

JUDGMENT OF THE COURT (Fifth Chamber)
14 November 1990 *

In Case C-105/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

Ibrahim Buhari Haji

and

Institut national d'assurances sociales pour travailleurs indépendents

on the interpretation of the first paragraph of Article 7, Article 48(2) and (3)(c) and (d) and 51(b) of the EEC Treaty and Articles 1 to 4, the first subparagraph of Article 10(1) and Articles 44 to 51 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, and of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the versions annexed to Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, Sir Gordon Slynn, R. Joliet, F. Grévisse and M. Zuleeg, Judges,

Advocate General: J. Mischo

Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: French.

having regard to the observations submitted on behalf of

Ibrahim Buhari Haji, by Constantin Nikis, of the Brussels Bar,

the Commission of the European Communities, by Mr Lima, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 6 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 October 1990,

gives the following

Judgment

- 1 By judgment of 23 March 1989, which was received at the Court on 3 April 1989, the Tribunal de travail (Labour Tribunal), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of certain provisions of the EEC Treaty, of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, and of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the versions annexed to Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

- 2 The questions were raised in proceedings brought by Ibrahim Buhari Haji against the Institut national d'assurances sociales pour travailleurs indépendants (National Social Insurance Institute for Self-employed Persons, hereinafter referred to as 'Inasti').

- 3 Born in Nigeria in 1914, Mr Buhari possessed British nationality until Nigeria's independence in 1960. Since then he has been of Nigerian nationality.
- 4 Between November 1937 and December 1986 he worked as a merchant in the Belgian Congo, which on 1 July 1960 became Zaire, where he still lives.
- 5 Having paid compulsory pension contributions until the Belgian Congo became independent, Mr Buhari applied in August 1986 for a retirement pension from Inasti in respect of his activity in the Belgian Congo until 30 June 1960.
- 6 Relying on the fact that Mr Buhari was of Nigerian nationality and resided in Zaire, Inasti, by decision of 10 November 1987, rejected his application pursuant to Article 144(2) of the Royal Decree of 22 December 1967 laying down general rules concerning retirement and survivors' pensions for self-employed persons, which provides that a retirement pension is payable abroad only to persons 'residing in the territory of a country where an employed person's pension could be paid to them under a reciprocal agreement'.
- 7 Hearing an appeal against that decision, the Tribunal de travail, Brussels, by judgment of 23 March 1989, held that Mr Buhari was entitled to a self-employed person's retirement pension in respect of his activity in the former Belgian Congo for the period from 1 January 1938 to 30 June 1956. As regards the period from 1 July 1956 to 30 June 1960, the Tribunal directed that proceedings be recommenced to allow Mr Buhari to produce the necessary evidence to secure recognition of that period for pension purposes.
- 8 The Tribunal also found that, under Belgian social security legislation, Mr Buhari's pension would be payable in Zaire or Nigeria if he were a national of Belgium or another Member State of the European Community and that, being a Nigerian national, he could receive it provided that he resided in Belgium or in another Member State of the European Community.

- 9 In those circumstances, by the same judgment of 23 March 1989, the Tribunal de travail, Brussels, stayed the proceedings on the question of the actual payment of the pension pending a preliminary ruling by the Court on the following question:
- ‘Does the payment by a Member State of a retirement pension (in the present case a self-employed person’s pension) on account of an occupation (in the present case as a colonist) previously pursued “in a territory which at the time maintained special relations with that Member State” to a person who at the time was a national of a second State (which in the meantime has become a Member State) and is now a national of a non-member country whose territory at the time maintained special relations with the second State (which in the meantime has become a Member State) fall within the scope of Articles 1 to 4, the first subparagraph of Article 10(1) and Articles 44 to 51 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 and subsequently Articles 35 to 59 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71? And, if not:
 - does the refusal by a Member State to pay a social security benefit (in the present case, a self-employed person’s retirement pension on account of a previous occupation as a colonist on the territory of its former colony) to a person residing “in a territory which at the time maintained special relations with that Member State” and domiciled in another territory — which also maintained at the time special relations with a second State (which in the meantime has become a Member State) and which has become a non-member country of which he now has the nationality — on the sole ground of his present nationality and residence constitute “discrimination on grounds of nationality” within the meaning of the first paragraph of Article 7, Article 48(2) and (3)(c) and (d), and Article 50(b)¹ of the Treaty, whether or not it is direct or indirect or based on nationality by application of formally neutral criteria which nevertheless lead to the same result, namely the putting of non-nationals at a disadvantage owing to the existence of a disproportionate obstacle? Or:
 - are the wording and spirit of the abovementioned Community provisions compatible with the Belgian rules at present in force in Article 144(2) of the Royal Decree of 22 December 1967 (regulating retirement and survivors’

