JUDGMENT OF THE COURT (Second Chamber)

16 December 2004 *

In Case C-293/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 20 May 2003, received at the Court on 4 July 2003, in the proceedings:

Gregorio My

v

Office national des pensions (ONP),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), G. Arestis and J. Klučka, Judges,

* Language of the case: French.

Advocate General: A. Tizzano,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 June 2004,

after considering the observations submitted on behalf of:

— Mr My, by C. Rosenfeld, avocat,

— the Office national des pensions, by G. Perl and J.-P. Lheureux, acting as Agents,

— the Greek Government, by A. Samoni-Rantou and M. Tassopoulou, acting as Agents,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by D. Martin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 2, 3, 17, 18, 39, 40, 42 and 283 EC and of Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 That reference is made in the course of proceedings between Mr My and the Office national des pensions (National Pension Office) ('ONP') concerning the refusal by the latter to take account of the periods of employment within an institution of the European Communities for the purposes of eligibility for an early retirement pension under the Belgian scheme.

Legal background

Community legislation

3 Under Article 11(1) and (2) of Annex VIII to the Staff Regulations of Officials of the European Communities ('Staff Regulations') in the version applicable at the time of the facts in the main proceedings:

'1. An official who leaves the service of the Communities to:

— enter the service of a government administration or a national or international organisation which has concluded an agreement with the Communities;

— pursue an activity in an employed or self-employed capacity, by virtue of which he acquires pension rights under a scheme whose administrative bodies have concluded an agreement with the Communities,

shall be entitled to have the actuarial equivalent of his retirement pension rights in the Communities transferred to the pension fund of that administration or organisation or to the pension fund under which he acquires retirement pension rights by virtue of the activity pursued in an employed or self-employed capacity.

2. An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation; or

— pursuing an activity in an employed or self-employed capacity;

shall be entitled upon establishment to have paid to the Communities either the actuarial equivalent or the flat-rate redemption value of retirement pension rights acquired by virtue of such service or activities.

In such case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid.'

National legislation

4 Under Article 3 of the Law of 21 May 1991 establishing a certain relationship between the Belgian pension schemes and those of international public law institutions (*Moniteur belge*, 20 June 1991, 'the 1991 Law'):

'Any civil servant may, with the agreement of the competent institution, request that the amount of retirement pension relating to service and periods prior to the date on which he joined the institution in question should be paid to that institution.'

5 Under Article 9 of that law, however, the person concerned is given the right to withdraw the request for a transfer of pension entitlements accumulated under the Belgian scheme. Such withdrawal is final and irrevocable.

6 Article 2(1)(5) of the 1991 Law defines the term 'official' as relating to 'any member of staff covered by the institution's pension scheme in respect of whom a transfer of pension rights is not governed by a regulation or specific agreement'. The term 'institution' is defined in Article 2(1)(1) as covering 'the Community institutions, the bodies connected with them for purposes of application of the Staff Regulations of officials and other servants of the European Union and organisations devoted to furthering the Communities' interests whose pension scheme confers on established officials the right to request the transfer, to the pension fund of the institution, pension rights acquired before entry into the service of the institution'.

7 The Law of 10 February 2003 governing the transfer of pension rights between the Belgian pension schemes and those of public international law institutions (*Moniteur belge*, 27 March 2003, 'the 2003 Law') provides, from that date, in Article 14, that an official leaving the employ of the European Communities to take up employment in Belgium may request the transfer to the Belgian scheme of either the actuarial equivalent of the pension rights acquired in the Community scheme or the flat-rate redemption value corresponding to contributions made under that scheme.

8 Article 29 of the 2003 Law provides that that law is to take effect on 1 January 2002 and apply to transfer requests submitted as from that date.

9 Furthermore, the first paragraph of Article 4(2) of the Royal Decree of 23 December 1996 implementing Articles 15, 16 and 17 of the Law of 26 July 1996 modernising social security and ensuring the viability of the statutory pension schemes (*Moniteur belge*, 17 January 1997, 'the Royal Decree'), provides:

'In order to claim an early retirement pension in accordance with paragraph 1 the claimant must prove that he has completed at least 35 calendar years of employment conferring entitlement to a pension under this Decree, under the Law of 20 July 1990, under Royal Decree No 50, under a Belgian scheme for manual workers, employees, miners, seamen or self-employed workers, under a Belgian scheme applicable to workers in the public services or of the Société nationale des chemins de fer belges [Belgian National Railway Company] or under any other Belgian scheme.'

The dispute in the main proceedings and the question referred

10 Mr My, an Italian national born on 20 February 1941, worked for 19 years under the Belgian social security scheme for employees, and then from 1 June 1974 for the Council of the European Communities as an official until 31 May 2001.

11 In March 1992, Mr My applied to the ONP in accordance with the Belgian Law of 20 May 1991 for his pension rights accumulated under the Belgian scheme to be transferred to the pension scheme of the Community institutions. In October 1992, the ONP notified him of the transfer value of those rights.

12 However, in October 2000, the Council informed the ONP that Mr My had decided to withdraw his application for transfer of his pension rights acquired under Belgian law, in accordance with Article 9 of the 1991 Law. By letter of 17 October 2000 to Mr My, the ONP acknowledged receipt of that withdrawal.

13 On 20 October 2000, Mr My applied for an early retirement pension under Article 4(2) of the Royal Decree.

14 By decision of 2 May 2001, the ONP rejected that application on the ground that Mr My had not accumulated the 35 years of service required under Article 4(2) of the Royal Decree in order to qualify for an early retirement pension. In that regard, the ONP refused to take into account the 27 years of service completed by Mr My as a Community official as the scheme laid down by the Staff Regulations was not referred to in the Belgian legislation.

15 Doubting the compatibility, firstly, of the 1991 law and the Staff Regulations, in that they do not guarantee a right to transfer pension rights from the Community scheme to the national scheme and, secondly, of Article 4(2) of the Royal Decree, in that it does not permit periods of employment within a Community institution to be taken into account, with the principles of free movement of workers and of non-discrimination and with the rights guaranteed to citizens of the Union by the EC Treaty, the Tribunal du travail de Bruxelles decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are national provisions, such as the [1991 Law] and Article 4(2) of the [Royal Decree], or Article 11 of Annex VIII to the Staff Regulations ... contrary to Articles 2, 3, 17, 18, 39, 40, 42 and 283 EC and Article 7 of Regulation (EEC) No 1612/68:

(a) in that these national provisions and the Staff Regulations do not allow a citizen of the European Union, such as the plaintiff, whose professional career has been

carried out first in an undertaking or in a national public service and then in the European Union civil service, or vice versa, to compare the pension benefits which he would obtain under each scheme, be it national or European, through transfer of rights acquired under the other scheme, and, based on this comparison, to request transfer of these rights either from the national scheme to the European scheme or, conversely, from the European scheme to the national scheme;

(b) in that by providing that the person concerned must expressly waive the right to transfer from the Belgian scheme to the European scheme or by causing an administrative practice to that effect, without the aforementioned comparison having been made, these provisions mislead or could mislead him;

(c) in that these national provisions do not allow years of service as an official of the European Union to be taken into account for the purposes of the grant of an early national pension?'

The question referred

The admissibility of the reference for a preliminary ruling

16 Firstly, the Netherlands Government considers that the reference for a preliminary ruling is inadmissible because of the lack of information in the

decision for referral as to both the factual circumstances and the legal context of the main proceedings.

17 The Court observes that it is settled case-law that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based, in order to enable the Court to give appropriate replies and to give the Member States' Governments and other interested parties the opportunity of submitting their observations in accordance with Article 23 of the Statute of the Court of Justice (see, inter alia, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 30 and 31).

18 In this case, it is apparent from the observations submitted by the parties to the main proceedings, the Greek Government, the Netherlands Government itself and the Commission of the European Communities that the information contained in the decision for referral was sufficient to enable them properly to state their views on the question put to the Court. Furthermore, the information contained in the referring judgment was supplemented by the file sent by the national court and by the written observations submitted to the Court. All of these elements, summarised in the Report for the Hearing, were made known to the Member States' Governments and the other interested parties in preparation for the hearing, during which they were able, if necessary, to supplement their observations.

19 The objection raised by the Netherlands Government must therefore be dismissed.

20 Secondly, the ONP considers that the reference for a preliminary ruling is inadmissible on the ground that, following the entry into force of the 2003 Law, it is devoid of purpose inasmuch as, in its view, that law makes it possible for officials of the European Communities to request transfer of their pension rights acquired within the Community scheme to the Belgian scheme, which permits periods of employment as an official of a Community institution to be taken into account for the purposes of entitlement to a national early retirement pension.

21 The Court observes that, although the 2003 Law does permit, as the ONP stated at the hearing, periods which led to the payment of contributions to the Community scheme to be taken into consideration even where, as in the main proceedings, the person involved has not requested the transfer of his pension rights from the Community scheme to the Belgian scheme, it is apparent from the file that Mr My lodged his application for an early retirement pension on 20 October 2000, a year before the entry into force of the 2003 law. Under Article 29 of that law, it came into force on 1 January 2002 and applies only to applications for transfer made after that date.

22 Consequently, the objection raised by the ONP must also be dismissed.

23 Finally, the Commission considers that the first two parts of the question, dealing with the transfer of pension rights in the strict sense, bear no relation to the main proceedings, which concern only whether the plaintiff's 27 years of service with the Council should be taken into account in respect of his entitlement to an early retirement pension under Belgian law. According to the Commission, therefore, only that last part need be answered by the Court.

24 The Court observes that, it is settled case-law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 24).

25 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61, and *Arduino*, paragraph 25).

26 As has already been mentioned, in the main proceedings Mr My has never requested transfer of the pension rights he acquired under the Community scheme to the Belgian pension scheme, but only that he be granted a national early retirement pension. In that regard, Mr My has contested the ONP's refusal to take into consideration his 27 years of service as an official at the Council in calculating the 35 calendar years of employment required under Article 4(2) of the Royal Decree, on which his entitlement to that pension depends.

27 It follows that the main proceedings concern only whether Community law requires the Belgian authorities to take into consideration Mr My's periods of employment completed both under the Belgian pension scheme and under the Community scheme.

28 In those circumstances, there is no need to answer the first two parts of the question referred.

Reckoning of periods of employment with the European Communities

Articles 2, 3, 40 and 283 EC

29 As the Court has already held (Case 126/86 *Giménez Zaera* [1987] ECR 3697, paragraph 11, and Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraphs 17 and 18), Articles 2 and 3 EC set out general aims made explicit by other provisions of the Treaty. They cannot be applied independently of the more specific provisions of the Treaty mentioned in the question referred.

30 In the same way, Articles 40 and 283 EC serve merely as the legal basis for the adoption, by the Council, of the measures necessary to achieve the free movement of workers, guaranteed by Article 39 EC, and the Staff Regulations of Officials of the European Communities and the Conditions of Employment of other servants of the Communities.

31 Consequently, Articles 2, 3, 40 and 283 EC have no relevance to the present case.

Articles 17 and 18 EC

32 Article 17 EC, whilst establishing citizenship of the Union, merely provides that citizens of the Union enjoy the rights conferred by the Treaty and are subject to the duties imposed thereby. It cannot therefore be applied independently of the specific provisions of the Treaty which govern the rights and duties of the citizens of the Union.

33 Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to the freedom of movement for workers. To the extent that the national court is also seeking an interpretation from the Court of the latter provision, it is appropriate to deal first with that point (see, in that regard, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26).

Article 42 EC

34 Article 42 EC confers on the Council the task of instituting a scheme allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security. The Council has in principle fulfilled that obligation by adopting 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

35 As the Court held in Case C-411/98 *Ferlini* [2000] ECR I-8081, paragraph 41, officials of the European Communities cannot be characterised as workers within the meaning of Regulation No 1408/71 as they are not subject to national legislation on social security, as required under Article 2(1) of that regulation, which defines its scope of personal application.

