JUDGMENT OF THE COURT (Fifth Chamber)

22 February 2001 *

In Joined Cases C-52/99 and C-53/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Cour du Travail de Liège (Belgium) for a preliminary ruling in the proceedings pending before that court between

Office National des Pensions (ONP)

and

Gioconda Camarotto (C-52/99),

Giuseppina Vignone (C-53/99),

on the interpretation of Article 95a 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 (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

* Language of the case: French.

THE COURT (Fifth Chamber),

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

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Office National des Pensions (ONP), by G. Perl, acting as Agent,

— Mrs Camarotto and Mrs Vignone, by D. Rossini, trade union representative,

— the Commission of the European Communities, by D. Gouloussis, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Office National des Pensions (ONP), represented by J.-P. Lheureux, acting as Agent, of Mrs Camarotto and Mrs Vignone, represented by D. Rossini, and of the Commission, represented by H. Michard, acting as Agent, at the hearing on 11 May 2000,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2000,

gives the following

Judgment

1 By two judgments of 2 February 1999, received at the Court on 17 February 1999, the Cour du Travail de Liège (Higher Labour Court, Liège) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions concerning the interpretation of Article 95a 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 (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7, hereinafter 'Regulation No 1408/71, as amended').

2 The questions have arisen in two sets of proceedings between the Office National des Pensions (National Pensions Office, hereinafter 'the ONP') and Mr Sutto (the proceedings being continued, following his death, by his widow, Mrs Camarotto) and between the ONP and Mrs Vignone (the widow of Mr Tammaro), concerning the calculation of retirement and survivor's pensions.

The Community legislation

3 It is appropriate at the outset to recall the reasons for which Regulation No 1408/71 was amended by Regulation No 1248/92.

4 In previous judgments (see, in particular, Joined Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851), the Court has held that a worker is entitled to the higher amount of the benefits which would be due under national law alone and under Community law. Where the competent institution determines the benefit due under Community law, it must not take account of the national rules against overlapping pursuant to Article 12(2) of Regulation No 1408/71 but must, if necessary, adjust the amount of the benefit payable, in accordance with the rule limiting overlapping as formerly laid down in Article 46(3) of that regulation.

5 In response to those judgments of the Court, Article 46 of Regulation No 1408/71 was amended by Regulation No 1248/92, which entered into force on 1 June 1992, so as to entitle the person concerned to claim from the competent institution of each Member State the highest amount, calculated without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the national legislation.

6 Article 95a of Regulation No 1408/71, as amended, lays down the following transitional provisions for application of Regulation No 1248/92:

'1. Under Regulation (EEC) No 1248/92, no right shall be acquired for a period prior to 1 June 1992.

2. All insurance periods or periods of residence completed under the legislation of a Member State before 1 June 1992 shall be taken into consideration for the determination of rights to benefits pursuant to Regulation (EEC) No 1248/92.

3. Subject to paragraph 1, a right shall be acquired under Regulation (EEC) No 1248/92 even though relating to a contingency which materialised prior to 1 June 1992.

4. The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of Regulation (EEC) No 1248/92.

5. If an application referred to in paragraph 4 is submitted within two years from 1 June 1992, the rights acquired under Regulation (EEC) No 1248/92 shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.

6. If the application referred to in paragraph 4 is submitted after the expiry of the two-year period after 1 June 1992, rights which have not been forfeited or not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.'

The main proceedings

7 On 23 November 1984, the ONP notified Mr Sutto of a decision to grant him a Belgian retirement pension of BEF 234 023 for an insurance period validated at the rate of 37/45 as at 1 March 1981 and a pension payable by the Italian institution amounting, as at that date, to ITL 1 716 220 (C-52/99).

8 On 30 January 1987, the ONP notified Mrs Vignone of a decision to grant her a Belgian survivor's pension of BEF 251 894 for an insurance period validated at the rate of 27/30 as at 1 December 1984 and a pension payable by the Italian institution amounting, as at that date, to ITL 626 625 (C-53/99).

9 Mr Sutto and Mrs Vignone both brought proceedings before the Tribunal du Travail de Namur (Namur Labour Court), Belgium, for an order that their Belgian pensions be recalculated on the basis of their insurance periods being validated at the rates of 42/45 and 30/30 respectively, with no reduction.

10 By judgment delivered on 13 November 1986, the Tribunal du Travail de Namur ruled that Mr Sutto should receive a retirement pension calculated on the basis of his insurance period being validated at the rate of 42/45, to be paid by the Belgian social security scheme for employed workers.

11 By judgment delivered on 14 May 1987, the Tribunal du Travail de Namur ruled that Mrs Vignone should receive a survivor's pension calculated on the basis of full validation of her insurance period, that is to say, at the rate of 30/30, to be paid by the Belgian social security scheme for employed workers.

12 By applications dated 23 April and 7 December 1987, the ONP lodged appeals against those judgments before the referring court. Since the cases were primarily concerned with the application of national rules against overlapping, the proceedings were stayed until judgment was given in other test cases pending either before the Belgian Cour de Cassation (Court of Cassation) or before the Court of Justice of the European Communities. Mr Sutto died during that period.

13 Following the amendment of Regulation No 1408/71 by Regulation No 1248/92, and whilst the two cases were still stayed, the ONP sent a letter

to its lawyer on 22 September 1994. That letter contained a breakdown of each of the two pensions, calculated on the basis of the rules applicable from 1 June 1992, giving a final amount more favourable to Mrs Camarotto and Mrs Vignone than that previously calculated. A copy of the letter came into the hands of their trade union representative. However, the ONP did not draw to their attention the fact that, in its view, it was necessary for them to submit to it an application for review within a time-limit of two years from 1 June 1992 in order to benefit from the application of Regulation No 1248/92 and to secure review, with effect from that date, of the calculation of the pensions at issue in the main proceedings.

14 Mrs Camarotto and Mrs Vignone maintain that they were misled by the letter in question, which was not sent to them until 16 November 1995. They further observe that they did not think it necessary to submit an application for review of the calculation of the pensions at issue in the main proceedings, since they had brought proceedings to that end before the Belgian courts.

15 Mrs Camarotto and Mrs Vignone also claim that they had intended, pursuant to Articles 807 and 808 of the Belgian Judicial Code, to bring to the attention of the referring court, when proceedings were resumed, the fact that Regulation No 1408/71 had been amended so as to entitle them to claim a higher pension.

16 In January 1996, it was decided to resume proceedings in the two main cases before the Cour du Travail de Liège. In the observations which it then lodged, the ONP asserted, on the basis of Article 95a(4) of Regulation No 1408/71, as amended, that it was not obliged to increase the pensions of Mrs Camarotto and Mrs Vignone with retroactive effect from 1 June 1992 unless it received from them an application for administrative review.

17 On 12 and 13 November 1997 respectively, Mrs Camarotto and Mrs Vignone sent their formal submissions to the ONP, which included applications for

judicial review pursuant to Article 807 of the Belgian Judicial Code. The ONP indicated that it was willing to grant a pension increase only from 1 December 1997. At all events, because of the pending litigation, the ONP did not pay the amount due in respect of the two pensions with effect from 1 June 1992.

18 There is therefore no dispute as to the amount of the two pensions at issue in the main proceedings in respect of the periods prior to 1 June 1992 and subsequent to 30 November 1997. In order to determine the pension rights relating to the period from 1 June 1992 to 30 November 1997, the Cour du Travail de Liège has referred the following questions to the Court for a preliminary ruling:

'1. Does Article 95a of Regulation No 1408/71, as amended by Regulation No 1248/92, laying down transitional provisions for application of Regulation (EEC) No 1248/92, refer solely to recipients of pensions where the decision granting the pension was final at the time of the entry into force of the amendment, or does it relate also to recipients of pensions who before the entry into force of the amendments introduced by the new regulation had already brought proceedings before a national court seeking to obtain precisely the right to the pension by contesting the application of the national rules against overlapping, a final decision in those proceedings not yet having been given at the time of the entry into force of the new provisions?

2. If Article 95a applies to all recipients without distinction, must the application referred to in Article 95a(4) be made to the competent social security institution in accordance with the formalities required by national legislation for the bringing of an application for review, or may it be made to the court before which the dispute has been brought in accordance with the applicable rules of procedure and, in the latter case, must the period of two years referred to in Article 95a(5) and (6) likewise be complied with?'

19 By order of the President of the Court of Justice of 10 March 1999, Cases C-52/99 and C-53/99 were joined for the purposes of the written and oral procedure and of the judgment, in accordance with Article 43 of the Rules of Procedure.

The questions referred for a preliminary ruling

20 The two questions referred by the national court raise three issues, concerning:

— the date on which rights of review are acquired pursuant to the transitional provisions laid down in Article 95a of Regulation No 1408/71, as amended (first question);

— the procedural rules applying to applications for review (first part of the second question);

— the possibility of submitting an application for review with retroactive effect outside the two-year period referred to in Article 95a(5) and (6) of Regulation No 1408/71, as amended (second part of the second question).

21 First, it should be borne in mind that, according to settled case-law, in the absence of relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for

proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, most recently, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

The first question

22 By its first question, the national court is asking in essence whether the transitional provisions contained in Article 95a of Regulation No 1408/71, as amended, apply solely to recipients of pensions in respect of whom the decision granting the pension was final as at 1 June 1992, or whether they also apply to persons who, before that date, had brought proceedings before a national court seeking determination of their pension rights by contesting the application of the national rules against overlapping, where a final decision in those proceedings had not yet been given.

23 The ONP maintains that Article 95a of Regulation No 1408/71, as amended, requires any person concerned whose pension has already been the subject of an 'award' to submit an application for review, and that it is immaterial in that regard whether the administrative decision granting the pension is definitive or not.

24 It should be noted that Article 95a of Regulation No 1408/71, as amended, has previously been considered by the Court in Case C-307/96 *Baldone* v *INAMI* [1997] ECR I-5123. In paragraphs 11, 12 and 13 of that judgment, the Court held that, when an invalidity benefit has been awarded prior to the entry into

force of Regulation No 1248/92, Article 95a(1) to (3) of Regulation No 1408/71, as amended, is not applicable. Such situations fall instead under Article 95a(4) to (6). The fact that, following a miscalculation of the benefit due, the competent authorities of a Member State proceed, after the entry into force of the amending regulation, to recalculate a benefit and correct the amount due cannot give rise to a new right but has the effect solely of determining correctly the amount of the benefit entitlement previously acquired.

25 It follows that application of Article 95a of Regulation No 1408/71, as amended, is not limited to situations in which a final decision granting a pension was adopted prior to 1 June 1992 but also extends to cases in which proceedings have been brought before a national court before that date, even where those proceedings had not yet been finally determined as at 1 June 1992. Otherwise, claimants would be denied the right to challenge the application of the national rules against overlapping, which would be contrary to the objective of Regulation No 1248/92.

26 The answer to the first question must therefore be that Article 95a of Regulation No 1408/71, as amended, laying down transitional provisions for application of Regulation No 1248/92, applies to recipients of pensions who, before the date of entry into force of the amendments introduced by the latter regulation, had already brought proceedings before a national court seeking to obtain the right to the pension by contesting the application of the national rules against overlapping, even if a final decision in those proceedings had not yet been given at the time of the entry into force of the new provisions.

The second question

27 By the second part of its second question, which should be examined first, the national court seeks to ascertain whether Article 95a of Regulation No 1408/71,

as amended, precludes application of a national rule the effect of which is to allow an application for review to be made after the expiry of the two-year period prescribed by that article.

28 The Court has always accepted that it is compatible with Community law for reasonable limitation periods for bringing proceedings to be laid down in the interests of legal certainty (Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet* [1976] ECR 2043, paragraphs 17 and 18, and Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 23).

29 Article 95a(5) of Regulation No 1408/71, as amended, prescribes a two-year time-limit for submission of an application for review. However, in recognising the possible existence of 'more favourable provisions of the legislation of any Member State', Article 95a(6) of Regulation No 1408/71, as amended, expressly reserves the possibility for Member States to allow claimants to submit an application for review after expiry of the two-year period without the claimants' rights being automatically forfeited or time-barred.

30 It follows that Community law does not preclude application of a two-year time-limit, provided that the national rules for its implementation are compatible with the principle of equivalence and do not render the exercise of rights of review impossible in practice or excessively difficult.

31 If the legislature lays down a time-limit greater than two years for bringing similar domestic actions, the national court is required to afford equally

favourable treatment to applications based on Community law. That equality also extends to any retroactive effect which may be recognised under national law.

32 The purpose of the first part of the second question is to ascertain whether, on the assumption that the two-year limitation period laid down in Article 95a of Regulation No 1408/71, as amended, is to be applied and that the rules governing its implementation are in conformity with the abovementioned requirements, Community law precludes national law from requiring a claimant to submit a formal application for review within two years, either to the social security institution or to the competent court.

33 It is apparent both from the terms and the scheme of Article 95a(4) of Regulation No 1408/71, as amended, that application of the provisions of Regulation No 1248/92 to pension rights acquired before 1 June 1992 is subject to an express application being made by the person concerned (see *Baldone*, cited above, paragraph 16).

34 However, although the submission of an application for review is thus made a precondition for the institution of review proceedings, Article 95a of Regulation No 1408/71, as amended, gives no indication as to the form which such an application is to take.

35 It is therefore for the referring court to determine, first, whether national law requires the claimant to take any steps outside the court proceedings which have already commenced and which may have been stayed, with a view to submitting an administrative application to the competent social security institution. If so, that court must then satisfy itself that such a requirement does not render the

claimant's exercise of the rights conferred on him by Community law impossible in practice or excessively difficult.

36 In that respect, in circumstances such as those in the present cases, the referring court must take into consideration that, according to the information provided to the Court of Justice, the administrative institution is not required to inform the claimant of his rights of review and that, in most cases, that person is not assisted by a lawyer or legal adviser.

37 Second, if the submission of an application to the competent administrative institution is not necessary, it is for the referring court to consider whether it would be justified to require the claimant to re-open the stayed proceedings within the time-limit laid down for bringing the application for review before the competent court.

38 The ONP argues that it is necessary, at the very least, to submit a claim to the court in the form prescribed by the applicable procedural rules, for example by lodging an application, pleading or statement of claim. So, since it was not until 12 and 13 November 1997 that the proceedings were re-opened, the ONP is willing to grant a pension increase to Mrs Camarotto and Mrs Vignone only with effect from the month following the actual date of their applications for review, that is to say, from 1 December 1997.

39 Mrs Camarotto and Mrs Vignone, however, relying on Articles 807 and 808 of the Belgian Judicial Code, assert that the claimants may supplement or amend their claim in order to take account of any matters of fact or of law arising at any time during the judicial procedure, provided that those matters are capable of increasing the rights of the insured persons. The effect of those provisions is, they submit, to require a Belgian court to apply to pension calculations the rules which

entered into force on 1 June 1992, so that it can give retroactive effect to their application for review.

40 Since the national court has sole competence to interpret and apply Articles 807 and 808 of the Belgian Judicial Code, it is for that court to determine whether individuals in a domestic situation similar to that of Mrs Camarotto and Mrs Vignone may have recourse to the procedure laid down in those articles. If so, the national court must ensure that the principle of equivalence is observed by permitting recourse to that procedure under the same conditions for applications based on Community law as for similar applications based on domestic law. Nor must the national procedure be such as to render the exercise of the rights conferred by Community law impossible in practice or excessively difficult.

41 It is also for the national court to determine whether the ONP can be allowed to rely on the delay by Mrs Camarotto and Mrs Vignone in lodging their claims as justification for its refusal to review their pensions as from 1 June 1992, having regard to the fact that it did not point out to them before the expiry of the two-year period that they needed, in its view, to submit an application for review.

42 The answer to be given to the second question must therefore be that it is for the national court to determine, first, whether its national law requires an application for review to be made either to the competent social security institution within the period prescribed and in accordance with the relevant formal requirements, or to the court itself according to the applicable rules of procedure. Second, it is for that court to ensure that those requirements are not less favourable than those governing similar situations under domestic law and that they are not such as to render impossible in practice or excessively difficult the exercise of the rights conferred on claimants by Regulation No 1408/71, as amended.

Costs

43 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Cour du Travail de Liège by judgments of 2 February 1999, hereby rules:

1. **Article 95a of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, laying down transitional provisions for application of Regulation No 1248/92, applies to recipients of pensions who, before the date of entry into force of the amendments introduced by the latter regulation, had already brought proceedings before a national court seeking to obtain the right to the pension by contesting the application of the national**

rules against overlapping, even if a final decision in those proceedings had not yet been given at the time of the entry into force of the new provisions.

2. It is for the national court to determine, first, whether its national law requires an application for review to be made either to the competent social security institution within the period prescribed and in accordance with the relevant formal requirements, or to the court itself according to the applicable rules of procedure. Second, it is for that court to ensure that those requirements are not less favourable than those governing similar situations under domestic law and that they are not such as to render impossible in practice or excessively difficult the exercise of the rights conferred on claimants by Regulation No 1408/71, as amended by Regulation No 1248/92.

La Pergola Edward Jann

Delivered in open court in Luxembourg on 22 February 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber