JUDGMENT OF THE COURT (Fifth Chamber)
18 November 1999 *

In Case C-161/98,

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

Georges Platbrood

and

Office National des Pensions (ONP)

on the interpretation 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

* Language of the case: French.

Community, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, J.C. Moitinho de Almeida, L. Sevón, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Office National des Pensions (ONP), by G. Perl, General Administrator,

— the Commission of the European Communities, by M. Wolfcarius, of its Legal Service, 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, Assistant Adviser, and of the Commission, represented by M. Wolfcarius, at the hearing on 24 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

1 By judgment of 21 April 1998, received at the Court on 27 April 1998, the Tribunal du Travail (Labour Court), Mons, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation 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, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7; 'Regulation No 1408/71').

2 That question was raised in proceedings between Georges Platbrood and the Office National des Pensions (the National Pensions Office, hereinafter 'the ONP') concerning the award of an old-age pension.

Community law

3 Article 46(1) of Regulation No 1408/71 states:

'1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 [consideration of other periods of insurance or of residence] or Article 40(3) [invalidity benefits], the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

(ii) on the other hand ...'.

4 Regulation No 1248/92 inserted, *inter alia*, Article 46b in Regulation No 1408/71, which contains special provisions applicable in the case of overlapping of benefits of the same kind payable under the legislation of two or more Member States. Article 46b(2) provides:

'The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall apply to a benefit calculated in accordance with Article 46(1)(a)(i) only if the benefit concerned is:

(a) either a benefit, which is referred to in Annex IV, part D, the amount of which does not depend on the length of the periods of insurance or of residence completed;

or

(b) a benefit, the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialised and a later date. In the latter case, the said provisions shall apply in the case of overlapping of such a benefit:

(i) either with a benefit of the same kind, except where an agreement has been concluded between two or more Member States providing that one and the same credited period may not be taken into account two or more times;

(ii) or with a benefit of the type referred to in (a).

The benefits and agreements referred to in (b) are mentioned in Annex IV, part D.'

5 The amendments made by Regulation No 1248/92 to Regulation No 1408/71 were concerned with delimiting the application of national rules against overlapping benefits and did not affect the principle of their operation (Case C-143/97 *ONP* v *Conti* [1998] ECR I-6365, paragraph 19).

Belgian law

6 The main proceedings concern the application of Article 32(1) of the Royal Decree of 21 December 1967 laying down general rules concerning retirement and survivor's pensions for employed persons (*Moniteur Belge* of 16 January 1968).

7 Article 15(3) of Royal Decree No 50 of 24 October 1967 (*Moniteur Belge* of 27 October 1967) provides:

'The King shall determine the way in which evidence is to be adduced of employment giving entitlement to a retirement pension and the arrangements under which periods not established are assimilated to periods of employment.'

8 Article 32(1) of the Royal Decree of 21 December 1967, adopted pursuant to Royal Decree No 50, provides:

> An employed person who was in employment in the period between 1 January 1938 and 31 December 1944 shall be deemed to have continued to be an employed person under the same conditions as regards duration throughout the period between the date on which his employment ceased and 31 December 1945; this presumption may be rebutted only for periods of employment in respect of which the person concerned can claim a pension under another Belgian scheme, with the exception of the scheme for self-employed persons, or under a scheme of a foreign country.

9 The presumption thus laid down is called 'the [statutory] war years presumption'.

10 The provisions of Article 32 of the Royal Decree of 21 December 1967 were repealed by Article 50(1)(1) of the Royal Decree of 4 December 1990 (*Moniteur Belge* of 20 December 1990), but remained applicable to pensions which, like Mr Platbrood's pension, actually became payable before 1 January 1991.

The main proceedings

11 Mr Platbrood, who was born in 1922, worked as an employed person in Belgium in 1941 and 1942. He was deported and forced to work at Luchenwalde, Germany, from 29 March 1943 to 30 April 1945. He then completed his military service from 3 December 1945 to 3 December 1946 before working, from 1 October 1947, in the public sector. The years of work in the public sector are not, however, the subject-matter of the main proceedings.

