JUDGMENT OF THE COURT (Third Chamber)

18 July 2006 *

In Case C-50/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Korkein hallinto-oikeus (Finland), made by decision of 4 February 2005, received at the Court on 8 February 2005, in the proceedings brought by

Maija T.I. Nikula,

THE COURT (Third Chamber),

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

Advocate General: M. Poiares Maduro,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2006,

* Language of the case: Finnish.

after considering the observations submitted on behalf of:

— Maija T.I. Nikula, by M. Ekorre,

— the Finnish Government, by A. Guimaraes-Purokoski and E. Bygglin, acting as Agents,

— the Spanish Government, by I. del Cuvillo Contreras, acting as Agent,

— the Netherlands Government, by H. Sevenster and M. de Grave, acting as Agents,

— the Portuguese Government, by L. Fernandes and S. Pizarro, acting as Agents,

— the Norwegian Government, by I. Djupvik and K. Fløistad, acting as Agents,

— the Commission of the European Communities, by D. Martin and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 33(1) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; 'Regulation No 1408/71').

2 That reference was made in proceedings brought by Ms Nikula before the Korkein hallinto-oikeus (Supreme Administrative Court of Finland) against a decision of the Lapin verotuksen oikaisulautakunta (Taxation Review Commission of Lapland) regarding the amount of taxable income taken into account for the year 2000 in calculating her sickness insurance contributions.

Legal context

Community legislation

3 Pursuant to Article 3(1) of Regulation No 1408/71:

'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.'

4 Article 27 of the regulation provides:

'A pensioner who is entitled to draw pensions or annuities under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides, and who is entitled to benefits under the legislation of the latter Member State, taking account where appropriate of the provisions of Article 18 and Annex VI, shall, with the members of his family, receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension or annuity was payable solely under the legislation of the latter Member State.'

5 Under Article 28a of the regulation:

'Where the pensioner entitled to a pension or annuity under the legislation of one Member State, or to pensions or annuities under the legislations of two or more Member States, resides in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, nor is any pension or annuity payable, the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of pensions, determined according to the rules laid down in Article 28(2), to the extent that the pensioner and members of his family would have been entitled to such benefits under the legislation administered by the said institution if they resided in the territory of the Member State where that institution is situated.'

6 Article 33(1) of that regulation provides:

'The institution of a Member State which is responsible for payment of a pension or annuity and which administers legislation providing for deductions from pensions or annuities in respect of contributions for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension or annuity payable by such institution, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.'

National legislation

7 Under Article 1 of the Sickness Insurance Law (sairausvakuutuslaki (No 364/1963)) all persons resident in Finland, regardless of their nationality, are insured against sickness. Sickness insurance contributions are levied under the tax system. The insured's right to benefits is not linked to the contributions paid.

8 Article 33(2) of that law provides that the insurance contributions paid by insured persons are calculated on the basis of the total income taken into account for local taxes in respect of the preceding tax year.

The main proceedings and the question referred for a preliminary ruling

9 Ms Nikula, a pensioner living in Kemi (Finland), received in 2000 as old age pensions, a number of benefits from the institutions of two Member States, the Kingdom of Sweden, where she worked for a number of years, and the Republic of Finland, where she resides.

10 For the tax year 2000, Ms Nikula was declared to be taxable principally in Finland. The pensions which she received from Swedish institutions were included in her taxable income, in accordance with Articles 18(1) and 25(3)(d) of the Convention (26/1997) concluded between Member States of the Nordic Council for the avoidance of double taxation in the matter of income tax and wealth tax.

11 Ms Nikula requested that the taxation be amended in such a manner that the pensions received from Swedish institutions were not taken into account in her taxable income used for the calculation of her sickness insurance contributions. By decision of 11 September 2002, the Lapin verotuksen oikaisulautakunta rejected her application.

12 Ms Nikula appealed against that decision to the Rovaniemen hallinto-oikeus (Administrative Court, Rovaniemi). That court dismissed her appeal by decision of 12 December 2003.

13 Ms Nikula sought leave to appeal against the decision of the Rovaniemen hallinto-oikeus and applied in her appeal before the Korkein hallinto-oikeus for the annulment of that decision and for an order that the pensions which she receives from Swedish institutions should not be taken into account in her taxable income used for the calculation of her sickness insurance contributions.

14 It is in those circumstances that the Korkein hallinto-oikeus decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 33(1) of Regulation No 1408/71 ... to be interpreted as meaning that in a situation where a pensioner is entitled under Article 27 of the regulation to claim

sickness and maternity benefits only from the institution of the place of residence and at the expense of that institution, the assessment of sickness insurance contributions in such a way that in the pensioner's State of residence both the pensions received from that State and the pensions he receives from another State are taken into account as the basis for determining the amount of those contributions — provided that the sickness insurance contributions do not exceed the amount of pensions awarded by the State of residence — is incompatible with that provision?'