1 — This should read ‘51(b)’.

pensions for self-employed persons), as amended by Article 24 of the Royal Decree of 17 July 1972 and Article 64(1) of the Royal Decree of 24 September 1984, or upon their restrictive interpretation given by the defendant?’

- 10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 11 By its first question the national court seeks essentially to determine whether the situation of a person entitled to social security benefits guaranteed by the legislation of a Member State in respect of self-employed activities pursued in a territory which at the time maintained special relations with a Member State is covered by Regulations Nos 1408/71 and 574/72, where, during the period in question, the person concerned was a national of a country which was not at that time a member of the European Community and became a member only after that person had lost the nationality of that country.
- 12 The scope of application of Regulations Nos 1408/71 and 574/72 is defined by Article 2(1) of Regulation No 1408/71 in the following terms:

‘This regulation shall apply to employed or self-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 or who are stateless persons or refugees residing within the territory of one of the Member States . . .’

- 13 With respect to the first condition, regarding a person’s being or having been subject to the legislation of one or more of the Member States, it is apparent from the judgment of the national court that Mr Buhari is entitled to a Belgian self-

employed person's retirement pension pursuant *inter alia* to Royal Decree No 72 of 10 November 1967 on retirement and survivors' pensions for self-employed persons.

- 14 It must first be stated that national provisions of that kind fall within the definition of 'legislation' which, according to Article 1(j) of Regulation No 1408/71 'means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2)'. Those branches and schemes include in particular retirement and survivors' benefits. to which the claim of the plaintiff in the main proceedings relates.
- 15 It must also be stated that the essential factor to be taken into consideration in determining the scope of that regulation is not the place where the activity was carried on but the link which exists between the worker, regardless of the place in which he pursued his occupation, and a social security scheme of a Member State under which he has completed periods of insurance (Joined Cases 82 and 103/86 *Laborero and Sabato v Office de sécurité sociale d' Outre Mer* [1987] ECR 3401).
- 16 It follows that provisions such as those laid down in Belgian Royal Decree No 72 come within the scope of Regulation No 1408/71.
- 17 As regards the second condition laid down by Article 2(1) of the regulation, namely that the employed or self-employed person concerned must be a national of a Member State, the Court held in its judgment in Case 10/78 *Belbouab v Bundesknappschaft* [1978] ECR 1915 that that condition must be interpreted as meaning that the status of national of one of the Member States refers to the time of the employment, of the payment of the contributions relating to the insurance periods and of the acquisition of the corresponding rights.
- 18 It follows that the term 'national' of 'one of the Member States' used in Article 2(1) of Regulation No 1408/71 must be considered in relation to the period in which the worker pursued his occupation.

- 19 That condition of nationality cannot be regarded as fulfilled where the worker in question was, at the time when he pursued his occupation and paid his contributions, a national of a State which was not yet a member of the Community and he lost the nationality of that State before its accession to the Community.
- 20 As the Court has already held, in particular in its judgment in *Belbouab, supra*, regulations adopted for the implementation of Article 51 of the EEC Treaty must be interpreted in the light of the objective pursued by that article, which is the establishment of the greatest possible freedom of movement for migrant workers within the common market.
- 21 However, there is no link between the situation of workers who had the nationality of a State which subsequently became a member of the European Community but lost that nationality before that State's accession and the attainment of freedom of movement for employed and self-employed persons within the Community. The position is different only for those in that category who retained the nationality of the State in question after its accession to the Community and whose rights are recognized and protected, under Community social security legislation, by the transitional provisions contained in Articles 94 and 95 of Regulation No 1408/71 for employed and self-employed persons respectively, which enable all periods of insurance, employment or residence completed prior to accession to be taken into account for determination of rights to benefits under the provisions of that regulation.
- 22 Since those provisions do not cover the case of persons like Mr Buhari who lost their nationality before the accession of the State concerned, their acquired rights can be safeguarded only by the existence in the act of accession of a special provision for their benefit. However, the Act of Accession of the United Kingdom contains no such provision.
- 23 It must therefore be stated in reply to the first question that the position of a person entitled to social security benefits guaranteed by the legislation of a Member State by reason of his having pursued an occupation as a self-employed person in territory which at the time maintained special relations with a Member

State does not come within the scope of Regulations Nos 1408/71 and 574/72 where, during the period in question, the person entitled was a national of a State which was not at the time a member of the European Community and became a member only after the person entitled ceased to be a national of it.

The second question

- 24 By its second question the Tribunal de travail, Brussels, asks whether a refusal to pay a pension to which a person having the nationality of a non-member country and residing in another non-member country is entitled under the legislation of a Member State constitutes discrimination prohibited by the EEC Treaty.
- 25 The national court points out that under Belgian social security legislation, Mr Buhari could receive his pension in Zaire or Nigeria if he were a national of Belgium or of another Member State of the European Community and that, being a Nigerian national, he could also receive it if he lived in Belgium or another Member State of the European Community.
- 26 It must be borne in mind that the prohibition contained in Article 7 of the EEC Treaty of discrimination on grounds of nationality within the scope of application of the Treaty was implemented with regard to matters of social security by Article 3(1) of Regulation No 1408/71, which provides that persons resident in one of the Member States to whom that regulation applies are to be subject to the same obligations and enjoy the same benefits under the social security legislation of any Member State as the nationals of that State.
- 27 It follows from the very terms of those provisions that the principle of non-discrimination is not applicable to a situation such as that in the present case where the person entitled to a social security benefit is not one of the persons covered by Regulation No 1408/71.

28 It must therefore be stated in reply to the second question that the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty and implemented by Article 3(1) of Regulation (EEC) No 1408/71 in matters of social security does not apply where the person entitled to a social security benefit is not one of the persons covered by Regulation (EEC) No 1408/71.

The third question

29 The third question is essentially whether Community law precludes national legislation which provides that a self-employed person's retirement pension is to be payable abroad only to persons residing in the territory of a country where an employed person's pension could be paid to them under a reciprocity agreement.

30 Pursuant to Article 51(b) of the EEC Treaty, which was implemented by Article 10 of Regulation No 1408/71, the payment of benefits acquired under the social security scheme of one or more Member States is guaranteed in Community law only to persons who reside in the territory of a Member State.

31 It follows that Community law does not prohibit national legislation under which social security benefits may not be paid to a person residing in a non-member country.

32 It must therefore be stated in reply to the third question that Community law does not preclude national legislation which provides that a self-employed person's retirement pension is payable abroad only to beneficiaries residing in the territory of a non-member country where an employed person's pension could be paid to them pursuant to a reciprocal agreement, provided that it takes effect only outside the Community.

Costs

- 33 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in reply to the questions submitted to it by the Tribunal de travail, Brussels, by judgment of 23 March 1989, hereby rules:

- (1) The position of a person entitled to social security benefits guaranteed by the legislation of a Member State by reason of his having pursued an activity as a self-employed person in territory which at the time maintained special relations with a Member State does not come within the scope 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 and Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 in the versions contained in Council Regulation (EEC) No 2001/83 of 2 June 1983 where, during the period in question, the person entitled was a national of a State which was not at the time a member of the European Community and became a member only after the person entitled ceased to be a national of it.

- (2) The prohibition of discrimination contained in Article 7(1) of the EEC Treaty and implemented by Article 3(1) of Regulation (EEC) No 1408/71 in matters of social security does not apply where the person entitled to a social security benefit is not one of the persons covered by Regulation (EEC) No 1408/71.

- (3) Community law does not preclude national legislation which provides that a self-employed person's retirement pension is payable abroad only to beneficiaries residing in the territory of a non-member country where an employed person's pension could be paid to them pursuant to a reciprocity agreement, provided that it takes effect only outside the Community.

Moitinho de Almeida

Slynn

Joliet

Grévisse

Zuleeg

Delivered in open court in Luxembourg on 14 November 1990.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber