JUDGMENT OF THE COURT (Fifth Chamber)
17 September 1997 *

In Case C-322/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Roma for a preliminary ruling in the proceedings pending before that court between

Emanuele Iurlaro

and

Istituto Nazionale della Previdenza Sociale (INPS)

on the interpretation of Article 9a of Regulation (EEC) No 1408/71 of the Council 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and subsequently amended by Council Regulation (EEC) No 2332/89 of 18 July 1989 (OJ 1989 L 224, p. 1), and of Article 15 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), as amended and updated by Regulation No 2001/83,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

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

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Iurlaro, by Rosa Maffei and Paolo Boer, both of the Rome Bar,

— the INPS, by Maddalena Pittelli, of the Rome Bar, and Patrizia Ciacci, of the Milan Bar,

— the Italian Government, by U. Leanza, Head of Department of Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Danilo Del Gaizo, Avvocato dello Stato,

— the Commission of the European Communities, by Antonio Aresu and Maria Patakia, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Iurlaro, represented by Paolo Boer, the INPS, represented by Maddalena Pittelli and Patrizia Ciacci, and the Commission, represented by Maria Patakia and Paolo Stancanelli, of its Legal Service, at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1997,

gives the following

Judgment

1 By order of 3 October 1995, received at the Court on 16 October 1995, the Pretura Circondariale di Roma (Rome District Magistrate's Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 9a of Regulation (EEC) No 1408/71 of the Council 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and subsequently amended by Council Regulation (EEC) No 2332/89 of 18 July 1989 (OJ 1989 L 224, p. 1) ('Regulation No 1408/71'), and of Article 15 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), as amended and updated by Regulation No 2001/83 ('Regulation No 574/72').

2 The question was raised in proceedings between Mr Iurlaro, an Italian national, and the Istituto Nazionale della Previdenza Sociale (National Social Welfare Institution; 'the INPS') concerning the latter's refusal to take into account, for the purpose of the acquisition of entitlement to an invalidity allowance under Italian law, periods of unemployment spent by Mr Iurlaro in Germany.

3 The documents before the Court show that between January 1954 and March 1956 Mr Iurlaro was insured in Italy and that, under that insurance, he paid 110 weekly social security contributions in that country. He then moved to Germany, where

he worked and paid social security contributions from 1959. It is common ground that between 18 October 1984 and 18 October 1989 Mr Iurlaro received unemployment benefit under German law, save for the period from 15 August 1989 to 1 October 1989, during which sickness benefits were paid to him.

4 On 18 October 1989, suffering from an infirmity which reduced his working capacity, in posts corresponding to his abilities, by more than two-thirds, Mr Iurlaro applied to the INPS for an invalidity allowance in Italy pursuant to Article 1 of Law No 222 of 12 June 1984 concerning revision of the rules on invalidity pension (GURI No 165 of 16 June 1984; 'Law No 222').

5 Under Article 4 of Law No 222 acquisition of entitlement to an invalidity allowance and an invalidity pension is subject to fulfilment of the insurance and contribution conditions laid down in Article 9(2) of Decree-Law No 636 of 14 April 1939, which became Law No 1272 of 6 July 1939. That provision, which was replaced by Article 2 of Law No 218 of 4 April 1952 on the reform of pensions in respect of compulsory invalidity, old-age and survivorship insurance (GURI No 89 of 15 April 1952, ordinary supplement), as amended by Law No 222, requires for that purpose that at least five years are to have elapsed since the person concerned joined the insurance scheme, and that at least 260 weekly contributions (five years of pensionable service) are to have been paid or credited in his favour, of which at least 156 (three years of pensionable service) are to have been paid during the five years preceding his application for benefit.

6 Article 4 of Law No 218 provides that 'periods in respect of which the ordinary allowance in respect of compulsory unemployment insurance is paid shall be regarded as contribution periods for the purposes of entitlement to pension and of the amount of pension'.

7 In addition, the order for reference shows that, under Paragraph 43 of the Sozialgesetzbuch (Social Law Code) (BGBl. III 860), as amended by the Gesetz zur Reform der gesetzlichen Rentenversicherung (Law on the Reform of Statutory

Old-Age Insurance) of 28 December 1989 (BGBl. IS.2261), insured persons are entitled, until they reach the age of 65 years, to an invalidity pension if they are unable to carry on their occupation, have three years of compulsory contributions during the five years last preceding the onset of the invalidity, and have completed the general contribution periods before the onset of the invalidity.

