JUDGMENT OF THE COURT (Fifth Chamber)
20 February 1997 *

In Joined Cases C-88/95, C-102/95 and C-103/95,

REFERENCES to the Court under Article 177 of the EC Treaty by the Juzgado de lo Social de Santiago de Compostela (Spain) for a preliminary ruling in the proceedings pending before that court between

Bernardina Martínez Losada,

Manuel Fernández Balado,

José Paredes

and

Instituto Nacional de Empleo (Inem),

Instituto Nacional de la Seguridad Social (INSS)

on the interpretation of Articles 4, 48 and 67 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

* Language of the case: Spanish.

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), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), and of Articles 48 and 51 of the EC Treaty,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, C. Gulmann, D. A. O. Edward (Rapporteur), J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: C. O. Lenz,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mrs Martínez Losada and others, by A. Vázquez Conde, R. Méndez Robleda and B. Mayo Martínez, of the Orense Bar,

— the Spanish Government, by A. J. Navarro González, Director General of the Department for Community Legal and Institutional Affairs, assisted by M. Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

— Commission of the European Communities, by M. Patakia and I. Martínez del Peral, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Martínez Losada and others, represented by A. Vázquez Conde; the Spanish Government, represented by L. Pérez de Ayala Becerril, Abogado del Estado, acting as Agent, and the Commission, represented by M. Patakia and I. Martínez del Peral, at the hearing on 11 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1996,

gives the following

Judgment

1 By orders of 9 March 1995 (C-88/95) and 13 March 1995 (C-102/95 and C-103/95), received at the Court on 23 March 1995 (C-88/95) and 31 March 1995 (C-102/95 and C-103/95), the Juzgado de lo Social (Social Court), Santiago de Compostela, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 4, 48 and 67 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7) (hereinafter 'Regulation No 1408/71'), and of Articles 48 and 51 of the EC Treaty.

2 The questions were raised in proceedings between Mrs Martínez Losada (C-88/95), Mr Fernández Balado (C-102/95) and Mr Paredes (C-103/95), on the one hand, and Instituto Nacional de Empleo ('Inem') and Instituto Nacional de la Seguridad Social, on the other, concerning payment of unemployment allowance as provided for by Spanish law for claimants of more than 52 years of age.

3 Under Article 215(3) of the General Law on Social Security, as codified by Royal Legislative Decree No 1/94 of 20 June 1994 (BOE No 154 of 29 June 1994), unemployed persons who have paid six years' unemployment insurance contributions and satisfy all the conditions, with the exception of the age requirement, for obtaining a contributory retirement pension under the social security system are eligible for unemployment allowance.

4 Article 161 of the General Law on Social Security makes the award of a contributory retirement pension dependent upon completion of a minimum period of 15 years' contributions, of which at least two years' contributions must have been made in the eight years immediately preceding the event giving entitlement to benefit.

5 It appears from the case-files that the plaintiffs in the main proceedings have been in gainful employment in a number of Member States where they have acquired entitlement to a retirement pension.

6 However, they have never worked in Spain and cannot therefore point to any period of contribution in respect of gainful employment under the Spanish social security scheme. Nevertheless, all three of them received six months' unemployment allowance under Spanish law. In the case of Mrs Martínez Losada, the allowance was intended to offset family expenses, while in the case of Mr Fernández Balado and Mr Paredes, the allowance was paid to them as returning migrant workers.

7 During the six-month period when the plaintiffs in the main proceedings were in receipt of unemployment allowance, the competent administrative institution under Spanish law paid contributions on their behalf to the sickness insurance and family benefits schemes.

8 By letters dated 30 July 1993, 10 September 1993 and 26 November 1993, the plaintiffs in the main proceedings applied to Inem for the unemployment allowance provided for claimants of more than 52 years of age. Their applications were rejected in accordance with a report to that effect by Instituto Nacional de la Seguridad Social on the ground they had not completed the minimum period of contribution required for entitlement to the retirement pension under the Spanish social security system.

9 According to the national court, it appears from the national case-files that Inem makes award of the unemployment allowance in question conditional on the claimant being eligible for a retirement pension under the Spanish social security scheme when he reaches the qualifying age, and that such allowance is refused where future or potential entitlement to a pension was acquired in another Member State.

10 The plaintiffs then appealed to the Juzgado de lo Social de Santiago de Compostela, which raised the question whether Article 48(1) of Regulation No 1408/71 was applicable to the cases before it and as to the interpretation to be given to Article 67 of that regulation.

11 Under Article 48(1) the competent institution of a Member State is not required to award a retirement pension where the duration of periods of contribution completed under the legislation of that State does not amount to one year or where no contributions have been paid.

12 Article 67, on unemployment benefits, reads as follows:

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

...

3. ... application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

...

in accordance with the provisions of the legislation under which the benefits are claimed.

...'.

13 The national court is in doubt as to how Regulation No 1408/71 should be applied. It observes that in a judgment of 28 February 1994 the Tribunal Supremo (Supreme Court) held that 'anyone who is not affiliated to the Spanish social security scheme and does not pay contributions thereto, and is hence outside that scheme, cannot qualify for the benefits which it confers'. According to that court, Article 48 of Regulation No 1408/71 recognizes that it is necessary for a person claiming benefit to have been affiliated for a minimum period to the social security scheme of the State by virtue of which the benefit is granted.

14 In those circumstances, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

1) 'Is the unemployment allowance for persons over 52 years of age applied for by the plaintiff, provided for by Article 13(2) of Law No 31/84 of 2 August 1984, as amended by Royal Decree No 3/89 of 31 March 1989 (now Article 215(3) of Royal Legislative Decree No 1/94 of 20 June 1994) approving the consolidated version of the General Law on Social Security an unemployment benefit within the meaning of Article 4(1) of Regulation (EEC) No 1408/71?' (C-102/95 and C-103/95)

2) 'Is Article 67(1) of Regulation No 1408/71 (in its present version) to be interpreted as meaning that periods of insurance or of employment completed under the legislation of any other Member State must be taken into account for the purposes of obtaining the unemployment allowance for persons over 52 years of age, provided for by Article 215(3) of Royal Legislative Decree No 1/94 of 20 June 1994, which approves the consolidated version of the General Law on Social Security, to the extent that, subject to age requirements, contributions paid during such periods give right to a retirement pension in a Member State other than that of the competent institution?' (C-88/95, C-102/95 and C-103/95)

3) 'Can such periods be taken into account even though the worker has not paid contributions in Spain or has paid contributions for less than one year, provided that he is entitled to a retirement pension in any Member State?' (C-88/95, C-102/95 and C-103/95)

4) 'Is it compatible with Articles 48(2) and 51 of the EC Treaty to require that, for migrant workers to receive the unemployment allowance available for persons of more than 52 years of age, it must be shown that, subject to age requirements, they are entitled to a retirement pension payable by the Spanish social security scheme (persons having such an entitlement in any other Member State being precluded from receiving such allowance)?' (C-88/95, C-102/95 and C-103/95)

15 By order of the President of the Court of 9 June 1995, Cases C-88/95, C-102/95 and C-103/95 were joined for the purposes of the written and oral procedures and of judgment.

16 The questions may conveniently be answered in the following order: first, third, second and fourth.

First question

17 The national court's first question seeks to establish whether an allowance such as that provided for by the Spanish General Law on Social Security for unemployed persons of over 52 years of age constitutes an unemployment benefit within the meaning of Article 4(1)(g) of Regulation No 1408/71.

18 According to Article 4(1)(g), Regulation No 1408/71 applies to all legislation concerning the branches of social security relating to 'unemployment benefits'. Article 4(2) provides that Regulation No 1408/71 applies to general and special social security schemes, whether contributory or non-contributory.

19 Under Article 5 of the regulation, Member States are to specify in declarations to be notified and published in accordance with Article 97 the legislation and schemes covered by Article 4(1) and (2).