The question referred for a preliminary ruling

15 By its question, the national court essentially asks whether Article 33(1) of Regulation No 1408/71 precludes, when the basis for calculating sickness insurance contributions applied in the Member State of residence of the recipient of pensions paid by the institutions of that Member State is determined, the inclusion in that basis, in addition to the pensions paid in the country of residence, also of pensions paid by the institutions of another Member State, provided that the sickness insurance contributions do not exceed the amount of pensions awarded by the State of residence.

Observations submitted to the Court

16 The Spanish and Portuguese Governments take the view that, on the basis of the provisions of Article 33(1) of Regulation No 1408/71, the competent Member State may not include in the calculation of the sickness insurance contributions those pensions or annuities paid by an institution of another Member State. That is also the view of the Commission of the European Communities, which submits that, by virtue of the general principle laid down in Case C-389/99 *Rundgren* [2001]

ECR I-3731, the competent Member State may make deductions for contributions only from the pension or annuity paid by one of its own institutions and not from pensions or annuities paid by the institutions of another Member State.

17 Those governments and that institution base their reasoning on paragraph 49 of the *Rundgren* judgment, according to which it follows from the provisions of Article 33(1) of Regulation No 1408/71 that the regulation merely authorises, in the cases in which it applies, the relevant institution of a Member State to make deductions, in order to cover inter alia sickness benefits, from the pension or annuity payable by it, that is to say, actually paid by it.

18 The Finnish, Netherlands and Norwegian Governments accept that there is a link between the power to make deductions from a pension and the obligation to bear the cost of benefits in kind. The cost of benefits in kind cannot be borne by the institution of a Member State which has only a hypothetical competence in respect of pensions (*Rundgren*, paragraph 47). However, they take the view that that link, accepted in paragraph 49 of that judgment, does not prevent the Member State in which the institution competent to pay sickness benefit is established from determining in its own legislation which income is to be taken into account in the calculation of sickness insurance contributions. That interpretation is corroborated by the expression 'calculated in accordance with the legislation concerned' in Article 33(1) of Regulation No 1408/71. The exercise of that power is merely subject to the obligation, on that institution, to ensure the effective payment of the benefits to the relevant recipients.

19 Those governments therefore take the view that, in that situation, a Member State may decide to include pensions paid by another Member State in the basis for calculating social contributions, whilst accepting that the amount of those contributions may not exceed the amount of pensions paid in the Member State of residence. In that event, the contributions could not be deducted in their entirety from the pensions paid in that Member State as they should be, as the Court held in paragraph 49 of *Rundgren*.

Findings of the Court

20 The objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, is to ensure free movement of employed and self-employed persons within the European Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the 5th, 6th and 10th recitals, that regulation upholds the principle of equality of treatment of workers under the various national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. The system put in place by Regulation No 1408/71 is merely a system of coordination, concerning inter alia the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement (Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraphs 19 and 20).

21 It is apparent from the order for reference that Ms Nikula, who resides in Finland, received pensions from both Swedish and Finnish institutions during the course of 2000.

22 Pursuant to Article 27 of Regulation No 1408/71, a pensioner who is entitled to draw pensions or annuities under the legislation of two or more Member States, including that of the Member State in whose territory he resides, is entitled to benefits in kind under the legislation of the Member State in whose territory he resides, as though he were a pensioner whose pension or annuity was payable solely under the legislation of the latter State.

23 Accordingly, it is for the Republic of Finland, as the Member State of residence of Ms Nikula, to ensure payment of the benefits in kind. That State is authorised, by virtue of Article 33(1) of the regulation, to make deductions of contributions in accordance with the rules laid down in its legislation.

24 In the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the income to be taken into account when calculating social security contributions (Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 51). This is a fortiori the case where Community legislation specifically refers to the law of the Member State which it designates as the State competent to deduct sickness insurance contributions. It is necessary, when the Member State concerned exercises that power, that it comply with Community law (see, in particular, *Terhoeve*, paragraph 34, and Case C-227/03 *Van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39).

25 That is the reason that Article 33(2) of the Finnish Law on sickness insurance provides that sickness insurance contributions are calculated on the basis of the total income taken into account for local taxes and including pensions and annuities paid by other Member States in respect of the preceding tax year.

26 Contrary to the submissions of the Commission and some Member States, which take the view that the position of the Court in *Rundgren* precludes on principle a Member State from deducting social contributions from pensions paid by another Member State, the ruling in that judgment is not transposable to the main proceedings in the present case.

