

JUDGMENT OF THE COURT (Fifth Chamber)

3 July 2003 *

In Case C-156/01,

REFERENCE to the Court under Article 234 EC by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court between

R.P. van der Duin

and

Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen UA,

and between

Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen UA

and

T.W. van Wegberg-van Brederode,

* Language of the case: Dutch.

on the interpretation of Articles 21, 22(1)(c), 28 and 31 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and 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 (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, A. La Pergola (Rapporteur), P. Jann and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M.-F. Contet, Principal Administrator

after considering the written observations submitted on behalf of:

— Mr van der Duin, by F.T.I. Oey, advocaat,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

- the Spanish Government, by N. Díaz Abad, acting as Agent,

- the French Government, by G. de Bergues and C. Bergeot-Nunes, acting as Agents,

- the United Kingdom Government, by R. Magrill, acting as Agent, assisted by C. Lewis, barrister,

- Commission of the European Communities, by H. Michard and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr van der Duin, represented by F.T.I. Oey, of Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen UA, represented by E.G.J. Broekhuizen, acting as Agent, of the Netherlands Government, represented by C. Wissels, acting as Agent, of the Spanish Government, represented by N. Díaz Abad, of the United Kingdom Government, represented by C. Lewis, and of the Commission, represented by H.M.H. Speyart, at the hearing on 26 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2002,

gives the following

Judgment

- 1 By order of 21 March 2001, received at the Court on 10 April 2001, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 21, 22(1)(c), 28 and 31 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and 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; ‘Regulation No 1408/71’).

- 2 Those questions were raised in two disputes between, first, Mr van der Duin, a Netherlands national living in France, and Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen UA (mutual sickness insurance fund; ‘ANOZ Zorgverzekeringen’), and, second, ANOZ Zorgverzekeringen and Mrs van Wegberg-van Brederode, a Netherlands national living in Spain, concerning the refusal of ANOZ Zorgverzekeringen to assume responsibility for care given to those persons in the Netherlands.

Community legal background

3 Article 1(o) to (q) of Regulation No 1408/71 provide:

‘For the purposes of this Regulation:

...

(o) “competent institution” means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were

resident in the territory of the Member State in which the institution is situated;

or

...

(p) “institution of the place of residence” and “institution of the place of stay” mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution, or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) “competent State” means the Member State in whose territory the competent institution is situated’.

- 4 Contained in Section 2, headed ‘Employed or self-employed persons and members of their families’ of Title III, Chapter 1, of Regulation No 1408/71, Article 19, headed ‘Residence in a Member State other than the competent State — General rules’, provides:

‘1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the

legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

- (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

...

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.

...'

- 5 Under Article 21 of Regulation No 1408/71, contained in the same section and headed 'Stay in or transfer of residence to the competent State':

'1. The employed or self-employed person referred to in Article 19(1) who is staying in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were resident there, even if he has already received benefits for the same case of sickness or maternity before his stay.

2. Paragraph 1 shall apply by analogy to the members of the family referred to in Article 19(2).

...’

- 6 Headed ‘Stay outside the competent State — Return to or transfer of residence to another Member State during sickness or maternity — Need to go to another Member State in order to receive appropriate treatment’, Article 22 of Regulation No 1408/71 provides in paragraphs 1 and 2:

‘1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

- (a) whose condition necessitates immediate benefits during a stay in the territory of another Member State;

or

...

- (c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

- (i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

...

2. ...

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided ;for by the legislation of the Member State on whose territory the person concerned resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.'

7 Contained in Section 5, headed 'Pensioners and members of their families', of Title III, Chapter 1, of Regulation No 1408/71, Article 28, headed 'Pensions

payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence', states:

'1. A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

- (a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;

...

2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined according to the following rules:

- (a) where the pensioner is entitled to the said benefits under the legislation of a single Member State, the cost shall be borne by the competent institution of that State;

...'

- 8 Contained in the same section, Article 31, headed 'Stay of the pensioner and/or members of his family in a State other than the State in which they reside', provides:

'A pensioner entitled to a pension or pensions under the legislation of one Member State or to pensions under the legislation of two or more Member States who is entitled to benefits under the legislation of one of those States shall, with members of his family who are staying in the territory of a Member State other than the one in which they reside, receive:

- (a) benefits in kind provided by the institution of the place of stay in accordance with the provisions of the legislation which it administers, the cost being borne by the institution of the pensioner's place of residence;

...'

- 9 Article 29(1) and (2) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, in the version amended and updated by Regulation No 2001/83 ('Regulation No 574/72') provides:

'1. In order to receive benefits in kind... under Article 28(1)... of [Regulation No 1408/71] in the territory of the Member State in which he resides, a pensioner and the members of his family shall register with the institution of the place of residence by submitting a certified statement testifying that he is entitled to the

said benefits for himself and for the members of his family, under the legislation or one of the legislations under which a pension is payable.

2. This certified statement shall be issued, at the request of the pensioner, by the institution or one of the institutions responsible for payment of the pension or, where appropriate, by the institution empowered to determine entitlement to benefits in kind, as soon as the pensioner satisfies the conditions for acquisition of the right to such benefit....’

10 Article 93(1) and (3) of Regulation No 574/72 provide:

‘1. The actual amount of benefits in kind provided under Article 19(1) and (2) of [Regulation No 1408/71] to employed and self-employed persons and to members of their families residing in the territory of the same Member State, and benefits in kind provided under Articles 21(2), 22, 25(1), (3) and (4), 26, 29(1) or 31 of [the same] regulation, shall be refunded by the competent institution to the institution which provided the said benefits as shown in the accounts of that institution.

...

3. If the actual amount of the benefits referred to in paragraph 1 is not shown in the accounts of the institution which has provided them, and no agreement has been concluded under paragraph 6, the amount to be refunded shall be determined on the basis of a lump-sum payment calculated from all the appropriate references obtained from the data available. The Administrative Commission shall assess the bases to be used for the calculation of the lump-sum payments and shall decide the amount thereof.’

11 Article 95(1) to (3) of Regulation No 574/92 state:

'1. The amount of the benefits in kind provided under Article 28(1)... of [Regulation No 1408/71] shall be refunded by the competent institutions to the institutions which provided the said benefits, on the basis of a lump sum which is as close as possible to the actual expenditure incurred.

2. The lump-sum payment shall be determined by multiplying the average annual cost per pensioner by the average annual number of pensioners to be taken into account, and by reducing the resultant amount by 20%.

3. The factors necessary for the calculation of the said lump sum shall be determined according to the following rules:

- (a) The average annual cost per pensioner shall be obtained, for each Member State, by dividing the annual expenditure on all the benefits in kind provided by the institutions of that Member State to all pensioners whose pensions are payable under the legislation of that Member State, under the social security schemes to be taken into consideration, and to members of their families, by the average annual number of pensioners;...

...'

- 12 As may be seen from Decision No 153 (94/604/EC) of the Administrative Commission of the European Communities on social security for migrant workers of 7 October 1993 on the model forms necessary for the application of Regulations No 1408/71 and No 574/72 (E 001, E 103 to E 127) (OJ 1994 L 244, p. 22), Form E 121 constitutes the certified statement required for the purposes of registering a pensioner and members of his family with the institution of their place of residence in accordance with Article 28 of Regulation No 1408/71 and Article 29 of Regulation No 574/72. That decision also shows that the certified statement required in the case envisaged by Article 31 of Regulation No 1408/71 is Form E 111, whereas a Form E 112 is required in the case referred to in Article 22(1)(c) and (i) of that regulation.

The disputes in the main proceedings and the questions referred

- 13 Mr van der Duin left the Netherlands in 1989 to take up residence in France.
- 14 Being affected by an incapacity for work of between 80 and 100%, Mr van der Duin has been receiving invalidity benefits since August 1990 under the Algemene Arbeidongeschiktheidswet (General Law on Incapacity for Work) and the Wet op de arbeidsongeschiktheidsverzekering (Law on Insurance against Incapacity for Work) at the expense of the competent Netherlands institution.
- 15 After taking up residence in France, Mr van der Duin registered with the local Caisse Primaire d'Assurance Maladie (Local Sickness Insurance Fund; 'the CPAM') by means of a Form E 121, which enabled him to benefit from the system for granting benefits in kind laid down by Article 28 of Regulation No 1408/71.

- 16 In November 1993, Mr van der Duin suffered a severe cut in the forearm, for the consequences of which he received treatment in France for about a year.
- 17 Between 31 January and 29 March 1995, Mr van der Duin was admitted to the Akademisch Ziekenhuis (University Hospital) of Rotterdam (Netherlands) where he was treated for a post-traumatic dystrophy of the right hand.
- 18 After Mr van der Duin resumed residence in the Netherlands on a permanent basis, his registration with the CPAM was terminated on 18 August 1995.
- 19 The Akademisch Ziekenhuis Rotterdam, which had asked ANOZ Zorgverzekeringen to assume responsibility for the care given to Mr van der Duin, met with a refusal on 24 November 1995. In support of that refusal, ANOZ Zorgverzekeringen argues, first, that the care in question does not satisfy the conditions laid down by Article 22(1)(a) and (i) of Regulation No 1408/71, since, notwithstanding the issuing of a Form E 111 to Mr van der Duin on 15 February 1995, his condition did not require immediate benefits within the meaning of that provision. Secondly, the conditions under Article 22(1)(c) and (i) of that regulation were not met either, given the CPAM's refusal on 29 August 1995 to issue the Form E 112, the issuing of which ANOZ Zorgverzekeringen had applied for on 5 August 1995, with retrospective effect.
- 20 Mr van der Duin's action against the decision of ANOZ Zorgverzekeringen was dismissed by the Arrondissementsrechtbank te 's-Hertogenbosch (District Court, 's-Hertogenbosch) (Netherlands) by a judgment of 2 December 1998. Mr van der Duin then appealed against that decision to the Centrale Raad van Beroep.

- 21 Mrs van Wegberg-van Brederode left the Netherlands in March 1995 in order to live in Spain with her husband. The latter receives a pension on the basis of the Algemene Ouderdomswet (General Law on Old Age Insurance) at the expense of the competent Netherlands institutions.
- 22 Having taken up residence in Spain, Mr and Mrs van Wegberg-van Brederode registered with the Servei Català de la Salut (a Spanish sickness insurance institution; 'the SCS') by means of a Form E 121, which allowed them to benefit from the system for granting benefits in kind under Article 28 of Regulation No 1408/71.
- 23 The need for a hysterectomy having been determined by a Spanish gynaecologist consulted by Mrs van Wegberg-van Brederode, the latter went to the Netherlands in order to be operated upon by her former gynaecologist. The operation took place on 19 April 1996.
- 24 The Netherlands hospital's request for responsibility to be assumed for the costs in connection with Mrs van Wegberg-van Brederode's operation was refused by ANOZ Zorgverzekeringen on 25 April 1997 for reasons essentially identical to those used against Mr van der Duin. First, notwithstanding the fact that Mrs van Wegberg-van Brederode had a Form E 111 issued to her by the SCS before leaving for the Netherlands, the operation in question did not satisfy the conditions laid down by Article 22(1)(a) and (i) of Regulation No 1408/71. Secondly, the conditions of Article 22(1)(c) and (i) of that regulation were not met in the main proceedings either, in view in particular of the SCS's subsequent refusal to issue Form E 112, the issuing of which with retrospective effect was applied for after the operation.
- 25 Mrs van Wegberg-van Brederode brought an action against that decision before the Arrondissementsrechtbank te Utrecht (District Court, Utrecht) (Netherlands).

In its judgment of 28 July 1999, that court allowed the action on the grounds that the SCS was not the competent institution to issue the authorisation referred to in Article 22(1)(c) and (i) of Regulation No 1408/71 and that the combined provisions of Articles 28 and 31 of that regulation showed that the cost of the treatment at issue in the main proceedings was the responsibility of the competent Netherlands institution.

- 26 ANOZ Zorgverzekeringen then appealed against that decision to the Centrale Raad van Beroep.
- 27 In its order for reference, the Centrale Raad van Beroep indicates that it provisionally accepts, first, that the condition of Mr van der Duin and Mrs van Wegberg-van Brederode did not necessitate immediate benefits within the meaning of Article 22(1)(a) of Regulation No 1408/71, and, secondly, that those persons went to the Netherlands in order to receive there the care that is at issue in the main proceedings.
- 28 In that latter respect, the referring court notes that the assuming of responsibility for benefits for which provision is made in Article 22(1)(c) and (i) of Regulation No 1408/71 is subject to prior authorisation being obtained. It also notes that, although it refers only to 'employed or self-employed persons', that provision also applies to pensioners, as the case-law of the Court of Justice shows (Case 182/78 *Pierik* [1979] ECR 1977).
- 29 The Centrale Raad van Beroep doubts, however, whether that provision may apply to a pensioner or members of his family who, in accordance with Article 28 of Regulation No 1408/71, enjoy benefits in kind provided by the institution of their place of residence on behalf of the competent institution of the Member State liable for payment of the pension, where those persons wish to go to the latter Member State for medical treatment.

30 In that respect, the referring court notes in particular that Article 21 of Regulation No 1408/71 specifically refers to the case of employed persons who, while resident in a Member State other than the competent State, stay in the competent State, which might suggest that Article 22 of that regulation concerns only the right to benefits provided outside the territory of the competent Member State. In this case, the Kingdom of the Netherlands remained the competent State, as is suggested in particular by the wording of Article 1(o) to (q) of Regulation No 1408/71 and the case-law of the Court of Justice (Case 117/77 *Pierik* [1978] ECR 825; Case 69/79 *Jordens-Vosters* [1980] ECR 75).

31 Failing that, the Centrale Raad van Beroep considers that the same case-law might at least indicate that, if Article 22(1)(c) and (i) of Regulation No 1408/71 were applied, it is the institution of the competent Member State — in this case the Netherlands institution — which should be empowered to issue the prior authorisation to which that provision refers.

32 If the Court were to confirm that that provision is not in fact applicable to socially insured persons in the same position as Mr van der Duin or Mrs van Wegberg-van Brederode, the referring court further asks whether it is necessary, regarding them, to apply Article 31 of Regulation No 1408/71 alone, or whether the provisions of Article 21 of the same regulation, although they refer only to workers, should be applied by analogy.

33 In those circumstances, the Centrale Raad van Beroep decided by order of 21 March 2001 to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 22(1)(c) of Regulation No 1408/71 also apply to (a member of the family of) a pensioner who is entitled under Article 28 of Regulation No 1408/71 to receive benefits from the institution of the place of residence

(in the present cases from the French or the Spanish sickness insurance funds respectively), those benefits being chargeable to the institution competent in accordance with Article 28(2)(a) of Regulation No 1408/71, that is to say the Netherlands sickness insurance fund, in a situation in which the pensioner (or a member of his family) travels to the Member State where the competent institution is situated (in this case the Netherlands) in order to receive medical treatment?

- (2) If the answer to Question 1 is in the affirmative, which institution is responsible for granting the authorisation referred to in Article 22(1)(c) of Regulation No 1408/71?
- (3) If the answer to Question 1 is negative, do the provisions of Article 21 or those of Article 31 of Regulation No 1408/71 govern the entitlement to benefits of (a member of the family of) a pensioner who is entitled under Article 28 of Regulation No 1408/71 to receive benefits from the institution of the place of residence (the French and Spanish sickness insurance funds respectively), those benefits being chargeable to the institution competent in accordance with Article 28(2)(a) of Regulation No 1408/71, that is to say the Netherlands sickness insurance fund, in a situation where the person concerned is staying in the competent State?’

The first question

- ³⁴ By its first question, the referring court essentially asks whether Article 22(1)(c) and (i) of Regulation No 1408/71 must be interpreted as applying to a pensioner and members of his family who reside in a Member State other than the one which is liable for payment of that pension and who benefit on that basis,

following their registration with the institution of the place of residence, from the system provided for by Article 28 of that regulation, where those socially insured persons wish to go to the Member State liable for payment of the pension for the purpose of receiving medical treatment there.

35 All the Governments which have submitted observations to the Court, and the Commission, consider that that question should be answered in the affirmative.

36 In order to reply to the question reformulated as above, it should first be noted that, according to the case-law of the Court, Article 22(1)(c) of Regulation No 1408/71 governs the entitlement to benefits in kind of pensioners and members of their family, resident in a Member State, who ask the competent institution for authorisation to go to the territory of another Member State to receive treatment there which is appropriate to their condition, while Article 31 of that regulation, to the exclusion of Article 22(1)(a), governs the entitlement of that class of insured persons to benefits in kind where those benefits become necessary during a stay in a Member State other than the State in which they reside (*Pierik*, paragraphs 6 and 7; Case C-326/00 *IKA* [2003] ECR I-1703, paragraphs 26, 34 and 39).

37 In that respect, the Commission argues that, in this case, the documents on file in the main proceedings in the case of Mr van der Duin do not allow it to be determined with certainty that his stay in the Netherlands was indeed planned for medical purposes.

38 It should, however, be remembered that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the

national court (see *inter alia* Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12; Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25; and *IKA*, paragraph 27). In this case, as stated in paragraph 27 of this judgment, the national court has indicated that it provisionally accepts that both Mr van der Duin and Mrs van Wegberg-van Brederode went to the Netherlands to receive the treatment at issue in the main proceedings, which explains, moreover, why it considered it appropriate to ask the Court about the possible applicability of Article 22(1)(c) and (i) of Regulation No 1408/71 to such situations.

- 39 Secondly, the case-law of the Court of Justice shows that Article 28 of Regulation No 1408/71 lays down a 'conflict rule', enabling the determination, in relation to pensioners resident in a Member State other than the one liable for payment of the pension, of the institution responsible for the payment of the benefits therein mentioned and the law applicable (*Jordens-Vosters*, paragraph 12).
- 40 Once a pensioner and the members of his family have subscribed to the system established by Article 28 of Regulation No 1408/71 by registering with the institution of the place of residence as Article 29 of Regulation No 574/72 requires, then, as the wording itself of Article 28 makes clear, that pensioner enjoys, for himself and his family, a right to benefits in kind provided as if the person concerned held a pension under the legislation of the Member State on whose territory he resides and were entitled to benefits in kind by virtue of that legislation.
- 41 The case-law of the Court shows that although, in such a case, the legislation of the Member State liable for payment of the pension may provide for additional social benefits in favour of those insured persons, that is simply an option that that Member State has, and any such conduct does not constitute for those persons a right flowing from Regulation No 1408/71 (*Jordens-Vosters*, paragraphs 11 to 13).

- 42 It follows in particular that pensioners and members of their families who fall under the system laid down in Article 28 of Regulation No 1408/71 cannot, as the referring court envisages, be credited by virtue of that regulation with an additional right allowing them, by analogy with what Article 21 of that regulation provides in relation to employees or self-employed persons who reside in a Member State other than the competent State, to enjoy, when they stay in the Member State liable for payment of the pension, benefits in kind according to the legislation of that Member State as if they resided there.
- 43 It should, moreover, be noted in that respect that, as most of the Governments which submitted observations and the Commission have argued, such an application by analogy would be incompatible with the detailed rules laid down by the Community legislature concerning the acceptance of responsibility, by the Member State liable for payment of the pension, for benefits provided on its behalf by the institution of the place of residence in accordance with the provisions of Article 28 of Regulation No 1408/71.
- 44 Indeed, as is apparent from Article 95 of Regulation No 574/72, the amount of the benefits provided by virtue of that Article 28 is in principle repaid to the institution of the place of residence by the competent institution of the State liable for payment of the pension by means of a lump-sum amount which is intended to cover the whole of the benefits in kind to be provided to the persons concerned, and the amount of which is calculated by reference to the average annual healthcare costs generated by a pensioner falling within the system of the Member State of residence, which lump sum therefore includes the cost of any healthcare that may be provided in a Member State other than that of residence.
- 45 To that extent, allowing a socially insured person who benefits from the system laid down by Article 28 of Regulation No 1408/71 to go at will to the Member

State liable for payment of the pension for the purposes of receiving from the competent institution of that State the benefits provided for by its legislation would imply that that Member State assumes a second time the burden of the care which it has already financed by means of the lump-sum payment to the Member State of residence.

- 46 Concerning employed or self-employed persons residing in a Member State other than the competent State, it should be noted, conversely, that the direct assumption of responsibility by the institution of the competent State for benefits provided to the person concerned during a stay in that State, provided for in Article 21 of Regulation No 1408/71, does not imply any double financing by that latter Member State. In relation to such persons, the assumption of responsibility by the competent State for benefits in kind provided to them by the institution of the Member State of residence pursuant to Article 19 of Regulation No 1408/71 takes place, as Article 93 of Regulation No 574/72 provides, not in the form of an annual lump sum but in the form of a repayment of the actual amount of the benefits provided, as shown by the accounts of that latter institution.
- 47 It follows from the above considerations that, once pensioners and members of their families are registered with the institution of the place of residence, those pensioners enjoy, in accordance with Articles 28 of Regulation No 1408/71 and 29 of Regulation No 574/72, for themselves and members of their families, a right to benefits in kind from the competent institution of the Member State of residence as if they were pensioners under the legislation of that latter State and were entitled on that basis to those benefits in kind. It follows that that institution and the Member State of residence become, for those socially insured persons, by reason of this legal fiction and the assimilation resulting therefrom, the competent institution and the competent State as regards the granting of those benefits, without prejudice to the considerations set out in paragraph 41 of this judgment.

- 48 In those circumstances, there is nothing to prevent socially insured persons who thus benefit from the system provided for in Article 28 of Regulation No 1408/71 from being made subject to Article 22(1)(c) and (i) of that regulation, just like other pensioners and family members who fall within the legislation of the Member State of residence.
- 49 Those socially insured persons satisfy, as that latter provision requires, the conditions imposed by the legislation of the competent State, namely the Member State of their residence, for entitlement to benefits. It follows that their movement to another Member State for the purposes of receiving benefits in kind guaranteed by that provision falls within the provisions of the latter, including where the movement in question is to the Member State liable for payment of the pension.
- 50 It should also be noted in that respect that, placed in the context of the general objectives of the EC Treaty, Article 22 of Regulation No 1408/71 is one of a number of measures designed to allow workers from one Member State to enjoy, under the conditions which it specifies, benefits in kind in the other Member States, whatever the national institution to which he is affiliated and whatever the place of his residence (see, by analogy, in relation to a previous version of that Article 22, *Pierik*, paragraph 14).
- 51 Taking account of the whole of the above considerations, the answer to the first question referred must be that Article 22(1)(c) and (i) of Regulation No 1408/71 must be interpreted as also applying to a pensioner and members of his family who reside in a Member State other than the one which is liable for payment of that pension, and who benefit on that basis, following their registration with the institution of the place of residence, from the system laid down by Article 28 of that regulation, where those socially insured persons wish to go to the Member State liable for payment of the pension in order to receive medical treatment there.

The second question

- 52 In its second question, the referring court asks which is the competent institution for issuing the prior authorisation mentioned in Article 22(1)(c) and (i) of Regulation No 1408/71 where the application for authorisation concerns a pensioner or members of his family residing in a Member State other than the one liable for payment of that pension and who benefit, on that basis, following their registration with the institution of the place of residence, from the system provided for in Article 28 of that regulation.
- 53 As is apparent from paragraph 47 of this judgment in particular, once pensioners and members of their families are registered with the institution of the place of residence, those pensioners enjoy, in accordance with Articles 28 of Regulation No 1408/71 and 29 of Regulation No 574/72, for themselves and members of their families, a right to benefits in kind from the competent institution of the Member State of residence as if they were pensioners under the legislation of that latter State and were entitled on that basis to those benefits in kind, with the result that that institution and the Member State of residence become, for those socially insured persons, by reason of this legal fiction and the assimilation resulting therefrom, the competent institution and the competent State as regards the granting of those benefits.
- 54 It follows that, as all the Governments submitting observations and the Commission have argued, the institution competent, in appropriate cases, to authorise those socially insured persons to go to another Member State, including the one which is liable for payment of the pension, for the purpose of receiving benefits in kind there under the conditions laid down by Article 22(1)(c) and (i), is the institution of the place of residence of the persons concerned.

55 As some of those Governments and the Commission have observed, that solution is also justified, first, in the light of the fact that it is in principle for the institution of the place of residence to bear the burden of the benefits in kind thus provided, in accordance with the provisions of Articles 36 of Regulation No 1408/71 and 93 of Regulation No 574/72, and, secondly, by the fact that that institution is the one best placed to verify in a particular case whether the conditions for issuing that authorisation, particularly those in which Article 22(2) of Regulation No 1408/71 make such issuing obligatory, are fulfilled.

56 In the light of the above, the answer to the second question referred must be that the institution competent to issue the prior authorisation mentioned in Article 22(1)(c) and (i) of Regulation No 1408/71 where the application for authorisation concerns a pensioner or members of his family who reside in a Member State other than the one which is liable for payment of that pension and who benefit, on that basis, following their registration with the institution of the place of residence, from the system provided for in Article 28 of that regulation is the institution of the place of residence of the persons concerned.

The third question

57 Since the referring court asks its third question only in the event of a negative answer to the first question, and the latter has been answered affirmatively, it is not necessary to reply to the third question.

Costs

- 58 The costs incurred by the Netherlands, German, Spanish, French and United Kingdom Governments and by the Commission, 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 (Fifth Chamber),

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 21 March 2001, hereby rules:

1. Article 22(1)(c) and (i) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and

their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 must be interpreted as also applying to a pensioner and members of his family who reside in a Member State other than the one which is liable for payment of that pension, and who benefit on that basis, following their registration with the institution of the place of residence, from the system laid down by Article 28 of that regulation, where those socially insured persons wish to go to the Member State liable for payment of the pension in order to receive medical treatment there.

2. The institution competent to issue the prior authorisation mentioned in the said Article 22(1)(c) and (i) where the application for authorisation concerns socially insured persons in such a position is the institution of the place of residence of the persons concerned.

Wathelet

Timmermans

La Pergola

Jann

von Bahr

Delivered in open court in Luxembourg on 3 July 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber