JUDGMENT OF THE COURT (Second Chamber)

20 January 2005 *

In Case C-225/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social n° 3 de Orense (Spain), made by decision of 30 March 2002, received at the Court on 17 June 2002, in the proceedings

Rosa García Blanco

v

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2004,

after considering the observations submitted on behalf of:

— Mrs García Blanco, by A. Vázquez Conde, abogado,

— Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS), by A.R. Trillo García and A. Llorente Alvarez, acting as Agents,

— the Spanish Government, by E. Braquehais Conesa, acting as Agent,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Commission of the European Communities, by H. Michard, I. Martínez del Peral and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 39 EC and 42 EC and of Articles 45 and 48(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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71').

2 The reference was made in the course of proceedings between the late Mrs García Blanco and the Instituto Nacional de la Seguridad Social (National Institute of Social Security, 'INSS') and the Tesorería General de la Seguridad Social (Social Security General Fund, 'TGSS') concerning the award of a retirement pension under the Spanish legislation.

Legal background

Community legislation

3 Article 1(r) of Regulation No 1408/71 defines 'periods of insurance' as follows:

'[P]eriods of contribution or periods of employment or self-employment as defined or recognised as period[s] 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'.

4 Article 3(1) of Regulation No 1408/71 provides:

'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 the State.'

5 Article 45(1) of the regulation lays down the principle of the aggregation of periods of insurance for the acquisition, retention or recovery of the right to benefits, in the following terms:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraphs 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.'

6 Article 46(2) of Regulation No 1408/71 provides:

'Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and/or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of

insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.'

7 Article 48(1) of Regulation No 1408/71 lays down an exception, as regards the award of a pension, for periods of insurance of less than one year's duration, in the following terms:

'Notwithstanding Article 46(2), the institution of a Member State shall not be required to award benefits in respect of periods completed under the legislation it administers which are taken into account when the risk materialises, if:

— the duration of the said periods does not amount to one year,

and

— taking only these periods into consideration, no right to benefit is acquired by virtue of the provisions of that legislation.'

National legislation

8 Article 161(1)(b) of the General Law on Social Security, in the codified version of Royal Legislative Decree 1/94 of 20 June 1994 (BOE No 154, 29 June 1994), as amended by Law No 50/98 of 30 December 1998 relating to fiscal, administrative and social measures (BOE, 31 December 1998) ('the General Social Security Law') makes the grant of a contributory retirement pension conditional on the completion of a minimum period of contribution of 15 years, at least two of which must have been completed within the period of 15 years immediately preceding the occurrence of the fact giving rise to entitlement to the benefit.

9 Article 218 of the General Social Security Law states that, where the insured person is in receipt of an unemployment benefit, the Instituto Nacional de Empleo (National Institute of Employment, 'INEM') is to pay the social security scheme contributions in various respects, depending on the nature of the benefit granted. Thus under Article 218(2):

'In the case of an unemployment allowance for workers over 52 years of age, the benefit agency must also contribute to old-age insurance.'

10 Under Article 215(1)(3) of the General Social Security Law, that unemployment allowance is payable to an unemployed worker who has contributed to unemployment insurance for six years and satisfies all the conditions, except the age requirement, for obtaining a contributory retirement pension under the Spanish social security scheme.

11 Finally, the 28th Additional Provision of the General Social Security Law, which entered into force on 1 January 1999, following the promulgation of Law No 50/98, reads as follows:

'Retirement contributions paid by the benefit agency in accordance with Article 218 (2) of this law shall be taken into account in calculating the basic amount of the retirement pension and the percentage to be applied to it. Such contributions shall in no case have validity and legal effect for the purpose of accrediting the minimum period of contribution required under Article 161(1)(b) of this law, which, in accordance with Article 215(1)(3), must have been completed by the time an application is made for the [unemployment] allowance for [unemployed] persons over 52 years of age.'

The main proceedings and the questions referred for a preliminary ruling

12 Mrs García Blanco, who was born on 9 October 1935 and died on 14 May 2002, applied on 18 October 2000, on reaching the age of 65, for the award of the retirement pension she was entitled to under the German and Spanish social security schemes. She had completed, first, actual periods of insurance equivalent to 209 months — more than 17 years — under German legislation, between 1 August 1966 and 31 May 1984, and aggregated, second, 4 265 days of contribution under Spanish legislation, made up as follows:

— 185 days, representing a period completed between 1 June and 2 December 1984 during which she received the contributory unemployment benefit,

contributions having been paid in respect of all branches of Spanish statutory social insurance, including old-age insurance, by INEM on her behalf;

— 4 080 days, representing a period completed by Mrs García Blanco between 9 August 1989 and 9 October 2000, during which she received the unemployment allowance for unemployed persons over 52 years of age, contributions having been paid by INEM on her behalf, in respect of old-age insurance only.

13 According to the case-file, following the death of her mother, with whom she lived, Mrs García Blanco received a family member's pension from 1 December 1989.

14 Mrs García Blanco obtained a pension paid by the German social security scheme. On the other hand, by decision of 27 April 2001, INSS refused to grant her a retirement pension, on the ground that she had not completed in Spain the minimum contribution period required for acquiring the right to a pension. According to INSS, in accordance with the 28th Additional Provision of the General Social Security Law, the period of 4 080 days during which INEM paid contributions on behalf of Mrs García Blanco, as a recipient of the special unemployment allowance, could not be taken into consideration. As for the remaining period of 185 days during which contributions were also paid on her behalf, while she was in receipt in Spain of contributory benefits under statutory unemployment insurance, it too could not be taken into account, in accordance with Article 48(1) of Regulation No 1408/71, as its duration was less than one year.

15 In May 2001 Mrs García Blanco brought proceedings against INSS and TGSS before the Juzgado de lo Social nº 3 de Orense (Social Court No 3, Orense, Spain), seeking a declaration that she was entitled to receive, from 10 October 2000, a retirement pension under the Spanish legislation.

16 According to the national court, the question arises whether, first, the 28th Additional Provision of the General Social Security Law can validly exclude the taking into account of the 4 265 days of contribution referred to in paragraph 12 above for the purpose of ascertaining whether the period of insurance in question exceeds one year, so that, if it can validly do so, then, in accordance with Article 48 (1) of Regulation No 1408/71, INSS is not obliged to grant benefits relating solely to that period.

17 The question arises, second, whether that additional provision, in that it excludes the taking into account of certain contributions, such as those paid solely in respect of old-age insurance, for the calculation of the qualifying periods laid down in Article 161(1)(b) of that law, discriminates against migrant workers, given that those periods must have been completed on the date of making the application for the unemployment allowance for an unemployed person over 52 years of age.

18 The national court refers in this respect to the case of workers who have received those unemployment allowances by establishing the qualifying period as a result of the taking into consideration of periods of insurance completed under the legislation of one or more other Member States, in accordance with the Court's case-law (see Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869 and Case C-320/95 *Ferreiro Alvite* [1999] ECR I-951).

19 Those workers cannot claim to have the social security contributions paid by INEM in respect of old-age insurance, during the period in which they received the unemployment allowance, taken into account in order to satisfy the condition concerning the minimum period of insurance laid down in Article 161(1)(b) of the General Social Security Law.

20 In those circumstances, the Juzgado de lo Social n° 3 de Orense decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Do Article 12 EC and Articles 39 EC to 42 EC ... and Article 45 of ... Regulation ... No 1408/71 ... preclude a national provision under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of completing the various qualifying periods established in the national legislation and of conferring entitlement to the old-age pension, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which are invalidated by law, with the result that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 45 of the aforementioned ... regulation, those qualifying periods would have to be regarded as completed?

2. Do Article 12 EC and Articles 39 EC to 42 EC ... and Article 48(1) of ... Regulation ... No 1408/71 ... preclude national provisions under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of

determining whether the total duration of insurance periods or periods of residence covered by the legislation of that Member State amounts to one year, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which fall due and are paid during unemployment, so that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 48(1) of the aforementioned ... regulation, the national benefit agency could not be relieved of the obligation to award national benefits?'

21 By letter of 8 April 2003, INSS informed the Court that, by decision of 3 April 2003, the statutory retirement pension claimed by Mrs García Blanco, who had died in the meantime, had been granted her with effect from 10 October 2000. That decision moreover requested the daughter of the deceased, in her capacity as successor, to choose between that retirement pension and the family member's allowance which had previously been granted her, as those two benefits could not be enjoyed at the same time. The person concerned opted for the allowance, the amount of which is greater than that of the retirement pension.

22 On 10 April 2003, the Registry of the Court asked the national court whether those circumstances meant that its reference for a preliminary ruling was being withdrawn.

23 By letter of 11 April 2003, that court replied that it maintained its reference, in particular because the Court's answer in the main proceedings could be of use to it in other proceedings pending before it.

24 By letters of 7 July and 18 September 2003, the Registry of the Court again requested the national court to inform it whether the main proceedings were still pending. It pointed out in this respect that a reference for a preliminary ruling could be made to the Court only in proceedings pending before a national court, and observed that it was open to the Juzgado de lo Social n° 3 de Orense to refer the same questions to the Court for a preliminary ruling in other proceedings pending before that court.

25 In its reply of 7 October 2003, the national court confirmed that the main proceedings were not concluded, in that, in particular, the deceased's successor had not discontinued her action and the defendants had not formally revoked the original decision refusing a pension against which the main action had been brought.

Answer of the Court

26 It should be recalled that, according to settled case-law, the procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, inter alia, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17; and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41).

27 Thus it is clear from both the wording and the scheme of Article 234 EC that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see, to that effect, Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 28, and *Djabali*, paragraph 18).

28 The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (*Djabali*, paragraph 19; *Bacardi-Martini and Cellier des Dauphins*, paragraph 42; and Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 72).

29 In the case at issue in the main proceedings, after the Juzgado de lo Social n° 3 de Orense had made its reference to the Court for a preliminary ruling, the retirement pension applied for by Mrs García Blanco under the Spanish social security scheme was granted her, with effect from the date on which she was able to enforce her entitlement to a retirement pension. Moreover, it is common ground that Mrs García Blanco's daughter, in her capacity as her successor, waived that statutory pension in order to receive the family member's allowance.

30 The conclusion must therefore be that the claims of the claimant in the main proceedings have been met in their entirety.

31 In those circumstances, an answer by the Court to the questions put by the Juzgado de lo Social n° 3 de Orense would be of no use to that court.

32 Consequently, there is no need to reply to the reference for a preliminary ruling.

Costs

33 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 (Second Chamber) rules as follows:

There is no need to reply to the reference for a preliminary ruling in Case C-225/02.

[Signatures]