8 Under the same provision the reference period of five years prior to the onset of the invalidity is extended by periods which are assimilated to contribution periods (Anrechnungszeiten), such periods including, pursuant to Paragraph 58 of the Sozialgesetzbuch, periods during which the worker was registered on unemployment lists in Germany and drew a benefit from bodies governed by public law. Those periods, which are thus taken into account in determining the reference period but are not taken into account as contribution periods for the purposes of acquiring entitlement to a pension in Germany, give rise furthermore to the payment of notional contributions for the purposes of calculating the amount of the pension.

9 Mr Iurlaro's application was rejected by the INPS on the ground that the minimum contribution requirement laid down by Law No 222 was not fulfilled. In its view, whilst Mr Iurlaro had, since 1954, paid 110 weekly contributions in Italy and 854 weekly contributions in Germany, he had, during the reference period referred to in Article 4 of Law No 222, in this case running from 18 October 1984 until 18 October 1989, drawn unemployment benefits in Germany but not paid any social security contributions.

10 His complaint against that decision having been rejected, Mr Iurlaro brought an action on 24 June 1994 before the Pretura Circondariale di Roma, arguing that the contribution requirement laid down by Law No 222 was fulfilled on the ground, *inter alia*, that the effect of extension of the reference period provided for by the German legislation as regards periods of unemployment was that the reference period to be taken into account for the application of the Italian legislation began on 18 October 1978.

11 Referring to Article 48 of the EC Treaty, the Pretore di Roma is uncertain as to whether the rule in Article 4 of Law No 222 should be disapplied on the ground that it conflicts with Article 15(1)(f) of Regulation No 574/72, which provides:

'In the cases referred to in Articles 18(1), 38, 45(1) to (3), 64, and 67(1) and (2) of the Regulation, aggregation of periods shall be effected in accordance with the following rules:

...

(f) where, under the legislation of one Member State, certain periods of insurance or residence are taken into account only if they have been completed within a specified time limit, the institution which administers such legislation shall:

...

(ii) extend such time limit for the duration of periods of insurance or residence completed wholly or partly within the said time limit under the legislation of another Member State, where the periods of insurance or residence under the legislation of the second Member State give rise only to the suspension of the time limit within which the periods of insurance or residence must be completed.'

12 The national court finds that rule to be unclear, since Article 9a of Regulation No 1408/71 appears to make its application conditional upon the legislation of both countries having made provision for the 'neutrality' of the specified periods, thereby excluding application of the rule in a situation where that possibility is

provided for in one of the two Member States (in this case, Germany) but not in the other (in this case, Italy).

13 Under Article 9a of Regulation No 1408/71, '[W]here, under the legislation of a Member State, recognition of entitlement to a benefit is conditional upon completion of a minimum period of insurance during a specific period preceding the contingency insured against (reference period) and where the aforementioned legislation provides that the periods during which the benefits have been granted under the legislation of that Member State or periods devoted to the upbringing of children in the territory of that Member State shall give rise to prolongation of the reference period, periods during which invalidity pensions or old-age pensions or sickness benefits, unemployment benefits or benefits for accidents at work (except for pensions) have been awarded under the legislation of another Member State and periods devoted to the upbringing of children in the territory of another Member State shall likewise give rise to prolongation of the aforesaid reference period.'

14 In view of those doubts the Pretore di Roma decided to stay proceedings and refer to the Court of Justice 'the question of the interpretation of Article 15(1)(f) of Regulation No 574/72 and Article 9a of Regulation No 1408/71, in the light of Article 48 of the Treaty establishing the EEC, in order to ascertain whether Article 4 of Law No 222/1984 should be so applied as to prolong the reference period for the recognition of entitlement to invalidity pension where a worker has been in receipt of unemployment benefit in another Member State (in this case Germany) in which such extension is provided for and, if so, whether such prolongation should be subject to conditions.'

15 By that question the national court asks essentially whether Articles 48 to 51 of the Treaty, Article 9a of Regulation No 1408/71 and Article 15(1)(f)(ii) of Regulation No 574/72 must be interpreted as requiring a Member State to extend the reference period which is laid down by its legislation for determining the minimum insurance requirement for the grant of an invalidity benefit by a period equivalent to

the periods of unemployment spent by the person concerned under the legislation of another Member State which, unlike that of the first Member State, allows such an extension where the periods of unemployment are spent on national territory.

16 For the purposes of answering this question it should be borne in mind that, whilst the Italian legislation applicable in this case takes account of periods of unemployment in respect of which benefit has been paid both for the purpose of entitlement to a pension and for the purpose of calculating its amount, under German law the period during which a worker draws unemployment benefits in Germany, whilst giving rise to notional contributions for the purpose of determining the amount of the pension, serves to extend the five-year reference period as regards the minimum contribution required for recognition of entitlement to a pension.

17 It must therefore be held at the outset that the requirements for applying Article 9a of Regulation No 1408/71, to which the question put to the Court refers, are not satisfied. As the Advocate General points out at paragraph 51 of his Opinion, the very wording of that provision shows that it is concerned solely with a situation where the legislation of a Member State which makes entitlement to a benefit conditional upon completion of a minimum period of insurance during a reference period itself allows for the extension of that period by periods during which certain benefits, and in particular unemployment benefits, were granted under the legislation of another Member State. That is not the situation in the case of legislation, such as the Italian legislation in point in the main proceedings, under which periods of unemployment do not extend the reference period.

18 It should next be noted that Mr Iurlaro has been subject only to legislation on invalidity benefits of 'Type B', that is to say, under which the amount of benefit is determined on the basis of the duration of the insurance periods completed. In such a case Article 40(1) of Regulation No 1408/71 provides that the worker in question is to receive benefits under the provisions of Chapter 3 (Articles 44 to 51) concerning old-age and death benefits, which are to apply by analogy.

19 Under Article 45(1) of that regulation the competent institution of a Member State whose legislation makes the acquisition of the right to old-age benefits conditional upon the completion of insurance periods is to take account of periods completed under the legislation of any other Member State as if they were periods completed under the legislation which it administers.

20 In that regard, Article 15(1)(f)(ii) of Regulation No 574/72, which applies 'in the cases referred to in Articles 18(1), 38, 45(1) to (3), 64, and 67(1) and (2) of the Regulation', provides that the institution of a Member State whose legislation takes certain insurance periods into account only if they have been completed within a specified time-limit must extend such time-limit for the duration of insurance periods completed within that time-limit under the legislation of another Member State, where those periods give rise, under the legislation of that latter Member State, only to the suspension of the time-limit within which the insurance periods are to be completed.

21 In a case such as that in point in the main proceedings, however, the periods of unemployment which were spent under German legislation during the reference period which is to be taken into account under Italian legislation do not give rise, under the legislation of the first State, solely to the suspension of the time-limit within which the insurance periods are to be completed. Under the German legislation applicable to the dispute in the main proceedings, as paragraph 16 of this judgment makes clear, periods of unemployment in respect of which benefit is paid are also taken into account for the purposes of calculating the amount of the invalidity benefit.

22 In those circumstances, the Court finds that in this case Article 15 of Regulation No 574/72 cannot be relied upon to any useful purpose, without its even being necessary to consider whether that provision covers cases where, as here, Article 45 of Regulation No 1408/71 is applicable not directly but, under Article 40 of the same regulation, by analogy.

23 Finally, the Court refers to its case-law (see, in particular, Case C-12/93 *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* v *Drake* [1994] ECR I-4337, paragraph 26), to the effect that Article 51 of the EC Treaty and Regulation No 1408/71 do not regulate the conditions under which insurance periods are constituted. It is for each Member State to determine the conditions governing the right or obligation to become a member of a social security scheme, provided that there is no overt or covert discrimination in that regard between nationals of the host Member State and those of other Member States.

24 In this case the Italian legislation, in preventing the taking into consideration, in order to extend the five-year reference period which it lays down for the purposes of calculating the minimum insurance requirement for the grant of an invalidity benefit, of periods during which the person concerned spent periods of unemployment under either Italian legislation or that of another Member State, employs objective criteria and applies without distinction to national workers and those of other Member States.

25 In those circumstances, the Court concludes that Articles 48 to 51 of the Treaty, Article 9a of Regulation No 1408/71 and Article 15(1)(f)(ii) of Regulation No 574/72 must be interpreted as not requiring a Member State to extend the reference period laid down by its legislation for determining the minimum insurance requirement for the grant of an invalidity benefit, by a period equivalent to periods of unemployment spent by the person concerned under the legislation of another Member State which, unlike that of the first Member State, allows such an extension where the periods of unemployment are spent on national territory.

26 Mr Iurlaro and the Commission also submit that the Italian institution, when applying the aggregation rules laid down in Article 45(1) of Regulation No 1408/71, must take into account not only periods of unemployment spent in Italy during the reference period in question, but also similar periods spent in Germany, even if, under German legislation, periods of unemployment are not taken into account for the purposes of the acquisition of entitlement to invalidity benefit. In this case Mr Iurlaro spent periods of unemployment in Germany totalling more than three years during the five-year period prior to his application for invalidity

benefit in Italy. He therefore fulfilled the requirement under Article 4 of Law No 222 that at least 156 weekly contributions (three years of pensionable service) must have been paid or credited in favour of the person concerned during the five years preceding his application for benefit.

27 It should be noted in that respect that the term 'periods of insurance' is defined in Article 1(r) of Regulation No 1408/71 as 'periods of contribution or periods of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

28 It follows that, for the purposes, *inter alia*, of applying Article 45 of Regulation No 1408/71, 'periods of insurance' means periods defined or recognized as such by the legislation under which they were completed (see, in particular, concerning periods treated as such, Case C-324/88 *Vella and Others* v *Alliance Nationale des Mutualités Chrétiennes* [1990] ECR I-257), subject however to compliance with Articles 48 to 51 of the Treaty (see, on that point, Case C-302/90 *Caisse Auxiliaire d'Assurance Maladie-Invalidité* v *Faux* [1991] ECR I-4875, paragraphs 25 to 28).

29 National legislation which takes into account for the purposes of acquisition of entitlement to invalidity allowance only such periods of insurance against unemployment that were completed on national territory, to the exclusion of similar periods completed in the territory of other Member States, infringes those provisions of the Treaty.

30 Such a requirement, for which no objective justification has been put forward and which establishes a difference in treatment between workers who have not exercised their right to freedom of movement and migrant workers, to the detriment of the latter, must be held to be discriminatory and thus in breach of the fundamental rules of the Treaty which are designed to ensure freedom of movement for workers.

31 It should, however, be pointed out that, at the hearing before the Court, the INPS and the Italian Government stated, without being contradicted, that it is only for a period not exceeding six months that the Italian scheme treats periods of unemployment as periods of contribution for the purposes of calculating whether entitlement to invalidity benefit has been acquired.

32 Having regard to those statements, the accuracy of which it is for the national court to verify, the Court finds that Articles 48 to 51 of the Treaty do not preclude the legislation of a Member State, such as the Italian legislation, from limiting to a period of six months the taking into account, for the purposes of granting an invalidity benefit, periods of unemployment spent in another Member State, where such limitation is applicable also to cases where those periods are spent in the Member State of the competent institution.

33 The answer to the question referred to the Court must therefore be that Articles 48 to 51 of the Treaty, Article 9a of Regulation No 1408/71 and Article 15(1)(f)(ii) of Regulation No 574/72 must be interpreted as not requiring a Member State to extend the reference period laid down by its legislation for determining the minimum insurance requirement for the grant of an invalidity benefit by a period equivalent to the periods of unemployment spent by the person concerned under the legislation of another Member State which, unlike that of the first Member State, allows such an extension where the periods of unemployment are spent on national territory. Moreover, Articles 48 to 51 of the Treaty do not preclude the legislation of a Member State from refusing to take into account, for the purposes of calculating whether the minimum insurance requirement attaching to the grant of an invalidity benefit is satisfied, periods of insurance against unemployment completed during a given period preceding the contingency insured against under the legislation of another Member State, over and above those which are taken into account by the legislation of the first Member State during that same period.

Costs

34 The costs incurred by the Italian Government and the Commission of the European Communities, which have 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 Pretura Circondariale di Roma by order of 3 October 1995, hereby rules:

Articles 48 to 51 of the EC Treaty, Article 9a of Regulation (EEC) No 1408/71 of the Council 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 and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and subsequently amended by Council Regulation (EEC) No 2332/89 of 18 July 1989, and Article 15(1)(f)(ii) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 2001/83 must be interpreted as not requiring a Member State to extend the reference period laid down by its legislation for determining the minimum insurance requirement for the grant of an invalidity benefit by a period equivalent to the periods of unemployment spent by the person concerned under the legislation of another Member State which, unlike

that of the first Member State, allows such an extension where the periods of unemployment are spent on national territory. Moreover, Articles 48 to 51 of the Treaty do not preclude the legislation of a Member State from refusing to take into account, for the purposes of calculating whether the minimum insurance requirement attaching to the grant of an invalidity benefit is satisfied, periods of insurance against unemployment completed during a given period preceding the contingency insured against under the legislation of another Member State, over and above those which are taken into account by the legislation of the first Member State during that same period.

Moitinho de Almeida Sevón Edward

Jann Wathelet

Delivered in open court in Luxembourg on 17 September 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber