person concerned is employed in the territory of that Member State. To that end, the existence of an employment contract and the type of employment, whether partial or casual, or even the number of hours worked by the employee, are irrelevant.

51 That interpretation is not invalidated by the case-law relating to Article 13(2)(f) of Regulation No 1408/71, according to which that article, which subjects a person to the legislation of the Member State of residence under the conditions which it lays down, applies both to persons who have definitively ceased all occupational activity and to those who have merely temporarily ceased their occupational activity (judgments in *Kuusijärvi*, C-275/96, EU:C:1998:279, paragraphs 39 and 40, and *Adanez-Vega*, C-372/02, EU:C:2004:705, paragraph 24).

52 As the SVB correctly maintains, the period during which the activities of casual employment are pursued cannot be regarded as a temporary suspension of the activity. In that regard, according to the documents before the Court, the employment relationship between Mr Giesen's wife and her employer continued without interruption for five years. Throughout that period, she was therefore subject under Article 13(2)(a) of Regulation No 1408/71 to the legislation of the Member State of employment, namely to German legislation.

53 Consequently, the answer to the first question is that Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a resident of a Member State, who comes within the scope of that regulation and who works for several days per month on the basis of an on-call contract in the territory of another Member State, is subject to the legislation of the State of employment both on the days on which he performs the employment activities and on the days on which he does not.

The second question

54 By its second question, the referring court asks, in essence, whether Article 13(2)(a) of Regulation No 1408/71, read in conjunction with Article 13(1) of that regulation, must be interpreted, in circumstances such as those of the main proceedings, as precluding a migrant worker who is subject to the legislation of the State of employment, from receiving, by virtue of national legislation of the State of residence, an old-age pension or family benefits from the latter State.

55 That question relates to the particular facts of the cases in the main proceedings in which the application of the legislation of the State of employment did not lead to the parties at issue being covered by the social security scheme of that State as regards entitlement to family benefits and an old-age pension.

56 Although the legislation of the State of residence at issue in the main proceedings precludes, under Article 6a(b) of both the AKW and the AOW, migrant workers such as the parties in the main proceedings from being covered by the old-age pension insurance scheme of that State, the referring court clarifies that, if the answer to the second question is in the negative, then it is for the referring court to disregard the exclusion clause and to apply the hardship clause provided for in the 1989 BUB and the 1999 BUB in order to remedy any unacceptable unfairness which might arise from the insurance obligation or the exclusion therefrom.

57 It is against that background that the question arises as to whether Article 13 of Regulation No 1408/71 precludes the Member State of residence from granting the benefits at issue.

58 It should be recalled that, in the judgments in *Bosmann* (C-352/06, EU:C:2008:290) and in *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10, EU:C:2012:339), the Court has already condoned exceptions to the single State principle and has recognised that a Member State which does not have jurisdiction by virtue of the provisions of Title II of Regulation No 1408/71 has the power to grant, under certain conditions, family benefits to a migrant worker under its own national law.

59 For instance, in the judgment in *Bosmann* (C-352/06, EU:C:2008:290), where there was no overlapping of the same type of family benefits despite the simultaneous application of the legislation of two Member States, the Court held that even though EU law did not require the competent authorities of

the State of residence to grant Ms Bosmann the family allowance in question, the possibility of such a grant could not be excluded either if that person may be entitled to those allowances solely on the basis of her residence in that Member State (see, to that effect, judgment in *Bosmann*, C-352/06, EU:C:2008:290, paragraphs 25, 27 and 28).

60 In particular, the Court held in paragraph 31 of the judgment in *Bosmann* (C-352/06, EU:C:2008:290) that, in circumstances such as those that gave rise to that judgment, the Member State of residence cannot be deprived of the right to grant child benefits to those resident within its territory. While, 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, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting, pursuant to its legislation, child benefits to that person.

61 An analogous exception to the single State principle provided for in Article 13(1) of Regulation No 1408/71 was upheld in the judgment in *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10, EU:C:2012:339) in which the Court recognised the power of the Member State, which did not have jurisdiction under the provisions of Title II of that regulation but within the territory of which a migrant worker was temporarily employed and subject to unlimited income tax liability there, to grant child benefits which were complementary to those paid by the Member State of residence.

62 As regards, in the first place, child benefits and the case of Ms Franzen, it should be pointed out, first, that the Netherlands legislation at issue in the main proceedings, as the German legislation, in the same circumstances as those of Ms Bosmann, does not subject the right to child benefits to conditions of employment or insurance. Consequently, leaving aside the exclusion provided for in Article 6a(b) of the AKW and the AOW, which aims to transpose the single State principle into national legislation, the mere fact of residence in the Netherlands is sufficient for entitlement to child benefits. Second, despite the formal application of the legislation of the Member State of employment, Ms Franzen did not have a right to the benefits at issue because of the limited number of hours worked and low income from her employment within the territory of that Member State. Therefore, as was the case in *Bosmann* (C-352/06, EU:C:2008:290), the facts of Ms Franzen's case do not present an overlapping of the same form of family benefit in relation to the same period of insurance.

63 As regards, in the second place, the old-age benefits and partner's allowance at issue in the cases of Mr van der Berg and Mr Giesen, it appears that the substantive conditions for granting such benefits under the legislation of the Member State of residence are fulfilled and that the granting of those benefits would not, in the event of the simultaneous application of the legislation of the State of residence and State of employment, give rise to an overlapping of the same form of family benefits in relation to the same period.

64 It was maintained at the hearing before the Court that the condition of residence is sufficient for affiliation in the Netherlands to the statutory old-age pension scheme, even if the person concerned is unemployed for a given period of time. In the cases in the main proceedings, the respective parties lost their affiliation to the social insurance scheme in the Netherlands because they were in casual employment in Germany, without being affiliated to the German old-age pension scheme because of their low incomes.

65 Consequently, it must be found, as was held in *Bosmann* (C-352/06, EU:C:2008:290), that Article 13(2)(a) of Regulation No 1408/71, read in conjunction with Article 13(1) of that regulation, does not preclude, in circumstances such as those in the main proceedings, a migrant worker who is subject to the social security scheme of the State of employment, who fulfils the substantive conditions for granting such benefits under the legislation of his State of residence and whose situation does not give rise to an overlapping of the same form of family benefits in relation to the same period, from receiving family benefits or an old-age pension from the latter State.

66 It follows from the foregoing considerations that the answer to the second question is that Article 13(2)(a) of Regulation No 1408/71, read in conjunction with Article 13(1) of that regulation, must be interpreted, in circumstances such as those in the main proceedings, as not precluding a migrant worker, who is subject to the legislation of the State of employment, from receiving, by virtue of national legislation of the Member State of residence, an old-age pension and family benefits from the latter State.

The third question

67 In view of the answer given to the second question, and in particular to the fact that the referring court is, as is apparent from paragraph 56 above, contemplating disregarding the exclusion clause in the event that the answer to the second question is in the negative, there is no need to answer the third question.

Costs

68 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 (Fourth Chamber) hereby rules:

1. **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 Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, must be interpreted as meaning that a resident of a Member State, who comes within the scope of that regulation, as amended, and who works for several days per month on the basis of an on-call contract in the territory of another Member State, is subject to the legislation of the State of employment both on the days on which he performs the employment activities and on the days on which he does not.**

2. **Article 13(2)(a) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 1992/2006, read in conjunction with Article 13(1) of that regulation, must be interpreted, in circumstances such as those in the main proceedings, as not precluding a migrant worker, who is subject to the legislation of the State of employment, from receiving, by virtue of national legislation of the Member State of residence, an old-age pension and family benefits from the latter State.**

[Signatures]