# OPINION OF ADVOCATE GENERAL F.G. JACOBS delivered on 8 April 1992 *

*My Lords,*

1. These cases have been referred to the Court under Article 177 of the EEC Treaty by the Cour du Travail [Labour Court], Liège, Belgium. The referring court asks for guidance on the effect of Articles 12 and 46 of Regulation No 1408/71 (as codified by Regulation No 2001/83, OJ 1983 L 230, p. 6), which deals with the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The questions, which are the same in both cases, read as follows:

'1. When a pension (in this case, a full pension) is granted by virtue of Belgian legislation alone, should the whole of Article 46 of Regulation No 1408/71-that is to say, including paragraph 3-be applied for the purpose of allowing or disallowing the overlapping of a benefit with a pension granted by another Member State (in this case, Italy)? Does the case-law arising from the *Petroni* judgment and subsequent judgments to the same effect continue to serve any real purpose?

2. Is the principle the same when the benefit in question is not a retirement pension calculated on the basis of years of insurance completed, or treated as such, but an invalidity pension paid by the Fonds National de Retraite des Ouvriers Mineurs [National Retirement Fund for Mineworkers] which is the same for all, subject only to variations relating to family circumstances?

3. Where the second sentence of Article 12(2) of Regulation No 1408/71 suspends a national provision against overlapping which reduces the benefit entitlement determined solely on the basis of periods of insurance in the Member State under consideration by reference to the entitlement to benefits of the same kind acquired in another Member State, can that suspension lead to the reduction of the national benefit pursuant to Article 46(3) of Regulation No 1408/71 when it has not been necessary to aggregate the periods of insurance in order to create an entitlement to benefits in that State and when the only effect of the second sentence of Article 12(2) of the regulation has been to preserve an entitlement acquired under national legislation alone?'

## The background

2. The orders for reference give very little detail of the background to the two cases,

* Original language: English.

but it appears from the referring court's files that they arose as follows.

3. Mr di Crescenzo, an Italian national, worked as a miner in Belgium for 27 years. He previously worked as an employed person in Italy for almost five years. With effect from 1 April 1975, he began to receive a full retirement pension from the Office National des Pensions pour Travailleurs Salariés ('ONPTS'), the competent Belgian institution. On 1 July 1980, he also became entitled to a retirement pension under Italian law. The competent Belgian institution took the view that, by virtue of the Belgian rules against overlapping, it had to take account of Mr di Crescenzo's Italian pension and, by decision of 17 May 1985, his Belgian pension was reduced with effect from 1 July 1980. Mr di Crescenzo maintained that the Belgian rules against overlapping could not be applied to the nationals of other Member States and he appealed to the Liège Tribunal du Travail [Labour Tribunal], which upheld his right to a full pension under Belgian law.

4. Following the decision of the Tribunal du Travail, the competent Belgian institution (by then the Office National des Pensions ('ONP'), which had replaced the ONPTS) accepted that Mr di Crescenzo was entitled to a full pension from 1 July 1980 until 31 December 1980, but took the view that, as a result of the introduction by the Belgian Law of 10 February 1981 of new provisions against overlapping, his pension should be reduced with effect from 1 January 1981, the date on which that Law entered into force. The competent Belgian institution appealed to the Cour du Travail in an attempt to establish that Mr di Crescenzo was not entitled to a full pension after 31 December 1980. Before the Cour du Travail, the competent institution argued that, as from 1 January 1981, he was entitled to either:

(a) a pension calculated exclusively on the basis of Belgian law, including the Belgian rules against overlapping, or

(b) a pension calculated under Article 46 of Regulation No 1408/71, including the limit imposed by paragraph 3 of that article,

whichever was the higher. Mr di Crescenzo claimed that Article 46(3) was not applicable in his case, whereupon the Cour du Travail decided to seek the guidance of the Court.

5. Mrs Casagrande is also an Italian national. Her husband, the late Mr Barel, worked as a miner in Belgium for 21 years, having previously worked in Italy as an employed person for 14 years. On 1 May 1968, he became entitled to a Belgian retirement pension. He died on 16 January 1983. On 30 September 1983, the ONPTS, the competent Belgian institution, notified Mrs Casagrande that a provisional decision had been taken to award her a survivor's pension based on Mr Barel's working life, including the period he had spent working in Italy. In its final decision, adopted on 12 October 1984, however, the competent Belgian institution applied the Belgian rules against overlapping and reduced Mrs Casagrande's pension with effect from 1 February 1983 because she was also in receipt of a survivor's pension from

the competent Italian institution by virtue of the period Mr Barel had spent working in Italy. On 21 February 1985, Mrs Casagrande was informed by the Caisse Nationale des Pensions de Retraite et de Survie that her Belgian survivor's pension was to be further reduced because of an increase in her Italian survivor's pension.

6. Mrs Casagrande took the view that she was entitled to a full Belgian survivor's pension from 1 February 1983 and therefore instituted proceedings before the Liège Tribunal du Travail, before which she argued that the Belgian rules against overlapping did not apply to the nationals of other Member States. Her appeal was successful, the Tribunal du Travail awarding her a full pension with effect from 1 February 1983 without any deduction by reason of the fact that she was also in receipt of a survivor's pension from another Member State. The competent Belgian institution (by then the ONP) appealed to the Cour du Travail, before which it argued that Mrs Casagrande's pension was to be calculated in the same way as that of Mr di Crescenzo.

**The referring court's first and third questions**

7. The basic question in both cases therefore appears to be the extent to which the Belgian authorities are entitled to take account of benefits awarded in other Member States in calculating the amounts due to the claimants. The answer to that question depends on the effect of Articles 12(2) and 46 of Regulation No 1408/71. Mr di Crescenzo and Mrs Casagrande maintain that the Belgian rules against overlapping do not apply to them because of the second sentence of Article 12(2). Although that provision seems to envisage that their claims should be subject to the limit laid down in Article 46(3), Mr di Crescenzo and Mrs Casagrande say that that provision cannot have the effect of reducing the pensions to which they are entitled by virtue of periods of employment completed in a single Member State.

8. Article 12(2) of Regulation No 1408/71 provides as follows:

'The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60(1)(b).'

9. Article 46 forms part of Chapter 3 of Title III of Regulation No 1408/71, a chapter which, according to Article 44(1), is concerned with the right to benefits in respect of old age and death (pensions) of employed or self-employed persons who have been

subject to the legislation of two or more Member States, or of their survivors. The first three paragraphs of Article 46 provide as follows:

'*Award of benefits*

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) ...

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.'

10. The policy underlying Chapter 3 of Title III of Regulation No 1408/71 is explained in the seventh and eighth recitals of its preamble (see OJ English Special Edition 1971 (II), p. 416) as follows:

'the provisions for co-ordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits; ... to this end, persons entitled to benefits for invalidity, old age and death (pensions) must be able to enjoy all the benefits which have accrued to them in the various Member States; ... however, in order to avoid unjustified overlapping of benefits, which could result in particular from the duplication of insurance periods and other periods treated as such, it is necessary to limit the benefits to the greatest amount which would have been due to a worker [or self-employed person] from one of these States if he had spent all his working life there.'

11. Article 46 of Regulation No 1408/71, and particularly Article 46(3), reflect this policy by imposing a limit on the amount of benefit payable to a claimant. That limit was to be the amount to which the claimant would have been entitled had he completed all the periods of insurance or residence completed under the legislation of the Member States in a single Member State. The relevant Member State for these purposes was to be the one under the legislation of which the resulting benefits would be the most generous.

12. It soon became apparent, however, that, far from protecting the position of the migrant, Article 46 could in some circumstances have the effect of reducing the amount of benefit to which he would have been entitled under national law alone. In Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, at paragraph 13, the Court stated that 'The aim of Articles 48 to 51 [of the Treaty] would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State'. The Court concluded, at paragraph 22 of the judgment, that 'Article 46(3) is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of the benefit acquired under national legislation alone.'

13. In Case 22/77 *FNROM* v *Mura* [1977] ECR 1699, the Court ruled that, where Article 46(3) was not applicable because it would have the effect of reducing the amount of benefit payable under national legislation alone, the second sentence of Article 12(2) was also inapplicable. As the Court

explained at paragraphs 14 and 15 of the judgment:

'When the second sentence is not applicable, the first sentence applies, with the consequence that national legislative provisions for reduction, suspension or withdrawal of benefit may be invoked.

However, it appears from Article 46(1) that if the application of national provisions on entitlement and calculation alone is less advantageous for the worker than the application of the rules for aggregation and apportionment, the latter must be applied.'

The Court therefore concluded that:

'So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46(1) of Regulation No 1408/71, be applied.'

The Court added in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385, at paragraph 15 of the judgment, that, where Article 46 of Regulation No 1408/71 applied, 'paragraph (3) of Article 46, which seeks to limit the overlap of acquired benefits, by the means provided in paragraphs (1) and (2) of that article, is applicable, to the exclusion of rules against overlapping laid down by national legislation.'

14. In Case C-108/89 *Pian* v *Office National des Pensions* [1990] ECR I-1599, at paragraphs 8 to 10, the Court summarized the effect of its case-law as follows:

'where a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not prevent that national legislation from being applied to him in its entirety, including any national rules against overlapping benefits.

It must be noted, however, ... that if the application of national legislation alone proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation No 1408/71, the provisions of that article must be applied ... .

In order to decide the proceedings before it, the national court must compare the benefits which would be due pursuant to national legislation alone, including the anti-overlapping rules thereof, with those that would be due under Article 46 of Regulation No 1408/71, including the rule against overlapping contained in Article 46(3).'

These principles were recently reiterated by the Court in Case C-5/91 *Di Prinzio* v *ONP*, judgment of 18 February 1992.

15. It seems to me that the *Petroni* decision lies at the origin of this approach. As the Court explained in Case C-199/88 *Cabras* [1990] ECR I-1023, at paragraphs 23 to 27:

'The provisions of Article 51 of the Treaty are intended to eliminate the disadvantages which migrant workers might suffer as a result of having acquired their social security rights under different national legislative systems.

That intended purpose would not be achieved if, as a result of the exercise of their right of freedom of movement, migrant workers were to lose social security advantages which they are guaranteed at all events by the legislation of one Member State alone or find themselves in a position less favourable than if they had worked all the time in one Member State.

That is why, as the case-law makes clear, the rules laid down in Article 46 of Regulation No 1408/71 can be applied to a migrant worker only if they do not have the effect of depriving the person concerned of the benefit accruing solely under the legislation of one Member State or of preventing him from receiving at least the most favourable full benefit payable under that legislation alone.

The Community provisions cannot therefore be applied unless their application proves to be at least as favourable to the migrant worker as the full application of the national legislation alone, including its anti-overlapping rules.

In that event, however, the Community rules must be applied in their entirety. The restrictions which those rules may impose on migrant workers must be accepted, because they are then the quid pro quo for the social security advantages which those workers derive from the Community rules and which they cannot obtain without them.'

Thus, if *Petroni* had been decided differently, the national authorities would have been required to apply the rules laid down in Article 46 even where they had the effect of depriving the claimant of benefits accruing solely under the legislation of a single Member State.

16. The national court appears to have considered *Petroni* difficult to reconcile with the Court's subsequent decision in Case 323/86 *Collini* v *ONPTS* [1987] ECR 5489, which envisages the application of Article 46 in its entirety, including Article 46(3). In *Collini*, it was held that:

'the anti-overlapping rule in Article 46(3) applies in all cases in which the total sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the limit of the highest theoretical amount of pension, even if the exceeding of that limit is not due to the duplication of insurance periods' (paragraph 13 of the judgment).

It was also held that:

'where there is only one institution providing an independent benefit for the purposes

of Article 46(1), that institution alone must reduce its benefit pursuant to the second subparagraph of Article 46(3), and must reduce it by the full amount by which the total sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the limit referred to in the first subparagraph of Article 46(3)' (paragraph 18).

It emerged at the hearing that the second point decided by the Court in *Collini* led the competent institution to recalculate the benefits due to Mr di Crescenzo and Mrs Casagrande after it had lodged its appeals with the national court.

17. The Court's decision in *Collini* does not in my view represent a departure from the principle laid down in *Petroni*. That principle established that Article 46(3) was incompatible with Article 51 of the Treaty only to the extent that it led to a reduction in the amount of the benefit acquired under national legislation alone. That was not the case in *Collini*, where, as Advocate General da Cruz Vilaça pointed out (at pp. 5497 and 5502), the national legislation, including its anti-overlapping provisions, proved less favourable than the application of Article 46, including Article 46(3). The principle laid down in *Petroni* was not therefore applicable.

18. I therefore consider that the referring court's first and third questions should be answered along the lines of the Court's judgment in *Pian*. Thus, the Belgian authorities must calculate the amount to which the claimants are entitled under Belgian law, including the Belgian rules against overlapping. They must then calculate the amount to which the claimants are entitled under Article 46 of Regulation No 1408/71. The claimant is entitled to the higher of the two amounts. I would add that, as the Court pointed out in Joined Cases 116, 117, 119, 120 and 121/80 *RWP* v *Celestre* [1981] ECR 1737, at paragraph 12, and Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679, at paragraphs 12 and 13, in calculating the amount referred to in Article 46(1), the competent authority must disregard any benefits received by the claimant under the legislation of another Member State. However, in calculating the claimant's entitlement under Article 46 as a whole, the competent authority must apply the limit imposed by Article 46(3).

19. Mr di Crescenzo and Mrs Casagrande argue that Article 46(3) is not applicable in their cases because they did not need to have recourse to the arrangements for aggregation of the periods of insurance for which Regulation No 1408/71 makes provision. In support of that argument, they cite the Court's ruling in Case 32/77 *Giuliani* v *Landesversicherungsanstalt Schwaben* [1977] ECR 1857, which arose out of a dispute over the way in which the German authorities had calculated the invalidity pension of an Italian national who resided in Italy and who had worked first in Italy and subsequently in Germany. The claimant satisfied the conditions for entitlement to a pension laid down by German law, but under German law payment of the pension was to be suspended while he was resident abroad. The German authorities therefore worked out his entitlement under Article 46 of Regulation

No 1408/71, including paragraph 3 of that article. The claimant argued that his entitlement should have been calculated exclusively on the basis of the German legislation, under which he would have been treated more generously, and that, by virtue of Article 10(1) of Regulation No 1408/71, the German authorities were not entitled to refuse payment by reason of the fact that he was resident in another Member State.

20. The Court held that Article 46(3) of Regulation No 1408/71 applied only where, for the purpose of acquiring the right to benefit, it was necessary to have recourse to the arrangements for aggregating periods of insurance. The Court said that, since the waiving of residence clauses pursuant to Article 10 of Regulation No 1408/71 had no effect on the acquisition of the right to benefit, it did not therefore involve the application of Article 46(3) of that regulation.

21. Interpreted in the light of its own particular facts and of the Court's subsequent case-law, it is clear in my view that *Giuliani* merely establishes that the competent institutions of the Member States are not entitled to withhold benefits which fall within the scope of Article 10(1) of Regulation No 1408/71 and which would otherwise be payable under national law simply because the claimant is resident in another Member State. Since benefit is treated as payable in such cases under national law alone, there can be no question of the application of Article 46 of Regulation No 1408/71 and of the limit imposed by paragraph 3 of that article. The circumstances of the present cases are different. Article 10(1) of Regulation No 1408/71 is not relevant because both Mr di Crescenzo and Mrs Casagrande are resident in Belgium. The question which the referring court is called upon to decide is whether, and if so to what extent, the Belgian authorities are entitled to take account of the pension paid to the claimants by the Italian authorities. In my view, the answer to that question is as set out in the Court's judgment in *Pian*.

**The referring court's second question**

22. As far as the referring court's second question is concerned, it was accepted at the hearing by all concerned, in my view rightly, that the Court does not need to address it. It is evident from the file that the main actions are not concerned with invalidity pensions paid by the Fonds National des Ouvriers Mineurs. The Commission simply refers in its written observations on the second question to paragraph 11 of the judgment in *Collini*, already cited, in which the Court explained the conclusion it reached in

paragraph 13, which is set out at paragraph 16 of this Opinion. The referring court's second question is not addressed by Mr di Crescenzo and Mrs Casagrande, while the ONP, which is the only national institution to have submitted observations, states that it has no jurisdiction to comment on the issues raised by it. In these circumstances, I consider that there is no need to answer the second question.

## Conclusion

I am therefore of the opinion that the questions referred to the Court in these cases should be answered as follows:

Where an employed or self-employed person or his survivor receives a pension by virtue solely of the national legislation of one Member State and that pension overlaps with a pension paid under the legislation of another Member State, Regulation No 1408/71 does not preclude the application to him in its entirety of the legislation of the first Member State, including any national rules against the overlapping of benefits, unless the result is less favourable to him than the application of the rules contained in Article 46 of Regulation No 1408/71, including the limit imposed by Article 46(3). In that event, Article 46 must be applied in its entirety, to the exclusion of any national rules against overlapping.