JUDGMENT OF THE COURT
30 April 1996 *

In Case C-308/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Bestuur van de Sociale Verzekeringsbank

and

J. M. Cabanis-Issarte

on the interpretation of Articles 2 and 3 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler,

* Language of the case: Dutch.

J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bestuur van de Sociale Verzekeringsbank, by E. H. Pijnacker Hordijk, of the Amsterdam Bar,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and B. J. Drijber, of its Legal Service, acting as Agents,

upon hearing the report of the Judge Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 September 1994,

having regard to the order of 27 June 1995 reopening the oral procedure,

after considering the answers given to the Court's written questions on behalf of:

— the Bestuur van de Sociale Verzekeringsbank, by E. H. Pijnacker Hordijk,

— the Netherlands Government, by A. Bos,

— the German Government, by B. Kloke, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the French Government, by M. Perrin de Brichambaut, Director of Legal Affairs in the Ministry of Foreign Affairs, C. de Salins, Deputy Director in the Directorate of Legal Affairs in the same ministry, and C. Chavance, Secretary of Foreign Affairs in the same Directorate, acting as Agents,

— the Austrian Government, by C. Stix-Hackl, Legationsrätin in the Federal Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and P. Watson, Barrister,

— the Commission, by B. J. Drijber,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van de Sociale Verzekeringsbank, represented by E. H. Pijnacker Hordijk, the Netherlands Government, represented by M. A. Fierstra, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the French Government, represented by C. Chavance and J.-F. Dobelle, Assistant Director in the Directorate of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, the United Kingdom, represented by S. Braviner and P. Watson, and the Commission, represented by D. Gouloussis and B. J. Drijber, at the hearing on 22 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 29 February 1996,

gives the following

Judgment

1 By judgment of 3 June 1993, received at the Court on 7 June 1993, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 2 and 3 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71').

2 Those questions have been raised in proceedings between Mrs Cabanis-Issarte and the Bestuur van de Sociale Verzekeringsbank (Board of the Social Insurance Bank, hereinafter 'the SVB') concerning the fixing of the contribution rate for a period of voluntary insurance under the Algemene Ouderdomswet (General Old-age Insurance Law, hereinafter 'the AOW').

3 Mrs Cabanis-Issarte, a French national, is the surviving spouse of a migrant worker, who was also French. In November 1948 Mr and Mrs Cabanis took up residence in the Netherlands on account of the husband's occupation. In October 1960 they returned to France. In November 1963 they moved back to the Netherlands and lived there until July 1969, the year in which Mr Cabanis reached retirement age. They then returned to settle finally in France, where Mr Cabanis died in October 1977.

4 From 1 January 1957, the date on which the AOW entered into force, until October 1960, Mrs Cabanis-Issarte was a 'compulsorily insured person' under the AOW, by virtue of her residence in the Netherlands. While Mr and Mrs Cabanis lived in France, from 20 October 1960 to 12 November 1963, she was insured under the AOW by reason of the voluntary contributions paid by her husband.

Subsequently she again became a 'compulsorily insured person' under the AOW, because she resided in the Netherlands, until her final return to France on 15 July 1969.

5 During the period prior to the entry into force of the AOW, from 23 November 1948 to 31 December 1956, Mrs Cabanis-Issarte was insured under Netherlands law by application of the transitional provisions of the AOW in conjunction with Annex V(H) of Regulation No 1408/71, as amended by the Act concerning the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ, English Special Edition 1972 [27 March 1972]).

6 Point 2(a), (c) and (e) of Annex V(H) contained several equiparation rules permitting such cover, which were worded as follows:

'(a) Insurance periods before 1 January 1957 during which a recipient, not satisfying the conditions permitting him to have such periods treated as insurance periods, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country, shall also be considered as periods of insurance completed in application of Netherlands legislation for general old-age insurance.

(...)

(c) As regards a married woman whose husband is entitled to a pension under Netherlands legislation on general old-age insurance, periods of the marriage preceding the date when she reached the age of 65 years and during which she resided in the territory of one or more Member States shall also be taken into account as insurance periods, in so far as those periods coincide with periods

of insurance completed by her husband under that legislation and with those to be taken into account in pursuance of subparagraph (a).