12 By decision of 30 September 1986, the ONP awarded Mr Platbrood, with effect from 1 July 1986, a retirement pension payable under the Belgian scheme for employed persons calculated on the basis of an employment record covering the years 1941 to 1946. In order to calculate that pension, the ONP took account of (1) the years 1941 and 1942 by reason of his work in Belgium which had involved payment of contributions; (2) the years 1943, 1944 and 1945, pursuant to Article 32(1) of the Royal Decree of 21 December 1967 establishing the war years presumption; and (3) the year 1946, having regard to the military service completed from 3 December 1945 to 3 December 1946.

13 On 4 May 1994, following German reunification in 1990, Mr Platbrood lodged an application at the Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office for Rhine Province), Düsseldorf, for a retirement pension covering the period from 29 March 1943 to 30 April 1945. That institution awarded him the pension with effect from 1 January 1992.

14 That decision led the ONP to recalculate Mr Platbrood's Belgian pension. By decision of 31 July 1995, the ONP granted Mr Platbrood a retirement pension payable by the Kingdom of Belgium with effect from 1 January 1992 on the basis of an employment record covering the years 1941, 1942, 1945 and 1946, the years 1943 and 1944 giving rise to entitlement to a German pension. The ONP therefore considered that the war years presumption was rebutted since Mr Platbrood had been awarded a retirement pension under a foreign scheme covering the years of deportation and forced labour.

15 The ONP also calculated the pension rights under domestic law on the basis of an employment record of 6/45ths; that calculation, required by Article 46(1) of Regulation No 1408/71, resulted in the award of an additional pension to offset the difference between the total of the two pensions received (4/45 plus 2/45) and the amount of a Belgian pension awardable for the same years (6/45).

16 On 30 January 1996, referring to Regulations Nos 1408/71 and 1248/92, Mr Platbrood claimed, with effect from 1 June 1992, the retention of the full German pension in addition to his Belgian pension, since he had worked for a German employer for at least one year during the Second World War. That application was rejected by the ONP on 16 April 1996.

17 Mr Platbrood challenged the ONP's decision before the Tribunal du Travail, Mons. Relying on Community law and the case-law of the Court of Justice he sought to show that the reduction in his Belgian pension was incompatible with the rules on provisions against overlapping in Regulation No 1408/71 and, in particular, with Article 46b(2) of that regulation.

18 In those circumstances, the Tribunal du Travail, Mons, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the new provisions of Regulation (EEC) No 1248/92 require Belgium to grant a beneficiary the right to a retirement pension calculated on the basis of an employment record comprising in part years in the course of which presumed or notional contributions must be taken into account — unless the person concerned can claim a pension under a foreign scheme for those periods of employment (principle that there is a legal presumption in respect of the war years, as laid down by Article 32(1) of the Royal Decree of 21 December 1967 establishing general rules for the retirement and survival pension scheme for employed persons prior to its repeal by the Royal Decree of 4 December 1990 — although it remains applicable to retirement pensions which became payable for the first time before 1 January 1991) in circumstances where, specifically, the person concerned has been awarded a retirement pension payable by Germany on the basis of actual contributions corresponding to the presumed or notional contributions which may be taken into account under the Belgian legislation?

In other words, must the new provisions of Regulation (EEC) No 1248/92 be interpreted as authorising overlapping, without reduction, suspension or with-

drawal, of a retirement pension awarded to a Belgian national, payable by Belgium and calculated on the basis of presumed or notional contributions by virtue of the principle that there is a legal presumption in respect of the war years, as laid down by Article 32(1) of the Royal Decree of 21 December 1967 (subject to the reservation contained in that provision whereby the person concerned may not, however, claim a pension under a foreign scheme for those periods of employment) with a retirement pension payable by Germany calculated on the basis of actual contributions covering the same period or, on the contrary, does the exception provided for by Article 32(1) of the Royal Decree of 21 December 1967 (no legal presumption in respect of the war years if the person concerned can claim a pension under a foreign scheme for those periods of employment) not constitute a provision on reduction, suspension or withdrawal declared inapplicable by the new provisions of Regulation (EEC) No 1248/92?'

The question referred for a preliminary ruling

19 By its question the national court asks in substance whether a national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 31 December 1944, was in employment is deemed to have continued to be an employed person under the same conditions as regards duration throughout the period between the date on which his employment ceased and 31 December 1945, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, constitutes a provision on reduction, suspension or withdrawal within the meaning of Regulation No 1408/71.

20 The ONP and the Commission take the view that that question should be answered in the negative.

21 The ONP contends, in particular, that a distinction should be drawn between provisions on reduction of a benefit and provisions conferring entitlement to that

benefit. In order for there to be a reduction of a benefit in a case of overlapping with a foreign benefit, it is necessary first to determine that benefit in accordance with the national legislation applicable.

22 The national provision at issue in the main proceedings governs the way in which evidence is to be adduced by means of a rebuttable presumption. In order to avoid the award of two pensions in respect of the same period, that presumption is deemed to be rebutted if the award of a pension payable by another State in respect of the same period shows that the person concerned did not work in Belgium under the employed persons' scheme during the said period.

23 The Commission adds that the present case is clearly different from Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679 and *ONP* v *Conti*, cited above, in which it had supported the argument that the national provisions then at issue had to be treated as provisions on reduction. The first case concerned the question whether a national provision which reduced the number of notional years credited, which were required in order to reach a full employment record of 30 years, by the number of years in respect of which the person concerned could claim a pension in another Member State constituted a provision on reduction. The second case concerned the characterisation of a provision which reduced a supplement to the partial pension of a mineworker who had worked for at least 25 years as an underground mineworker because of other pensions drawn under another Belgian or foreign scheme.

24 According to the Commission, the 'periods' of notional years or of supplement could not be localised in time. There was no question, therefore, of double application of two sets of legislation during 'the same period'. By contrast, in the present case, there is a presumption which is related to a specific period (the

Second World War) and is rebuttable by the production of evidence. The provision at issue here in the main proceedings does not, therefore, according to the Commission, constitute a provision on reduction.

25 It should be recalled first of all that the Court has held that a national rule must be regarded as a provision for reduction of benefit if the calculation which it requires to be made has the effect of reducing the amount of pension which the person concerned may claim because he receives a benefit from another Member State (*ONP* v *Conti*, paragraph 25).

26 In that same judgment, the Court stressed that provisions for reduction of benefits cannot be rendered exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules for calculating the amount payable (*ONP* v *Conti*, paragraph 24).

27 Such national provisions cannot, furthermore, be exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules of evidence.

28 However, in the present case, the war years presumption is part of legislation whose purpose is to reduce the damaging effects of the Second World War on the pension rights of workers subject to Belgian legislation.

29 To that end, an employed person who was in employment in Belgium during the period between 1 January 1938 and 31 December 1944 is deemed to have continued to be an employed person under the same conditions as regards

duration throughout the period between the date on which his employment ceased and 31 December 1945.

30 That presumption operates, in particular, in favour of a worker who, having worked in Belgium, is not in a position to provide evidence of having paid sufficient contributions during all the years at issue because of the destruction or loss of documents and of a person who, as a result of the events of the War, could not continue his employment record in Belgium.

31 It should be emphasised that the presumption at issue is a presumption that contributions were paid into the Belgian scheme under consideration and not a presumption of employment in Belgium. In a case such as that of the applicant in the main proceedings, the presumption could not therefore be rebutted by the mere fact that he had worked in Germany for a certain time. On the other hand, once a pension had been awarded to him in respect of the periods of employment in Germany, the considerations which led the Belgian legislature to lay down the war years presumption for his benefit ceased to be valid for him.

32 In those circumstances, a national provision which in such a situation provides that the war years presumption is not applicable to periods of employment in respect of which the person concerned receives a pension under another social security scheme cannot be categorised as a provision on 'reduction' within the meaning of Regulation No 1408/71. Such a provision merely gives due effect to the fact that, for all or part of the periods of employment in respect of which the person concerned is not in a position to prove payment of sufficient social security contributions under the Belgian scheme in question, he is already receiving a pension under another scheme.

33 The answer to the question must therefore be that a national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 31 December 1944, was in employment is deemed

to have continued to be an employed person under the same conditions as regards duration throughout the period between the date on which his employment ceased and 31 December 1945, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, does not constitute a provision on reduction, suspension or withdrawal within the meaning of Regulation No 1408/71.

Costs

34 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 question referred to it by the Tribunal du Travail, Mons, by judgment of 21 April 1998, hereby rules:

A national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 31 December 1944, was in employment is deemed to have continued to be an employed person under the

same conditions as regards duration throughout the period between the date on which his employment ceased and 31 December 1945, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, does not constitute a provision on reduction, suspension or withdrawal within the meaning 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, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992.

Edward Moitinho de Almeida Sevón

Puissochet Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber