JUDGMENT OF THE COURT (Third Chamber)
24 September 1987 *

In Case 37/86

Reference to the Court under Article 177 of the EEC Treaty by the Arbeidsrechtbank (Labour Tribunal), Antwerp, for a preliminary ruling in the action before that court between

Johanna van Gastel, née Coenen, resident in Berchem (Belgium),

and

Rijksdienst voor Werknemerspensioenen, Brussels,

and between

Johanna van Gastel, née Coenen, resident in Berchem (Belgium),

and

Rijkskas voor Rust- en Overlevingspensioenen, Brussels,

on the interpretation of Article 12 (2) 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,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of Chamber, U. Everling and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

* Language of the Case: Dutch.

the Rijksdienst voor Werknemerspensioenen, by its general director, R. Masyn, by its Deputy Adviser, J. C. A. de Clerck, and K. Mul, lawyer,

the Netherlands Government, by E. F. Jacobs, acting General Secretary at the Ministry of Foreign Affairs,

the Commission of the European Communities, represented by its Legal Adviser, J. Griesmar, and by F. Herbert, lawyer,

having regard to the Report for the Hearing and further to the hearing on 18 March 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 June 1987,

gives the following

Judgment

1 By a judgment of 6 February 1986, which was received at the Court on 12 February 1986, the Arbeidsrechtbank, Antwerp, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 12 (2) 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 (Official Journal 1983, L 230, p. 8).

2 That question was raised in the course of proceedings brought by Mrs Johanna van Gastel, née Coenen, widow of the late Mr van Gastel, against the Rijksdienst voor Werknemerspensioenen (National Pension Office for Employed Persons, hereinafter referred to as 'the Pension Office') and in proceedings between Mrs van Gastel and the Rijkskas voor Rust- en Overlevingspensioenen (National Retirement and Survivors' Pension Fund, hereinafter referred to as 'the Fund'), concerning Mrs van Gastel's survivor's pension.

3 According to the documents before the Court, Mrs van Gastel's deceased husband, a Netherlands national who was resident in Belgium, was awarded a Belgian employed person's retirement pension from 1 November 1976. The pension was

calculated for a household on the basis of a period of employment of 17/45ths, pursuant to Article 46 of Regulation No 1408/71. From the same date Mr van Gastel had also been awarded, on the basis *inter alia* of voluntary contributions, a Netherlands old-age pension pursuant to the Netherlands Algemene Ouderdomswet (General law on old age, hereinafter referred to as 'the Netherlands old-age law'].

4 After Mr van Gastel died on 20 February 1983, Mrs van Gastel obtained a Netherlands old-age pension under the Netherlands old-age law awarded on the basis that she had been insured up to her 65th birthday (13 August 1979) through voluntary contributions. She was also awarded a Belgian survivor's pension the amount of which was fixed at 80% of her deceased husband's retirement pension.

5 However, on 20 April 1984 the Pensions Office informed Mrs van Gastel of its decision that, as a result of the award of the Netherlands old-age pension, the Belgian survivor's pension had to be reduced, pursuant to the rules against overlapping benefits contained in Article 52 of the Royal Decree of 21 December 1967, Article 12 of Regulation No 1408/71 and Article 7 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended (Official Journal 1983, L 230, p. 86). Article 52 of the Royal Decree of 21 December 1967 provides that: 'A survivor's pension . . . may overlap with one or more retirement pensions or any other benefits in its stead awarded under Belgian or foreign legislation . . . only up to a sum equal to 110% of the amount of the survivor's pension awarded to the widow multiplied by the inverse fraction thereof . . . used to calculate the retirement pension forming the basis for calculating the survivor's pension'.

6 Mrs van Gastel appealed to the Arbeidsrechtbank (Labour Tribunal) Antwerp against the Pension Office's decision of 20 April 1984. On 29 August 1984 the Fund, acting pursuant to that decision, claimed the reimbursement of the sum allegedly overpaid and Mrs van Gastel then appealed against the latter decision to the same court. In the course of the two sets of proceedings the Arbeidsrechtbank Antwerp stayed the proceedings and referred the following question to the Court:

'Should or should not the following be regarded as benefits of the same kind within the meaning of Article 12 (2) of Regulation No 1408/71 entailing possible

consequences with regard to the application of Article 46 of Regulation No 1408/71 and Articles 7 and 46 of Regulation No 574/72: a "survivor's pension" awarded under the Belgian legislation on employed persons' pensions to the surviving spouse on the basis of the period in employment of the deceased spouse or of the periods of insurance completed by him or her and an "old-age pension" granted under the Netherlands pensions legislation (General law on old age) to a woman who has been married and who attains the age of 65 but has not been employed herself or completed periods of insurance in the Netherlands but whose deceased husband has completed periods of insurance under the pensions legislation of the Netherlands?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant provisions of Community law and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 It should be recalled first of all that in proceedings brought under Article 177 of the EEC Treaty the Court has no jurisdiction to apply the rules of Community law to a specific case nor, consequently, to classify provisions of national law with respect to such a rule. It may, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful in assessing the effects of such provisions of national law.

9 Having regard to the contents of the file relating to the main proceedings, the preliminary question must be understood as asking whether a survivor's pension acquired under the legislation of a Member State and an old-age pension acquired under the legislation of another Member State are 'benefits of the same kind' within the meaning of Article 12 (2) of Regulation No 1408/71 in so far as both pensions are intended to ensure that the surviving spouse who has attained a certain age and to whom the pensions are awarded on the basis of the periods of insurance completed by the deceased spouse has the means of subsistence.

10 In this regard, it must be borne in mind that, according to the consistent case-law of the Court (see most recently the judgment of 5 July 1983 in Case 171/82 *Valentini* v *Assedic* [1983] ECR 2157), social security benefits must be regarded as being of the same kind when their purpose and object together with the basis on

which they are calculated and the conditions for granting them are identical, irrespective of characteristics peculiar to the various national laws. On the other hand, the same case establishes that characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.

11 As regards the purpose and objective of the benefits, it need only be stated, as the Court also held in its judgment of 5 May 1983 in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385, that benefits acquired under the legislation of two Member States which seek to ensure that an aged person deprived of the income of his or her deceased spouse has sufficient means of subsistence have the same purpose. The fact, which was stressed by the Pension Office, that only one of these benefits, in this case the old-age pension, is intended to ensure that its recipient has sufficient income, whereas the other, the survivor's pension, depends solely on the period of insurance and the salary of the deceased spouse, is not such as to induce a different assessment.

12 As regards the basis for calculation and the conditions for the award of the benefits, it must be considered that they are identical when the respective sums are determined on the basis of the insurance and the social security contributions of the deceased spouse. On the other hand, the particular characteristics of the national legislation in question, such as the fact that, for the purposes of the old-age pension, the widow is considered as being personally insured and that the contributions paid by the deceased spouse depended on the joint income of the spouses, should not be taken into consideration. Such characteristics, which, as in this case, are linked to the fact that national law does not allow the widow who has attained a particular age to claim rights under the deceased spouse's insurance but only allows her rights based on her own insurance and to that end converts the widow's pension into an old-age pension are in fact only formal characteristics of that legislation. The existence of such characteristics cannot therefore exclude the possibility that the benefits are of the same kind.

13 With regard to this interpretation, no argument can be based on the fact, relied on by the Pension Office, that under specific provisions contained in Annex VI to Regulation No 1408/71 invalidity, old-age and widows' pensions are to be regarded as benefits of the same kind for the purposes of the application of Article 12 (2) to Danish, Irish, and United Kingdom legislation. Those provisions, which

were introduced upon the accession of those three Member States, classify the benefits provided for by those Member States as 'benefits of the same kind'; however, the absence of analogous provisions as regards the other Member States does not allow the opposite conclusion to be drawn in their case.

14 For those reasons, the answer to the question submitted to the Court must be that a survivor's pension acquired under the legislation of a Member State and an old-age pension acquired under the legislation of another Member State are 'benefits of the same kind' within the meaning of Article 12 (2) of Council Regulation No 1408/71 of 14 June 1971, as amended, in so far as both pensions are intended to ensure that the surviving spouse who has attained a certain age and to whom the pensions are awarded on the basis of the periods of insurance completed by the deceased spouse has the means of subsistence.

15 It should also be added, in order to give the national court all the information which could be useful to it in applying Community law to the instant case, that, according to well- established case-law (see most recently the judgments of 5 May 1983 in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig*, cited above and of 13 March 1986 in Case 296/84 *Sinatra* ECR 1047, at paragraphs 13 and 20), when a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not prevent that legislation from being applied to him in its entirety, including the national rules against overlapping benefits. If, however, the application of that national legislation is less favourable to the worker than the application of Article 46 of Regulation No 1408/71, the provisions of that article must be applied. On the latter supposition, Article 46 (3), 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. It should also be noted that, under Article 46 (2) of Regulation No 574/72, the benefit amounts corresponding to periods of voluntary or optional continued insurance are not to be taken into account for the purposes of Article 46 (3) of Regulation No 1408/71.

Costs

16 The costs incurred by the Government of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the

main proceedings are concerned, in the nature of 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 (Third Chamber),

in answer to the question put to it by the Arbeidsrechtbank, Antwerp, by judgment dated 6 February 1986, hereby rules:

A survivor's pension acquired under the legislation of a Member State and an old-age pension acquired under the legislation of another Member State are 'benefits of the same kind' within the meaning of Article 12 (2) of Council Regulation No 1408/71 of 14 June 1971, as amended, in so far as both pensions are intended to ensure that the surviving spouse who has attained a certain age and to whom the pensions are awarded on the basis of the periods of insurance completed by the deceased spouse has the means of subsistence.

Galmot Everling Moitinho de Almeida

Delivered in open court in Luxembourg on 24 September 1987.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber