OPINION OF ADVOCATE GENERAL JACOBS
delivered on 22 February 1989 *

My Lords,

1. This case is concerned with the question whether a person is entitled, by virtue of the application of Community law, to the benefit of provisions of national legislation under which women who obtained reimbursement of pension contributions on marriage are permitted to reacquire past pension rights by the payment of retroactive contributions, notwithstanding that certain requirements laid down by the national legislation are not satisfied.

2. The plaintiff, Mrs Lieselotte Hartmann Troiani, was born in 1928. She was employed in Germany from 1 March 1952 to 31 August 1963 and made pension contributions under German social security legislation. She married an Italian national in 1963 and in consequence acquired Italian nationality in addition to her German nationality. On her marriage, she obtained, by virtue of paragraph 1304 of the German Social Security Law (Reichsversicherungsordnung), reimbursement of pension contributions she had made in respect of periods of employment in Germany and after a further 11 months of employment there, during which she made compulsory pension contributions, went to live in Italy with her husband. Since 1964 she has worked in Italy for certain periods and made compulsory insurance contributions there.

3. On 23 September 1981 the plaintiff applied to the defendant in the national proceedings, the Landesversicherungsanstalt Rheinprovinz, for permission to make retroactive pension contributions under paragraph 2, subparagraph 28, of the law reforming the pension scheme for workers (Arbeiterrentenversicherungs-Neuregelungsgesetz). That provision, reflecting social concern at the inadequate provision for retirement of many married women, allows women who have lost their entitlement to pension rights through reimbursement of pension contributions on marriage, to reacquire those rights by the retroactive payment of contributions in respect of the periods for which contributions had been reimbursed. Entitlement to make retroactive payments is however subject to two conditions: first, a woman seeking the benefit of the provision must, at the time of application, be engaged in an activity or employment subject to the compulsory German pension-insurance scheme. Second, for at least 24 months after the reimbursement of her pension contributions, she must have paid contributions into the

* Original language: English

German pension fund in respect of an activity or employment subject to the compulsory German pension scheme. I shall refer to the first condition as the condition of present affiliation. As the referring court points out, for an activity or employment to be subject to the compulsory German pension scheme, it must be carried out on the national territory.

4. On 11 January 1982 the defendant rejected the plaintiff's application on the ground that she fulfilled neither of the above conditions. By judgment of 3 May 1983 the Sozialgericht (Social Court) of Düsseldorf upheld the defendant's decision. On appeal, the Landessozialgericht (Higher Social Court) for North-Rhine Westphalia, by judgment of 2 September 1985, found for the plaintiff. Faced with a further appeal on a point of law, the Bundessozialgericht (Federal Social Court) took the view that the decision turned on the question of the extent to which Community law, and in particular Article 9(2) of Regulation No 1408/71 (Official Journal, English Special Edition 1971 (II), p. 416), applies to the plaintiff's claim.

5. The Federal court took the view that, by virtue of the application of Article 9(2) of Regulation No 1408/71, the plaintiff was able to take account of periods of insurance completed in Italy in order to satisfy the second condition limiting entitlement to make retroactive contributions, namely the requirement of 24 months' compulsory insurance. However, the Federal court was uncertain whether Article 9(2) also applied to the first condition, namely, the requirement that the applicant, at the time of making the application, should be engaged in an activity or employment subject to the compulsory German pension scheme. The court was also unsure whether, in the event that Article 9(2) did not apply, that condition of present affiliation could be said to constitute an obstacle to the free movement of workers contrary to Article 48 *et seq.* of the EEC Treaty.

6. Accordingly, by decision received at the Court's Registry on 7 December 1987, the Federal Social Court referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Is Article 9(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 to be construed as covering cases in which the retrospective payment of voluntary pension-insurance contributions is made conditional on the individual's being engaged at the time of the application in employment subject to compulsory pension-insurance contributions under national law?

