JUDGMENT OF THE COURT (First Chamber)
6 June 1990 *

In Case C-342/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeidshof Gent (Labour Court, Ghent), Belgium, for a preliminary ruling in the proceedings pending before that court between

Rijksdienst voor Pensioenen (National Pension Office)

and

E. Spits,

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 (of which a codified version is annexed to Council Regulation (EEC) No 2001/83, Official Journal 1983, L 230, p. 6),

THE COURT (First Chamber)

composed of: Sir Gordon Slynn, President of Chamber, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: G. Tesauro
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

Rijksdienst voor Pensioenen, by R. Masyn, General Manager,

the Commission of the European Communities, by B.-J. Drijber and Sean van Raepenbusch, members of its Legal Department, acting as Agents,

* Language of the case: Dutch.

having regard to the Report for the Hearing and further to the hearing on 12 December 1989,

after hearing the opinion of the Advocate General delivered at the sitting on 6 February 1990,

gives the following

Judgment

1 By order of 18 November 1988, which was received at the Court on 28 November 1988, the Arbeidshof Gent (Labour Court, Ghent) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 46(1) 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 (of which a codified version is annexed to Council Regulation (EEC) No 2001/83, Official Journal 1983, L 230, p. 6).

2 The question was raised in proceedings between Mr Spits, a Netherlands national, and the Rijksdienst voor Pensioenen (National Pension Office), a Belgian social security institution, concerning the calculation of his retirement pension.

3 Mr Spits, who was born in August 1914, worked in Belgium from 1932 to 1938 and in the Netherlands from then until his retirement in 1979. Under the Netherlands' legislation Mr Spits was therefore entitled to a pension corresponding to an insurance record of 50 years in the Netherlands, from August 1929 to July 1979, as the years between 1929 and 1938 were recognized under that legislation as 'notional' insurance periods.

4 When Mr Spits applied for a pension to the competent Netherlands institution, it informed its Belgian counterpart, the National Pension Office, which calculated the pension payable. For that purpose the National Pension Office applied Article 10 of Royal Decree No 50 of 24 October 1967 on retirement and survivors' pensions for employed persons (*Belgisch Staatsblad* of 27 October 1967).

5 Under paragraph 1 of that provision, the right to a pension of 1/45 of the annual salary (actual, notional or standard) is acquired for each calendar year of employment completed between 1 January of the year of the 20th birthday of the person concerned and 31 December of the year preceding his 65th birthday. According to an administrative practice, however, years worked by the person concerned before his 20th birthday are taken into account in order to increase a person's pension rights where he cannot claim a full record, that is to say 45 years of employment.

6 When it calculated the pension payable to Mr Spits under Article 10 of Royal Decree No 50, the National Pension Office took into account only the years between 1934 and 1938 and excluded the two years worked before his 20th birthday, that is to say 1932 and 1933, on the ground that, by taking into account the years of insurance completed in the Netherlands, Mr Spits had a record of 50 years. Consequently, Mr Spits was granted a pension of 5/45 on the basis of the remuneration to be taken into account from 1934 up to and including 1938.

7 Mr Spits brought an action challenging that decision before the competent national court on the ground that no provision of Royal Decree No 50 required that, in order to determine the record completed by the person concerned, the years completed abroad should be added to the years worked in Belgium. Consequently, Mr Spits considered that he was entitled to a pension of 7/45, which took into account his remuneration for the years from 1932 up to and including 1938.

8 Mr Spits was successful in the court of first instance, which considered that the years 1932 and 1933 should be taken into account. The National Pension Office appealed against that judgment to the Arbeidshof Gent which stayed the proceedings and requested the Court to give a preliminary ruling on the question

'whether or not a person in the context described above can legitimately claim recognition of both the years at issue between the parties, namely 1932 and 1933, in respect of which adequate pension contributions appear to have been made in Belgium and which precede the 20th birthday of the person concerned, who claims a contribution record in the Netherlands on account of employment there as a result of which he is entitled to a pension under the Algemene Ouderdoms-Wet — AOW (General Law on Old Age) corresponding to a total insurance period of 50 years'.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 Although in its question the Arbeidshof does not mention any provision of Community law, it is clear from the documents before the Court that the question in fact concerns the interpretation of Article 46 of Regulation No 1408/71 and in particular Article 46(1). Furthermore, both the National Pension Office and the Commission acknowledged at the hearing that a proper interpretation of Article 46(1) would result in a pension calculated on the basis of 7/45 of the relevant salary and not 5/45.

11 Article 46 concerns the award of old-age and death benefits where a worker has been subject to the legislation of two or more Member States. Article 46(1) determines the method of calculation to be applied where under the national rules a pension may be granted without its being necessary to take into account periods of insurance completed in another Member State of the Community. This benefit, known as an 'independent benefit' is then compared with the benefit payable under the system of aggregating and apportioning periods of insurance introduced by Article 46(2), and the person concerned is entitled to the higher of the two amounts, subject to the provisions of Article 46(3).

12 Article 46(1) provides that the competent institution is to calculate the benefit payable under national legislation alone on the basis solely of the periods completed under that legislation. In calculating the amount of this independent

benefit, the competent institution is required by Article 12(2) of Regulation No 1408/71 to disregard any national provision precluding the overlapping of benefits.

13 It should also be noted that under the principle of equal treatment for national workers and migrant workers the latter must benefit in the same way as nationals from any administrative practice which permits derogation from the strict application of national rules such as those at issue in the main proceedings according to which years worked by the person concerned in the Member State in question prior to his 20th birthday may be taken into account.

14 It follows from the foregoing that the answer to the question asked by the Arbeidshof Gent must be that, in determining the amount of the independent benefit referred to in Article 46(1) of Regulation No 1408/71, the competent institution of a Member State must disregard any period of insurance completed in another Member State and take into account any administrative practice permitting derogation from the strict application of the national legislation.

Costs

15 The costs incurred by the Commission of the European Communities, which has 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question submitted to it by the Arbeidshof Gent, by order of 18 November 1988, hereby rules:

In determining the amount of the independent benefit referred to in Article 46(1) of Regulation (EEC) No 1408/71, the competent institution of a Member State must disregard any period of insurance completed in another Member State and take into account any administrative practice permitting derogation from the strict application of the national legislation.

Slynn Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 6 June 1990.

J.-G. Giraud
Registrar

Gordon Slynn
President of the First Chamber