SUMMARY

ECJ 15 January 2015, case C-179/13 (Raad van bestuur van de Sociale Verzekeringsbank – v – L.F. Evans), Nationality discrimination

Facts

Ms Evans is a British citizen. From 7 November 1973 till 31 May 1980 she worked in The Netherlands. Upon termination of her last job, she received Dutch unemployment benefits. On 17 November 1980, she was hired by the American consulate in Amsterdam. From that time onwards, she paid no Dutch social insurance contributions. Originally, this was because Dutch law exempted consular staff from participation in the Dutch social insurance legislation. In 1999, Ms Evans was offered the option of opting into the Dutch social insurance system, but she elected to stay out of that scheme. In 2008, the authority that administers Dutch state retirement benefits, the *Sociale Verzekeringsbank*, informed her that the period from 18 November 1980 would not be taken into account for the purpose of calculating her entitlement to Dutch state retirement benefits.

National proceedings

Ms Evans appealed this decision, arguing that her period of employment with the American consulate should count towards calculating her state retirement benefits. The court of first instance, basing its reasoning on the ECJ's judgment in Boukhalfa (C-214/94), found in her favour. The Sociale Verzekeringsbank appealed. The appellate court referred questions to the ECJ. The first question was whether, for the period during which a national of a Member State has been employed at a consular post of a third State within the territory of a Member State of which he is not a national but within whose territory he resides, that national may be regarded

by that Member State as not being excluded from the scope of Regulation 1408/71. The second question, which only comes into play in the event the first is answered in the negative, is whether refusal to take the period from 18 November 1980 into account constitutes unjustified discrimination on the basis of nationality. Both questions require account to be taken – as from 1986 – of the Vienna Convention on Consular Relations.

ECJ's findings

1.A situation such as that at issue in the main proceedings differs from that which gave rise to the judgment in *Boukhalfa*, in that that judgment concerned a national of a Member State employed by the embassy of a Member State within the territory of a third State (§ 32).

2.In the absence of harmonisation at EU level, it is, in principle, for the legislation of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme (§ 33 - 34).

3.EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the EU legal order and is binding on the institutions (§ 35).

4.The idea of being 'subject to the legislation of a Member State', as referred to in Article 2 of Regulation No 1408/71, ought to be interpreted in the light of the Vienna Convention, which codifies the law of consular relations and states principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions (§ 36).

5.Article 48 of the Vienna Convention provides that members of the consular post, with respect to services rendered by them for the sending State, are in principle exempt from social security provisions which may be in force in the receiving State, while Article 71(2) of the Convention qualifies this by providing that members of the consular post who are nationals of or permanently resident in the receiving State are to enjoy facilities, privileges and immunities insofar as these are granted to them by the receiving State (§ 37).

6.Until 1 August 1987, Dutch legislation provided that consular officers and agents who were not Dutch nationals did not have social insurance and that, after that date, consular officers and agents who were permanent residents of the Netherlands were insured there, while laying down arrangements whereby staff who had taken up their duties before 1 August 1987 could opt out, thus remaining uninsured under the Dutch social insurance scheme, an option of which Ms Evans availed herself. It follows that the Kingdom of the Netherlands intended to take advantage of the option afforded to it by Article 71(2) of the Vienna Convention of exempting certain staff at consular posts, such as Ms Evans, from the Dutch social security

scheme (§ 38-39).

7.Accordingly, in view of the above, it should be held that, in a situation such as that of Ms Evans, a member of staff of a consular post is not, for the duration of the period in which he is employed by the consular post of a third State, subject to the social security legislation of the Member State concerned, within the meaning of Article 2 of Regulation No 1408/71, and, therefore, does not fall within the scope of that regulation (§ 40).

8.The conditions creating the right or the obligation to become affiliated to a social security scheme may not have the effect of excluding from the scope of national legislation persons to whom that legislation applies pursuant to Regulation No 1408/71. Consequently, the effect of Article 13(2)(a) of Regulation No 1408/71 is that a provision of the applicable national legislation pursuant to which cover by the social security scheme established by that legislation is conditional on residence in the Member State concerned may not be relied on against the persons referred to in that provision. However, this cannot have the effect of causing the affiliation of a worker to the social security scheme of a Member State within the meaning of Regulation No 1408/71 to be determined autonomously by that regulation independently of the national legislation governing such affiliation. With regard, more particularly, to the members of the service staff of diplomatic missions and consular posts referred to in Article 16 of Regulation No 1408/71, this article merely determines the national legislation applicable. Article 16 does not, however, lay down the conditions creating the right or the obligation to become affiliated to a social security scheme: those conditions should be determined by the legislation of each Member State in the light of the international law applicable (§ 44-46).

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

Ruling

Article 2 of Council Regulation (EEC) No 1408/71 [...] read in conjunction with Article 16 of that regulation, should be construed as meaning that, for the period during which a national of a Member State has been employed in a consular post of a third State within the territory of a Member State of which he is not a national but within whose territory he resides, that national is not subject to the legislation of a Member State within the meaning of this provision if, by virtue of the legislation of his Member State of residence, adopted pursuant to Article 71(2) of the Vienna Convention [...], he is not affiliated to the national social security scheme.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-01-15

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