(2) If not, does a national provision such as the one described in Question 1 contravene Article 48 *et seq.* of the EEC Treaty or any other provisions of Community law?'

The first question

7. Article 9 of Council Regulation No 1408/71 reads as follows:

'*Admission to voluntary or optional continued insurance*

(1) The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons.

(2) Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.'

8. I must first deal with a point that has not been raised in the observations submitted to the Court. Article 9 is expressed to apply only to voluntary or optional continued insurance. It seems at first sight questionable whether the reacquisition of past pension rights can properly be regarded as falling within the concept of 'continued insurance', a concept which seems to relate to the acquisition of new rights rather than to the reacquisition of past rights. However, in Case 93/76 *Liégeois* v *Office national des pensions pour travailleurs salariés* [1977] ECR 543, the Court, having compared the different language versions of Article 9, stated at paragraph 14 that those versions 'show an intention to cover every type of insurance incorporating a voluntary element and it matters little whether there is any continuance of existing insurance or not'. Although the factual context in which that proposition was stated was different from that of the present case, the proposition is clearly designed to be of general application and is applicable here. Moreover, there seems no reason of principle why Article 9 should not apply to the reacquisition of pension rights in the same way as to continued insurance. Such an interpretation of Article 9 is clearly in accordance with the purposes of Regulation No 1408/71. Article 9 is therefore applicable to the reacquisition of past pension rights. Its applicability is, as I shall seek to show, particularly significant for the answer to the first question.

9. As the order for reference points out, the issue posed by the first question is whether Article 9(2), in addition to ensuring the equivalence of periods of insurance completed in another Member State, also requires present employment and affiliation in another Member State to be treated as equivalent in a case in which national legislation requires engagement in employment subject to affiliation to the compulsory national insurance scheme as a condition of admission to a voluntary pension-insurance

scheme. It appears from the file that the plaintiff, at the time of her application, was affiliated to the compulsory pension scheme in Italy.

10. The written observations for the plaintiff take the view that Article 9(2) should be given a broad interpretation. The Commission, however, argues that Article 9(2) is concerned only with the assimilation of insurance periods *stricto sensu* and not with other conditions of admission to insurance schemes which have nothing to do with the completion of insurance periods as such. In this connection the Commission points to a number of judgments in which, it argues, this Court has refused to extend the scope of provisions of Regulation No 1408/71 dealing with the assimilation of insurance periods to cover other types of conditions relating to affiliation to insurance schemes.

11. Thus the Commission points out that in Case 20/75 *d'Amico* v *Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891, the Court held that Article 45(1) of Regulation No 1408/71 did not cover a requirement of German law which made the early acquisition of the right to retirement benefit conditional upon the person concerned having been unemployed for a certain time, with the result that the German insurance authorities were not required to take into consideration the fact that Mr d'Amico had been registered as unemployed in another Member State.

12. The Commission also points to Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229 which is somewhat closer to the present case. In that case a French national sought to take advantage of German legislation permitting victims of Nazi persecution to make retroactive social security contributions. The Court ruled that Article 9(2) of Regulation No 1408/71 did not require insurance periods completed in France to be treated as equivalent for the purposes of satisfying a preliminary condition of eligibility to make retroactive payments under which the person concerned had to establish the status of an 'insured person' by means of affiliation to the national social security scheme.

13. I do not find it possible to accept the Commission's point of view. I agree that in the case-law referred to the Court has shown a reluctance to extend the scope of provisions dealing with equivalence of insurance periods to cover other types of conditions unrelated to the completion of insurance periods as such. Where I differ from the Commission is that I do not agree that a condition of present affiliation to a compulsory insurance scheme must be seen as unrelated to the completion of insurance periods. On the contrary, affiliation to an insurance scheme is an essential concomitant of the completion of insurance periods and must therefore be seen as integrally connected therewith.