27 Mr Rundgren, originally of Finnish nationality but a Swedish national since 18 July 1975, had no income other than the pensions and life annuities paid by the Kingdom of Sweden. That Member State assumed responsibility for payment of the benefits in kind.

28 Thus, firstly, the Republic of Finland, paying neither pension nor annuity to him, could not, under Article 33(1) of Regulation 1408/71, 'make ... deductions ... from the pension or annuity payable by [it]'.

29 Secondly, by application of the principle that a pensioner cannot be required, because he resides in the territory of a Member State, to pay compulsory insurance contributions to cover benefits payable by an institution of another Member State (Case C-140/88 *Noij* [1991] ECR I-387, paragraph 14), the Republic of Finland could not claim payment from Mr Rundgren of contributions such as those prescribed by Finnish legislation, since he was entitled to benefits having a similar purpose, for which the Kingdom of Sweden assumed responsibility as the Member State competent in his regard in respect of pensions (*Rundgren*, paragraph 56).

30 Although it is true that it would be contrary to the principle of free movement of persons for the legislation of a Member State to require pensioners to contribute to an additional social security scheme without offering corresponding social protection (Case C-53/95 *Kemmler* [1996] ECR I-703 and Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829), that is, however, not the case in the main proceedings, since Finnish legislation must apply as the legislation of the State of residence, to the exclusion of any other legislation, to all pensioners resident in Finnish territory.

31 Thus, in a case such as that of the main proceedings, in which an institution of the Member State of residence pays a pension and an institution of the same Member State is responsible for payment of sickness insurance expenses, there is no provision of Regulation No 1408/71 which prohibits that State from calculating the amount of the social contributions of a resident on the basis of his total income, whether it comes from pensions paid by the Member State of residence or from pensions paid by another Member State.

32 However, whatever the calculation method adopted, the amount of the contributions may not exceed that of the pensions paid by the institutions of the Member State of residence since, as stated in paragraph 28 of this judgment, by application of Article 33(1) of Regulation No 1408/71, the sickness insurance contributions may be

deducted only from the pensions or annuities paid by the Member State of residence (see, to that effect, *Rundgren*, paragraph 49).

33 Furthermore, it would be an obstacle to the free movement of persons for the Member State of residence to implement a system which did not take into account the sickness insurance contributions already paid by pensioners during their working years in a Member State other than the Member State of residence. Such a system would have the effect of penalising those pensioners simply because they exercised their right to free movement and of favouring those who remained in a single Member State for all their working lives.

34 The Court has held that Article 39 EC precludes a Member State from calculating the sickness insurance contributions of a retired worker subject to its legislation on the basis of the gross amount of the supplementary retirement pension payable under an agreement which that worker draws in another Member State, without taking account of the fact that a part of the gross amount of that pension has already been deducted by way of sickness insurance contributions in the latter State (Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 36).

35 In order to avoid that risk and to guarantee equal treatment within the Community for Member State nationals in the light of different national legislation, the Member State responsible for benefits which, under its legislation, normally includes in the basis for calculating sickness insurance contributions pensions or annuities paid by institutions of another Member State must exclude from the basis of calculation the amount of pensions for which contributions have already been paid by those pensioners in other States, whether paid by the persons concerned out of their income from work or directly deducted from that income.

36 It is for the persons concerned to prove that the earlier contributions were in fact paid.

37 The answer to the question must therefore be that Article 33(1) of Regulation No 1408/71 does not preclude, when the basis is determined for calculating sickness insurance contributions applied in the Member State of residence of the recipient of pensions paid by the institutions of that Member State responsible for the payment of benefits under Article 27 of that regulation, the inclusion in that basis of calculation, in addition to the pensions paid in the Member State of residence, also of pensions paid by the institutions of another Member State, provided that the sickness insurance contributions do not exceed the amount of pensions paid in the Member State of residence.

38 However, Article 39 EC precludes the amount of pensions received from institutions of another Member State from being taken into account if contributions have already been paid in that other State out of income from work received in that State. It is for the persons concerned to prove that the earlier contributions were in fact paid.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 33(1) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, does not preclude, when the basis is determined for calculating sickness insurance contributions applied in the Member State of residence of the recipient of pensions paid by the institutions of that Member State responsible for the payment of benefits under Article 27 of that regulation, the inclusion in that basis of calculation, in addition to the pensions paid in the Member State of residence, also of pensions paid by the institutions of another Member State, provided that the sickness insurance contributions do not exceed the amount of pensions paid in the State of residence.**

2. **However, Article 39 EC precludes the amount of pensions received from institutions of another Member State from being taken into account if contributions have already been paid in that other State out of the income from work received in that State. It is for the persons concerned to prove that the earlier contributions were in fact paid.**

[Signatures]