36 Consequently, Mr My's situation is not covered either by Article 42 EC or by Regulation No 1408/71.

Article 39 EC and Article 7 of Regulation No 1612/68

37 It is established case-law that an official of the European Communities has the status of a migrant worker. A Community national working in a Member State other than his State of origin does not lose his status of worker within the meaning of Article 39(1) EC through occupying a post within an international organisation, even if the rules relating to his entry into and residence in the country in which he is employed are specifically governed by an international agreement (Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 11; Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 20, and *Ferlini*, cited above, paragraph 42).

38 It follows that a worker who is a national of a Member State, such as Mr My, may not be refused the rights and social advantages which Article 39 EC and Regulation No 1612/68 afford him (see Case 152/82 *Forcheri* [1983] ECR 2323, paragraph 9; *Echternach and Moritz*, paragraph 12; *Schmid*, paragraph 22; and *Ferlini*, paragraph 43).

39 However, it is apparent from the file that Mr My, who arrived in Belgium at the age of nine, spent his entire working life in Belgium, firstly as an employee of various Belgian companies, then, up to retirement age, as an official in the General Secretariat of the Council.

40 The provisions of the Treaty relating to the free movement of workers, and particularly Article 39 EC, cannot be applied to situations which are wholly internal to a Member State (Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16, and the case-law cited).

41 In order, nevertheless, to establish the existence of a link to one of the situations covered by Article 39 EC, the Commission submitted that the period of employment in an international civil service such as that of the European Union should be equated to a period spent in the civil service of another Member State.

42 Such a legal fiction, as is apparent from points 85 to 89 of the Advocate General's Opinion, finds no support in the provisions of the Treaty relating to the free movement of workers.

43 Consequently, Mr My's situation is not covered either by Article 39 EC or by Article 7 of Regulation No 1612/68.

Article 11(2) of Annex VIII to the Staff Regulations and Article 10 EC

44 The system for the transfer of pension rights, as set out in Article 11(2) of Annex VIII to the Staff Regulations, seeks by enabling the Community scheme to be

coordinated with the national schemes to facilitate movement from national employment, whether public or private, to the Community administration and thus to ensure that the Communities have the best possible chance of being able to choose qualified staff who already possess suitable experience (Case 137/80 *Commission* v *Belgium* [1981] ECR 2393, paragraphs 11 and 12).

45 In particular, the Court has held that, by refusing to adopt the measures necessary for the transfer to the Community pension scheme of sums due to be repaid in respect of or the actuarial equivalent of retirement pension rights acquired under the national pension scheme, as provided for by Article 11(2) of Annex VIII to the Staff Regulations, a Member State might also impede the recruitment by the Community of national officials with a certain length of service, since movement from the national administration to that of the Community would entail the loss of pension rights to which they would be entitled if they had not accepted employment with the Community (*Commission* v *Belgium*, paragraph 19).

46 That is also the case where a Member State refuses to take into account, for the purposes of entitlement to an early retirement pension under its own scheme, periods of employment under the Community pension scheme.

47 It is plain that national legislation such as that at issue in the main proceedings is likely to impede and therefore to discourage employment within an institution of the European Union, inasmuch as, by accepting employment with such an institution, a worker who was formerly a member of a national pension scheme risks losing the

right to benefit under that scheme from an old-age pension to which he would have been entitled had he not accepted that employment.

48 Such consequences cannot be accepted in the light of the duty of genuine cooperation and assistance which Member States owe the Community and which finds expression in the obligation laid down in Article 10 EC to facilitate the achievement of the Community's tasks.

49 Consequently, the reply to the question referred must be that Article 10 EC, in conjunction with the Staff Regulations, must be interpreted as meaning that national legislation which does not permit years of employment completed by a Community citizen in the service of a Community institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme is contrary to those provisions.

50 In the light of the foregoing, there is no need to answer the question referred insofar as it concerns the interpretation of Article 18 EC.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that

court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

Article 10 EC, in conjunction with the Staff Regulations of Officials of the European Communities, must be interpreted as meaning that national legislation which does not permit years of employment completed by a Community citizen in the service of a Community institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme is contrary to those provisions.

Signatures.