14. The case-law referred to by the Commission can in my view readily be distinguished from the present case. Both the *d'Amico* case and the *Brunori* case also referred to by the Commission (Case 266/78 [1979] ECR 2705) arose

under Article 45(1) of Regulation No 1408/71 which is concerned with the assimilation of periods of insurance completed in other Member States for the purposes of the acquisition, retention or recovery of pension rights. Both cases concerned conditions of admission to insurance schemes which were additional to and distinct from conditions relating to the completion of insurance periods. The present case arises under Article 9 of Regulation No 1408/71, and the condition in issue in this case can be assimilated, for reasons to which I will turn, to the conditions set out in Article 9.

15. At first sight, the issue in the *Vigier* case appears similar to that in the present case, namely, whether Article 9(2) permits the status of insured person acquired by virtue of affiliation to an insurance scheme in one Member State to be treated as equivalent for the purposes of the acquisition of that status in another Member State. However, there are important differences between that case and the present one. In *Vigier*, the Court ruled that Article 9(2) did not require the social security institution of a Member State to take into account periods of insurance completed in another Member State for the purposes of the acquisition of the status of an insured person in a case where the person in question had never been affiliated to the insurance scheme of the first Member State, i. e. had never paid the single contribution required under the law of that State in order to give rise to the status of insured person. In the present case, the plaintiff was, before her departure for Italy, affiliated to the German social security scheme, and paid contributions for a number of years. Indeed the national provisions in question, by their nature, can apply only to persons who have been so affiliated and have made contributions. In addition, the plaintiff in *Vigier*, who had lived since her childhood in France, could not be regarded as a migrant worker for the purpose of Regulation No 1408/71, and it is therefore appropriate that Article 9(2), which is concerned precisely to deal with the question of successive periods of employment in different Member States, was not applied to those facts. I do not therefore consider that the *Vigier* judgment forms an obstacle to the application of Article 9(2) in this case.

16. In any event if, instead of focusing only on Article 9(2), Article 9 is taken as a whole, then it appears that that provision can be taken to contemplate a condition of present affiliation such as that at issue in the present case.

17. In the first place, it is necessary to have regard also to the provisions of Article 9(1). Article 9(1) requires present residence in another Member State to be treated as equivalent in a case where national legislation requires residence as a condition of admission to a voluntary pension insurance scheme. In the case of workers, a requirement of affiliation is (other than in the special case of frontier workers) tantamount to a requirement of residence.

18. Secondly, if it is accepted that, as I have already indicated with reference to the *Liégeois* case, Article 9 applies not only to continued insurance but also to the reacquisition of pension rights, then that

provision can be taken to contemplate a condition of present affiliation in addition to the condition of present residence and the condition of completion of periods of insurance which are expressly referred to in paragraphs 1 and 2. In the case of voluntary or optional continued insurance it would not be necessary to refer to a condition of present affiliation to a compulsory scheme, because it can be presumed that present affiliation would not normally be a condition of admission to a voluntary scheme. It is therefore not surprising that Article 9 does not refer expressly to such a condition. However, once it is accepted that Article 9 applies also to the reacquisition of pension rights, then it is clear that the condition of present affiliation must be treated in the same way as the condition of present residence and the condition of completion of periods of insurance. Consequently, if Article 9 is read as a whole, it must be regarded as meaning that current affiliation in another Member State must be treated as satisfying the condition of present affiliation.

19. Furthermore, the purpose of Article 9 is to enable a worker to qualify for voluntary insurance in one Member State when he is resident in another Member State or has completed periods of insurance in another Member State. The requirement of present affiliation in the first Member State would defeat that purpose.

20. Accordingly, I am of the view that the first question should be answered in the affirmative. I would suggest that the answer be framed in the following terms, in order to make clear the exact scope of the ruling:

'Article 9 of Regulation No 1408/71 must be interpreted as meaning that where, under the legislation of a Member State, the right to make voluntary pension-insurance contributions in respect of periods of insurance previously completed under the legislation of that Member State is conditional upon being affiliated to the compulsory pension-insurance scheme of that Member State at the time when the application to make the voluntary contributions is made, affiliation to a compulsory pension scheme in another Member State at that time shall be treated as satisfying that condition.'

The second question

21. In view of the proposed reply to the first question, an answer to the second question is not strictly called for. However, I will state briefly my views on that question, which raises an important issue as to the possible role of Article 48 of the Treaty in supplementing Community legislation on social security.

22. The first point is whether the condition of present affiliation is contrary to the principle prohibiting discrimination on grounds of nationality, stated in Articles 7 and 48 of the Treaty and also in Article 3(1) of Regulation No 1408/71. I agree with the Commission that that principle has no application in this case. In my view, apart from any other considerations, and even if the condition could not be objectively justified, it does not overtly discriminate,

since it applies to all persons seeking to take advantage of the facility of making retrospective contributions, without regard to nationality; and it seems doubtful whether it discriminates indirectly, since (as this case illustrates) it is likely to affect predominantly those who have started their working career in Germany and have subsequently worked abroad, so that it is unlikely to have the effect of disadvantaging predominantly the nationals of other Member States.

23. However, the Commission argues that the guarantee of free movement of workers, laid down in Article 48(1) and elaborated in particular by Council Regulation (EEC) No 1612/68 on the free movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), is not limited to the abolition of discrimination on grounds of nationality but involves also the abolition of obstacles to free movement. I agree with the Commission that the disputed condition of German legislation is capable of constituting an obstacle to the free movement of workers in that it penalizes a person who has made effective use of that freedom. It is undeniable, also, that a broad interpretation must be given to Article 48. However, I am doubtful about the possibility of reliance on general Treaty provisions — such as Article 48 — in order to fill gaps in Community social security legislation. The question arises, it must be remembered, only on the hypothesis that the Community legislator left a lacuna in Article 9 of Regulation No 1408/71. It is, in my view, a surprising proposition that where there is a detailed scheme of legislation in place it is possible to fall back on the Treaty to fill a lacuna in the legislation. If that were so, the need for legislation, and particularly for amending legislation, would be minimal. It seems to me clear that, in the design of the Treaty, the obstacles to free movement of workers resulting from requirements under national law of the kind in issue in this case were intended to be overcome by legislation adopted pursuant to Article 51 of the Treaty. It is necessary, certainly, to interpret that legislation so as to give effect to the objectives of the Treaty, in particular Articles 48 and 51; but the solution cannot be found by reliance on Article 48 alone.

24. It is noteworthy that the Commission has not cited any case-law in support of its thesis. I do not think that the judgments of 7 July 1988 in Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877 and Joined Cases 154 and 155/87 *Inasti* v *Wolf* [1988] ECR 3897 would, taken in their context, assist the Commission's argument. There the Court ruled that a provision of Belgian social security legislation which refused to take into account employment in another Member State for the purposes of determining whether self-employed workers were exempt from a requirement to make social security contributions in Belgium, was contrary to Articles 48 and 52 of the Treaty, since the provision had the effect of forming an obstacle to the exercise of occupational activities outside that Member State. However, in relation to those judgments it is notable that the relevant Community legislation — namely Council Regulation (EEC) No 1390/81, extending

the application of Regulation No 1408/71 to self-employed persons and members of their families (Official Journal 1981, L 143, p. 1) — had not come into force at the time of the periods of self-employment at issue in those cases, with the result that the judgment could only be framed in terms of the interpretation of Articles 48 and 52.

Conclusion

25. In conclusion, I am of the opinion that the first question referred by the national court should be answered as follows:

'Article 9 of Regulation No 1408/71 must be interpreted as meaning that where, under the legislation of a Member State, the right to make voluntary pension-insurance contributions in respect of periods of insurance previously completed under the legislation of that Member State is conditional upon being affiliated to the compulsory pension-insurance scheme of that Member State at the time when the application to make the voluntary contributions is made, affiliation to a compulsory pension scheme in another Member State at that time shall be treated as satisfying that condition.'