Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 24 May 2012[1]

Case C-589/10

Janina Wencel
v
Zakład Ubezpieczeń Społecznych w Białymstoku

(Reference for a preliminary ruling from the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Poland))

(Social security — Article 7 and Annex III to Regulation No 1408/71 — Retirement pension granted in Poland prior to accession — Applicability of European Union law — Applicability of a social security convention concluded before the date of application of Regulation No 1408/71 — Person habitually resident in two Member States who has been granted a retirement pension in one and a widow's pension in the other — Withdrawal of one of the pensions and order to repay sums paid without entitlement — Possibility of dual residence for the purposes of Regulation No 1408/71)

I – Introduction

1. In this case, the referring court has formulated three questions in the context of proceedings concerning the legality of a 2009 decision of the Polish authorities to withdraw a retirement pension granted in 1990 to Mrs Janina Wencel and to seek repayment of the benefits paid over the previous three years. Taking into account various factors, and in accordance with an international convention concluded in 1975 between Poland and the Federal Republic of Germany, the view was taken that the German social security system had sole competence in relation to the pension.

2. The Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Labour and Social Security Chamber of the Court of Appeal, Białystok) asks whether this administrative decision (and the Polish legislation on which it is based) is compatible with European Union law and, in particular, Regulation (EEC) No 1408/71,[2] whose applicability to the main proceedings is open to question.

3. This case will allow the Court of Justice to bring some important clarifications to its case-law on social security, as well as to the case-law on the legal issues which often arise in connection with the accession to the European Union of new Member States and the application to them of transitional provisions.

1 — Original language: Spanish.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) amended on numerous occasions ('Regulation No 1408/71').

II – Legal framework

A – *Regulation No 1408/71*

4. Pursuant to Article 1(h) of Regulation No 1408/71, for the purposes of the regulation, 'residence' means 'habitual residence'.

5. Although, under the terms of Article 6, as a general rule Regulation No 1408/71 replaces international social security conventions, Article 7 makes exceptions to this rule in certain cases and includes among the provisions which it states will continue to apply, 'certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III' (Article 7(2)(c)).

6. Point 19(a) of Part A of Annex III to Regulation No 1408/71 refers to the 'Convention of 9 October 1975 on old-age and work-injury provisions, under the conditions and the scope defined by Article 27(2) to (4) of the Convention on social security of 8 December 1990'. [3]

7. Article 10(1) of Regulation No 1408/71 provides that, 'save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated. …'

B – *The Polish legislation*

8. In Poland, retirement and other social security pensions are governed by the Ustawa z dnia 17.12.1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law on retirement pensions and other pensions from the Social Security Fund) of 17 December 1998. [4]

9. Article 114(1) of the Pensions Law provides that the right to benefits and the amount thereof shall be re-assessed at the request of the person concerned or on the institution's own initiative where, after the decision on benefits has become final, new evidence is presented or circumstances existing before the decision was issued are revealed which affect the right to benefits or the amount thereof.

10. Under Article 138(1) and (2) of the Pensions Law, any person who has received benefits to which they were not entitled is required to repay them. Benefits paid out in spite of circumstances leading to the cessation or suspension of the right to benefits or termination of benefits payments in full or in part, where the person receiving the benefits has been advised that they are not entitled to them, are to be regarded as benefits paid without entitlement.

3 — Dz. U. of 1976, No 16, item 101, ('the 1975 Convention').

4 — Consolidated version: Dz. U. of 2009, No 153, item 1227, ('the Pensions Law').

C – The Convention of 9 October 1975

11. Also relevant to the case is Article 4(1) of the Convention between Germany and Poland of 9 October 1975, which provides as follows: 'Retirement pensions are to be granted by the insurance institution of the State in whose territory the recipient lives, in accordance with the provisions applicable to such institution'. Article 4(3) states as follows: 'The right to a pension exists only during the period of residence in the territory of the State whose insurance institution established the pension'.

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

12. The dispute in the main proceedings concern the retirement pension rights of Mrs Janina Wencel, a Polish national born in 1930 who has been simultaneously registered as resident in Germany and Poland since 1975. It is appropriate to start by describing the circumstances surrounding the residence of the person concerned.

13. On the one hand, Mrs Wencel was registered as resident in Poland, where she was working for her daughter-in-law as a childminder for her own grandchildren between 1 April 1984 and 31 October 1990. As a result of this occupational activity in Poland, on 24 October 1990 the Zakład Ubezpieczeń Społecznych (Social Security Institution, 'the ZUS') decided to grant Mrs Wencel the right to the retirement pension which is at issue in this case, starting from 1 July 1990, in respect of the insurance periods completed in Poland.

14. On the other hand, in 1975 Mrs Wencel had applied to the German authorities for a residence permit and the file shows that she was registered in Frankfurt am Main from 1975 to 2010. Mrs Wencel's husband had moved to Frankfurt am Main, where he was employed, in 1975 and he lived there until his death in 2008. He was granted an invalidity pension by the German authorities in 1984. From 1 August 2008, Mrs Wencel has received a widow's pension from the German social security institution. In the application for this pension she gave an address in Frankfurt.

15. The parties have indicated that Mrs Wencel is currently living in Poland.

16. In 2009, the ZUS became aware that Mrs Wencel was also registered in Germany and required her to submit a written declaration as to her actual place of residence. In a written statement of 24 November 2009 Mrs Wencel indicated that her habitual residence since 25 August 1975 had been in Germany, but that she had spent all leave and holidays in Poland.

17. In the light of this statement, the ZUS issued two decisions. The first, dated 26 November 2009, reversed the decision of 24 October 1990 granting Mrs Wencel the retirement pension and terminated payment of the pension from 1 December 2009. The grounds for this decision were that, in the view of the ZUS, despite having given an address in Poland when she applied for the pension in 1990, her centre of interest and habitual residence had been in Germany since 1975. For this reason, the ZUS maintained that the Polish pensions institution had never been the competent body to deal with Mrs Wencel's pension application, but that, under Article 4 of the 1975 Convention, the responsibility for making that decision fell on the German social security institution. The ZUS concluded that the applicant had no entitlement to a retirement pension from the Polish social security system.

18. The second decision of the ZUS, dated 23 December 2009, was a consequence of the first decision and required Mrs Wencel to repay the sums paid by way of retirement pension to which she was not entitled over the previous three years, that is, for the period between 1 December 2006 and 30 November 2009, together with the corresponding interest.

19. Mrs Wencel challenged both decisions in the Sąd Okręgowy – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Labour and Social Security Chamber of the Regional Court, Białystok), arguing that the ZUS was in breach of provisions of European Union law on freedom of movement and residence and had misinterpreted the provisions on the coordination of social security systems. She pointed out that, as from 1975, she had resided in both Poland and Germany and therefore should not now have her right to a retirement pension removed. By decision of 26 November and 23 December 2009, both actions were dismissed. The Sąd Okręgowy took the view that the applicant had been registered as habitually resident in both Poland and Germany, but that, in fact, she had spent the majority of her time in Germany and consequently her centre of interest must have been in that country.

20. Mrs Wencel appealed against the decision at first instance to the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku. In view of the uncertainties regarding the interpretation of the provisions of European Union law that it considered applicable to the case, the appeal court stayed the main proceedings and referred the following questions for a preliminary ruling:

‘(1) Does the principle of freedom of movement and residence in the Member States of the European Union, as expressed in Articles 21 TFEU and 20(2) TFEU, mean that Article 10 of Council Regulation … 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 … must be interpreted as meaning that old-age cash benefits acquired under the legislation of one Member State are not to be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient lived simultaneously (had two equivalent habitual residences) in the territory of two Member States, including of one other than that in which the institution responsible for payment of the retirement pension is situated?

(2) Must Articles 21 TFEU and 20(2) TFEU and Article 10 of Council Regulation … No 1408/71 be interpreted as precluding the application of national provision Article 114(1) of the Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Polish Law on retirement pensions and other pensions from the Social Security Fund) of 17 December 1998 (Dziennik Ustaw of 2009, No 153, item 1227, as amended), in conjunction with Article 4 of the Agreement of 9 October 1975 between the People’s Republic of Poland and the Federal Republic of Germany on pension and accident insurance (Dziennik Ustaw No 16, item 101, of 1976, as amended), which entails re-examination of the case by the Polish pension institution and removal of the pension right of a person who, for many years, has had simultaneously two habitual residences (two centres of interest) in two countries now belonging to the European Union and who did not, prior to 2009, submit an application or declaration concerning the transfer of residence to one of those countries?

In the event that the answer is in the negative:

(3) Must Articles 20(2) TFEU and 21 TFEU and Article 10 of Council Regulation No 1408/71 be interpreted as precluding the application of national provision Article 138(1) and (2) of the Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych of 17 December 1998 (Dziennik Ustaw of 2009, No 153, item 1227, as amended), which entails the demanding by the Polish pension institution of repayment of a retirement pension in respect of the period of the last three years from a person who, from 1975 to 2009 had simultaneously two habitual residences (two centres of interest) in two countries now belonging to the European Union, where that person had not, at the time the application for the grant of a retirement pension was examined and after it was received, been advised by the Polish insurance institution of the need to inform it also that he has two habitual residences in two countries and of the need to submit an application or declaration concerning the choice of an insurance institution of one of those countries as competent to consider applications concerning retirement pensions?’

IV – Procedure before the Court of Justice

21. The reference for a preliminary ruling was lodged at the Registry of the Court on 14 December 2010.

22. Written observations have been submitted by the ZUS, the Polish and German Governments and the Commission.

23. At the hearing on 1 March 2012, oral argument was presented by the representatives of the ZUS, the Republic of Poland, the Federal Republic of Germany and the Commission.

V – Analysis

24. In this case, the referring court has formulated three questions which, in summary, raise the issue of whether a person who has simultaneously lived in two States since 1975, and who was granted a retirement pension in one of them in 1990, can use European Union law as a basis for challenging the legality of a decision whereby, 19 years later, the pension is withdrawn and the sums paid over the previous three years are reclaimed.

25. The three questions, as formulated, appear to be based on a set of assumptions, the correctness of which must in some cases be debated, leading to a reformulation of those questions and the addition of some further considerations which, although not specifically requested in the order for reference, will, in my view, assist in providing a reply which is as useful and as thorough as possible in reaching a decision in the main proceedings.

A – *The first question referred*

1. The possibility of dual residence for social security purposes

26. The first question assumes a factual situation whereby Mrs Wencel has simultaneous dual residence in both Poland and Germany, to which the referring court seems to want to attribute some legal significance. In particular, the referring court asks whether the protection given by Article 10 of Regulation No 1408/71, in conjunction with Articles 21 TFEU and 20(2) TFEU applies to the recipient of a retirement pension who has had such dual residence in two Member States 'including ... one other than that in which the institution responsible for payment of the retirement pension is situated'.

27. However, I feel it necessary to state at the outset that the scheme of Regulation No 1408/71 does not appear to permit a declaration of dual residence in two different Member States for social security purposes and nor can such a thing be a requirement of the Treaty.

28. Many of the rules for co-ordination of social security schemes contained in Regulation No 1408/71 use the residence of the person concerned as a 'link' in order to determine what legislation is applicable or which institution is responsible. So, for example, residence determines what social security legislation is applicable in the case of a person who pursues an activity in the territory of several Member States (Article 14(2)(b) and Article 14a(1) of Regulation No 1408/71) or in cases where 'the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him' (Article 13(2)(f)). Likewise, residence determines which institution has responsibility in the case of, for example, payment of special non-contributory benefits (Article 10a(1)).

29. If legal effect were to be given to situations of dual residence, these and many other provisions of Regulation No 1408/71 would be incapable of application and the principle of a single applicable legislation, which, together with the principles of equality and of preservation of rights acquired and in the course of being acquired, is one of the fundamental governing principles of this piece of EU legislation, would be contravened. [5]

30. The case-law of the Court has consistently stated that the provisions of Title II of Regulation No 1408/71 constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Union are to be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complication which may arise from that situation. [6] So, establishing a single place of residence for social security purposes, inter alia, prevents overlapping of benefits, which is prohibited by Regulation No 1408/71 (Article 12).

31. Situations such as that of Mrs Wencel, in which the person has several centres of interest of equal importance in more than one Member State are not at all unusual. The EU legislature is conscious of this and has listed the factors which must be taken into account in determining a person's residence, specifying that, even if following an overall assessment of all of these elements there still remains a difference of views between the institutions concerned, the intention of the person will be the decisive factor. [7] It follows that establishing a single residence for social security purposes is unavoidable, whether by selection or, failing that, by election.

32. Moreover, it is my understanding that a provision which requires designation of a single place of residence for social security purposes and which does not give legal effect to a situation of *de facto* dual residence, does not in and of itself contravene Articles 20 TFEU and 21 TFEU, to which the referring court refers. In the circumstances of this case, as we shall see, withdrawal of the Polish pension should not have prevented Mrs Wencel from applying to the German authorities for the relevant benefit. The requirement to specify a single State of residence does not, therefore, in principle cause the person concerned to be disadvantaged, as she was also able to apply in Germany for aggregation of the periods in respect of which contributions were paid in Poland.

33. In conclusion, it is my view that the reply to the first question referred should simply be that declaring dual residence for social security purposes is precluded under Regulation No 1408/71 and that this does not infringe Article 20(2) TFEU and Article 21 TFEU.

2. The applicability of EU law and, in particular, Article 10 of Regulation No 1408/71 to the case

34. In order to provide the referring court with a reply which will be as useful as possible in reaching a decision in the main proceedings, I should supplement the foregoing conclusion by saying that Article 10 of Regulation No 1408/71, which the court refers to in its question, is not applicable in the situation under consideration here. In fact, as we shall see, EU law is barely relevant to this case, which is governed, in essence, by an international convention (a): furthermore, the circumstances of this case do not fall within the factual situation contemplated by Article 10(b).

5 — The new Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166 p. 1-123) is based on the same principles.

6 — See, in particular, Case 60/85 *Luitjen* [1986] ECR 2365.

7 — Article 11 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284 p. 1).

a) Applicability of the 1975 Convention between Germany and Poland

35. In 1990, when the ZUS granted Mrs Wencel's retirement pension, EU law, and Regulation No 1408/71 specifically, clearly did not apply in Poland. By contrast, the Convention of 9 October 1975 between Germany and Poland governing old-age and work-injury provisions was in force.

36. The 1975 Convention was one of the so-called 'integration' agreements on pensions, whose purpose was to resolve the problems in the area of social security which had arisen between the Federal Republic of Germany and Poland as a consequence of the territorial changes and population displacements caused by the first and second world wars. [8] Under Article 4 of the Convention, responsibility for granting pensions lay with 'the insurance institution of the State in whose territory the recipient lives, in accordance with the provisions applicable to such institution', and the right to the pension was lost if the person concerned ceased to reside in the territory of the State whose insurance institution established the pension.

37. As the German government has stated, a convention based on the idea of exporting pensions and preserving rights acquired in the State of origin was not achievable in the political context of the time (1975), and neither was a concept of normal work-related migration. In that specific context, each signatory State basically took on the payment of the pensions of persons resident in their territory, but agreed to take into account the periods of contribution in the other State when calculating the pension. [9]

38. At the time Mrs Wencel submitted her application for a retirement pension, the case appeared to be an purely domestic one: the ZUS granted and then paid a pension in accordance with Polish legislation, to a person who had worked and made contributions in Poland and who had at no stage informed them that she was resident anywhere other than Poland. Now, it is to be supposed that if in 1990 the Polish authorities had been aware that Mrs Wencel's residence, as determined in accordance with the rules provided by the domestic legislation, was in Germany and not in Poland, they would have refused to grant the pension, given that, under the 1975 Convention between Germany and Poland, the competence to make any such award fell to the German social security institutions: the institution responsible for payment of the pension would have had to be the German institution, and its calculation would have had to have been done in accordance with the German legislation then in force, albeit taking into account the periods for which contributions were made in Poland.

39. It is therefore entirely reasonable to assume that, if Mrs Wencel was resident in Germany in 1990, she would have been able to apply to the German authorities for a retirement pension, which would have been calculated taking into account the years during which she made contributions in Poland. [10] The 1975 Convention, on the other hand, did not cover an application to the Polish authorities.

40. This was, apparently, the criterion behind the disputed decisions in the main proceedings, which ordered Mrs Wencel's pension to be withdrawn and required her to repay the amounts relating to the previous three years. These decisions too were governed by the 1975 Convention, despite having been taken after the accession of Poland to the European Union.

8 — In Germany, the Fremdrentengesetz (Law of 28 September 1958 on pension rights acquired by contribution abroad) was passed in the same context and pursuant to the same principle of 'integration'. In this regard, see Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraphs 101 to 104.

9 — In 1990, this context having changed, the two States signed a further convention, which is not, however, applicable to this case, since, by virtue of Article 27(2) of the new social security convention of 8 December 1990, the 1975 Convention will continue to apply to persons who changed their residence prior to 1990.

10 — It is to be noted, however, that, according to the information presented at the hearing, had she done so, Mrs Wencel would probably not have been entitled to a retirement pension until five years later, since German pensions legislation, which would have had to apply to the case, albeit with all contribution periods being aggregated, set the pensionable age at five years higher than the Polish pensionable age (65 as opposed to 60).

41. Although Regulation No 1408/71 was already applicable in Poland from its accession in 2004, replacing the social security conventions between the Member States (Article 6 of the Regulation), Article 7 makes provision for some exceptions to this rule, one of which is applicable in this case.

42. Thus, by virtue of Article 7(2)(c) of Regulation No 1408/71, notwithstanding the provisions of Article 6, 'certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation [shall continue to be generally applicable] provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III'.

43. Subparagraph c) therefore contemplates that the provisions of social security conventions that are listed in Annex III to the Regulation are to apply, by way of exception, where they are more favourable to the person concerned or, in any event, where they arise from specific historical circumstances and their effect is limited in time.

44. In my view, in that point 19(a) of Part A of Annex III expressly mentions the 1975 Convention between Germany and Poland in general,[11] in that the Convention was entered into as a result of the specific historical circumstances explained earlier and in that its effect is limited in time by reason of the terms of the 1990 Convention mentioned above, the 1975 Convention, rather than Regulation No 1408/71, must be regarded as unconditionally applicable to the retirement pension at issue here, and there is no need to consider whether the provision in question is or is not more favourable to the beneficiary than the EU law provision.

45. Case-law certainly does not, in principle, preclude the simultaneous application of this type of convention and Community law, in so far as this is possible. Thus, *Torrekens*[12] stated that the regulation known as Regulation No 3 (which preceded Regulation No 1408/71) continued to apply 'to the extent to which these conventions do not impede its application' (paragraph 21).

46. On the other hand, the Court stated in *TNT Express Nederland BV*,[13] in connection with Article 71 of Regulation No 44/2001,[14] that an EU law provision which gives precedence to the application of a convention 'cannot have a purport that conflicts with the principles underlying the legislation of which it is part' or 'lead to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation's provisions lead' (paragraph 51).

47. The same idea is apparent in a line of case-law which holds that, despite the mandatory nature of the general rule that social security conventions are replaced by Regulation No 1408/71 and the strictly exceptional nature of the derogations under Article 7, and Annex III in particular, the Treaty freedoms 'preclud[e] the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Regulation No 1408/71, of conventions operating between two or more Member States'.[15]

11 — It should be noted that point 19 of Annex III refers to the 1975 Convention in its entirety, unlike the other points, which mention only certain specific provisions of other conventions.

12 — Case 28/68 *Torrekens* [1969] ECR 125.

13 — Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107.

14 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

15 — *Habelt and Others*, paragraphs 118 and 119. See also Case C-227/89 *Rönfeldt* [1991] ECR I-323 and Case C-277/99 *Kaske* [2002] ECR I-1261. However, the case-law specifies that this principle cannot apply to workers who did not exercise their right to freedom of movement prior to entry into force of the Regulation (Case C-475/93 *Thévenon* [1995] ECR I-3813).

48. It is my view, however, that freedom of movement is in any event preserved in this case. In holding in 2009 that the institution responsible for payment of the pension was that of another Member State, the ZUS did not cause Mrs Wencel to 'lose' social security advantages or acquired rights, for the simple reason that the right to a Polish pension never existed. Neither did it, in principle, put her in a less favourable position which might have impeded her movement within the EU, since the withdrawal of the Polish pension did not deprive her of the right to apply for a pension in Germany.

49. Consequently, the review in 2009 of the legality of the decision taken in 1990 was governed by the 1975 Convention. EU law is of no relevance where the issue is to determine whether the 1990 decision of the ZUS to grant a Polish pension was or was not valid and hence whether, in 2009, it should have been annulled. Only if it were to be shown that in 1990 Mrs Wencel's habitual residence for social security purposes was in Poland could the validity of the decision of the ZUS be challenged, but this would be under the 1975 Convention and the rules on the determination of residence contained therein and in the Polish legislation.

b) The factual situation arising in this case is not provided for in Article 10 of Regulation No 1408/71

50. Furthermore, as I have already mentioned, the factual situation under consideration here is not provided for in Article 10 of Regulation No 1408/71, which applies to quite different circumstances to those which have given rise to the main proceedings.

51. According to its wording, Article 10 acts to prevent pensions being detrimentally affected in any way as a result of the fact that 'the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated'. However, as explained previously, in the case of Mrs Wencel, there could be no such divergence between the place where the institution was located and the residence of the person concerned. Under the 1975 Convention, it was this residence that determined which State was responsible for the pension; it follows that either Mrs Wencel's residence was in Germany, in which case the institution responsible for payment was the German institution, or her residence was in Poland, in which case the pension would fall within the competence of the Polish authorities. Furthermore, in that, as we have seen, a 'dual residence' scenario has no place in the context of Regulation No 1408/71,[16] the circumstances of this case cannot possibly fall within the factual situation of Article 10.

52. In short, we are looking at different factual situations and it is not therefore appropriate in this case to seek the protection which Article 10 of Regulation No 1408/71 might offer.

53. Over and above the foregoing remarks, and in the interests of providing the Sąd Apelacyjny with a useful reply, it should be mentioned that Article 10 may be relevant in the new situation in which Mrs Wencel finds herself now that she is again living in Poland on a stable basis, following the death of her husband.

54. Of course, any such change of residence (and it is, in any event, for the national court to ascertain whether or not this is the case) would not make the decision of the ZUS in 1990, which, as has been pointed out, must still be considered under the 1975 Convention, any less lawful. In this regard, it should be recalled that, pursuant to Article 94 of Regulation No 1408/71, the Regulation does not confer any rights for periods prior to its entry into force in the territory of the Member State concerned. This provision is consistent with the principle of legal certainty, which, according to the case-law, precludes a regulation from being applied retroactively, regardless of whether such

16 — In all probability, the 1975 Convention, which is applicable here, follows the same approach as Regulation No 1408/71 in this particular respect. At the risk of venturing into territory which is beyond the jurisdiction of the Court of Justice, I think I can state with some confidence, in view of the description of the Convention given by the parties, that having a legal situation of dual residence would be, if anything, more problematic in the context and circumstances which gave rise to the Convention than in the EU law context, in that residence is apparently the only relevant criterion or link in that legal context.

application might produce favourable or unfavourable effects for the person concerned.[17] Consequently, even if there had been a change of residence in 2009, the institution responsible for paying Mrs Wencel's pension would still be the German social security institution, pursuant to the 1975 Convention. Such a change cannot affect the legality of a decision which has already been taken or a right which arose when the Convention was exclusively applicable.

55. However, it is also a generally recognised principle that, even if the new legislation is applicable only to the future, it must also apply, subject to exceptions, to the future effects of situations which arose while the earlier law was in force.[18] It can therefore be said that EU law may have some impact in relation to the actual payment of the German pension at the present time.

56. As noted above, Article 4(3) of the 1975 Convention provides that the right to a pension 'exists only during the period of residence in the territory of the State whose insurance institution established the pension'. Once they have become part of the European Union, however, Member States must ensure that EU law is observed when applying this rule. It can therefore be argued that, as the person concerned moved to Poland after that country became a member of the EU, the pension right would be 'exported' pursuant to Regulation No 1408/71. Under the Convention, which applied at the time the right arose, the institution responsible for paying the pension would still be the German institution, but Mrs Wencel could claim her retirement pension in Poland, and may possibly be able to argue that her German widow's pension should be 'exported' too.

57. Furthermore, the return to Poland cannot have any negative impact on the person concerned. This situation does fall fully within the scope of Regulation No 1408/71, and in particular Article 10, since Mrs Wencel would be residing in the territory of a Member State (Poland) other than that in which the institution responsible for payment is situated (Germany). The article states that this state of affairs must not bring about any reduction, modification, withdrawal or suspension of benefits. Obviously, the effects of this rule are limited to pensions accruing from the time of Mrs Wencel's return to Poland and do not apply to decisions relating to pensions which accrued at an earlier time. It would therefore be important, in such a situation, to establish when such return occurred for the purposes of assessing the legality of the 2009 ZUS decision ordering repayment of the benefits relating to the previous three years.

3. Conclusion to the first question referred

58. In conclusion, the reply to the first question referred should be prefaced, first of all, by the statement that a declaration of dual residence for social security purposes has no place within the framework of Regulation No 1408/71, and that ruling out this option does not constitute a breach of Articles 20(2) TFEU and 21 TFEU. Secondly, it must be made clear that EU law (and Regulation No 1408/71 in particular) is not relevant in assessing the legality of a decision in 1990 to grant a Polish pension, and, pursuant to Article 7(2)(c) of Regulation No 1408/71, the pension rights of a Polish national who has worked and paid contributions in Poland but has transferred her residence to Germany prior to 1990, continue to be governed by the German-Polish Convention of 9 October 1975 on old-age and work-injury provisions. This situation is not covered by Article 10 of Regulation No 1408/71.

59. However, if the beneficiary of the pension had moved back to Poland after the accession of Poland to the European Union, Article 10 of Regulation No 1408/71 requires that the return must not give rise to any reduction, modification, suspension, withdrawal or confiscation of those pension rights.

17 — Case C-290/00 *Duchon* [2002] ECR– I-3567, paragraph 21 and case-law cited there.

18 — *Duchon*, paragraph 21 and case-law cited there.

B – *The second and third questions referred*

60. In the second and third questions referred, which can be addressed together, the Polish court asks the Court of Justice whether Articles 21 TFEU and 20(2) TFEU, and Article 10 of Regulation No 1408/71 preclude decisions such as those taken by the ZUS in 2009, which removed the right to a retirement pension of a person who 'has had simultaneously two habitual residences (two centres of interest) in two countries now belonging to the European Union and who did not, prior to 2009, submit an application or declaration concerning the transfer of residence to one of those countries' and demanded repayment of the amounts relating to the previous three years, bearing in mind that, at the time the application for the grant of a retirement pension was examined and after it was received, that person was not 'advised by the Polish insurance institution of the need to inform it also that he has two habitual residences in two countries and of the need to submit an application or declaration concerning the choice of an insurance institution of one of those countries as competent to consider applications concerning retirement pensions'.

61. Both of these questions, like the first question, start from the premiss that it is possible for a factual situation of dual residence in two Member States to have legal effects. Once this premiss of dual residence has been ruled out, these two questions, as formulated, are also irrelevant.

62. However, in the interests, once again, of providing the referring court with a useful reply, I think it is necessary to make an observation in connection with what the referring court has said about the actions of the ZUS and the person concerned during the application, grant and payment process relating to the pension.

63. The statements in the order for reference indicate that Mrs Wencel did not declare her change of residence, and the ZUS, for its part, did not inform her of the need to make such a declaration. The Sąd Apelacyjny seems to suggest that these circumstances may be relevant when considering the legality of the decisions of the ZUS under EU law. [19]

64. In fact, notwithstanding what has already been said on the subject of the applicability of the 1975 Convention to this case, Regulation No 1408/71 should be used as a criterion of the legality of the 2009 ZUS decision, in so far as its formal and procedural aspects are concerned.

65. Thus, Article 84a of the regulation, which concerns relations between the institutions and the persons covered by the regulation, is relevant to an assessment of whether, when it took the decision in 2009, the ZUS met the standards of conduct imposed on it by this provision, which was fully in force at the date in question, in connection with its relations with Mrs Wencel.

19 — In the course of the hearing, it was also mentioned that a recent judgment of the Polish Constitutional Court, delivered on 28 February 2012 (case K 5/11), might have implications for the legality of the 2009 ZUS decision, in that the latter was adopted on the basis of Article 114(1) of the Pensions Law. The judgment found another provision of this law, Article 114(1a), which provides that a pension must be re-assessed if it is shown that the evidence submitted does not constitute an adequate basis upon which to make a determination regarding the right to a pension or the amount of the benefit, to be unconstitutional. Although the possibility that the finding of unconstitutionality in respect of Article 114(1a) might have implications for Article 114(1) is not categorically ruled out by the judgment (which specifically refers to the close link between the two), this is a matter which in any event falls outside the jurisdiction of the Court of Justice.

66. In that Article 84a relates only to the formal aspects of the relations between the social security system of a Member State and the persons covered by the regulation, and does not affect the substance of the 2009 decision, there can be no objection to its application in this case.[20] In particular, it cannot be claimed that the purpose of Regulation No 1408/71 is not to regulate the procedure for the repayment of benefits which were improperly paid. It is true that it falls to each Member State to adopt specific legislation regarding this procedure, but such legislation must comply with EU law in all cases.

67. Briefly, Article 84a(1) imposes a duty of mutual information and cooperation on the institutions and the persons covered by the regulation, taking the form of a requirement to 'provide the person concerned with any information required for exercising the rights conferred on them by this Regulation', in the case of the former, and a requirement to 'inform the institutions of the competent State and of the State of residence as soon as possible of any changes in their personal or family situation which affect their right to benefits under this Regulation', in the case of the latter.

68. It will be for the national court to establish whether the ZUS and Mrs Wencel have satisfied these requirements of cooperation, information and good administration, and to determine the extent to which any failure to do so may give rise to an annulment of the 2009 decision.

69. In the case of Mrs Wencel's actions, it should also be borne in mind that, pursuant to Article 84a(2), failure to comply with the requirement to inform the relevant national institutions may result in the application of measures in accordance with national law. However, the article specifies that such measures must be 'proportionate', which means that the national court will need to assess whether the withdrawal of the pension and the demand for repayment of amounts improperly received constitute measures which are 'proportionate' to any failure on the part of Mrs Wencel to comply with her obligation to inform.

70. In conclusion, the reply to the second and third questions should be that any decision of the Polish social security authorities subsequent to the date of Poland's accession to the European Union must respect the formal requirements of Article 84a of Regulation No 1408/71, even in the case of decisions relating to pension rights which are not governed by EU law. It will be for the relevant national court to establish whether there has been a failure to meet such requirements in the present case and, if so, what the proper and proportionate response to such a failure should be.

VI – Conclusion

71. I therefore propose that the Court of Justice should respond to the questions referred for a preliminary ruling by the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Poland) as follows:

(1) A declaration of dual residence for social security purposes has no place within the framework 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. Ruling out this option does not constitute a breach of Articles 20(2) TFEU and 21 TFEU.

20 — Neither is there any reason why the Court of Justice should not rule on this point, since there is extensive case-law to the effect that it may be required to take into consideration rules of EU law to which the national court did not refer in its questions. See, for example, Case C-157/10 *Banco Bilbao Vizcaya Argentaria* [2011] ECR I-13023, paragraph 19.

EU law (and Regulation No 1408/71 in particular) is not relevant in assessing the legality of a decision in 1990 to grant a Polish pension. Pursuant to Article 7(2)(c) of Regulation No 1408/71, the pension rights of a Polish national who has worked and paid contributions in Poland but has transferred her residence to Germany prior to 1990, continue to be governed by the German-Polish Convention of 9 October 1975 on old-age and work-injury provisions.

This situation is not covered by Article 10 of Regulation No 1408/71. However, if the beneficiary of the pension had moved back to Poland after the accession of Poland to the European Union, Article 10 of Regulation No 1408/71 requires that the return must not give rise to any reduction, modification, suspension, withdrawal or confiscation of those pension rights.

(2) Any decision of the Polish social security authorities subsequent to the date of Poland's accession to the European Union must respect the formal requirements of Article 84a of Regulation No 1408/71, even in the case of decisions relating to pension rights which are not governed by EU law. It will be for the relevant national court to establish whether there has been a failure to meet such requirements in the present case and, if so, what the proper and proportionate response to such a failure should be.