JUDGMENT OF THE COURT
OF 16 MAY 1979 [1]

Fonds national de retraite des ouvriers mineurs (FNROM) v Giovanni Mura (preliminary ruling requested by the Cour du Travail, Mons)

"Social security"

Case 236/78

Social security for migrant workers — Benefits — Overlapping — Right acquired by virtue of national legislation alone — Provisions for reduction or suspension — Applicability — Community rules more favourable — Preference
(Regulation No 1408/71 of the Council, Art. 46)

Where the provisions of Article 46 of Regulation No 1408/71 are more favourable to the worker than the provisions of national legislation alone, by virtue of which the worker receives a pension, the provisions of that article must be applied in their entirety.

In Case 236/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour du Travail (Labour Court), Mons, for a preliminary ruling in the action pending before that court between

FONDS NATIONAL DE RETRAITE DES OUVRIERS MINEURS [National Mine-Workers' Pension Fund], (FNROM), Brussels,

and

GIOVANNI MURA, Boussu (Belgium),

on the interpretation of Article 46 (1) and (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to

1 — Language of the Case: French.

employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II) p. 416),

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, acting as President, Lord Mackenzie Stuart (President of the Second Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The Cour du Travail, Mons, is making a second reference to the Court of Justice in the same case. By judgment of 21 January 1977 the national court submitted a question on the interpretation of Article 12 of Regulation No 1408/71. Answer was given by judgment of 13 October 1977 (Case 22/77/*Mura* [1977] ECR 1699).

The facts of the case may be summarized as follows:

Mr Mura, an Italian national, worked as a mine-worker in France, from 1958 to 1962 and in Belgium from 1962 to 1973. On then becoming incapacitated Mr Mura received on 1 November 1973 a Belgian pension on the sole basis of the Belgian legislation: he fulfilled the condition of ten years' service in mining undertakings as required by the said legislation. From 1 November 1973 he also received a proportionate part of an invalidity pension under French insurance, awarded to him as from 1 November 1973, through the aggregation of the periods of employment in both Belgium and France.

Applying the national rules against the overlapping of benefits (Article 23 (1) of the Belgian Royal Decree of 19 November 1970 on the invalidity pension

scheme for mine-workers) and Article 46 (3) of Regulation No 1408/71, the Fonds National de Retraite des Ouvriers Mineurs, hereinafter referred to as "the Fund", reduced the Belgian pension by the amount of the French pension relating to the period from 1 November 1973 to 31 March 1975 and claimed from Mr Mura reimbursement of the overpayment.

Basing his entitlement to receive the Belgian pension without reduction chiefly on the judgment of the Court in Case 24/75 *Petroni* [1975] ECR 1149, Mr Mura brought an action before the Tribunal du Travail, Mons, in which he was successful. The Fund appealed to the Cour du Travail, Mons, which referred the following question to the Court of Justice for a preliminary ruling:

"Must Article 12 of Regulation No 1408/71 authorizing the overlapping of benefits take precedence over national rules against overlapping in cases in which the Community provisions result in a migrant worker's being placed in a more favourable position than a non-migrant worker?"

The Court ruled that:

"So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied".

When the matter was pursued before the national court and it was decided that the hearing was to be continued, the Fund took the view that Article 46 (2) (c) of Regulation No 1408/71 merely specified the method for calculating the amount of the apportionment and that its application could be contemplated only in the cases of those who came exclusively under the system of Article 46 (2), that is to say who had to rely on aggregation of insurance periods to give entitlement to pension.

In view of these considerations the Cour du Travail, Mons, decided that it was proper to make a fresh reference to the Court of Justice in accordance with Article 177 of the EEC Treaty. By judgment of 13 October 1978 the Cour du Travail referred the following question to the Court for a preliminary ruling:

"Does the second subparagraph of Article 46 (1) of Regulation (EEC) No 1408/71 preclude the application of Article 46 (2) (c)? This question is of particular relevance inasmuch as the Court of Justice, in its judgment of 14 March 1978 in Case 98/77, *Schaap*, refers in the operative part, and not in the statement of the grounds therefor, to the whole of Article 46".

The judgment making the reference was received at the Court on 27 October 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Mr Mura, represented by D. Rossini, Director of the Patronato ACLI, a social service organization, by the Italian Government, represented by its ambassador A. Maresca, acting as Agent, assisted by the Avvocato dello Stato, O. Fiumara, and by the Commission of the European Communities, represented by Mrs M. J. Jonczy, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to

open the oral procedure without any preparatory inquiry..

II — Summary of the written observations submitted to the Court

Mr Mura takes the view that Article 46 (1) of Regulation No 1408/71 does not exclude the application of Article 46 (2) (c) when calculating the pension according to the rules of aggregation and apportionment. Indeed:

— The wording of Article 46 (2) (c) leaves no doubt that it applies to Article 46 (2) as a whole.

— Article 46 (2) (c) is the logical corollary of subparagraphs (a) and (b) since its objective is:

  — To guarantee the migrant worker the full benefit due by the national legislation on the basis of a maximum length of insurance periods;

  — To prevent the method of calculation used from resulting in the imposition on the competent institution of the burden of a benefit higher than the full benefit due under the legislation which it applies.

Mr Mura worked for 11 years in Belgium and four in France. Since the maximum length of insurance periods giving entitlement in Belgium to the full pension under the mining scheme was fixed at ten years, the denominator of the fraction to be taken into account in calculating the Belgian pension under Article 46 (2) (c) could not exceed ten. However, since the application of the fraction 11/10ths would be to burden the Belgian institution with a benefit in excess of the full benefit provided for by the Belgian legislation, it would be right to limit the benefit due from Belgium to the amount of the full pension. This would be in accordance with the judgments in the aforementioned Case 24/75 and in Case 1/67 *Ciechelski* [1967] ECR 181.

The *Italian Government* observes that it appears from the case-law of the Court, confirmed by the judgments in Cases 98/77, *Schaap*, [1978] ECR 707, and 105/77 *Boerboom-Kersjes*, [1978] ECR 717, that:

— In the absence of a common social security scheme the Community rules guarantee, simply by co-ordinating the various national schemes and aggregating insurance periods, that a person who has worked successively or alternately in several Member States is not deprived thereby of social security benefits which he would have enjoyed if he had always worked in the same State; on the other hand these rules ought not to involve the reduction or withdrawal of social security benefits already due to the worker under national legal systems without reference to the Community legislation or to the overlapping provided for by the said Community rules;

— The Community rules do not replace national rules, which apply in their entirety both when they grant an independent benefit and when they reduce it (rule against overlapping);

— The Community rules guarantee to the worker in any event the most favourable treatment available as a result of the full application of the national rules and the application of the principles of aggregation and apportionment under the provisions of Regulation No 1408/71.

The rules on aggregation and apportionment include Article 46 (2) (c) which guarantees to the worker the benefits acquired under national legislation subject only to the restriction that in no event has the competent national institution to bear costs of a benefit greater than the full benefit provided for by the legislation which it administers.

As a result the Italian Government thinks that the question ought to be answered less in terms of the interpretation of the second subparagraph of Article 46 (1) than by application in any event of the rules laid down in Article 46 (2) as a whole in order to determine by means of comparison the most favourable position for the worker. In its view it would be wrong to object that the rules of Article 46 (2) are directly applicable solely when the conditions for the acquisition of the right to benefits are fulfilled only having regard to the provisions of Article 45.

Article 46 provides for the application of the provisions either of paragraph (1) or of paragraph (2) according to whether or not the aforementioned conditions are satisfied (save in the first case for the qualification of the comparison mentioned in the second subparagraph of Article 46 (1)). Further, if an independent national benefit were reduced by the application of the national rule against overlapping up to a level corresponding to an amount which a worker receives in another Member State under the Community rules, not only would he receive no benefit from the application of the Community rules, but they might even work to his disadvantage (splitting up of the full benefit, less favourable exchange rate and so forth). It therefore appears right to ascertain whether the application in their entirety of the rules on aggregation and apportionment (that is to say the whole of the rules referred to in Article 46 (2)) as if there were no independent national benefit, would lead to a more favourable position for the worker of which he could take advantage.

The *Commission* observes first of all that the Belgian legislation in question is not of the type of those systems referred to in Article 46 (2) (c) of Regulation No 1408/71, namely those which provide a ceiling of benefits based on a maximum insurance period. The Belgian pension is granted at a flat rate to a worker who is incapable of working and who has worked for a minimum of ten years in mining undertakings.

The Commission observes that strictly according to Article 46 (1) it must be inferred that neither the qualification with regard to the calculation of the apportionment contained in Article 46 (2) (c) nor the rules in relation to duplicate periods in Article 46 (2) (d) apply when entitlement to benefit depends on the national legislation alone and the apportionment is made in order to grant the maximum amount.

Nevertheless, since the Court in its judgment in Case 22/77 referred to the "Rules regarding aggregation and apportionment" it may be asked whether it did not intend to include in this the whole of Article 46 (2). In view of the fact that Member States may henceforth apply their rules against overlapping, it would be right to apply the qualification set out in Article 46 (2) (c) in order that the terms of the comparison between the national benefit and the apportionment should not be distorted.

Although the facts of those cases did not justify such a difference, the Court referred in its judgments in *Schaap* and *Boerboom-Kersjes* to the "Rules laid down by Article 46 of Regulation No 1408/71". It seems that it intended to go beyond the rules on aggregation and apportionment and that, bearing in mind the observations made by Mr Advocate General Warner in his opinion, it referred to Article 46 as a whole, so as to include in the terms of the comparison Article 46 (3).

According to Mr Warner's opinion the Court decided that Article 46 (3) was incompatible with Article 51 of the Treaty to the extent only to which it reduced the amount of a benefit acquired under national legislation alone, but it did not declare Article 46 (3) otherwise invalid. The Advocate General claimed that two distinct principles were relevant:

— The principle that Article 51 of the Treaty does not empower the Council to take away from migrant workers rights given them by the legislative systems of Member States.

— The primacy of Community law by virtue of which national legislation cannot take away rights conferred by Community law.

The Commission therefore thinks that Article 46 (3) is applied, not as in the aforementioned case of *Petroni* to reduce a benefit acquired under national legislation alone, but to allow a migrant worker to receive the highest benefit which he can claim in a Member State either under the national legislation, having regard to the provisions on overlapping, or under the provisions of Community law. The migrant worker thus has a guarantee that the reduction in his benefits, whether on the basis of national clauses against overlapping or Article 46 (3), cannot lead to a sum less than the highest theoretical amount.

The Commission therefore considers that the answer to the question might be as follows:

"Article 46 (2) (c) of Regulation No 1408/71 of the Council, which refers to legislative systems which take account of the length of insurance periods in calculating the benefit, is an integral part of the system of aggregation and apportionment provided for by the said regulation in relation to pensions.

So long as a worker receives a pension under national legislation alone, the provisions of Regulation No 1408/71 do

not prevent the national legislation from being applied in its entirety, including the national rules against overlapping, it being understood that if the application of that legislation is less advantageous than that of the system under Article 46 of Regulation No 1408/71, the provisions of Article 46 (2) and (3) must be applied in order to allow the worker to receive the highest benefit which he can claim either under national legislation or under the rules of Community law".

III — Oral procedure

The Fund, represented by S. Yanick, of the Mons Bar, G. Mura, represented by D. Rossini, Director of the Patronato ACLI social service organization, and the Commission of the European Communities, represented by Mrs M. J. Jonczy, acting as Agent, submitted oral argument at the hearing on 22 March 1979.

The Fund put forward two arguments explaining that the judgment in Case 22/77 related only to Article 46 (1), referring itself only to Article 46 (2) (a) and (b):

— On the one hand Mr Mura's case ought not to be considered on the basis of Article 46 (2) since he received in Belgium a full invalidity pension on the basis solely of the periods completed in that country. Article 46 (2) thus applies only in connexion with the comparison provided for in the second sub-paragraph of Article 46 (1).

— Further, Article 46 (2) (c) must not be applied in the present case in so far as the Belgian legislation is not of the type referred to therein. Article 46 (2) (c) refers to legislative systems which prescribe a maximum insurance period whereas the Belgian mining scheme prescribes a minimum period.

With the aid of two examples similar to Mr Mura's case the Fund demonstrates that it is not possible automatically to infer that the application of the Belgian legislation to a person in receipt of invalidity benefits is less advantageous than that of the rules of Community law.

The Advocate General delivered his opinion at the hearing on 4 April 1979.

Decision

1 By a judgment of 13 October 1978, received at the Court on 27 October, the Cour du Travail, Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 46 (1) and (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 That question has been raised in the context of an action concerning the way in which the competent Belgian institution calculated the invalidity pension of an Italian national, the defendant in the main action, who was employed as a mine-worker in France from 1958 to 1962 and then in Belgium from 1962 to 1973, when he became incapacitated.

3 In Belgium the worker satisfied the condition laid down by national legislation for the acquisition of the right to an invalidity pension under the scheme for mine-workers, namely a minimum of ten years' service in mining undertakings. On the other hand, for the acquisition of his right to benefit in France, he had to have recourse to the provisions of Article 45 of Regulation No 1408/71; for the purpose of calculating that benefit, the periods actually completed in both Member States were aggregated and the French benefit was apportioned. Applying the national rules against the overlapping of benefits and Article 46 (3) of Regulation No 1408/71, the competent Belgian institution, the Fonds National de Retraite des Ouvriers Mineurs (FNROM), then deducted the apportioned amount of French benefit from the invalidity pension and asked the person concerned to refund the sum overpaid.

4 During the course of the same action the Cour du Travail, Mons asked in a previous judgment of 21 January 1977 under Article 177 of the Treaty whether Article 12 of Regulation No 1408/71 authorizing the overlapping of benefits must take precedence over national rules against overlapping in cases in which the Community provisions result in a migrant worker's being placed in a more favourable position than a non-migrant worker.

5 In its judgment of 13 October 1977 in Case 22/77 [1977] ECR 1699 the Court gave the following answer:

"So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied".

6 The Cour du Travail, Mons, sharing the doubts expressed by the Fund on the interpretation of Article 46 of Regulation No 1408/71, made a second reference to the Court and asked the following question:

"Does the second subparagraph of Article 46 (1) . . . preclude the application of Article 46 (2) (c)? This question is of particular relevance inasmuch as the Court of Justice, in its judgment of 14 March 1978 in Case 98/77, *Schaap*, refers in the operative part, and not in the statement of the grounds therefor, to the whole of Article 46".

7 To answer this question it is necessary to consider in the first place the provisions of Regulation No 1408/71.

8 Article 46 of the regulation contains the provisions to be applied for the award of old-age pensions in the case of a worker who has been subject to the legislation of two or more Member States. For the award of invalidity benefits in the case of a worker who has been subject successively or alternately to the legislative systems of two or more Member States, one at least of which is not a system determining the amount of benefit independently of the duration of insurance periods or of residence, the provisions of Article 46, by virtue of Article 40 (1), apply by analogy.

9 Article 46 provides that "the theoretical amount" of benefit shall be calculated by the institution of each of the Member States to whose legislation the worker has been subject. The theoretical amount is the amount of benefit which the worker could claim if all the insurance periods or periods of residence completed under the legislation of the Member States to which he has been subject had been completed in the State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed, then that amount shall be taken as the theoretical amount.

10 The "actual amount" of the benefit is calculated as follows. Where a worker has been subject to the legislation of a Member State and where the conditions for entitlement to benefit have been satisfied without application

of the provisions of Article 45 being necessary, the competent institution of that Member State shall, in accordance with the legislation which it administers, determine the amount of benefit corresponding to the total length of the insurance periods or periods of residence to be taken into account in pursuance of such legislation. It shall also undertake the calculation of the amount of benefit which would be obtained by applying the rules laid down in Article 46 (2) (a) and (b), namely the rules on aggregation and apportionment. Only the higher of these two amounts is to be considered (Article 46 (1)). Where a worker has been subject to the legislation of any Member State and does not satisfy the conditions for entitlement to benefits unless account is taken of the provisions of Article 45 (Article 46 (2) (a) and (b)), the responsible institution of that Member State is to apply the rules on aggregation and apportionment set out in Article 46 (2). The process of apportionment enables an "actual amount" to be established on the basis of the theoretical amount *pro rata* with the length of the periods of insurance or residence completed before the occurrence of the event insured against under the legislation applied by that institution as compared with the total length of the periods of insurance and residence completed under the legislation of all the Member States concerned before the occurrence of that event.

11 The first subparagraph of Article 46 (3) provides that the worker shall be entitled to the total sum of the benefits calculated in accordance with the above-mentioned provisions, within the limit of the highest theoretical amount of benefits. The second subparagraph of Article 46 (3) nevertheless provides that where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph (1) shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with Article 46 (1).

12 In its judgment of 21 October 1975 in Case 34/75, *Petroni* [1975] ECR 1149, the Court ruled that Article 46 (3) is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under national legislation alone. In subsequent judgments and in particular in the judgment of 13 October 1977 in the present case and that of 14 March 1978 in Case 98/77, *Schaap* [1978] ECR 707, the Court stated that where, on the application of national rules against

overlapping, the application of the national legislation alone in its entirety proves less favourable to the worker than the application of the rules laid down by the Council in Regulation No 1408/71, the latter must be applied.

13 It follows that in such a case the provisions of Article 46 of the regulation must be applied in their entirety.

Costs

14 The costs incurred by the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

15 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Cour du Travail, Mons, by a judgment of 13 October 1978, hereby rules:

Where the provisions of Article 46 of Regulation No 1408/71 are more favourable to the worker than the provisions of national legislation

alone, by virtue of which the worker receives a pension, the provisions of that article must be applied in their entirety.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
Acting as President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 4 APRIL 1979

My Lords,

This case comes to the Court, for the second time, by way of a reference for a preliminary ruling by the Cour du Travail of Mons. On the first occasion it bore number 22/77 and the Judgment of the Court was delivered on 13 October 1977. It is reported at [1977] ECR 1699.

The facts, Your Lordships will remember, are these.

Signor Mura, who was born on 28 October 1937, worked as a miner in France for some four years, from 1957 to 1962, and in Belgium for eleven years, from 1962 to 1973. He then became incapacitated.

The Belgian legislation in point is that concerning invalidity benefits for mineworkers, which is administered by the Fonds National de Retraite des Ouvriers Mineurs (the "FNROM"). It is mainly contained in an Arrêté Royal of 19 November 1977 (Moniteur Belge 26. 11. 1970).

By virtue of Article 1 of that Arrêté Royal a mineworker is entitled to an invalidity pension if, having been employed for at least ten years as such, he becomes incapacitated from normal work. By Article 4 the amount of the pension is fixed at an annual sum expressed in Belgian francs which varies