JUDGMENT OF THE COURT (Sixth Chamber)
17 December 1998 *

In Case C-244/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hof van Cassatie (Belgium) for a preliminary ruling in the proceedings pending before that court between

Rijksdienst voor Pensioenen

and

Gerdina Lustig

on the interpretation of Articles 45 and 49 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 the 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 (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7) and Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. Hirsch, G. F. Mancini, H. Ragnemalm and R. Schintgen (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Rijksdienst voor Pensioenen, by G. Perl, General Administrator,

— the Belgian Government, by J. Devadder, General Adviser in the Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent,

— the Commission of the European Communities, by P. J. Kuijper and P. Hillenkamp, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Rijksdienst voor Pensioenen, represented by J. C. A. De Clerck, Legal Adviser, the United Kingdom Government, represented by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by S. Moore,

Barrister, and of the Commission, represented by P. van Nuffel, of its Legal Service, acting as Agent, at the hearing on 9 July 1998,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1998,

gives the following

Judgment

1 By judgment of 30 June 1997, received at the Court on 4 July 1997, the Hof van Cassatie (Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 45 and 49 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 the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) (hereinafter 'Regulation No 1408/71'), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7) and Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10).

2 The question was raised in proceedings between Mrs Lustig, a Belgian national, and the Rijksdienst voor Pensioenen (National Pensions Office; hereinafter the 'Rijksdienst'), concerning the latter's refusal to take account, for the purposes of applying the legislation concerning the guaranteed minimum retirement pension granted under Belgian legislation, of periods of insurance completed by Mrs Lustig in the Netherlands for as long as she was not yet entitled to a retirement pension under Netherlands legislation.

The national legislation

3 Article 152 of the Belgian Law of 8 August 1980 concerning the 1979-1980 budget (*Belgisch Staatsblad*, 15 August 1980, p. 9463; hereinafter 'the 1980 Law') provides that:

'Retirement pension payable by the employees' pension scheme in respect of a complete employment record may not be lower than a guaranteed minimum of ... per annum ...

The King shall determine:

(1) what is meant by a complete employment record and the rules whereby its attainment is to be calculated;

...'

4 Article 33 of the Amending Law on Social Sector Pensions of 10 February 1981 (*Belgisch Staatsblad*, 14 February 1981, p. 1697; hereinafter 'the 1981 Law') provides:

'For persons who have completed at least two thirds of a complete career in employment in Belgium, the amount of retirement pension granted under the retirement and survival pension regime for employees shall not be less than a fraction of the basic rates determined by Article 152 of the Law of 8 August 1980 concerning the 1979-1980 budget.

That fraction shall be equivalent to that used for calculating a pension under the retirement regime for employed persons.

The King shall determine:

(1) what is meant by two thirds of a complete career and the rules whereby the attainment of a complete career is to be calculated;

...'

5 At the time material to the main proceedings in this case, a complete employment record was deemed to be 40 years' employment in Belgium in the case of a woman.

The Community legislation

6 Article 45(1) of Regulation No 1408/71, which forms part of Chapter 3, headed 'Old-age and death (pensions)' under Title III of the regulation provides:

'The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence shall take into account, to the extent necessary, periods of insurance or residence completed under the legislation of any Member State as if they were periods completed under the legislation which it administers.'

7 Article 45 of Regulation No 1408/71 was amended by Regulation No 1248/92, which entered into force on 1 June 1992 'for the purpose of clarifying the rules for taking account of the periods of insurance or of residence completed in two or more Member States as an employed person and a self-employed person and/or in the context of a general scheme and a special scheme' (fourth recital in the preamble to Regulation No 1248/92). Since then, Article 45(1) reads as follows:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraphs 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or as a self-employed person. For that purpose, it shall take account of these periods as if they had been completed under its own legislation.'

8 Article 46 of Regulation No 1408/71 sets out the method for calculating the benefits concerned. That article has also been amended by Regulation No 1248/92, although the amendments have not affected the principles of the calculation method in question, which may be summarised as follows:

— The competent institution first calculates the so-called 'independent' amount under the first subparagraph of Article 46(1) [now Article 46(1)(a)(i)] of Regulation No 1408/71. For that purpose, it determines in accordance with its own legislation the amount of the benefit to which the worker would be entitled under that legislation, taking into account only periods of insurance or residence completed under that legislation.

— The first sentence of the second subparagraph of Article 46(1) [now Article 46(1)(a)(ii)] of Regulation No 1408/71 provides that the competent authority is then to calculate, secondly, the *pro rata* amount of the benefit in accordance with Article 46(2). For that purpose, it begins by determining under Article

46(2)(a) of Regulation No 1408/71 the so-called 'theoretical' amount of the benefit which the worker would be entitled to claim if all his periods of insurance or residence in various Member States had been completed in the Member State in question and under the legislation applied by the institution at the date of calculation of the benefit. The competent institution is then to calculate the actual amount of the benefit, in accordance with Article 46(2)(b) of Regulation No 1408/71, on the basis of the theoretical amount and in accordance with the ratio which the duration of the periods of insurance completed before the materialisation of the risk under the legislation which it administers bears to the total duration of the periods of insurance completed before the materialisation of the risk under the legislations of all the Member States concerned.

— Finally, in accordance with the second sentence of the second subparagraph of Article 46(1) (which has now become the first subparagraph of Article 46(3)) of Regulation No 1408/71, the institution making the calculation is to compare the independent amount and the *pro rata* amount and award the higher of the two.

9 Article 49(1) of Regulation No 1408/71 reads as follows:

'If, at a given time, the person concerned does not satisfy the conditions laid down for the provision of benefits by all the legislations of the Member States to which he has been subject, taking into account where appropriate the provisions of Article 45, but satisfies the conditions of one or more of them only, the following provisions shall apply:

(a) each of the competent institutions administering a legislation whose conditions are satisfied shall calculate the amount of the benefit due, in accordance with the provisions of Article 46;

(b) however:

(i) if the person concerned satisfies the conditions of at least two legislations without having recourse to insurance periods completed under the legislations whose conditions are not satisfied, these periods shall not be taken into account for the purposes of Article 46(2);

(ii) if the person concerned satisfies the conditions of one legislation only without having recourse to insurance periods completed under the legislations whose conditions are not satisfied, the amount of the benefit due shall be calculated only in accordance with the provisions of the legislation whose conditions are satisfied, taking account of the periods completed under that legislation only.'

10 The above provision was amended for the first time by Regulation No 1248/92 which inserted into the first sentence a reference to Article 40(3) of Regulation No 1408/71 and added a second subparagraph to enable the provision to be applied in the cases referred to in the second sentence of Article 44(2) of the same regulation (24th recital in the preamble to Regulation No 1248/92). Those amendments are not relevant to this case.

11 Article 49(1) of Regulation No 1408/71 was further amended by Regulation No 3096/95 in order to permit, in the cases referred to in point (b)(i) and (ii) of that paragraph, the taking into account of periods completed under legislations whose conditions of entitlement are not satisfied when it results in the person concerned receiving a higher level of benefit (fifth recital in the preamble to Regulation No 3096/95). Following those amendments, which in accordance with the second para-

graph of Article 3 of Regulation No 3096/95 came into force as regards old-age and survivors' benefits on 1 June 1992, Article 49(1) of Regulation No 1408/71 reads as follows:

'If, at a given time, the person concerned does not satisfy the conditions laid down for the provision of benefits by all the legislations of the Member States to which he has been subject, taking into account where appropriate Article 45 and/or Article 40(3), but satisfies the conditions of one or more of them only, the following provisions shall apply:

(a) each of the competent institutions administering a legislation whose conditions are satisfied shall calculate the amount of the benefit due, in accordance with Article 46;

(b) however:

(i) if the person concerned satisfies the conditions of at least two legislations without having recourse to periods of insurance or residence completed under the legislations whose conditions are not satisfied, these periods shall not be taken into account for the purposes of the provisions of Article 46(2) unless taking account of the said periods makes it possible to determine a higher amount of benefit;

(ii) if the person concerned satisfies the conditions of one legislation only without having recourse to periods of insurance or residence completed under the legislations whose conditions are not satisfied, the amount of the benefit due shall, in accordance with Article 46(1)(a)(i), be calculated only in accordance with the provisions of the legislation whose conditions are satisfied, taking account of the periods completed under that legislation only, unless taking account of the periods completed under the legislations whose conditions are not satisfied makes it possible, in accordance with Article 46(1)(a)(ii), to determine a higher amount of benefit.

The provisions of this paragraph shall apply *mutatis mutandis* where the person concerned has expressly requested the postponement of the award of old-age benefits, in accordance with the second sentence of Article 44(2).'

The dispute in the main proceedings

12 On 20 January 1988, on the approach of her 60th birthday, Mrs Lustig, who was born on 15 January 1929, submitted an application to the Rijksdienst for a Belgian retirement pension as from 1 February 1989.

13 By decision of 2 June 1988, the Rijksdienst granted her a pension of BFR 106 834 with effect from 1 February 1989. The amount thus granted corresponded to an employment record of 19 years completed in Belgium between 1970 and 1988 (19/40ths).

14 On 13 April 1993, Mrs Lustig, who had worked in the Netherlands between 1946 and 1968, applied for an old-age pension under the Algemene Ouderdomswet (Netherlands General Old-Age Insurance Law) as from her 65th birthday. The competent Netherlands authority, the Sociale Verzekeringsbank, granted her the pension requested with effect from 1 January 1994.

15 Following the grant of the Netherlands old-age pension, the Rijksdienst recalculated Mrs Lustig's Belgian pension in accordance with Article 46(2) of Regulation No 1408/71 and, by decision of 23 December 1993, granted her a pension of BFR 142 046 as from 1 January 1994.

16 The documents before the Court show that, in determining the amount thus granted as from 1 January 1994, the Rijksdienst applied the provisions concerning the guaranteed minimum applicable to pensions of the Laws of 1980 and 1981. However, in respect of the period from 1 February 1989, as from which date Mrs Lustig was entitled to a Belgian retirement pension at the age of 60, until 1 January 1994, as from which date she was entitled to a Netherlands pension at the age of 65, the Rijksdienst refused the benefit of those provisions to Mrs Lustig on the ground that it could take her employment record in the Netherlands into account only as from the time when her entitlement to pension in the Netherlands actually came into being, that is to say 1 January 1994.

17 By application of 2 February 1994, Mrs Lustig brought an action against the Rijksdienst's decision of 23 December 1993 before the Arbeidsrechtbank te Antwerpen (Labour Court, Antwerp), arguing that a pension based on the statutory minimum should also have been awarded to her in respect of the period from 1 February 1989 until 1 January 1994.

18 By judgment of 15 December 1994, the Arbeidsrechtbank te Antwerpen annulled the contested decision in so far as it determined 1 January 1994 as the pension commencement date and held that Mrs Lustig was entitled to a retirement pension increased to the level of the statutory minimum as from 1 January 1989.

19 By judgment of 17 April 1996, the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp), on appeal by the Rijksdienst, confirmed the judgment at first instance on different grounds and decided that the Rijksdienst should, pursuant to Articles 45(1) and 49(1)(b)(ii) of Regulation No 1408/71, have acknowledged Mrs Lustig's right to the guaranteed minimum as from 1 February 1989, taking her employment record in the Netherlands into account for the purpose of determining the minimum period as an employee required for such entitlement, but taking into consideration only her employment record in Belgium, namely 19/40ths, for the purposes of the (proportional) calculation of the amount to be granted.

20 The Rijksdienst appealed on a point of law against the judgment of the Arbeidshof te Antwerpen, arguing *inter alia* that Article 45 of Regulation No 1408/71 deals in a more general way with the taking into account of periods of insurance whereas Article 49 of that regulation, taking the provision of Article 45 into account, concerns more specific situations inasmuch as it governs the calculation of benefits where the person concerned does not simultaneously fulfil the conditions laid down by all the legislations under which periods of insurance or residence were completed. Pointing to the fact that Mrs Lustig, having attained the age of 60 by 1 February 1989, could claim a retirement pension in Belgium calculated on the basis of several years of service, without any need to rely on periods of insurance or residence completed in the Netherlands, where she did not satisfy the age condition for entitlement to benefits, the Rijksdienst argued that the relevant provision in this case was the special provision of Article 49(1)(b)(ii) of Regulation No 1408/71 and not Article 45(1), with the result that the amount of the benefit due should be calculated in accordance with Belgian legislation only, taking into account only periods completed under that legislation.

21 Taking the view that, in relation to Article 45(1), the Rijksdienst's plea raised a question of the interpretation of Article 49(1)(b)(ii), the Hof van Cassatie decided to refer the following question to the Court for a preliminary ruling:

'Is Article 49(1)(b)(ii) of Regulation No 1408/71 in conjunction with Article 45 of that regulation to be interpreted as meaning that, where the person concerned fulfils the conditions laid down by one legislation for entitlement to an old-age pension, albeit a limited one, without having recourse to periods of insurance completed under another legislation whose conditions of pension entitlement are not satisfied, the competent national authority is nevertheless obliged to take into account periods completed under the latter legislation where that could result in the award of a greater old-age pension up until such time as the conditions laid down under the latter legislation are fulfilled?'

The question referred to the Court

22 In answering that question, the first point to be made is that Article 45 of Regulation No 1408/71 provides for periods of insurance or residence completed under the legislation of other Member States to be taken into account solely for the purposes of the acquisition, retention or recovery of the right to old-age benefits, whereas the dispute in the main proceedings is concerned with the determination of the amount of such benefits (see, to that effect, Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* v *Office National des Pensions* [1993] ECR I-6497, paragraph 13).

23 Article 51 of the EC Treaty requires aggregation of all periods taken into account under the laws of the several countries not only for the purpose of acquiring and retaining the right to benefits but also for the purpose of calculating them.

24 As regards the calculation of old-age benefits, that principle is expressed in particular in Article 46 of Regulation No 1408/71.

25 With respect to the calculation of benefits, Article 46 provides that the competent institution is to establish the actual amount of the benefit in the ratio which the length of the periods of insurance completed under the legislation administered by it bears to the total length of the periods of insurance completed under the legislations of all the Member States concerned (Case C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033, paragraph 15).

26 Article 49(1) of Regulation No 1408/71 determines the method for calculating benefits, *inter alia*, where at a given time the person concerned does not simultaneously fulfil the conditions laid down by all the legislations under which he has completed periods of insurance or residence.

27 In that respect, Article 49(1)(a) of Regulation No 1408/71 establishes the principle whereby each of the competent institutions administering a legislation whose conditions are satisfied is to calculate the amount of the benefit due, in accordance with Article 46.

28 Article 49(1)(b)(ii) concerns the particular situation of a person who has been subject to the legislation of several Member States but, at a given time, fulfils the conditions of only one of them without needing to have recourse to periods of insurance or residence completed under legislations whose conditions are not fulfilled. That is the situation of a person such as Mrs Lustig, who, at the time she reached the age of 60 and obtained a Belgian retirement pension under Belgian legislation only, did not yet fulfil the conditions for the award of benefit under Netherlands legislation.

29 It therefore needs to be determined in this case whether the amount of the benefit due to a person in such a situation under the legislation whose conditions are fulfilled must be calculated in accordance with that legislation only and taking account only of periods completed under it, even if taking account of the periods completed under the legislations whose conditions are not fulfilled would entitle him to a higher amount of benefit.

30 In that respect, the case-law has consistently held that all the provisions of Regulation No 1408/71 are to be interpreted in the light of the objective of Article 51 of the Treaty, which is to contribute, by means, *inter alia*, of the aggregation of insurance, residence or employment periods, to establishment of freedom of movement for workers (to that effect, see Case C-406/93 *Reichling* v *INAMI* [1994] ECR I-4061, paragraph 21; Case C-481/93 *Moscato* v *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1995] ECR I-3525, paragraph 27; Case C-482/93 *Klaus* v *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1995] ECR I-3551, paragraph 21).

31 That objective entails that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty (*Reichling*, cited above, paragraph 24) and that the rule on the aggregation of insurance, residence or employment periods is aimed at ensuring that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State (*Moscato*, cited above, paragraph 28).

32 It is undisputed that a person in Mrs Lustig's position would have been entitled from the age of 60 to a higher amount of old-age benefit if she had completed the whole of her career as an employee in and under the legislation of the Member State whose conditions she first fulfilled.

33 It has, moreover, been consistently held that if the application of the legislation of the Member State in question alone proves less favourable to the worker than that of the Community scheme set out in Article 46 of Regulation No 1408/71, the provisions of that article must be applied in their entirety (see, in particular, Joined Cases C-90/91 and C-91/91 *Office National des Pensions* v *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 16).

34 Article 49(1)(b)(ii) of Regulation No 1408/71, interpreted in the light of Article 51 of the Treaty, therefore requires that periods completed under the legislations of Member States whose conditions are not fulfilled are to be taken into account for the purposes of calculating old-age benefits under Article 46 of the regulation, where this is shown to be more beneficial for the person concerned than merely applying the legislation whose conditions have been fulfilled and taking into account only periods completed under that legislation.

35 Since that interpretation of Article 49(1)(b)(ii) of Regulation No 1408/71 follows directly from Article 51 of the Treaty, the amendment made to that provision by Regulation No 3096/95 can only be clarificatory in nature.

36 Contrary to what the United Kingdom Government has argued at the hearing, that conclusion cannot be called into question by the judgment in Case C-146/93 *McLachlan* v *CNAVTS* [1994] ECR I-3229.

37 It is true that, at paragraph 29 of that judgment, the Court held that the taking into account by the national legislation whose conditions are fulfilled of periods completed under the legislation of another Member State is excluded by Article 49 as regards the calculation of the amount of the pension.

38 That finding must however be understood in the light of the particular context of the case which gave rise to the *McLachlan* judgment. As the Advocate General has rightly pointed out at point 16 of his Opinion, the applicant in that case did not seek mere application of the aggregation and apportionment rules in Article 46 of Regulation No 1408/71, but the payment under the legislation of the Member State whose conditions he fulfilled of an amount of pension which took account of periods completed under the legislation of the Member State whose conditions he did not yet fulfil, on the ground that he would have been entitled to such a pension if he had completed the whole of his career under the first legislation.

39 By excluding in those circumstances, for the purpose of calculating the amount of pension due under the legislation whose conditions were fulfilled, the taking into account of periods completed under the legislation whose conditions were not yet fulfilled, the Court merely intended to ensure that, in conformity with the system under Regulation No 1408/71 which allowed different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights, each State paid the benefits corresponding to the periods completed under its legislation (*McLachlan*, cited above, paragraphs 29, 30 and 37).

40 By contrast, in the case which is the subject of this reference for a preliminary ruling, the application of the person concerned seeks to have the periods completed under the legislation whose conditions were not yet fulfilled taken into account solely for the purposes of applying the Belgian legislation concerning the guaranteed minimum and not for the purposes of the calculation properly so-called, on the basis of the total duration of the periods completed in the two Member States and in proportion to the periods completed under the Belgian legislation, of the amount of the retirement pension to which she is entitled under that legislation, taking account of the application of the said legislation in relation to the guaranteed minimum. Unlike Mr McLachlan, therefore, Mrs Lustig is not asking that the actual amount of the pension to which she is entitled under the legislation whose conditions are fulfilled be calculated so as to take account of periods completed under the legislation of the Member State whose conditions are not yet fulfilled as if they had been completed under the legislation of the first State.

41 In the light of the foregoing considerations, taken as a whole, the answer to the question referred to the Court must be that Article 49(1)(b)(ii) of Regulation No 1408/71 and Article 49(1)(b)(ii) of Regulation No 1408/71, as amended by Regulation No 1248/92 and Regulation No 3096/95, must be interpreted as requiring the competent institution, where the person concerned fulfils the conditions laid down

by one legislation for payment of an old-age pension, albeit a limited one, without recourse being necessary to periods of insurance or residence completed under another legislation whose conditions are not fulfilled, nevertheless to take into account, in accordance with Article 46 of the same regulation, periods completed under the latter legislation where, as a result, an old-age benefit of a higher amount may be awarded up until such time as the conditions laid down under the latter legislation are also fulfilled.

Costs

42 The costs incurred by the Belgian and United Kingdom Governments and by the Commission, 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 (Sixth Chamber),

in answer to the question referred to it by the Hof van Cassatie (Belgium) by judgment of 30 June 1997, hereby rules:

Article 49(1)(b)(ii) 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 the

version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and Article 49(1)(b)(ii) of Regulation No 1408/71, in the version resulting from Regulation No 2001/83, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 and Regulation (EC) No 3096/95 of 22 December 1995, must be interpreted as requiring the competent institution, where the person concerned fulfils the conditions laid down by one legislation for payment of an old-age pension, albeit a limited one, without recourse being necessary to periods of insurance or residence completed under another legislation whose conditions are not fulfilled, nevertheless to take into account, in accordance with Article 46 of the same regulation, periods completed under the latter legislation where, as a result, an old-age benefit of a higher amount may be awarded up until such time as the conditions laid down under the latter legislation are also fulfilled.

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 17 December 1998.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber