JUDGMENT OF THE COURT (Fifth Chamber)
4 June 1985 *

In Case 117/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour du travail [Labour Court], Mons, for a preliminary ruling in the action pending before that court between

Office national des pensions pour travailleurs salariés (ONPTS) [National Pension Office for Employed Persons]

and

Salvatore Ruzzu

on the interpretation of Article 51 of the EEC Treaty, Articles 12 and 46 of 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 (Official Journal, English Special Edition 1971 (II), p. 416) and of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159),

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of:

— the appellant in the main proceedings, by A. Marcel, assistant general director, and by Jean Peltot, acting as Agent,

— the respondent in the main proceedings, by D. Rossini, a trade union representative,

* Language of the Case: French.

— the Commission of the European Communities, by M. Beschel, a member of its Legal Department, assisted by F. Herbert, of the Brussels Bar,

— the Government of the Italian Republic, by P. G. Ferri, Avvocato dello Stato,

— the Belgian Government, by P. Mainil, State Secretary for Pensions, and by G. Perl, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 March 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By judgment of 2 May 1984 which was received at the Court Registry on 7 May 1984, the Cour du travail [Labour Court], Mons, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 12 and 46 of 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 (Official Journal, English Special Edition 1971 (II), p. 416) and of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159).

2 That question was raised in a dispute concerning the refusal of the Office national des pensions pour travailleurs salariés (ONPTS) [National Pension Office for Employed Persons, hereinafter referred to as 'the Office'] to award S. Ruzzu, a former miner of Italian nationality, a full pension of 30/30ths on the ground that he received a partial pension in respect of periods of employment completed in Italy.

3 It is clear from the documents forwarded to the Court of Justice by the Cour du travail that, following the amendment on 1 April 1975 of the first subparagraph of

Article 10 (2) of Belgian Royal Decree No 50 of 24 October 1967, a person who has worked as an underground coalminer for 25 years is entitled to a full pension of 30/30ths. The five additional years of notional employment from which he benefits are not localized in time. However, the Office's practice was to reduce the benefit of those years of notional employment by the number of years of actual employment in another Member State. That practice was based on the Law of 10 February 1981 which entered into force retroactively on 1 January 1981 and which provides for a reduction of the number of additional years thus taken into account in the case of a miner by the number of years in respect of which he can claim a pension under another Belgian scheme, excluding the scheme for self-employed workers, or under a scheme in a foreign country.

4 Mr Ruzzu was employed in Italy before his employment in Belgium, from 1952 to 1969, as a mineworker underground. From 1969 to 31 October 1977 he received invalidity benefits as an underground miner. Since the relevant Belgian legislation treats the latter period as a period of actual employment, Mr Ruzzu was able to claim an employment record spanning 25 years. On 1 November 1977 he retired. The Office established, by decision of 6 February 1981, that Mr Ruzzu could claim an employment record spanning 30 years for the purposes of the first subparagraph of Article 10 (2) of Belgian Royal Decree No 50 with a view to obtaining a full pension, which it reduced however, in accordance with its consistent practice, by 4/30ths corresponding to the four additional years of notional employment on the ground that those years coincided with the years of actual employment in Italy.

5 Mr Ruzzu challenged the Office's decision before the competent national courts. When the dispute came before it on appeal, the Cour du travail, Mons, considered that the Law of 10 February 1981 was immediately applicable as from 1 January 1981. However, it raised the question whether, having regard to the case-law of the Court and, in particular, to the judgment of 2 July 1981 in Joined Cases 116, 117, 119, 120 and 121/80 *ONPTS* v *Celestre* [1981] ECR 1737, the reduction provided for by the aforesaid law was in conformity with Community law. Accordingly, the national court referred the following question to the Court of Justice for a preliminary ruling:

'Is the interpretation to be placed on Article 51 of the EEC Treaty and on Regulations No 1408/71 (in particular, Articles 12 and 46 thereof) and No 574/72 of the Council such that the aims of the Treaty and the requirements of the regulations admit of a provision in the legislation of a Member State which reduces the additional insurance periods taken into account by that legislation on the basis of national legislation alone and without recourse to apportionment (Type A legislation) by the number of years (which do not overlap with the previous periods) in respect of which a worker may, in another Member State, claim an

invalidity pension in accordance with Community rules (Type B legislation), thus entailing a reduction in the retirement benefit payable under national legislation alone (Type A legislation) as a result of the award of the apportioned invalidity benefit in another Member State (Type B legislation)? It should be added that the two benefits are to be regarded as being of the same kind (see the *Celestre* case) and that the reduction which the provision in question entails is a reduction of the retirement benefit acquired independently of Community law (see the *Jerzak* case). Would an affirmative reply not cause the migrant worker to forfeit the benefit of an additional insurance period in the Member State having Type A legislation? And would it not imply that the application, under Article 12 (2) of Regulation No 1408/71, of a provision against overlapping benefits would also be warranted if the benefit to be reduced was acquired solely under national legislation (Type A)?'

6 The question referred to the Court of Justice by the Cour du travail, Mons, is concerned with a problem involving the interpretation of Community law and is designed essentially to ascertain whether a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12 (2) of Regulation No 1408/71 which, by virtue of the last sentence of Article 12 (2), is not to be applied when the amount of the pension is calculated under Article 46 (1) of that regulation.

7 The Office contends that Article 12 (2) of Regulation No 1408/71 cannot be relied upon in the case of a benefit awarded in accordance with Article 46 (1) of that regulation. The title of Article 12 is 'Prevention of overlapping of benefits' whilst, according to the Office, Article 46 (1) authorizes a State to determine the periods of insurance or residence to be taken into account in pursuance of its legislation. The power of the national legislatures to determine periods of insurance is also confirmed by Article 1 (r) of Regulation No 1408/71. The Office takes the view that Article 12 (2) of Regulation No 1408/71 refers exclusively to benefits, not to periods of insurance. It follows, in its view, that when Article 46 (1) of Regulation No 1408/71 is applied, account must be taken of a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State.

8 Mr Ruzzu considers that the solution of the dispute must be sought in the interpretation of Article 12 (1) of Regulation No 1408/71, not Article 12 (2). He claims that the Belgian pension cannot be reduced by the application of that provision since, in this case, there is no duplication of insurance periods for the purposes of Article 12 (1).

9 The Commission considers that a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12 (2) of Regulation No 1408/71 and that, when the benefit is calculated in accordance with Article 46 (1), that national provision is not to be applied, having regard to the last sentence of Article 12 (2).

10 The Belgian Government considers that the Law of 10 February 1981 can in no way be described as a provision for reduction of benefit within the meaning of Article 12 (2) of Regulation No 1408/71. In its view that law merely lays down detailed rules for taking into account the insurance periods completed by a worker with a view to determining his entitlement to a pension. The question submitted amounts to a request for a decision on a problem which is a matter for national law alone.

11 The Italian Government infers from the operative part of the Court's judgment of 2 July 1981 in the *Celestre* case that Article 12 (2) of Regulation No 1408/71 precludes the application of a national rule to the calculation of a pension awarded under Article 46 (1) of that regulation which reduces the benefit of the additional years of notional employment by the years of insurance completed in another Member State.

12 It must be pointed out in the first place that the amount of the pension awarded to a worker who has been subject to the legislation of more than one Member State must, in the Member State in which 'the conditions for entitlement to benefit have been satisfied, without application of the provisions of Article 45 being necessary', be calculated in accordance with the provisions of Article 46 (1).

13 In its judgment of 2 July 1981 in the *Celestre* case the Court stated that: 'it is clear from the last sentence of Article 12 (2) of Regulation (EEC) No 1408/71 that where the provisions of Article 46 of the regulation are applied, national legislative provisions for reduction, suspension or withdrawal do not apply. It follows that the amount referred to in Article 46 (1) is the amount to which the worker would be

entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State'.

14 It follows from the aforesaid judgment that, pursuant to Article 12 (2) and Article 46 (1) of Regulation No 1408/71, the amount of a migrant worker's pension must be determined in accordance with the relevant national legislation, irrespective of any entitlement to a pension which may arise under the legislation of any other Member State.

15 The fact that the reduction of the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State is now effected at national level on the basis of a statutory provision, and no longer by the application of a mere administrative practice, cannot alter that conclusion.

16 For those reasons, the answer to the question submitted by the national court must be that a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12 (2) of Regulation 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 which, by virtue of the last sentence of Article 12 (2), is not to be applied when the amount of the pension is calculated under Article 46 (1) of that regulation.

Costs

17 The costs incurred by the Belgian Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action 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 submitted to it by the Cour du travail, Mons, by judgment of 2 May 1984, hereby rules:

A national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12 (2) of 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 which, by virtue of the last sentence of Article 12 (2), is not to be applied when the amount of the pension is calculated under Article 46 (1) of that regulation.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 4 June 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber