JUDGMENT OF THE COURT (SECOND CHAMBER)
18 FEBRUARY 1982 [1]

Georges Vermaut v Office National des Pensions pour Travailleurs Salariés (reference for a preliminary ruling from the Tribunal du Travail, Liège)

(Social security — Pension rights)

Case 55/81

Social security for migrant workers — Insurance covering old age and death — Aggregation of periods of insurance — Periods of less than a year completed under the legislation of another Member State — Taking into account of such periods — Requirement by the competent Member State of contributions corresponding to such periods — Not permitted

(Regulation No 1408/71 of the Council Art. 48 (2))

1. Pursuant to Article 48 (2) of Regulation No 1408/71 the national institution competent in retirement pension matters must take account of periods of insurance of less than one year completed by the worker under the legislation of other Member States even if the right to a pension arises under national legislation alone.

2. A Member State is not entitled to require the payment by the worker of contributions corresponding to the periods of insurance referred to in Article 48 of Regulation No 1408/71 and completed under the legislation of other Member States or the transfer of the contributions for those periods which may have been paid in such Member States.

In Case 55/81

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

GEORGES VERMAUT

1 — Language of the Case: French.

and

OFFICE NATIONAL DES PENSIONS POUR TRAVAILLEURS SALARIÉS

on the interpretation of Article 48 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),

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the arguments of the parties set out in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

Mr Vermaut, the plaintiff in the main action, a Belgian national, worked principally in Belgium. However, he worked for short periods, neither of which amounted to one year, in the United Kingdom from 10 December 1937 to 29 September 1938 and in Germany from 9 January 1939 to 27 August 1939. In the last two cases his work was interrupted because he was called up for service in the Belgian army and because he was ultimately taken prisoner of war.

The Office National des Pensions pour Travailleurs Salariés (ONPTS) [National Pension Office for Employed Persons, hereinafter referred to as "the Office"], at the request of the plaintiff made on

7 September 1976 decided to award him a retirement pension of BFR 23 432 from 1 June 1977 pursuant to the provisions of the Arrêté Royal [Royal Decree] of 24 October 1967 (Moniteur Belge of 27 October 1967). In the calculation thereof account was taken of normal employment, in particular for the years 1936, 1937 and 1949 to 1950, and of employment of less than 185 days for the years 1955 and 1956. Moreover three added years were awarded pursuant to Article 11 bis of that decree.

The decision of the Office does not take into account the years 1938 and 1939, thereby depriving the plaintiff of the increase for the war years 1940 to 1945 in accordance with the provisions of the Royal Decree of 21 December 1967 (Moniteur Belge of 16 January 1968).

According to the fourth subparagraph of Article 32 (1) of that decree:

"An employed person who pursued an activity in that capacity in the course of the period 1 January 1938 to 30 December 1944 is deemed to have continued in that activity as an employed person under the same conditions as to duration throughout the entire period between the date on which his occupation terminated and 31 December 1945".

Furthermore Article 34 (1) of the same decree treats as equivalent to periods of activity as an employed person:

". . . periods of inactivity as a result of call up for military service in the Belgian army . . ."

in so far as the person concerned was an employed person at the time when the event giving rise to such equivalent treatment occurred or if that person has already entered on a period treated as equivalent to a period of activity.

Since Mr Vermaut disagreed with the decision of the Office he instituted proceedings on 28 July 1977 before the Tribunal du Travail, Liège, claiming in particular that the years 1938 and 1939 should be duly taken into account.

The Landesversicherungsanstalt Rheinprovinz [Regional Insurance Office for the Rhine Province], Düsseldorf and the Department of Health and Social Security confirmed, in reply to an inquiry addressed to them by the Office, that because of the shortness of Mr Vermaut's periods of employment in Germany and the United Kingdom respectively he did not acquire any pension right under their legislation.

The Office contended before the Tribunal du Travail, Liège, from which the plaintiff requested a ruling in his favour on the basis of Regulation No 1408/71, that periods of less than a year must be taken into account with regard to the acquisition of the right to the theoretical pension but that they must not be taken into account in order to determine the apportionment of the pension and consequently, since the right to the national pension was acquired in Belgium, those periods should be disregarded.

In those circumstances the Tribunal du Travail, Liège, having heard the concurring opinion of the Auditeur du Travail [officer representing the public interest in labour matters], considered that it must stay the proceedings and refer the following question to the Court of Justice:

"1. Where the length of the periods of insurance under the legislation of a Member State does not amount to one year, is the competent institution — in this case the Office National des Pensions pour Travailleurs Salariés — permitted not to take account of those periods because entitlement to a national pension exists; or must the competent institution take those periods into account as if they had been

completed under the legislation of the State of that institution? (Application of Article 48 of Regulation No 1408/71).

2. In the case of pensions taking effect after 1 January 1977, Belgian law requires payment of contributions. If Belgium must regard the periods in question as having been completed under its legislation, is it entitled to require payment of contributions by the plaintiff, may it request transfer of contributions paid to the Federal Republic of Germany and the United Kingdom or must it take the periods in question into consideration without being able to claim anything from the plaintiff, the Federal Republic of Germany or the United Kingdom?"

The judgment making the reference was recorded at the Court Registry on 11 March 1981. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the following: G. Vermaut; R. Masyn, the general manager, for the Office; G. Dagtoglou, Treasury Solicitor's Department, for the United Kingdom; and by Jean Amphoux, Legal Adviser to the Commission, acting as Agent, for the Commission of the European Communities.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, by an order of 16 September 1981, to assign the case to the Second Chamber pursuant to Article 95 of the Rules of Procedure and to open the oral procedure without any preparatory inquiry.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Mr Vermaut merely states that he is satisfied with the exposition of the situation by the Tribunal du Travail and states that "les échanges respectivement anglais et allemand ont payé leurs assurances sociales au Belgique" (sic) ["the United Kingdom and German exchanges respectively have paid their social security to Belgium" (sic)].

The Office gives its views first of all on its concept of the interpretation of Article 48 of Regulation No 1408/71. In the opinion of the Office, the observations of the Commission and the opinion of the Advocate General in Case 49/75 *Borella* [1975] ECR 1461 show that Article 48 (1) must receive a restrictive interpretation if a State wishes to be relieved of its obligations.

However, this does not apply, according to the Office, in the case of paragraphs (2) and (3). In this connection the Office maintains that the use of the word "other" before the words "Member States concerned" makes it possible to draw a distinction between the scope of Article 48 (2) and (3), which covers all Member States which may rely on the first paragraph because periods of insurance amounting to less than one year do not confer a right to benefits. In this connection it relies upon the statement of the reasons relating to the articles amending Regulation No 3, submitted by the Commission to the Council on 11 January 1966 (Journal Officiel No 194 of 28 October 1966, p. 3333).

Pursuing that line of argument the Office contends that, with regard to the acquisition of the pension right (the theoretical amount) the Belgian State must take into account the periods of insurance completed in other Member States, in accordance with Article 48 (2) but that method of calculation has, however, no effect on the actual benefit

to be granted to the claimant. The calculation of an apportionment on the basis of time may take place only if the periods of insurance affect the numerator and denominator of the fraction. Since Mr Vermaut has no valid period of insurance outside Belgium it was mathematically impossible for the Belgian institution to calculate an apportionment and Article 48 (2) is consequently inapplicable.

With regard to Article 48 (3) the Office considers that it refers exclusively to the case where the worker has completed periods of less than a year under the legal systems to which he was subject and where he did not acquire any right under such systems on the basis of such periods alone, taken in isolation. Member States which grant benefits on the basis of their internal legislation are accordingly excluded from its scope.

The Office in conclusion suggests the following reply to the first question:

"Article 48 (3) of Regulation No 1408/71 does not apply to Member States which recognize rights to benefits in accordance with their internal legislation alone",

and furthermore it is of the view that consideration of the second question is not required within the framework of this case.

The United Kingdom confines its observations to the second preliminary question, that is to say, to the transfer of contributions between Member States where Article 48 of Regulation No 1408/71 requires a State to take into account periods of insurance of less than a year completed in another Member State. The United Kingdom submits in this connection that there is no provision of Community law which requires contributions properly paid under the legislation of one Member State to be transferred to another Member State. There is no justification of law or policy for such a transfer and above all it is not necessary in order to attain the objective of the free movement of workers laid down in Article 51 of the EEC Treaty. Furthermore, in the absence of an express and clear provision to that effect such an obligation may not be inferred and would in addition in the opinion of the United Kingdom prove unworkable in practice by reason of the shortness of the period of insurance, of the absence of precise information and of the absence of a basis for determining the amount of the contributions to be transferred in such a case.

Finally the United Kingdom considers that the article in question is a provision which operates and is intended to operate without the need for financial provision. Moreover the amounts at stake in individual cases, as in this case, cannot be large and would involve disproportionate administrative expense. The only solution consistent with sensible and economical administration is to let the cost of implementing Article 48 lie where it falls, on the basis that taken overall each Member State will neither gain nor lose.

The Commission observes first of all that the problems in this case display two aspects:

(i) That of taking into account periods completed abroad for supplementing periods of military service or of

captivity which form the subject-matter of Article 13 (2) (d) of Regulation No 1408/71, and

(ii) that of taking into account periods completed abroad in order to calculate the retirement pension which alone forms the subject-matter of the preliminary questions referred to the Court which are solely concerned with the interpretation of Article 48 of the said regulation.

The Commission considers that, with regard to the first aspect, the proper application of Article 13 (2) (d) should have led the Office to take into account the periods of insurance completed in the United Kingdom and in Germany by Mr Vermaut as though they were periods completed under Belgian legislation.

With regard to the second aspect the Commission considers that the situation in this case falls under Article 48 (1) and (2) of Regulation No 1408/71. It states that, although paragraph (1) relieves the institutions of Member States of their obligations where short periods of insurance have been completed, paragraph (2) requires the Member States in question (in this case Belgium) to take into account such periods for the purposes of applying Article 46. Paragraph (3) is irrelevant to the solution of the problem. The application of that provision is limited to the specific case where the periods completed by the worker under different legal systems were less than a year and where, through the application of Article 48 (1), all institutions are relieved of their obligations towards the worker.

The Commission maintains that the subject-matter and wording itself of the provisions of Article 48 show clearly that the requirement of taking into account periods completed abroad of less than a year does not apply only to the acquisition and retention of rights to benefit but must also apply in the award of such benefits by the States in question, and particularly in the calculation of the theoretical amount in accordance with Article 46 (2). The plaintiff's Belgian retirement pension must be calculated on the basis of the provisions of that last article and of Article 48 of Regulation No 1408/71 read together.

With regard to the second question the Commission admits that Regulation No 1408/71 is silent as to the problem of the payment of contributions corresponding to the periods of insurance conferring the right to benefits but it emphasizes that in any event the State responsible for payment may not render the award of benefits which it is obliged to provide under the regulation subject to additional conditions which are not prescribed. Furthermore the State responsible for payment is not entitled to render payment of the part of the benefits corresponding to the periods completed abroad subject to the transfer by the institutions of the Member States where such periods of insurance were completed of the contributions paid to the latter in respect of the said periods. This conclusions is based, in the opinion of the Commission, on the principle of general reciprocity and is in the interests of simplicity.

The Commission proposes that the following answers should be given to the questions submitted by the Tribunal du Travail:

"1. The competent institution must, pursuant to Article 48 (2) of Regulation (EEC) No 1408/71, take into account all periods completed by the worker in order to establish the theoretical amount of benefit in accordance with Article 46 (2), (a), even if the right to a pension was acquired by the claimant solely

under the provisions of the national legislation applied by the institution.

2. The competent institution is required to consider periods of insurance of less than a year duly completed in the territory of other Member States as fulfilling all the conditions required by its own legislation in order that they may be taken into account in fixing the pension of the claimant.

3. The system of coordination established by Regulations (EEC) Nos 1408/71 and 574/72 does not include provisions providing for the transfer of contributions between Member States".

III — Oral procedure

At the sitting on 22 October 1981 oral argument was presented by the following: by J. Peltot, Advocate, for the Office; by J. Amphoux, Legal Adviser to the Commission, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 17 December 1981.

Decision

1 By judgment of 25 February 1981, which was received at the Court on 11 March 1981, the Seventh Chamber of the Tribunal du Travail [Labour Tribunal], Liège, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation 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).

2 These questions were raised in connection with a dispute concerning the refusal of the Office National des Pensions pour Travailleurs Salariés [National Pension Office for Employed Persons, hereinafter referred to as "the Office"], a Belgian social security body, to take into account in awarding a retirement pension periods of employment of less than a year completed in Member States other than Belgium so that the recipient of that pension was deprived of the increase for the war years 1940 to 1945 provided for by Belgian legislation.

3 The right to the retirement pension is granted to the claimant solely on the basis of his periods of insurance in Belgium which are sufficient by themselves alone for him to acquire that right. The fact that the claimant worked for ten months in London in 1938 and for eight months in Heidelberg in 1939 and paid contributions and that his work was interrupted each time because he was called up for service in the Belgian army was accordingly not taken into account.

4 In support of his application to the national court the claimant invoked Article 48 of Regulation No 1408/71 which prescribes the detailed procedures for taking account of periods of insurance of less than a year.

5 The Office considered that the periods of less than a year should be taken into account for the acquisition of the right to the pension but that they should not be taken into account for the purpose of determining the *pro rata* pension. Since the plaintiff acquired the right to the national pension in Belgium it was unnecessary to take account of periods of employment of less than a year completed in other Member States.

6 Furthermore the insurance bodies of the United Kingdom and of the Federal Republic of Germany refused to recognize the acquisition of a right to a national pension because of the short duration of the claimant's periods of contribution.

7 In order to settle that dispute the Tribunal du Travail submitted the following preliminary questions to the Court:

1. Where the length of the periods of insurance under the legislation of a Member State does not amount to one year, is the competent institution — in this case the Office National des Pensions pour Travailleurs Salariés — permitted not to take account of those periods because entitlement to a national pension exists; or must the competent institution take those periods into account as if they had been completed under the legislation of the State of that institution?

2. In the case of pensions taking effect after 1 January 1977, Belgian law requires payment of contributions. If Belgium must regard the periods in question as having been completed under its legislation, is it entitled to

require payment of contributions by the plaintiff, may it request transfer of contributions paid to the Federal Republic of Germany and the United Kingdom or must it take the periods in question into consideration without being able to claim anything from the plaintiff, the Federal Republic of Germany or the United Kingdom?

First question

8 By Question 1 the Tribunal du Travail, Liège, wishes to establish whether the Belgian institution which is competent in retirement pension matters must take account of periods of insurance of less than a year completed under the legislation of two other Member States in which such periods do not confer entitlement to pension rights or whether that institution may grant the pension on the basis of Belgian legislation alone without taking account of the periods of insurance completed in those two States.

9 Article 48 (1) of Regulation No 1408/71 provides that the Member States are not bound to take account of periods of insurance of less than a year completed under their legislation if under that legislation no right to benefits is acquired by virtue only of those periods.

10 On the other hand according to the wording of Articles 48 (2) "the competent institution of each of the other Member States concerned shall take into account the periods referred to in paragraph (1), for the purposes of applying the provisions of Article 46 (2) excepting those of subparagraph (b)", which latter provisions concern the calculation of the actual amount of the benefit on a *pro rata* basis.

11 These two provisions, taken together, show clearly that the competent institution of a Member State, in this case the Office, must calculate the amount of the theoretical pension by applying the provisions of national legislation (Article 46 (1)) on the basis of the periods of insurance completed in the Member State concerned as well as in the other Member States (Article 48 (2)) and refrain from any *pro rata* calculation.

12 Accordingly the reply to Question 1 must be that pursuant to Article 48 (2) of Regulation No 1408/71 the national institution competent in retirement pension matters must take account of periods of insurance of less than a year, completed by the worker under the legislation of other Member States even if the right to a pension arises under national legislation alone.

Second question

13 By Question 2 the Tribunal du Travail, Liège, wishes to establish whether a Member State may, on the ground that its national legislation renders the award of a pension conditional on the payment of contributions, require from the worker payment of contributions corresponding to the periods of insurance referred to in Article 48 of Regulation No 1408/71 and completed under the legislation of other Member States or request the transfer of the contributions in respect of such periods which have been paid in such Member States.

14 Regulation No 1408/71 does not contain any provision on the payment by the worker of contributions in respect of the periods of insurance in question. The objectives pursued by the regulation in question imply that the obligations flowing from that regulation for the benefit of migrant workers should be uniformly enforced in all Member States. The imposition of additional conditions, such as that of payment of the contributions by the worker, would accordingly be contrary to the system established by the regulation and might result in inequality of treatment of recipients in the various Member States.

15 The transfer of contributions paid in the other Member States is accordingly not prescribed by the above-mentioned regulation. Such a transfer is also contrary to the system established by the regulation which, in order to simplify matters, permitted that, by reason of their relatively insignificant amount, charges which must be borne by the institutions concerned of the Member States which are required to take account, in determining the pensions which they award, of periods of insurance of less than a year completed under the legislation of other Member States should be compensated on a fixed scale and did not justify the establishment between institutions of the Member States of a system of reimbursement of contributions in respect of those short periods. The addition of further conditions

accordingly cannot be permitted on the basis of the interpretation of a provision which remains silent on that point.

16 The reply to Question 2 submitted by the national court must accordingly be that a Member State is not entitled to require the payment by the worker of contributions corresponding to the periods of insurance referred to in Article 48 of Regulation No 1408/71 and completed under the legislation of other Member States or the transfer of the contributions for those periods which may have been paid in such Member States.

Costs

17 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 action 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 (Second Chamber)

in answer to the questions referred to it by the Tribunal du Travail, Liège, by judgment of 25 February 1981, hereby rules:

1. **Pursuant to Article 48 (2) of Regulation No 1408/71 the national institution competent in retirement pension matters must take account of periods of insurance of less than a year completed by the worker under the legislation of other Member States even if the right to a pension arises under national legislation alone.**

2. **A Member State is not entitled to require the payment by the worker of contributions corresponding to the periods of insurance referred to in Article 48 of Regulation No 1408/71 and completed under the**

legislation of other Member States or the transfer of the contributions for those periods which may have been paid in such Member States.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 18 February 1982.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 17 DECEMBER 1981 [1]

Mr President,
Members of the Court,

In Case 55/81 I should like in essence to follow the worthy example set by Mr Advocate General Warner in Case 69/79, *Jordens-Vosters* v *Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie* ([1980] ECR 88). In principle I subscribe in this case too so completely to the observations of the Commission that it accordingly suffices for me to adopt them as my own. The questions submitted to the Court by the Seventh Chamber of the Labour Tribunal, Liège, should in fact be answered, in my opinion, in accordance with the proposals of the Commission in this matter.

In this connection I would simply add that the Office National des Pensions pour Travailleurs Salariés (ONPTS) acknowledged during the oral procedure the correctness of the remarks of the Commission with regard to the periods of employment abroad required to comply with Article 13 (2) (d) of Regulation No 1408/71 (defence at pp. 6 and 7).

The provisions regarding increased benefits provided for by that article in conjunction with the Belgian legislation concerning periods spent in military service and as a prisoner of war has, however, already led to an increase in Mr Vermaut's pension. The questions of the Labour Tribunal did not, however, relate to that point. Since that matter has become irrelevant to the original dispute it need accordingly have no effect on the answers drawn up by the Commission, which I have adopted, to the questions submitted.

1 — Translated from the Dutch.