(...)

(e) As regards a woman who has been married and whose husband has been subject to Netherlands legislation on old-age insurance, or is deemed to have completed periods of insurance in pursuance of subparagraph (a), the provisions of the two preceding subparagraphs shall apply by analogy.

(...)'.

7 From his retirement in February 1969 until his death in October 1977, Mr Cabanis received a 'married person's pension', calculated on the basis of the abovementioned periods of insurance completed by the two spouses. During that period, Mrs Cabanis-Issarte, who reached 65 years of age in May 1974, could not herself claim a pension under the AOW, since as a married woman her only cover under that scheme, as applicable at the time, was through the pension paid to her husband.

8 On the other hand, after her husband's death, Mrs Cabanis-Issarte was able to claim, as from 1 April 1978, independent entitlement to a 'single person's pension' under the AOW. However, the SVB reduced that pension by an amount corresponding to the 29 years during which Mrs Cabanis-Issarte was not insured under that scheme, that is to say the period from her 15th birthday (13 May 1924) to the date on which the couple first took up residence in the Netherlands (23 November 1948) and the period from the date on which she finally returned to France (15 July 1969) until her 65th birthday (13 May 1974).

9 As regards the latter period, the SVB suggested that Mrs Cabanis-Issarte should pay voluntary contributions. By decision of 7 July 1980, it fixed the contributions for voluntary insurance at the maximum rate, in accordance with Article 2(1) of the Royal Decree of 24 February 1961 (*Staatsblad* 56), which provides that:

'the contribution for each full calendar year within the relevant period shall be the maximum amount which an insured person can be required to pay under the Algemene Ouderdomswet for the year in question'.

10 That provision is not however applicable to a national of the Netherlands whose contribution, under Article 2(2) of the 1961 Royal Decree, is lower in that

'provided he can demonstrate to the satisfaction of the Sociale Verzekeringsbank that this results in a lower amount, [the contribution] shall for each full calendar year within the relevant period be an identical percentage of his income in the calendar year in question as laid down under Article 28 of the Algemene Ouderdomswet for that year, but at least 5% of the maximum amount which an insured person can be required to pay in accordance with that law for the year in question.'

11 Article 3 of the Royal Decree of 22 December 1971 (*Staatsblad* 798) contains provisions similar to those just cited, the only difference being that the latter decree also refers to the Algemene Weduwen-en Wezenwet (General Law on Insurance for Widows and Orphans).

Mrs Cabanis-Issarte appealed to the Raad van Beroep, Amsterdam, against the SVB's decision fixing at the maximum rate the amount of the contributions which she was to pay for voluntary insurance.

13 By judgment of 2 February 1987 the Raad van Beroep, Amsterdam, upheld her appeal. It considered in particular that 'Regulation (EEC) No 1408/71 is applicable to Mrs Cabanis-Issarte pursuant to Article 2 and that, in accordance with Article 3 of the regulation, she is entitled to have the voluntary contribution rules applied to her, on the same conditions as those enjoyed by Netherlands nationals'.

14 Article 2(1) of Regulation No 1408/71 provides that the regulation is to apply '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 (...) as well as to the members of their families and their survivors.'

15 Article 3(1) provides that: 'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

16 The SVB has appealed against that judgment to the Centrale Raad van Beroep. That court notes in particular that, if she had stayed in the Netherlands during the period from 15 July 1969 to 13 May 1974, a person such as Mrs Cabanis-Issarte would have continued to be compulsorily insured as a resident and that, unlike the voluntary insurance rate, the contribution would not have been fixed at the maximum rate.

17 Being uncertain as to Mrs Cabanis-Issarte's rights under Regulation No 1408/71, the Centrale Raad van Beroep decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Pursuant to Article 2 of Regulation (EEC) No 1408/71, is that regulation, including the principle of equal treatment laid down in Article 3 thereof, applicable in cases such as this to persons like the respondent:

(a) because she should be treated as an entitled person in accordance with Point 2(a) of Annex V(H) of that regulation (as that annex was numbered at the time of the contested decision)?

(b) because she should be treated as a family member or (ultimately) a survivor within the meaning of Article 2 of that regulation by virtue of the fact that — in accordance with Article 9 of the Royal Decree of 24 February 1961 applicable at that time — she enjoyed insurance cover on the basis of her now deceased spouse's payment of voluntary contributions (for the period from 20 October 1960 to 12 November 1963)?

(c) because she should be treated as a family member or survivor by virtue of the circumstance, to be established, that during the last-mentioned period, but also outside it, she is covered by Point 2(e) in conjunction with Point 2(c) of the abovementioned annex?

(2) Can it be held that in cases such as this social security advantages have been lost as a result of exercising the right to freedom of movement, with the result that the aims set out in Articles 48 to 51 of the EEC Treaty have not been achieved, and if so, what are the consequences for the nationality requirement at issue in this case for the purposes of a reduction in contributions?'

The first question

18 By its first question the national court seeks in essence to ascertain whether Articles 2 and 3 of Regulation No 1408/71 are to be interpreted as meaning that they may be relied on by the surviving spouse of a migrant worker for the purpose of determining the rate of contribution in relation to a period of voluntary insurance completed under the old-age pension scheme of the Member State in which the worker was employed.

19 It has been settled case-law since the judgment in Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669 that the only rights which the members of a worker's family can claim under Article 2 of Regulation No 1408/71 are derived rights, that is to say those acquired through their status as a member of a worker's family.

20 The SVB, the Governments of the Member States which have submitted observations and the Commission all take the view that in the light of that case-law the surviving spouse of a migrant worker cannot rely on Article 3 of Regulation No 1408/71 for determining the rate of contribution to be paid in relation to a period of voluntary insurance in order to qualify for an old-age pension, since entitlement to such a benefit is not a derived right acquired through status as a member of a migrant worker's family or as his or her survivor, but is a person's own right acquired irrespective of any familial relationship with a worker.

21 Article 2(1) of Regulation No 1408/71, which defines the persons covered by the regulation, refers to two clearly distinct categories of persons: workers, on the one hand, and members of their families and their survivors, on the other. In order to fall within the scope of the regulation, the former must be nationals of a Member State, or stateless persons or refugees residing within the territory of one of the Member States. There is on the other hand no nationality requirement for application of the regulation to the family members or survivors of workers who are themselves Community nationals.

22 The distinction drawn between workers and members of their families or survivors determines the persons to whom many of the provisions of Regulation No 1408/71 apply, some applying solely to workers.

23 Thus, the spouse of a Community worker cannot rely on his or her status as a member of the worker's family in order to claim application of Articles 67 to 71 of Regulation No 1408/71, the main purpose of which is coordination of rights to unemployment benefits provided by virtue of the national legislation of the Member States for employed persons who are nationals of a Member State and not for members of their families.

24 That was the situation in *Kermaschek*, cited above. Mrs Kermaschek, a Yugoslav national, sought application to her case of the provisions of Regulation No 1408/71 relating to aggregation of periods of insurance or employment in order to acquire entitlement to unemployment benefit. She could not rely on her status of worker in Germany since she was a national of a non-member country. Nor could she rely on her status of spouse of a German national since the provisions of Community law at issue applied exclusively to workers.

25 The case now before the national court is, however, different. Mrs Cabanis-Issarte asks for the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71 to be applied in the determination of the rate of contribution for a period of voluntary insurance completed under Netherlands legislation and intended to supplement a period of compulsory insurance completed under the same legislation.

26 Subject to the special provisions of Regulation No 1408/71, Article 3(1) grants to 'persons resident in the territory of one of the Member States' and to whom the regulation applies the right to equal treatment as regards application of the social security legislation of the Member States, without drawing any distinction between workers, members of workers' families or their surviving spouses. Further and in

any event, any derogation from equal treatment based on one of the provisions of the regulation to which Article 3(1) refers must be objectively justified if the fundamental rule of non-discrimination laid down by Article 3(1) in the field of social security is not to be deprived of meaning.

27 It is common ground, first, that, in accordance with Article 2(1), Mrs Cabanis-Issarte, as the surviving spouse of a migrant worker, is a person covered by Regulation No 1408/71, that the old-age pension paid to her by the SVB comes within the 'old-age benefits' branch referred to in Article 4(1)(c) of that Regulation and, lastly, that no provision of the Regulation, in particular of Title III, Chapter 3 'Old age and death (pensions)', which contains special provisions for various classes of benefit, excludes application of Article 3(1), concerning the conditions governing the grant to the surviving spouse of a worker of an old-age pension based on voluntary contributions.

28 It follows that Mrs Cabanis-Issarte satisfies the conditions for application of Article 3(1) of Regulation No 1408/71 to her.

29 However, in several judgments subsequent to *Kermaschek*, cited above, the Court has held that a member of a migrant worker's family could not rely on Articles 2 and 3 of Regulation No 1408/71 to claim, on grounds of equal treatment with nationals of the host State, a social security benefit provided for by the legislation of that State since the benefit in question was granted as a right in person and not by reason of the beneficiary's status as a member of a worker's family. The Court did so without first finding that any special provisions of the regulation precluded application of Article 3(1) (see Case 157/84 *Frascogna* v *Caisse des Dépôts and Consignations* [1985] ECR 1739; Case 94/84 *ONEM* v *Deak* [1985] ECR 1873;

Case 147/87 *Zaoui* v *CRAMIF* [1987] ECR 5511; Case C-243/91 *Belgian State* v *Taghavi* [1992] ECR I-4401, and Case C-310/91 *Schmid* v *Belgian State* [1993] ECR I-3011).

30 The impossibility for a worker's spouse who, having accompanied the worker to another Member State, decides to return to his or her State of origin with the worker or after the worker's death, to rely on the equal treatment rule in relation to the grant of certain benefits provided for by the legislation of the last State of employment would adversely affect freedom of movement for workers, which forms the context for the Community rules on coordination of national social security laws. It would run counter to the purpose and spirit of those rules to deprive the spouse or survivor of a migrant worker of the benefit of application of the principle prohibiting discrimination in the calculation of old-age benefits which the spouse or survivor would have been able to claim, on the same conditions as nationals, if he or she had remained in the host State.

31 Furthermore, the distinction between rights in person and derived rights which the Court drew in the judgments cited in paragraph 29 above may undermine the fundamental Community law requirement that its rules should be applied uniformly, by making their applicability to individuals depend on whether the national law relating to the benefits in question treats the rights concerned as rights in person or as derived rights, in the light of specific features of the domestic social security scheme.

32 Such specific features may produce a situation where, for the purposes of grant of an old-age pension under the laws of one Member State, pension rights accrued during periods of insurance or residence, taken into account in calculating the pension, are classified as rights in person or as derived rights depending on the period under consideration. As the Advocate General points out in paragraph 15 of his Opinion of 29 February 1996, that is so in the case of Mrs Cabanis-Issarte who, under Netherlands law, acquired, in relation to certain periods of insurance,

pension rights as a member of a migrant worker's family but, in relation to other periods, acquired such rights as direct personal rights.

33 Moreover, as the Commission points out, such a distinction between rights in person and derived rights tends to be blurred in the national social security systems, in view of the tendency for social security cover to be universal.

34 Since, therefore, the distinction drawn between rights in person and derived rights renders the fundamental rule of equal treatment inapplicable to the surviving spouse of a migrant worker, the rule in *Kermaschek* should be limited to the circumstances described in paragraphs 23 and 24 above.

35 However, in order to justify a distinction in the present case between rights in person and derived rights, the SVB and the governments which have submitted observations maintain, in essence, that such a distinction, which makes it possible to delimit the scope of rights which workers and members of their families respectively may claim under Regulation No 1408/71, stems from the principle of freedom of movement for workers whose primary beneficiaries are persons who pursue or have pursued an economic activity and from whose status the rights conferred by Community law on family members are derived.

36 The Netherlands Government observes, in particular, that not only has Mrs Cabanis-Issarte never worked in the competent State, but that the benefit rights in question also relate to a period during which she did not even live in that State.

37 That line of argument cannot be accepted.

38 First of all, freedom of movement for workers, guaranteed by Article 48 of the Treaty, entails the right of integration into the host State, especially for the worker's family, in order to avoid the adverse consequences for freedom of movement which would otherwise arise. The provision of equal treatment, particularly in the field of social advantages, provided for in Article 7(2) of Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), and consistently upheld by the Court in favour of the members of workers' families, pursues the same objective and constitutes an important factor affecting integration into the host State.

39 Next, as regards the application of national social security laws to workers and members of their families, Article 51 of the Treaty entrusts the Council with the task of adopting such measures in the field of social security as are necessary to provide freedom of movement for workers (see, in particular, the judgments in Cases C-481/93 *Moscato* v *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1995] ECR I-3525, paragraph 27, and Case C-482/93 *Klaus* v *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1995] ECR I-3551, paragraph 21).

40 To that end, Regulation No 1408/71 contains a number of provisions intended *inter alia* to prevent, by arrangements and rules which vary depending on the branch of social security concerned, a worker who has exercised his right to freedom of movement and who decides, after reaching retirement age, to return to his country of origin, as well as the members of the worker's family, from being deprived of social security advantages which they could have claimed if they had stayed in the last State of employment.

41 In the present case, it is established that Mrs Cabanis-Issarte, a French national, has never worked and that she accompanied her husband throughout those parts

of his working life which were spent in the Netherlands. Accordingly, it is because her husband exercised his right to freedom of movement that she was granted the right to settle with him in the Netherlands and, consequently, was able to accrue pension rights under Netherlands legislation, both in relation to the periods during which she resided in the Netherlands and in relation to the periods during which she resided in France, on account of her husband's or her own voluntary insurance.

42 In that respect, it is clear that in the case before the national court the purpose of the period of voluntary insurance at issue is necessarily to supplement the periods of compulsory insurance which Mrs Cabanis-Issarte had completed in the Netherlands because she lived there with her husband, who was a migrant worker.

43 It follows that, contrary to what the SVB and the Netherlands Government in particular maintain, Mrs Cabanis-Issarte's situation, in relation to the period of voluntary insurance in respect of which the SVB refuses to allow her to pay the same reduced contributions which nationals are allowed to pay, is covered by Community rules on freedom of movement for workers and, in particular, by the rule prohibiting discrimination in the field of social security laid down in Article 3(1) of Regulation No 1408/71, which relates both to workers and to members of their families.

44 In the light of the foregoing considerations, the answer to the first question must therefore be that Articles 2 and 3 of Regulation No 1408/71 are to be interpreted as meaning that they may be relied on by the surviving spouse of a migrant worker for the purpose of determining the rate of contribution in relation to a period of voluntary insurance completed under the old-age pension scheme of the Member State in which the worker was employed.

The second question

45 In view of the answer given to the first question, there is no need to consider or reply to the second question.

Temporal effect of this judgment

46 Both the SVB and the Governments of the Member States which have submitted written observations to the Court submit that, in the event of a departure from the *Kermaschek* line of authority, the temporal effects of the judgment should be limited. In this regard, reference has been made to the serious consequences which the judgment would entail for the funding of social security schemes and the radical change involved in such a departure from precedent.

47 Although the Governments of the Member States which have submitted written observations have not been in a position to assess, even in approximate terms, the financial consequences of the ruling given in reply to the first question, overriding considerations of legal certainty preclude legal situations being called into question which have been definitively settled in accordance with the Court's previous case-law, whose scope is limited by this judgment.

48 Accordingly, it must be held that this judgment cannot be relied on in support of claims concerning benefits relating to periods prior to the date of delivery of this judgment, except by persons who have, prior to that date, initiated proceedings or raised an equivalent claim.

Costs

49 The costs incurred by the Netherlands, German, French, Austrian and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Centrale Raad van Beroep, by judgment of 3 June 1993, hereby rules:

1. Articles 2 and 3 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 (EEC) No 2001/83 of 2 June 1983, are to be interpreted as meaning that they may be relied on by the surviving spouse of a migrant worker for the purpose of determining the rate of contribution in relation to a period of voluntary insurance completed under the old-age pension scheme of the Member State in which the worker was employed.

2. This judgment may not be relied on in support of claims concerning benefits relating to periods prior to the date of delivery of the judgment, except by persons who have, prior to that date, initiated proceedings or raised an equivalent claim.

Rodríguez Iglesias Edward Puissochet

Hirsch Mancini Schockweiler

Moitinho de Almeida Kapteyn Gulmann

Murray Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 30 April 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President