JUDGMENT OF THE COURT (Sixth Chamber)
2 October 1997 *

In Case C-144/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour du Travail de Bruxelles for a preliminary ruling in the proceedings pending before that court between

Office National des Pensions (ONP)

and

Maria Cirotti

on the interpretation of Articles 46 and 51 of Regulation (EEC) No 1408/71 of the Council 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray (Rapporteur), P. J. G. Kapteyn, G. Hirsch and H. Ragnemalm, Judges,

* Language of the case: French.

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Office National des Pensions (ONP), by Gabriel Perl, General Administrator,

— Mrs Cirotti, by Jules Raskin, of the Liège Bar, and Franco Agostini, of the Rome Bar,

— the Commission of the European Communities, by Maria Patakia and Peter Hillenkamp, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Office National des Pensions, represented by Jean-Paul Lheureux, Assistant Adviser, of Mrs Cirotti, represented by Jules Raskin, and of the Commission, represented by Maria Patakia, at the hearing on 6 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By a judgment of 25 April 1996, received at the Court on 3 May 1996, the Cour du Travail de Bruxelles (Higher Labour Court, Brussels) referred to the Court for a

preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 46 and 51 of Regulation (EEC) No 1408/71 of the Council 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6; hereinafter 'Regulation No 1408/71').

2 The question was raised in proceedings between Mrs Cirotti and the Office National des Pensions (National Pensions Office; 'the ONP') concerning the calculation of the share of her husband's employed person's retirement pension to which she was entitled under Belgian law.

3 Mrs Cirotti is an Italian national entitled to an invalidity pension in Italy. From July 1981 she received in Belgium a share of the employed person's retirement pension paid to her husband, from whom she was living apart, on the basis of Article 74(2) of the Belgian Royal Decree of 21 December 1967 laying down general rules for the retirement and survivors' pensions of employed persons, as amended by the Royal Decree of 3 December 1970 (*Moniteur Belge* of 23 December 1970).

4 As it stood on 1 July 1981, that provision stated:

'A wife living apart or judicially separated from her husband may obtain payment of part of his retirement pension provided that:

(a) she has not been deprived of parental authority or convicted of an attempt on the life of her husband;

(b) if she lives abroad, such residence does not prevent payment of an employed person's pension;

(c) she has ceased all occupational activity other than as authorized under Article 64, and does not receive benefit on account of sickness, invalidity or involuntary unemployment pursuant to Belgian or foreign social security legislation, save for benefit relating to loss of limb or the use thereof;

(d) she does not receive a Belgian or foreign retirement or survivor's pension or advantage in lieu thereof, or a benefit in respect of loss of limb or the use thereof of such an amount that application of paragraph 4 does not result in any charge on her husband's pension being made in her favour.'

5 As amended by the Royal Decree of 21 May 1991 (*Moniteur Belge* of 27 June 1991), that article provides:

'One spouse living apart or judicially separated from the other may obtain payment of part of the retirement pension of that other, provided that:

(a) that spouse has not been deprived of parental authority or convicted of an attempt on the life of the other;

(b) his or her residence abroad, or the application of Article 70, does not prevent payment of an employed person's pension;

(c) he or she has ceased all occupational activity other than as authorized under Article 64, and does not receive benefit on account of sickness, invalidity or

involuntary unemployment pursuant to Belgian or foreign social security legislation, or any allowance on account of interruption or reduction of work;

(d) he or she does not receive a retirement or survivor's pension or advantage in lieu thereof pursuant to a Belgian scheme, a scheme of a foreign country or a scheme applicable to the staff of an institution governed by public international law, of such an amount that application of paragraphs 3 and 4 does not result in any deduction from the pension of the other spouse being made in his or her favour.'

6 The documents before the Court show that, by a decision of 21 December 1988, the ONP reduced the amount of the benefits paid to Mrs Cirotti under the above provisions, in order to take account of increases in her Italian pension since 1981, which appear to be index-linked.

7 By application of 17 January 1989, Mrs Cirotti challenged that decision of the ONP before the Tribunal du Travail de Bruxelles (Labour Court, Brussels), which ruled in her favour by a judgment of 17 June 1993, in which it applied by analogy to the present case the interpretation given by the Court of Justice in Case C-93/90 *Cassamali* v *Office National des Pensions* [1991] ECR I-1401. In that judgment, the Court ruled that where, under national rules against the overlapping of benefits, the pension paid to a worker by a Member State has been calculated at an amount such that, when added to the amount of a benefit of any kind paid by another Member State, it does not exceed a certain maximum, neither Article 51(1) of Regulation (EEC) No 1408/71 nor any other provision of Community law allows the amount of that pension to be adjusted in order to prevent that maximum from being exceeded, in the event of subsequent alterations being made to the other benefit on account of general economic and social developments.

8 By application of 9 July 1993, the ONP appealed against that judgment before the Cour du Travail de Bruxelles, challenging the Tribunal's reasoning by analogy. In its submission, the spouse's right to a share of the employed person's pension (at issue in the main action here) is to be regarded as analogous not to a person's own survivors' pension, but to a guaranteed level of income. That share should there-

fore be evaluated in such a way as to take account of changes in the spouse's resources and should vary by reference to other social security advantages received, possibly in another Member State.

9 The ONP adds that to apply the approach taken in the *Cassamali* judgment by analogy would result in spouses having unequal resources, since the total income of the spouse receiving the share of the retirement pension would increase if the benefit enjoyed by that person in his or her own right in another Member State was increased. That result would be contrary to Article 3(1) of Regulation No 1408/71.

10 That provision reads:

'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.'

11 Article 46 of Regulation No 1408/71, concerning the calculation of old-age pensions, provides:

'1. Where an employed or self-employed person 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 and/or Article 40(3) being necessary, the competent institution of that Member State shall, in accordance with the provisions of the legislation which it administers, determine the amount of benefit corresponding to the total length of the periods of insurance or residence to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph (2) (a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefits are not satisfied unless account is taken of the provisions of Article 45 and/or Article 40(3), the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to which the employed or self-employed person has been subject had been completed in the Member 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 referred to in this subparagraph;

(b) the institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph, and in the ratio which the length of the periods of insurance or residence completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance and residence completed under the legislations of all the Member States concerned before the risk materialized;

(c) if the total length of the periods of insurance and residence completed before the risk materializes under the legislations of all the Member States concerned is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers;

(d) the procedure for taking into account overlapping periods, when applying the rules of calculation laid down in this paragraph, shall be laid down in the implementing regulation referred to in Article 98.

3. The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2 (a).

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 the provisions of paragraph 1.

4. When in a case of invalidity, old age or survivors' pensions, the total of the benefits due from two or more Member States, under the provisions of a multilateral social security convention referred to in Article 6 (b), is lower than the total which would be due from such Member States under paragraphs 1 and 3, the person concerned shall benefit from the provisions of this chapter.'

12 Article 51 of Regulation No 1408/71 provides:

'1. If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the States concerned are altered by a fixed percentage or amount, such percentage or amount must be applied directly to the benefits determined under the provisions of Article 46, without the need for a recalculation in accordance with the provisions of that article.

2. On the other hand, if the method of determining or the rules for calculating benefits should be altered, a recalculation shall be carried out in accordance with the provisions of Article 46.'

13 Considering that the outcome of the dispute before it depended on the interpretation of Regulation No 1408/71, and in particular Articles 46 and 51 thereof, the national court decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 46 and 51 of Regulation (EEC) No 1408/71 be interpreted as applying in the event of an invalidity benefit calculated under the legislation of one Member State overlapping with an old-age benefit calculated under the legislation of another Member State that grants a person a share of the employed person's old-age benefit payable to his or her spouse from whom that person is living apart, even if this would give migrant workers an advantage over non-migrant workers, when Article 3(1) of the regulation provides for equal treatment of all nationals of the Member States?'

14 The question asks in essence whether Articles 46 and 51(1) of Regulation No 1408/71 are to be interpreted as precluding the share of an employed person's old-age benefit, which has been granted to his or her separated spouse under the legislation applicable in a Member State, from being recalculated by reference to alterations in an invalidity benefit received by that spouse under the legislation of another Member State as a result of general economic and social developments.

15 By way of a preliminary observation, it should be noted that the documents before the Court show that the benefit the calculation of which is at issue in the main proceedings consists of a share of an employed person's old-age pension which is granted to that person's separated spouse only where certain conditions analogous to those governing the grant of personal old-age pensions are complied with, in

particular the condition that the spouse requesting such share must, subject to certain exceptions, have ceased all occupational activity.

16 Such a benefit must therefore be regarded as an 'old-age benefit' within the meaning of Regulation No 1408/71, and the rights of the beneficiary must, in accordance with Article 44 of that regulation, be determined in accordance with Chapter 3 of Title III of the regulation, of which Articles 46 and 51 form part.

17 Next, when calculating the amount of the old-age benefits payable to a worker who has been subject to the legislation of two or more Member States, the competent institution in each Member State must compare the amount payable under the national legislation alone, including any rules against overlapping, and the amount resulting from the application of Article 46 of Regulation No 1408/71. For the calculation of each benefit, the worker must enjoy the benefit of whichever system is most favourable to him (see, in particular, the judgment in Case C-85/89 *Ravida* v *Office National des Pensions* [1990] ECR I-1063, paragraph 18).

18 As the Court pointed out in Case 7/81 *Sinatra* v *FNROM* [1982] ECR 137, at paragraph 8, any subsequent alteration in one of the benefits implies in principle that a fresh comparison is to be carried out, for each benefit, between the national system and the Community system in order to determine which is the more advantageous to the worker following the alteration.

19 In paragraphs 9 and 10 of the same judgment, however, the Court stated that, in order to reduce the administrative burden which a fresh examination of the worker's situation following every alteration of benefits would represent, Article 51(1) of Regulation No 1408/71 excluded a recalculation of benefits in accordance with Article 46 and, hence, a fresh comparison between the national system and the Community system when the alteration resulted from events unconnected with the worker's personal circumstances and was the consequence of general economic and social developments.

20 The ONP argues nevertheless that Article 51(1) of Regulation No 1408/71 cannot apply in a case such as the present given that the amount of the employed person's old-age pension, a share of which is granted to that person's separated spouse, has been calculated solely on the basis of the Belgian legislation, which is more favourable than Article 46(2).

21 It is sufficient to note in that regard that, according to paragraph 20 of the *Cassamali* judgment, cited above, Article 51(1) applies even where the benefit to be reduced due to index-linked increases in another benefit has been calculated in accordance with national provisions and not according to Article 46.

22 In challenging the applicability of Article 51(1), the ONP also cites the judgment in Case C-65/92 *Office National des Pensions* v *Levatino* [1993] ECR I-2005, which concerned a dispute as to whether alterations in an Italian pension linked to changes in the cost of living should be taken into account when calculating the guaranteed income for elderly persons provided for by Belgian legislation.

23 In that case, the Court took the view that, whilst the provisions of Articles 46 and 51(2) of Regulation No 1408/71 were applicable to the determination and adjustment of the amount of a benefit such as the guaranteed income for elderly persons, those of Article 51(1) were not.

24 In the ONP's submission, the same applies in relation to the rights of separated spouses provided for by Belgian legislation.

25 As the Advocate General pointed out in paragraph 24 of his Opinion, the Court's reasoning in the *Levatino* judgment was based on the special nature of the guaranteed income for elderly persons and is therefore not applicable by analogy to the benefit at issue in the main proceedings.

26 In *Levatino*, having found that the purpose of the guaranteed income was to offset the inadequacy of the resources of the person concerned so as to enable him to attain the minimum level of resources guaranteed by the statute (paragraph 34), the Court held that to apply Article 51(1) would result in any increase in that person's resources as a result of the increase in his foreign pension not being taken into account, and in his systematically receiving income in excess of the minimum income guaranteed by the statute (paragraph 35).

27 In the same judgment, the Court added that to apply Article 51(1) would not only put migrant workers at an advantage, but would alter the purpose of the guaranteed income benefit and disrupt the scheme of the national legislation in question (paragraph 36).

28 In a case such as that at issue in the main proceedings, it cannot be argued that to apply Article 51(1) to the calculation of the benefit in question would have the effect of altering the purpose and disrupting the scheme of the Belgian legislation, since the latter is not designed, unlike the guaranteed income for elderly persons, to offset the inadequacy of the resources of the person concerned so as to enable him to attain the minimum income guaranteed by Belgian law.

29 Finally, the ONP argues that to apply Article 51(1) in this case would result in an infringement of Article 3(1) of Regulation No 1408/71, since one separated spouse would enjoy a higher income than the other.

30 On that point, it is clear from the wording of Article 3(1) that that provision is not intended to establish equality of treatment between spouses.

31 In relation to the same provision, the national court asks whether the application of Article 51(1) to a case such as this might not give migrant workers an advantage over non-migrant workers.

32 On that point, the first observation to be made is that Article 3(1) is concerned with equality between the nationals of one Member State and the nationals of other Member States. By contrast, it does not preclude the application of national legislation treating non-migrant workers less favourably than migrant workers.

33 Moreover, as the judgment in Case 22/77 *FNROM* v *Mura* [1977] ECR 1699 demonstrates, it is beside the point to argue that the application of Community rules on the coordination of social security schemes would favour migrant workers over those who have never left their own country, since no discrimination can arise in legal situations which are not comparable. Furthermore, any such differences in treatment which do exist result from the lack of a common social security scheme.

34 It follows that Articles 46 and 51(1) of Regulation No 1408/71 must be interpreted as precluding the share of an employed person's old-age pension granted to that person's separated spouse under the legislation of a Member State from being

recalculated by reference to alterations arising from general economic and social developments in an invalidity benefit received by that separated spouse under the legislation of another Member State.

Costs

35 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Cour du Travail de Bruxelles by judgment of 25 April 1996, hereby rules:

Articles 46 and 51(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as precluding the share of an employed

person's old-age pension granted to that person's separated spouse under the legislation of a Member State from being recalculated by reference to alterations arising from general economic and social developments in an invalidity benefit received by that separated spouse under the legislation of another Member State.

Mancini Murray Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 2 October 1997.

R. Grass

Registrar

G. F. Mancini

President of the Sixth Chamber