JUDGMENT OF THE COURT (Sixth Chamber)

9 August 1994 *

In Case C-406/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail, Neufchâteau (Belgium), for a preliminary ruling in the proceedings pending before that court between

André Reichling

and

Institut National d'Assurance Maladie-Invalidité (INAMI)

on the interpretation of the last sentence of Article 46(2)(a) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco, C. N. Kakouris (Rapporteur), F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Reichling, by J. Olivier, of the Neufchâteau Bar,

— INAMI, by Y. Magerotte, of the Neufchâteau Bar,

— the Commission of the European Communities, by M. Wolfcarius, of its Legal Service, acting as Agent, and T. Margellos, of the Athens Bar,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 9 June 1994,

gives the following

Judgment

1 By judgment of 13 September 1993, received at the Court on 29 September 1993, the Tribunal du Travail (Labour Court), Neufchâteau, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the last sentence of Article 46(2)(a) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 That question was raised in proceedings between Mr Reichling and the Institut National d'Assurance Maladie-Invalidité (INAMI) concerning the calculation by the INAMI of Mr Reichling's invalidity pension.

3 Before setting out the facts of the case, it is appropriate to rehearse the relevant provisions of Community law.

Legal background

4 As is apparent from the case-file, the laws of the Member States on invalidity benefits are of two types. In some the amount of invalidity benefit is independent of the length of the periods of insurance completed by the worker ('Type A' schemes). In others the amount of those benefits depends on the periods of insurance ('Type B' schemes).

5 In order to cope with possible problems for migrant workers moving from a Type B legislation to a Type A legislation, Article 40(1) of Regulation No 1408/71 provides that if a worker suffering from invalidity has been successively subject to both types of legislation, the provisions of Chapter 3 (old age and death (pensions)) of Title III of the regulation, in other words Articles 44 to 51, apply by analogy.

6 Article 45 lays down the principle of the aggregation of periods of insurance for the acquisition, retention or recovery of the rights to benefits.

7 Article 46 sets out rules for the award of benefits. With respect more particularly to the calculation of the theoretical amount of the benefit, paragraph 2(a) of that article provides that:

'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'.

The parties to the main proceedings disagree on the interpretation of that last sentence.

The main proceedings

8 According to the case-file, Mr Reichling, of Belgian nationality and residing at Fauvillers (Belgium), was employed successively in Belgium (which has Type A legislation) for a period of insurance of 7 569 days and then in Luxembourg (which has Type B legislation) for a period of insurance of 734 days. Because of illness, Mr Reichling was unable to work from 11 November 1989, and on 8 November 1990 he applied to the INAMI for the award of an invalidity pension.

9 By a decision of 20 August 1991, the INAMI awarded him a daily allowance on a pro rata basis of BF 548.35 from 11 November 1990.

10 In making that award the INAMI, in accordance with Article 45 of Regulation No 1408/71, aggregated the periods of insurance he had completed in Belgium and in Luxembourg.

11 For calculating the amount of the invalidity benefit the INAMI referred to Articles 28(1) and 27(2) of the Belgian Royal Decree of 31 December 1963 on the payment of allowances.

12 In Belgian law the amount of the benefit, which is independent of the length of the periods of insurance, is calculated on the basis of the remuneration last received before the risk materialises. Since at the time when he became incapacitated Mr Reichling was working in Luxembourg and thus did not receive any salary in Belgium, the INAMI, to calculate the theoretical amount of the pension, applied Article 28(1) of the Royal Decree, which provides that:

'If at the moment when the person entitled became incapacitated for work he had ceased for more than 14 days to be covered by the Belgian compulsory sickness and invalidity insurance scheme, the remuneration which shall be used for the purpose of calculating an invalidity allowance which is wholly or partly payable by that scheme under an international convention or regulation on social security shall be that referred to in Article 27(2).'

13 Article 27(2) of the Decree reads as follows:

'In the case of a person entitled who does not fulfil the conditions prescribed in Articles 22 to 27(1) at the time when he becomes incapacitated for work, the remuneration lost shall be equal to the minimum remuneration laid down for a category I employee by the Commission Paritaire Nationale Auxiliaire pour Employés (National Auxiliary Joint Committee for Employees), having regard to the age of the person entitled at the date on which he becomes incapacitated for work.'

14 Since the amount of benefit so calculated was lower than that which Mr Reichling would have been entitled to if the calculation of the theoretical amount had been based on his last remuneration in Luxembourg, he challenged the INAMI's decision before the Tribunal du Travail, Neufchâteau. Mr Reichling argued *inter alia* that the INAMI's decision was contrary to Community law, since for the purposes

of calculating the theoretical amount of his invalidity pension, it treated him as a worker without remuneration, whereas at the time when he became incapacitated he was receiving remuneration in Luxembourg.

15 In those circumstances the Tribunal du Travail, Neufchâteau, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Must the last sentence of Article 46(2)(a) of Regulation No 1408/71 of 14 June 1971 be interpreted as meaning that the amount of the benefit is necessarily and exclusively that to which the person concerned could lay claim if all the periods of insurance had been completed in the Member State in question under the legislation applicable at the time when the benefit was awarded, so that the competent institution could not rely on any period during which the person concerned was not subject to the social security system of the Member State in question in determining the amount of the benefit without taking account of the pay last received by the worker, that is to say, in a different manner from that applicable to workers having ceased work on grounds of illness in the Member State in question?'

16 It is apparent from the file that during the main proceedings, Regulation No 1408/71 was amended in certain respects by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7). The latter regulation *inter alia* added, with effect from 1 June 1992, subparagraphs 9 and 10 in the part of Annex VI of Regulation No 1408/71 dealing with Belgium. The effect of those subparagraphs is that in a situation such as that which gave rise to the main proceedings, the Belgian institution must take as the basis for the calculation of the theoretical amount the income received by the employee at the time when the risk materializes, in a Member State other than Belgium. Following that amendment, the INAMI took into account the remuneration received by Mr Reichling in Luxembourg and proceeded to recalculate his benefit from 1 June 1992 (the date when the amending regulation came into force). The main proceedings are therefore con-

cerned only with the period before that date, that is to say, the period from 11 November 1990 to 31 May 1992.

The question referred to the Court

17 In its question the national court is essentially asking whether the last sentence of Article 46(2)(a) of Regulation No 1408/71 must be interpreted as meaning that where, under the applicable legislation of a Member State, the amount of the invalidity benefit depends on the remuneration received by the worker at the time when invalidity occurred, and the worker in question was not at that time subject to the social security scheme of that State because he was working in another Member State, the competent institution must calculate the theoretical amount of the benefit on the basis of the remuneration last received by the worker in the other Member State.

18 Mr Reichling and the Commission observe that Article 46 of Regulation No 1408/71 is intended to implement the principles set out in Article 51 of the EC Treaty which requires the aggregation of the periods of insurance completed by the worker, not only for the purposes of the acquisition and retention of the right to benefit but also for the purpose of the calculation of the benefit.

19 Since under Article 46(2)(a) of Regulation No 1408/71 the theoretical amount is the benefit the worker would have received if he had completed all his periods of insurance in a single Member State, Mr Reichling and the Commission consider that that amount must be calculated by notionally transposing the migrant worker's insurance position in another Member State, even if the applicable legislation is a Type A legislation, like the Belgian legislation. Otherwise, a worker who had

exercised the right to freedom of movement conferred on him by the Treaty would be disadvantaged, since he would receive an invalidity benefit lower than he would have received if he had always been subject to Belgium legislation.

20 The INAMI concedes that by virtue of Regulation No 1408/71 the principle of aggregation of the periods of insurance comes into play for the acquisition of the right to benefits (Article 45) and also for calculation of the actual amount (on a pro rata basis) of the benefit if the worker's right has been acquired by aggregation. However, the length of the periods of insurance completed by the worker has no effect on the determination of the theoretical amount referred to in Article 46(2)(a) if under the applicable legislation the amount of the benefit depends on the remuneration last received by the worker, as in the case of Belgian legislation. Consequently, in the INAMI's opinion, if at the time when the invalidity occurs the worker is not in receipt of remuneration in Belgium, Article 46(2)(a) does not authorize the competent institution to calculate the theoretical amount of the benefit on the basis of the remuneration last received by the worker in another Member State. Otherwise, the last sentence of Article 46(2)(a) would be nugatory.

21 It must be observed in this respect that Article 46 of Regulation No 1408/71 must be interpreted in the light of Article 51 of the EC Treaty, as indeed must all the provisions of that regulation.

22 The purpose of Article 51 is to facilitate freedom of movement for workers by securing for migrant workers and their dependants 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries.'

23 The same objective is moreover pursued by Regulation No 1408/71, as can be seen from its sixth recital (OJ, English Special Edition 1971 (II), p. 416), which is couched in similar terms to Article 51 of the Treaty.

24 That objective entails that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty.

25 That situation may arise in a case such as that which is the subject of the main proceedings. It is common ground that if Mr Reichling had always worked and had completed all his periods of insurance in Belgium, he would have received remuneration there and would thus not have been considered as a worker without remuneration. He would therefore have been entitled to an invalidity pension higher than that awarded him.

26 At the time when he became incapacitated, Mr Reichling was not in receipt of remuneration in Belgium, but was in receipt of remuneration in another Member State. That remuneration should have been taken into account by the competent Belgian institution as if it had been remuneration received in Belgium, pursuant to Article 46(2)(a) interpreted in the light of the objective referred to in paragraph 24 above, because a migrant worker must not suffer a reduction in the amount of the benefit he would have received had he not been migrant.

27 That interpretation is not affected by the last sentence of the provision in question. The problem it addresses relates solely to the effect of the length of the completed periods of insurance and residence on the amount of the benefit.

28 It follows that in a situation such as that at issue in the main proceedings, Article 46(2)(a) of Regulation No 1408/71, interpreted in the light of Article 51 of the EC Treaty and the objectives of Regulation No 1408/71, requires that account be taken, for the purposes of calculating the theoretical amount of benefit, of the remuneration received by the worker at the time when he became incapacitated in a Member State other than that under whose legislation the theoretical amount is calculated.

29 That interpretation of Article 46(2)(a) of Regulation No 1408/71 is borne out by the provision which was inserted into Annex VI to Regulation No 1408/71, dealing with Belgium, by Regulation No 1248/92 (see paragraph 16 above). Contrary to the arguments of the INAMI, which regards that provision as a change to the existing rules and develops an argument *a contrario* therefrom, Regulation No 1248/92 in fact merely clarified those rules, as is shown by the fact that the preamble to the regulation does not contain any explanation of the new provision.

30 Finally, it should be noted that in the judgment in Case 67/79 *Fellinger* v *Bundesanstalt für Arbeit* [1980] ECR 535 a similar interpretation was adopted with respect to the calculation of the unemployment benefit to be awarded to a frontier worker.

31 In *Fellinger* the Court held that Article 68(1) of Regulation No 1408/71, viewed in the light of Article 51 of the Treaty and the objectives it pursues, had to be interpreted as meaning that in the case of a frontier worker who is wholly unemployed, the competent institution of the Member State of residence, whose legislation provides that the calculation of benefits is based on the amount of the previous salary, must calculate those benefits taking into account the salary received by the worker in the last employment held by him in the Member State in which he worked immediately before becoming unemployed.

32 Consequently, the answer to the question referred to the Court should be that Article 46(2)(a) of Regulation No 1408/71 must be interpreted as meaning that where under the applicable legislation of a Member State the amount of the invalidity benefit depends on the remuneration received by the worker at the time when invalidity occurred, and the worker in question was not at that time subject to the social security scheme of that State because he was working in another Member State, the competent institution must calculate the theoretical amount of benefit on the basis of the remuneration last received by the worker in the other Member State.

Costs

33 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 Tribunal du Travail, Neufchâteau, by judgment of 13 September 1993, hereby rules:

Article 46(2)(a) of Council Regulation (EEC) 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 codified by Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as meaning that where under the applicable legislation of a Member State the amount of the invalidity benefit depends on the remuneration received by the worker at the time when invalidity occurred, and the worker in question was not at that time subject to the social security system of that State because he was working in another Member State, the competent institution must calculate the theoretical amount of benefit on the basis of the remuneration last received by the worker in the other Member State.

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber