JUDGMENT OF THE COURT (Fourth Chamber)

21 September 2000 *

In Case C-124/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Sozialgericht, Münster, Germany, for a preliminary ruling in the proceedings pending before that court between

Carl Borawitz

and

Landesversicherungsanstalt Westfalen,

joined party:

Bundesrepublik Deutschland,

on the interpretation of Community law in matters of social security, in particular the principle of equal treatment,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, P.J.G. Kapteyn and A. La Pergola, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, and N. Yerrell, a national civil servant on secondment to its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2000,

gives the following

Judgment

1 By order of 12 March 1999, received at the Court on 14 April 1999, the Sozialgericht (Social Court), Münster, referred for a preliminary ruling under

Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Community law in matters of social security, in particular the principle of equal treatment.

2 That question was raised in proceedings between Carl Borawitz and the Landesversicherungsanstalt Westfalen ('the LVA') concerning the LVA's refusal, in his case, of a retroactive disability pension payment.

Community law

3 Article 48 of the EC Treaty (now, after amendment, Article 39 EC) states:

'1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...'

4 Article 3(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 by Council Regulation (EEC) No 1945/93 of 30 June 1993 (OJ 1993 L 181, p. 1; 'Regulation No 1408/71'), lays down the principle of equal treatment as follows:

'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.'

5 As regards the amount of the benefits paid by a Member State to a recipient resident in another Member State, the first subparagraph of Article 10(1) of that regulation states:

'Save as otherwise provided in this regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

6 Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ 1972 L 74, p. 1), as

amended by Regulation No 1945/93 ('Regulation No 574/72'), contains a section on the payment of benefits in Title IV, Chapter 3, entitled 'Invalidity, old age and death (pensions)'. In that context, Article 58, entitled 'Expenses incurred in the payment of benefits', provides:

'The expenses incurred in the payment of benefits, particularly postal and bank charges, may be recovered from the recipients by the paying body under the conditions provided for by the legislation administered by that body.'

German law

7 Paragraph 118(2a) of the Sechstes Buch des Sozialgesetzbuches — SGB VI — (Book VI of the German Code of Social Law, 'the SGB VI') sets out the minimum amount which must be exceeded if a retroactive payment is to be made. Drawing a distinction between payments made in Germany and those made abroad, it provides:

'Retroactive payments which do not exceed

1. one tenth of the current value of the pension in the case of payments made in Germany, or

2. three tenths of the current value of the pension in the case of payments made abroad,

shall not be made.'

8 It appears from the order for reference that that provision was introduced with effect from 1 July 1993 to ensure that administrative and accounting expenses did not exceed the amount of the retroactive payments.

9 It should also be noted that the expression 'current value of the pension' constitutes a reference figure which does not correspond to the actual amount of the pension.

The facts in the case in the main proceedings and the question referred for preliminary ruling

10 Mr Borawitz, who was born on 8 October 1930, has, since 1 August 1993, been in receipt of a disability pension of DEM 660.63 per month which the LVA granted to him. By letter of 20 June 1995, the LVA informed him that that amount would be raised as from 1 September 1995 to DEM 663.94, under the Rentenanpassungsgesetz (German Law on the Adjustment of Pensions).

11 Also on 20 June 1995, the LVA informed Mr Borawitz that for the period from 1 July to 31 August 1995 he was entitled to a retroactive payment of DEM 6.62.

It added, however, that under Paragraph 118(2a) of the SGB VI that amount could not be paid since, first, it did not exceed three tenths of the current value of his disability pension (namely DEM 13.80) and, second, during the periods in question, Mr Borawitz had been residing in the Netherlands. It is common ground that that amount exceeds the 'domestic' threshold of one tenth of the current value of Mr Borawitz's disability pension (namely DEM 4.60).

12 Since he had not received the retroactive payment, Mr Borawitz lodged an objection with the LVA, claiming that the distinction under German legislation between payments made in Germany and those made in other Member States was in breach of the principle of equal treatment in Article 3 of Regulation No 1408/71.

13 By decision of 16 April 1996, the appeals board of the LVA dismissed that objection on the ground that Paragraph 118(2a) of the SGB VI does not fall within the scope of Article 10(1) of Regulation No 1408/71. That article concerns provisions in force in Member States which reduce, modify, suspend, withdraw or confiscate benefits, characteristics which, according to the LVA, Paragraph 118(2a) of the SGB VI does not have.

14 On 3 May 1996, Mr Borawitz initiated proceedings before the Sozialgericht, Münster. Called upon to intervene in the proceedings, the Federal Republic of Germany submitted in essence that Paragraph 118(2a) of the SGB VI does not distinguish between nationals and non-nationals and that the only distinction made is between payments made in Germany and those made in other Member States (payments which, in practice, are often, or even in the majority of cases, made to German nationals).

15 Furthermore, the intervener pointed out that Paragraph 118(2a) of the SGB VI is a special provision of social security law and constitutes an exception to the general rule in that field that payments of social benefits are made free of charge even when such payments are made abroad. Since the expenses of payment abroad are often much higher, but the recipients have not paid higher contributions to the social security scheme, that exception is manifestly justified in the case of 'uneconomic' payments.

16 Having doubts as to the compatibility of the German legislation with Community law, the Sozialgericht, Münster, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Paragraph 118(2a) of the Sixth Book of the Sozialgesetzbuch (Code of Social Law, "SGB VI") compatible with European Community law, in particular the principle of equal treatment, in so far as it limits retroactive pension payments to a greater extent when the payment is made abroad than when the payment is made in Germany?'

The question referred for preliminary ruling

17 In addressing that question, it must be borne in mind that, within the framework of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court

with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, for example, Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* v *Direction Générale des Douanes* [1998] ECR I-2039, paragraph 22).

18 In that context, the Court finds that, by the question referred, the national court is essentially seeking to ascertain whether Community law, in particular the principle of equal treatment, as laid down in Article 3(1) of Regulation No 1408/71, precludes national legislation which fixes the minimum amount of a cash benefit that can be paid to a Community national residing in another Member State at a higher level than that required where that payment is made within the same Member State.

19 The Commission submits that the threshold amount for making payments does not distinguish between whether the national is German or not, but only whether the payment is made within the country or abroad. There is thus no question of direct discrimination based on nationality.

20 As regards possible indirect discrimination, the Commission points out that, in so far as the German legislation provides for a higher threshold amount in respect of payments abroad, recipients of pensions who are resident abroad are placed at a disadvantage.

21 The Commission, however, questions whether that disadvantage particularly affects German nationals or nationals of other Member States. It submits that

there is no doubt that nationals of other Member States are also concerned, namely all those who, at the end of their working life in Germany, return to their country of origin and nationals of other Member States who are in receipt of a German pension in their capacity as former frontier workers.

22 Consequently, the existence of indirect discrimination is, according to the Commission, doubtful and can be acknowledged only on condition that one of the two groups is clearly more affected than the other. In its submission, it is for the national court to establish whether that condition is fulfilled.

23 In this respect, it must be borne in mind that the object of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 48 of the Treaty, equal treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the Member States (Case C-131/96 *Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3659, paragraph 29).

24 It is settled case-law that the principle of equal treatment, as laid down in that article, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (*Mora Romero*, paragraph 32).

25 Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or where the great majority of those affected are migrant workers, as well as conditions which are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers (Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraph 18).

26 It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law (*O'Flynn*, paragraph 19).

27 It is clear from that body of case-law that, unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is in point and if there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, Case C-57/96 *Meints* v *Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, paragraph 45).

28 That is true of a provision which, like that at issue in the main proceedings, fixes a higher threshold amount in respect of payments made abroad than that applicable to domestic payments. It operates in practice like a residence requirement which is more easily satisfied by national beneficiaries than by beneficiaries from other Member States.

29 Such a provision is especially liable to affect nationals of other Member States since the proportion of such nationals is inherently likely to be higher amongst recipients of pension payments outside Germany than amongst those in receipt of pension payments within that State.

30 Contrary to the observations submitted by the Federal Minister for Labour and Social Affairs to the national court, it is irrelevant in this respect whether the majority of recipients of pension payments who are resident outside Germany are, or are not, of German nationality. In order to establish whether there is indirect indiscrimination, it is necessary to compare the proportion of nationals and non-nationals amongst the recipients of such payments in Germany, on the one hand, and in other Member States, on the other.

31 Since, in particular, the second group includes nationals of other Member States who, at the end of their working life in Germany, return to their country of origin or who are in receipt of a German pension in their capacity as former frontier workers, the proportion of nationals of other Member States is likely to be higher in the second group of recipients of pension payments than in the first group.

32 Although it is not impossible that such unequal treatment may be justified by the existence of higher expenses associated with payments made abroad, any justification in this respect presupposes that those expenses can be shown to be inevitable. Similarly, the recovery of the expenses incurred in the payment of benefits, which is provided for in Article 58 of Regulation No 574/72, cannot be relied on where no expenses of that kind are incurred.

33 In this respect, as Mr Borawitz argued before the national court, and the Commission confirmed, social security payment transactions between Germany and the Netherlands are carried out under a 'clearing' system. Under that system, information relating to the payment of a pension such as Mr Borawitz's is sent to a liaison office of the beneficiary's State of residence which is then responsible for paying the pension by means of a domestic payment. That 'clearing' system does not generate any additional expenses since no payment abroad is in fact made.

34 In addition, since the case in the main proceedings concerns the retroactive payment of a single amount in connection with a pension of a periodic nature, payment of that amount would not generate any transfer expenses if the amount were included in a future payment of the pension. Unless that is impossible, separate payment of the amount must not prejudice the beneficiary.

35 The answer to the question referred to the Court must therefore be that the principle of equal treatment, as laid down in Article 3(1) of Regulation No 1408/71, precludes national legislation which fixes the minimum amount of a cash benefit that can be paid to a Community national residing in another Member State at a higher level than that required where that payment is made within the same Member State, in circumstances where the payment to be sent to another Member State does not involve expenses higher than those incurred in respect of the payment of the same benefit within the first Member State.

Costs

36 The costs incurred by the Commission, 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 (Fourth Chamber),

in answer to the question referred to it by the Sozialgericht, Münster, by order of 12 March 1999, hereby rules:

The principle of equal treatment, as laid down in Article 3(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 by Council Regulation (EEC) No 1945/93 of 30 June 1993, precludes national legislation which fixes the minimum amount of a cash benefit that can be paid to a Community national residing in another Member State at a higher level than that required where that payment is made within the same Member State, in circumstances where the payment to be sent to another Member State does not involve expenses higher than those incurred in respect of the payment of the same benefit within the first Member State.

Edward Kapteyn La Pergola

Delivered in open court in Luxembourg on 21 September 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fourth Chamber