Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 March 2013 *

(Social security for migrant workers — Article 46a of Regulation (EEC) No 1408/71 — National rules against overlapping — Old-age pension — Increase in the amount paid by a Member State — Survivor's pension — Reduction in the amount paid by another Member State)

In Case C-127/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidshof te Antwerpen (Belgium), made by decision of 3 March 2011, received at the Court on 11 March 2011, in the proceedings

Aldegonda van den Booren

v

Rijksdienst voor Pensioenen,

THE COURT (Fifth Chamber),

composed of M. Ilešič, acting as President of the Fifth Chamber, J-J. Kasel (Rapporteur) and M. Safjan, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents, assisted by P. Vanagt and E. Pools, advocaten,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 46a 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1), ('Regulation No 1408/71') and of Article 4(3) TEU and Articles 45 TFEU to 48 TFEU.

2 The request has been made in proceedings between Mrs van den Booren and the Rijksdienst voor Pensioenen (Belgian National Pensions Office; 'NPO') concerning the application of the Belgian rules against overlapping of benefits at the time of determination of the amount of the Belgian survivor's pension received by Mrs van den Booren.

Legal context

European Union law

3 Under Article 12(2) of Regulation No 1408/71:

'Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.'

4 Articles 44 to 51a are contained in Chapter 3, entitled 'Old age and death (pensions)', of Regulation No 1408/71.

5 Article 45 of Regulation No 1408/71 relates to consideration of periods of insurance or of residence completed under the legislation to which an employed person or self-employed person was subject with regard to the acquisition, retention or recovery of the right to benefits.

6 Article 46 of Regulation No 1408/71, defines, in paragraph 1, the rules which apply where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 of that regulation. Paragraph 2 of Article 46 sets out the rules which apply where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45.

7 Article 46a of Regulation No 1408/71, which concerns the general provisions relating to reduction, suspension or withdrawal applicable to benefits in respect of invalidity, old age or survivors under the legislation of the Member States, provides:

'1. For the purposes of this Chapter, overlapping of benefits of the same kind shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. For the purposes of this Chapter, overlapping of benefits of different kinds means all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.

3. The following rules shall be applicable for the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

(a) account shall be taken of the benefits acquired under the legislation of another Member State or of other income acquired in another Member State only where the legislation of the first Member State provides for the taking into account of benefits or income acquired abroad;

(b) account shall be taken of the amount of benefits to be granted by another Member State before deductions of taxes, social security contributions and other individual levies or deductions;

(c) no account shall be taken of the amount of benefits acquired under the legislation of another Member State which are awarded on the basis of voluntary insurance or continued optional insurance;

(d) where provisions on reduction, suspension or withdrawal are applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of a similar or different kind payable under the legislation of other Member States or other income acquired within the territory of other Member States, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation or the income acquired within the territory of other Member States.'

8 Article 46b(1) of Regulation No 1408/71, concerning special provisions applicable in the case of overlapping of benefits of the same kind under the legislation of two or more Member States, reads as follows:

'The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall not be applicable to a benefit calculated in accordance with Article 46(2).'

Belgian law

9 Article 52(1) of the Royal Decree of 21 December 1967 on the general regulation of the retirement and survivor's pension scheme for employed workers (*Belgisch Staatsblad* of 16 January 1968), as amended by the Royal Decree of 9 July 1997 (*Belgisch Staatsblad* of 9 August 1997), ('the Royal Decree of 21 December 1967') provides:

'Where the surviving spouse can claim both a survivor's pension under the pension scheme for employed workers and one or more retirement pensions, or any other benefit taking the place thereof under the pension scheme for employed workers or under one or more other pension schemes, the survivor's pension may be aggregated with those retirement pensions only up to a sum equal to 110% of the amount of the survivor's pension which would have been awarded to the surviving spouse for a complete contributions record.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Mrs van den Booren, who was born on 18 August 1920, resides in Maastricht (Netherlands). Her husband, Mr Bartels, who died on 1 March 1982, worked as an underground miner in Belgium, inter alia during the period from 1951 to 1961.

11 By administrative decision of 11 July 1986, the NPO granted Mrs van den Booren a Belgian survivor's pension retroactively with effect from 1 August 1985 in the annual amount of EUR 1 879.03 gross (index 319.78). From that same date Mrs van den Booren also received a Netherlands old-age pension under the Algemene Ouderdomswet (General Law on Old-Age Insurance; 'AOW') in the amount of EUR 827.13 per month.

12 By decision of 20 May 2003, Mrs van den Booren's Netherlands old-age pension was increased to EUR 869.24 per month (or EUR 10 430.88 per annum) with retroactive effect from 1 January 2002.

13 That increase resulted from the fact that, at the end of 2002, the Netherlands legislature had filled the legal lacuna affecting certain married women who were resident in the Netherlands and whose spouses had not been insured under the AOW on the ground that they had worked outside the Netherlands during the period from 1 January 1957 to 1 January 1980.

14 On 23 January 2004 the Bureau voor Belgische Zaken (Office for Belgian Affairs) sent a copy of the decision of 20 May 2003 to the NPO.

15 By registered letter of 12 August 2004, the NPO notified Mrs van den Booren that the decision of 11 July 1986 had been revised, to the effect that, as a result of the increase in her Netherlands old-age pension as from 1 January 2002, her Belgian survivor's pension, which on that same date had amounted to EUR 2 845.49 gross, was being reduced to EUR 1 866.18 gross (index: 107.30) per annum. By the same letter, the NPO also requested reimbursement by Mrs van den Booren of the benefits overpaid in respect of the period from 1 March 2004 to 31 July 2004, an amount totalling EUR 506.45.

16 Mrs van den Booren brought an action against the decision revising her survivor's pension and against the reimbursement decision before the arbeidsrechtbank te Tongeren (Labour Court, Tongeren), which, by a decision of 21 October 2009, declared that action to be unfounded. As regards, more specifically, the argument raised by Mrs van den Booren relating to Article 46a of Regulation No 1408/71, that court found that there had been no infringement of that article. As the Netherlands old-age pension had to be considered to be a benefit taking the place of a retirement pension, it was necessary to proceed, in accordance with Article 46a(3)(a) of Regulation No 1408/71, with a reduction of the Belgian survivor's pension (see Case C-107/00 *Insalaca* [2002] ECR I-2403).

17 The arbeidsrechtbank te Tongeren further found that there had also been no infringement of the fundamental freedom of movement of workers. In its view, the judgments cited in that regard by Mrs van den Booren (Case C-165/91 *van Munster* [1994] ECR I-4661 and Case C-262/97 *Engelbrecht* [2000] ECR I-7321) concerned different situations. According to that court, Article 52(1) of the Royal Decree of 21 December 1967 applied without distinction both to Belgian nationals who have always remained in Belgium and to migrant workers, and the application of the rule contained in that Article 52 did not lead to any reduction in Mrs van den Booren's overall income.

18 On 27 November 2009, Mrs van den Booren lodged an appeal against that decision before the arbeidshof te Antwerpen (Higher Labour Court, Antwerp). She claims that the application of Article 52(1) of the Royal Decree of 21 December 1967 infringes Article 46a of Regulation No 1408/71 and that it constitutes, in any event, a barrier to the right to free movement of persons, set out in Articles 39 EC to 42 EC. Mrs van den Booren refers in this regard to the above judgments in *van Munster* and *Engelbrecht*, according to which it is for the national court to interpret national law in a manner which accords with the requirements of European Union law and to refrain from applying that national law in cases where this would lead, in combination with the legislation of another Member State, to a result which is contrary to those requirements.

19 It is in those circumstances that the arbeidshof te Antwerpen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 52(1) of the Royal Decree of 21 December 1967 …, under which a survivor’s pension is reduced as a result of the increase in an old-age pension awarded under [the AOW] pursuant to the implementation of the equal treatment of men and women by the Law of 28 March 1985, compatible with [European Union] law, in particular with Article 46a of Regulation (EEC) No 1408/71 …?

(2) Is Article 52(1) of the Royal Decree of 21 December 1967 … compatible with [European Union] law, in particular with Articles [4(3) TEU and 45 TFEU to 48 TFEU], if that provision is interpreted in such a way that an old-age pension awarded under [the AOW] is to be included under the retirement pensions or equivalent benefits referred to in that provision, and, in case of incompatibility, should Article 52(1) of the Royal Decree of 21 December 1967 … then be disapplied?’

Consideration of the questions referred

Admissibility

20 In its written observations, the Belgian Government disputed, as a preliminary point, the admissibility of the present request for a preliminary ruling on the ground that the referring court had not adequately set out either the legal and factual context of the case or demonstrated the need to refer the questions for a preliminary ruling.

21 In that respect, it should be noted that it is for the national courts alone, which are seised of a case and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they refer to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 24 and the case-law cited, and Case C-393/08 *Sbarigia* [2010] ECR I-6337, paragraph 19).

22 It follows that questions relating to European Union law enjoy a presumption of relevance. Accordingly, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2010] ECR I-11421, paragraph 25, and *Sbarigia*, paragraph 20).

23 Such is not, however, the position in the case in the main proceedings. The decision making the reference contains a sufficient description of the legal and factual context of the dispute in the main proceedings to enable the Court to give a useful answer to the questions referred.

24 In addition, it should be noted that the Belgian Government has been in a position to comment on the questions raised, as is apparent from its written observations lodged pursuant to Article 23 of the Statute of the Court of Justice of the European Union.

25 It follows that the present request for a preliminary ruling is admissible.

Substance

26 It should be borne in mind, as a preliminary point, that, although it is not for the Court, in proceedings brought under Article 267 TFEU, to rule on the compatibility of rules of domestic law with European Union law, it is none the less competent to give the national court full guidance on the interpretation of European Union law in order to enable that court to determine whether those rules are so compatible (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8).

27 The two questions referred to the Court, which it is appropriate to examine together, must be understood as seeking, in essence, to ascertain whether the provisions of Regulation No 1408/71, and more specifically Article 46a thereof, must be interpreted as precluding the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, and whether, in the event of a negative reply, the primary law of the European Union, and more specifically Article 4(3) TEU and Articles 45 TFEU to 48 TFEU, prevents the application of such legislative rules.

28 From the outset, it must be borne in mind that, according to settled case-law, a national rule must be regarded as a provision on reduction of benefit, within the meaning of Regulation No 1408/71, if the calculation which it requires to be made has the effect of reducing the amount of the pension which the person concerned may claim by reason of the fact that he receives a benefit from another Member State (*Insalaca*, paragraph 16).

29 In that regard, it follows from Article 12(2) of Regulation No 1408/71 that provisions on reduction laid down in the legislation of a Member State may, unless that regulation provides otherwise, be invoked against persons who receive a benefit from that Member State if they can claim other social security benefits, even when those benefits are acquired under the legislation of another Member State (*Insalaca*, paragraph 22).

30 An exception to the principle laid down in Article 12(2) of Regulation No 1408/71 is contained in Article 46b(1) of that regulation, which provides that, in the case of overlapping of benefits of the same kind, provisions on reduction laid down by the legislation of a Member State do not apply to benefits calculated in accordance with Article 46(2) of that regulation (*Insalaca*, paragraph 23).

31 In that regard, the Court has consistently held that social security benefits must be regarded as being of the same kind, within the meaning of Article 12(2) of Regulation No 1408/71, when their purpose and object, as well as the basis on which they are calculated and the conditions for granting them, are identical (Case 197/85 *Stefanutti* [1987] ECR 3855, paragraph 12; Case C-98/94 *Schmidt* [1995] ECR I-2559, paragraph 24; and *Insalaca*, paragraph 24).

32 Article 46a(1) of Regulation No 1408/71 states that overlapping of benefits of the same kind is defined as the overlapping of benefits in respect of invalidity, old age and survivors 'calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person'. In accordance with Article 46a(2) of Regulation No 1408/71, benefits calculated or provided on the basis of the careers of two different persons cannot be treated as being benefits of the same kind within the meaning of Article 46a(1) (see, to that effect, *Stefanutti*, paragraph 13, and Case C-366/96 *Cordelle* [1998] ECR I-583, paragraphs 20 and 21).

33 In so far as it transpires, regard being had to the written observations submitted to the Court, that the Belgian survivor's pension received by Mrs van den Booren was calculated on the basis of the professional career of her late husband and that she receives the Netherlands old-age pension in her own right, those two benefits cannot be considered to be benefits of the same kind coming within the exception provided for under Article 46a(1) of Regulation No 1408/71.

34 Consequently, Regulation No 1408/71 does not prevent the application of a national rule against overlapping such as that referred to by the national court, provided that the limits imposed by Regulation No 1408/71 are observed.

35 In that regard, Regulation No 1408/71 provides, in particular in Article 46a(3)(d), that, if a rule against overlapping is applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of the same kind or of a different kind payable under the legislation of another Member State, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation of the other Member State (*Cordelle*, paragraph 14).

36 Accordingly, pursuant to that rule, the Belgian survivor's pension of the person concerned may be reduced only within the limit of the amount of the Netherlands old-age pension (*Cordelle*, paragraph 15).

37 In those circumstances, the conclusion on that point must be that Article 46a of Regulation No 1408/71 does not preclude the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, provided, in particular, that the conditions set out in Article 46a(3)(d) are observed.

38 However, the interpretation of Regulation No 1408/71 thus provided must be understood without prejudice to the solution which might flow from the potential applicability of provisions of primary law. The finding that a national measure may be consistent with a provision of a secondary law measure, in this case Regulation No 1408/71, does not necessarily have the effect of removing that measure from the scope of the Treaty's provisions (Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 66 and case-law cited).

39 It is in that context that the referring court raises the question more specifically of whether, in the case before it, there is a barrier to the right of free movement, as found by the Court in the above judgments in *van Munster* and *Engelbrecht*.

40 However, from the outset, it must be borne in mind that the above judgments in *van Munster* and *Engelbrecht* concerned the situation of a reduction of the Belgian pension of one of the spouses by reason of the application of the single rate, instead of the household rate, following the award of a pension or an advantage in lieu thereof to the other spouse, and not, as in the case in the main proceedings here, of overlapping of a Belgian survivor's pension and a Netherlands old-age pension in respect of one and the same person.

41 Consequently, the solution adopted in those judgments is not transposable to a situation such as that here at issue in the main proceedings.

42 Furthermore, although it is true that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to determine the conditions for granting social security benefits in kind, the Member States must, when exercising that power, comply with European Union law (see, to that effect, inter alia, *von Chamier-Glisczinski*, paragraph 63 and the case-law cited).

43 In that regard, as regards the provisions of primary law to which the national court refers, it is sufficient to bear in mind that Article 45 TFEU gives effect to a fundamental principle under which, in particular, the activities of the European Union are to include the abolition, as between Member States, of obstacles to freedom of movement for persons (Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 36 and the case-law cited).

44 As a result, European Union law militates against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Member State nationals of the fundamental freedoms guaranteed by the Treaty (Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 45 and the case-law cited).

45 According to settled case-law, national measures of that kind may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (*Government of Communauté française and Gouvernement wallon*, paragraph 55 and the case-law cited).

46 Accordingly, it is for the national court to assess the compatibility of the rules of national legislation at issue with the requirements of European Union law by determining whether the Belgian rule against overlapping, which admittedly applies without distinction to Belgian nationals and to nationals of other Member States, does not in fact lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, and, if such a disadvantage is established in the present case, whether the national rule at issue is justified by objective considerations and is proportionate to the legitimate objective pursued by national law.

47 In the light of all of the foregoing, the answer to the questions referred for a preliminary ruling is as follows:

— Article 46a of Regulation No 1408/71 must be interpreted as meaning that it does not preclude the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, provided, in particular, that the conditions set out in Article 46a(3)(d) are observed;

— Article 45 TFEU must be interpreted as meaning that it likewise does not preclude the application of such national legislative rules in so far as they do not lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, and, if such a disadvantage is established, in so far as it is justified by objective considerations and is proportionate in relation to the objective legitimately pursued by national law, this being a matter for the referring court to ascertain.

Costs

48 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 46a 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 (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, must be interpreted as meaning that it does not preclude the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, provided, in particular, that the conditions set out in Article 46a(3)(d) are observed.

Article 45 TFEU must be interpreted as meaning that it likewise does not preclude the application of such national legislative rules in so far as they do not lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, and, if such a disadvantage is established, in so far as it is justified by objective considerations and is proportionate in relation to the objective legitimately pursued by national law, this being a matter for the referring court to ascertain.

[Signatures]