20 As the Court found in Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, the Spanish Government has amended its declaration under Article 5 of Regulation No 1408/71 so as specifically to include the allowance in question. The Spanish Government has therefore expressly accepted that it constitutes unemployment benefit within the meaning of Article 4(1) of Regulation No 1408/71.

21 According to the Court's case-law, whilst the fact that a national law or regulation has not been mentioned in the declarations referred to in Article 5 of Regulation No 1408/71 is not of itself proof that that law or regulation does not fall within the field of application of the regulation, the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No 1408/71 (see, in particular, Case 35/77 *Beerens* [1977] ECR 2249).

22 Consequently, the answer to be given to the first question is that an allowance such as that provided for by the Spanish General Law on Social Security for unemployed persons of more than 52 years of age constitutes an unemployment benefit within the meaning of Article 4(1) of Regulation No 1408/71.

Third question

23 The essence of the third question is whether Article 48(1) of Regulation No 1408/71 is to be interpreted as meaning that periods of insurance or employment completed under the legislation of a Member State which give entitlement in that State to a retirement pension can be taken into account in another Member State for the purposes of the grant of unemployment allowance where the persons concerned have not paid any contributions in the latter Member State or have paid contributions for less than one year.

24 Article 48(1) of Regulation No 1408/71 forms part of the provisions of Chapter 3, 'Old age and death (pensions)', of Title III of that regulation.

25 In Case 269/87 *Ventura* [1988] ECR 6411, the Court held that, since none of the provisions of Chapter 8, 'Benefits for dependent children of pensioners and for orphans', of Title III referred to Article 48 of Regulation No 1408/71, that article could not be applied to orphans' pensions.

26 The same applies to the unemployment benefits referred to in Chapter 6, 'Unemployment benefits', of Title III, which likewise makes no reference to Article 48.

27 Consequently, Article 48 does not apply to unemployment benefits of the kind at issue in the main proceedings and hence the taking into account by a Member State of periods of employment or insurance completed by the persons concerned under the legislation of another Member State for the purposes of the award of unemployment benefit is governed solely by Article 67 of Regulation No 1408/71, which is the subject of the second question.

28 The answer to the third question must therefore be that Article 48 of Regulation No 1408/71 is not applicable to unemployment benefits.

Second question

29 The essence of the second question is whether, on a proper construction of Article 67 of Regulation No 1408/71, a person who has completed periods of insurance in one Member State may rely on those periods in order to obtain entitlement to unemployment benefit in a second Member State when he has not been in employment in that State, but contributions have been paid on his behalf to the sickness insurance and family benefits schemes by the competent unemployment institution.

30 The Commission takes the view that, in circumstances such as those in issue in the main proceedings, the persons concerned should be able to rely on periods during which the competent Spanish institution paid them unemployment benefits and paid contributions to the sickness insurance and family benefits schemes. According to Case 388/87 *Warmerdam-Steggerda* [1989] ECR 1203, the fact that the persons concerned paid contributions to another branch of social security is irrelevant.

31 In contrast, the Spanish Government considers that since the plaintiffs were never affiliated to the Spanish social security scheme and never paid contributions themselves, they do not satisfy the condition laid down by Article 67(3) in order to be able to rely on periods of insurance or employment completed in other Member States.

32 The Spanish Government contends that to require the plaintiffs in the main proceedings to have paid at least one contribution to the Spanish social security scheme on their own behalf and to require the last period of contribution to have been completed in Spain accords with Article 67 of Regulation No 1408/71 and Articles 48(2) and 51 of the Treaty. It cannot be right that any worker who has reached the age of 52 and acquired entitlement to a pension under the legislation of another Member State can go to Spain and receive unemployment allowance there without having ever paid contributions to the Spanish social security scheme.

33 Article 51 of the Treaty lays down the principle of aggregation of all periods taken into account under the laws of the several countries and that of exportation of benefits, but it does not define the expression 'periods of insurance'.

34 Article 1(r) of Regulation No 1408/71 defines periods of insurance as 'periods of contribution or periods of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

35 In *Warmerdam-Steggerda*, paragraphs 10, 17 and 19, it was held that Regulation No 1408/71 does not determine the conditions under which periods of employment or insurance are constituted. Those conditions are determined solely by the legislation of the Member State in which benefits are applied for.

36 Consequently, a Member State is entitled to make the award of unemployment allowance conditional on the persons concerned having last completed periods classed as 'periods of insurance' or 'periods of employment' under its own legislation.

37 It is therefore for the national court to determine whether the periods during which the competent Spanish institution paid contributions to the sickness insurance and family benefits schemes on behalf of the plaintiffs in the main proceedings constitute periods of insurance under its domestic legislation.

38 The answer to the national court's second question must therefore be that it is for the national court to determine whether the condition laid down by Article 67(3) of Regulation No 1408/71 to the effect that a person who has completed periods of insurance in another Member State cannot rely on those periods in order to obtain unemployment benefit in the State concerned unless he last completed periods of insurance in accordance with the provisions of the legislation of that State, is fulfilled where the person concerned has never been in employment in that State but contributions have been paid on his behalf to the sickness insurance and family benefits schemes by the competent unemployment institution.

Fourth question

39 The fourth question arises only in case the national court should consider that the periods during which the competent Spanish institution paid contributions to the sickness insurance and family benefits schemes on behalf of the plaintiffs in the main proceedings constitute periods of insurance under its domestic legislation.

40 Since the allowance granted to claimants of more than 52 years of age is to be classed as an 'unemployment benefit' and not as a 'benefit in the nature of a retirement pension', the condition laid down by the Spanish legislation for the grant of that allowance must be construed, not as requiring the person concerned to be entitled to a retirement pension as such, but as requiring him to have completed a period of 15 years' contributions to a retirement pension scheme.

41 In its written observations, the Spanish Government expressly accepted that entitlement to the allowance in question is not conditional on the contributions of the person concerned having been paid during the requisite period to the retirement pension scheme of the Spanish social security scheme. According to the Government, it is sufficient for those concerned to have paid 15 years' contributions to the social security scheme of another Member State or for them to have paid contributions during the same period partly to the Spanish scheme and partly to the scheme of another Member State.

42 In those circumstances, the fourth question is to be understood as seeking to establish whether it is contrary to Articles 48 and 51 of the Treaty for national legislation to require the person concerned to have paid contributions for a 15-year period to a pension scheme in one or more Member States in order to qualify for the grant of an unemployment allowance for claimants of over 52 years of age.

43 The Court has consistently held that the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between Community workers (Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27).

44 The answer to the national court's fourth question must therefore be that it is not contrary to Articles 48 and 51 of the Treaty, or to Regulation No 1408/71, for national legislation to require the person concerned to have paid contributions for a 15-year period to a pension scheme in one or more Member States in order to qualify for the grant of an unemployment allowance for claimants of over 52 years of age.

Costs

45 The costs incurred by the Spanish Government and the Commission of the European Communities, 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 Juzgado de lo Social de Santiago de Compostela by orders of 9 and 13 March 1995, hereby rules:

1) An allowance such as that provided for by the Spanish General Law on Social Security for unemployed persons of more than 52 years of age constitutes an unemployment benefit within the meaning of Article 4(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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992.

2) Article 48 of the aforementioned regulation is not applicable to unemployment benefits.

3) **It is for the national court to determine whether the condition laid down by Article 67(3) of the aforementioned regulation to the effect that a person who has completed periods of insurance in another Member State cannot rely on those periods in order to obtain unemployment benefit in the State concerned unless he last completed periods of insurance in accordance with the provisions of the legislation of that State, is fulfilled where the person concerned has never been in employment in that State but contributions have been paid on his behalf to the sickness insurance and family benefits schemes by the competent unemployment institution.**

4) **It is not contrary to Articles 48 and 51 of the EC Treaty, or to the aforementioned regulation, for national legislation to require the person concerned to have paid contributions for a 15-year period to a pension scheme in one or more Member States in order to qualify for the grant of an unemployment allowance for claimants of over 52 years of age.**

Moitinho de Almeida Gulmann Edward

Puissochet Wathelet

Delivered in open court in Luxembourg on 20 February 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber