JUDGMENT OF THE COURT (First Chamber)

21 July 2005 *

In Case C-30/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Bolzano (Italy), made by decision of 9 January 2004, received at the Court on 28 January 2004, in the proceedings

Ursel Koschitzki

v

Istituto nazionale della previdenza sociale (INPS),

THE COURT (First Chamber),

composed of K. Lenaerts, President of the Fourth Chamber, acting for the President of the First Chamber, N. Colneric (Rapporteur), K. Schiemann, E. Juhász and M. Ilešič, Judges,

* Language of the case: Italian.

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2005,

after considering the observations submitted on behalf of:

— Ms Koschitzki, by M. Rossi, R. Ciancaglini and K. de Guelmi Cuccurullo, avvocati,

— the Istituto nazionale della previdenza sociale (INPS), by A. Todaro, A. Riccio and N. Valente, avvocati,

— the Commission of the European Communities, by L. Pignataro and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 46(2)(b) 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, in its version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10) ('Regulation No 1408/71').

2 The reference was made in the course of proceedings between Ms Koschitzki and the Istituto nazionale della previdenza sociale (National Social Welfare Institution) ('INPS') concerning the calculation of Ms Koschitzki's pro rata old-age pension.

Law

Community law

3 Article 1 of Regulation No 1408/71 provides:

'For the purpose of this Regulation:

...

(t) "benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.

4 Article 46(1) to (3) of Regulation No 1408/71, entitled 'Award of benefits', provides:

'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 or Article 40(3), 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, pursuant to paragraph 2;

...

2. Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and/or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.

3. The person concerned shall be entitled to the highest amount calculated in accordance with paragraphs 1 and 2 from the competent institution of each Member State without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which this benefit is due.

Where that is the case, the comparison to be carried out shall relate to the amounts determined after the application of the said provisions.'

5 Article 46a of Regulation No 1408/71, entitled 'General provisions relating to reduction, suspension or withdrawal applicable to benefits in respect of invalidity, old age or survivors under the legislations of the Member States', provides in paragraph 3:

'The following rules shall be applicable for the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

(a) account shall be taken of the benefits acquired under the legislation of another Member State or of other income acquired in another Member State only where the legislation of the first Member State provides for the taking into account of benefits or income acquired abroad;

(b) account shall be taken of the amount of benefits to be granted by another Member State before deduction of taxes, social security contributions and other individual levies or deductions;

(c) no account shall be taken of the amount of benefits acquired under the legislation of another Member State which are awarded on the basis of voluntary insurance or continued optional insurance;

(d) where provisions on reduction, suspension or withdrawal are applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of a similar or different kind payable under the

legislation of other Member States or other income acquired within the territory of other Member States, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation or the income acquired within the territory of other Member States.'

6 Article 46c of Regulation No 1408/71, entitled 'Special provisions applicable in the case of overlapping of one or more benefits referred to in Article 46a(1) with one or more benefits of a different kind or with other income, where two or more Member States are concerned', provides in paragraph 2:

'Where the benefit in question is calculated in accordance with Article 46(2), the benefit or benefits of a different kind from other Member States or other income and all other elements provided for by the legislation of the Member State for the application of the provisions in the respect of reduction, suspension or withdrawal shall be taken into account in proportion to the periods of insurance and/or residence referred to in Article 46(2)(b), and shall be used for the calculation of the said benefit.'

National law

7 The supplement intended to bring a pension to the minimum level is a benefit granted by the Italian Republic, through the INPS, in particular to those entitled to invalidity, old-age or survivors' pensions in order to supplement the pension itself if the amount of the pension, calculated on the basis of the contributions paid, is less than the 'minimum subsistence' level. The amount of the minimum pension, which is fixed each year and depends on certain conditions as to income, is wholly chargeable to general taxation.

8 Under Article 6 of Decree-Law No 463 of 12 September 1983 laying down urgent measures in matters of social security and control of public expenditure, provisions for various sectors of the public administration and the extension of certain time-limits (GURI No 250 of 12 September 1983, 'Decree-Law 463/83'), which became, after amendment, Law No 638 of 11 November 1983 (GURI No 310 of 11 November 1983, 'Law No 638/83'), entitlement to the supplement is subject to the general condition that the recipient does not have an income which exceeds a specified threshold or an income which, combined with that of his spouse, exceeds a higher threshold, subject to a number of exceptions provided for by the Law.

9 Article 4 of Legislative Decree No 503 of 30 December 1992 (ordinary supplement to GURI No 305 of 30 December 1992, 'Legislative Decree No 503/92'), which reformulated Article 6 of Law No 638/83, fixed new income limits for the receipt of a supplement. The calculation of the income limit includes the income of a cohabiting spouse where the couple are not legally separated.

10 Article 1(16) of Law No 335 of 8 August 1995, reforming the compulsory and supplementary pension scheme (ordinary supplement to GURI No 190 of 16 August 1995, 'Law No 335/95'), lays down the general principle that 'the provisions relating to the supplement intended to bring the pension to the minimum level do not apply to pensions awarded exclusively in accordance with the system of contributions'.

11 Under Article 3(15) of Law No 335/95:

'From the date on which this Law enters into force the monthly amount of pensions, entitlement to which is or has been acquired by virtue of the overlapping of insurance and contribution periods provided for by international agreements or

conventions on social security matters, cannot, in respect of each year of contributions, be less than one fortieth of the minimum pension applicable at the date on which this Law enters into force or the date of pensionable age if it that is later. In the case of an incomplete year, the amount cannot be less than ITL 6 000 per month.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 Ms Koschitzki has been the recipient of an old-age pension in Italy since October 1996. She accrued 262 weeks of contributions in Italy and 533 weeks in Germany, that is 795 weeks of contributions in total.

13 In October 1996, Ms Koschitzki's family income exceeded the limit provided for in Article 4 of Legislative Decree No 503/92. In 1996 the family income, consisting of her income and that of her cohabiting spouse, was ITL 39 769 000 (EUR 20 538.97). In that year the limit mentioned in Article 6 of Law No 638/83, as amended by Article 4 of Legislative Decree No 503/92, was fixed at ITL 660 300 (EUR 341.01) per month.

14 Ms Koschitzki and the INPS are in dispute as to whether the supplement intended to bring the pension up to the Italian minimum pension must be taken into account in order to determine the theoretical amount of the pension on which the calculation of the pro rata pension is based.

15 Relying on the judgment in Case C-132/96 *Stinco and Panfilo* [1998] ECR I-5225, Ms Koschitzki takes the view that the answer to that question should be affirmative. She submits that the Italian pro rata pension to which she became entitled on

1 October 1996 must be calculated as follows: minimum pension 1996 (ITL 660 300 = EUR 341.01) x coefficient of the proportional reduction referred to in Article 46(2)(b) of Regulation No 1408/71 (262 weeks: 795 weeks = 0.32956) = ITL 217 600 (EUR 112.38).

16 The INPS argues that in this case the supplement should not be taken into account in order to determine the theoretical amount. That amount is ITL 36 540 (EUR 18.87), which gives an Italian pro rata pension of ITL 12 042 (EUR 6.21) per month.

17 The INPS finally decided to grant a pension of ITL 83 000, EUR 42.86 per month.

18 In its order for reference the Tribunale di Bolzano (District Court, Bolzano) points out that the wording of the judgment in *Stinco and Panfilo* appears to support Ms Koschitzki's view as to the method of calculation. It considers, however, that that judgment did not state whether the supplement, on which the calculation of the Italian pro rata pension is based, must always be included, even where the family income exceeds the ceiling referred to by Italian law.

19 It says that in the main proceedings the family income, that is Ms Koschitzki's income and the income of her cohabiting spouse, unquestionably exceeds the income ceiling. Under Italian law Ms Koschitzki is not entitled to the supplement intended to bring the pension up to the Italian statutory minimum pension.

20 It states that, according to the INPS's argument, the method of calculation put forward by the applicant leads to an unfair result in terms of equal treatment between an Italian pensioner and an 'international' pensioner. If the Court finds for the INPS it will be necessary to add to the end of the operative part of the judgment in *Stinco and Panfilo* the qualification 'if the limits on income and the other conditions that it provides for are not exceeded'.

21 In those circumstances the Tribunale di Bolzano decided to stay its proceedings and refer the following question to the Court for a preliminary ruling:

'In the light of Article 42 EC ..., which requires the adoption of appropriate measures in the field of social security for the implementation of the free movement of workers, can Article 46(2)(b) of Regulation No 1408/71 be interpreted as meaning that the basis of calculation of the Italian pro rata pension must always be the notional pension, brought up to the statutory minimum, even if the income limits laid down by Italian law for bringing the pension up to the minimum have been exceeded (Article 6 of Law No 638/83, amended by Article 4 of Legislative Decree No 503/92), or, on the other hand, must Article 46(2)(b) be interpreted as meaning that the basis of calculation of the Italian pro rata pension must be the unaugmented notional pension (non-supplemented theoretical amount) where the pensioner's income exceeds the limits laid down by Italian law for entitlement to the supplement to bring the pension up to the statutory minimum amount?'

The question referred for a preliminary ruling

22 Article 46(2)(b) of Regulation No 1408/71, to which the question refers, makes reference to the theoretical amount set out in Article 46(2)(a). The national court asks, essentially, whether, in order to determine the theoretical amount of the

pension on which the calculation of the pro rata pension is based pursuant to Article 46(2)(a) of Regulation No 1408/71, a supplement to bring the pension up to the minimum amount under national legislation must be taken into account where the income limits provided for by the national law relating to the supplement are exceeded.

23 In order to answer that question, it must be recalled that the Court held in paragraph 22 of the judgment in *Stinco and Panfilo* that Article 46(2)(a) of Regulation No 1408/71 must be interpreted as meaning that the competent institution, in determining the theoretical amount of the pension on which the calculation of the pro rata pension is based, is required to take into account a supplement intended to bring the pension to the level of the minimum pension under national legislation.

24 In that case the INPS had awarded Mr Stinco and Mr Panfilo pro rata pensions, in accordance with Article 46(2) of Regulation No 1408/71, calculated by reference to the notional pensions which they would have received if they had worked in Italy throughout their working life. The amount of the notional pensions was such that, had they in fact been entitled to domestic pensions of that amount, they would have been awarded the statutory Italian pension supplement so as to reach the minimum pension level (see paragraph 8 of *Stinco and Panfilo*).

25 In this case, on account of the fact that the income limits fixed by the national legislation on the supplement intended to bring the pension to minimum pension level are exceeded, an insured person in the position of Ms Koschitzki, who worked exclusively in the Member State concerned, cannot claim that supplement.

26 In order to determine whether, in such circumstances, the supplement at issue must be taken into consideration in order to calculate the theoretical amount referred to in Article 46(2)(a) of Regulation No 1408/71, it is necessary to interpret that provision in the light of its wording and its purpose.

27 It is clear from the express provisions of Article 46(2)(a) of Regulation No 1408/71 that the theoretical amount must be calculated as if the insured person had worked exclusively in the Member State concerned (Case 793/79 *Menzies* [1980] ECR 2085, paragraph 10).

28 As to the purpose of that article, the Court has already held that the calculation to be made pursuant to that provision is intended to give a worker the maximum theoretical amount which he could claim if all periods of insurance had been completed in the State concerned (*Menzies*, paragraph 11).

29 It follows that if the law of the Member State concerned provides that the right to the supplement is subject to the general condition that the recipient does not have an income greater than a specified threshold or an income combined with that of his cohabiting spouse exceeding a higher threshold, that provision must also be taken into account for the calculation of the theoretical amount referred to in Article 46(2)(a) of Regulation No 1408/71.

30 Ms Koschitzki argues, however, that another approach is called for. She submits that account should be taken of the definition of the word 'benefit' in Article 1(t) of Regulation No 1408/71, which provides that '"benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds ...'. Since it is an element of the basic benefit, the supplement intended to bring the

pension to the minimum level cannot be excluded from the determination of the theoretical pension.

31 However, in order to determine the theoretical amount of a pension, merely classifying the supplement as a 'benefit', within the meaning of Article 1(t) of Regulation No 1408/71, does not predetermine the way in which the supplement must be taken into consideration. The duty to take account of the supplement does not imply that a meaning must be attributed to it which it does not have under national law.

32 It follows that classifying the supplement intended to bring the pension to the Italian statutory minimum pension as a 'benefit' does not require the inclusion, for the purpose of determining the theoretical amount referred to in Article 46(2)(a) of Regulation No 1408/71, of a supplement which a pensioner could not claim if he was covered only by national law.

33 Ms Koschitzki relies on a number of arguments based on an interpretation of Articles 46(3), 46a and 46c of Regulation No 1408/71. First, she submits that the income ceiling laid down by Italian law must be regarded as a provision on reduction of benefit within the meaning of Articles 46a and 46c. Second, she takes the view that, in accordance with Article 46(3), her entitlement to a pension under Article 46 (2) must be calculated, in the first stage, without consideration of national provisions relating to reduction of benefit. Reduction provisions are applicable only in the second stage of the calculation, when a comparison is made between the amount of the benefit due under the national law alone applying its anti-overlapping rules, and the amount of the benefit due under Community law applying its anti-overlapping rules. Ms Koschitzki cites, in that connection, the judgment in Joined Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 27.

34 Those submissions are based on an incorrect reading of Regulation No 1408/71.

35 The Court has consistently held that a national rule must be regarded as a provision on reduction of benefit, within the meaning of Regulation No 1408/71, if the calculation which it requires to be made has the effect of reducing the amount of the pension which the person concerned may claim, because he receives a benefit from another Member State (see, in particular, Case C-143/97 *Conti* [1998] ECR I-6365, paragraph 25, and Case C-107/00 *Insalaca* [2002] ECR I-2403, paragraph 16).

36 On the other hand, a national law such as that at issue in the main proceedings does not constitute a provision for reduction of benefit within the meaning of Articles 46 (3), 46a and 46c of Regulation No 1408/71.

37 As far as concerns *Di Crescenzo and Casagrande*, that judgment refers to a situation in which a provision for reduction of benefit within the meaning of Regulation No 1408/71 was at issue. That judgment does not support the applicant's argument.

38 It follows from all of the foregoing that the answer to the question referred is that Article 46(2)(a) of Regulation No 1408/71 must be interpreted as meaning that, in order to determine the theoretical amount of the pension on which the calculation of the pro rata pension is based, the competent institution is not required to take into consideration a supplement intended to bring the pension to the minimum level under national legislation where, on account of the fact that the income limits fixed by the national legislation on that supplement are exceeded, an insured person who has worked exclusively in the Member State concerned cannot lay claim to such a supplement.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 46(2)(a) 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, in its version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EC) No 3096/95 of 22 December 1995, must be interpreted as meaning that, in order to determine the theoretical amount of the pension on which the calculation of the pro rata pension is based, the competent institution is not required to take into consideration a supplement intended to bring the pension to the minimum level under national legislation where, on account of the fact that the income limits fixed by the national legislation on that supplement are exceeded, an insured person who has worked exclusively in the Member State concerned cannot lay claim to such a supplement.

[Signatures]