JUDGMENT OF THE COURT
OF 12 NOVEMBER 1974 [1]

Alliance Nationale des Mutualités Chrétiennes and Institut National d'Assurance Maladie Invalidité v Thomas Rzepa (preliminary ruling requested by the Tribunal du Travail Mons)

Case 35/74

Summary

1. *Social security for migrant workers — Invalidity — Pension — Articles 27 and 28 of Regulation No 3 — Application by analogy — Benefits — Apportionment — Condition — Aggregation of periods of insurance completed under different legislations*

   (Council Regulation No 3, Article 26 (2), 27, 28)

2. *Social security for migrant workers — Invalidity, old age and death — Benefits — Recoverable advance — Limitation — Application of national law*

   (Council Regulation No 4, Article 34 (3))

1. Application by analogy of Articles 27 and 28 of Regulation No 3 to the cases referred to under Article 26 (1) means that apportionment of benefits may not be made unless it has been necessary, in order to give rise to entitlement, to aggregate beforehand the periods completed under different legislations.

2. As Article 34 (3) is integrated with the provisions of national social security laws and supplements them, any limitation or time limit which may apply must, in the present state of the law, be dictated by national social security law.

In Case 35/74

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Labour Court (Tribunal du Travail) of Mons for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

ALLIANCE NATIONALE DES MUTUALITÉS CHRÉTIENNES

and

INSTITUT NATIONAL D'ASSURANCE MALADIE INVALIDITÉ

v

THOMAS RZEPA

on a question of limitation under the law applicable to the social security of employed persons moving within the Community,

THE COURT

composed of: R. Lecourt, President, C. Ó Dálaigh and A. J. Mackenzie Stuart (Rapporteur), Presidents of Chambers, A. M. Donner, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher and M. Sørensen, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment making the reference and the written observations submitted under Article 20 of the Statute of the Court may be summarized as follows:

I — Facts and written procedure

Mr Rzepa, who is of Polish origin but was officially classified as a UNO refugee up to 31 October 1959, has proved completion of invalidity insurance periods in Belgium and the Federal Republic of Germany.

Belgian legislation on invalidity benefits is referred to in Annex F of Regulation No 3 as being of type A, which means that, in principle, benefits are calculated without regard to the length of completed periods of insurance; German legislation, on the other hand, is of type B.

On 9 January 1953 the defendant, as a result of illness, became incapable of

working; he was at that time subject to Belgian legislation and was insured with the Alliance Nationale des Mutualités Chrétiennes, from whom he was in receipt of benefit until 31 December 1959.

On 1 January 1960, Mr Rzepa was granted a Belgian pension under the special scheme for mineworkers.

It was only when application was made for an invalidity pension under the special scheme for mineworkers that Mr Rzepa's case was brought to the notice of the German organization, the Bundesknappschaft of Aachen.

Having been apprised of the German benefit payment, the Alliance Nationale des Mutualités Chrétiennes, from whom Mr Rzepa had, under Belgian legislation, been in receipt of benefit for this same period, took the view that it had paid Mr Rzepa in error the sum representing the proportion of benefit duly paid by the German organization.

In an action which it brought for recovery of this sum, the Alliance Nationale argued that it represented no more than an advance for the period from 1 January 1959 to 31 October 1959, which, in its view, was recoverable under Article 34 (3) of Regulation No 4 as being the sum in excess of the proportion of invalidity benefit which Belgium was actually under an obligation to pay.

Article 34 (3) provides: 'Before determining the benefit in accordance with Articles 26 to 28 of the Regulation, and in cases which might lead to delay, the scrutineer institution shall make a recoverable advance, calculated on the basis of the amount of benefit which would be payable under the national legislation applied by the said institution, taking account of the provisions of the Regulation'.

Mr Rzepa was not informed that the benefit was paid on a provisional basis; nor, for its part, does the Alliance Nationale des Mutualités Chrétiennes consider this to have been necessary.

Under Belgian social security law the period of limitation is two years and the action for recovery was met by the objection that it was time barred. The Institut National d'Assurance Maladie Invalidité thereupon made an application on 2 May 1973 to intervene before the Labour Court of Mons, in which it questions whether national law applies to the present case since the advances in question were paid under Community law and not under Belgian legislation.

By judgment of 2 May 1974 the Labour Court of Mons decided to stay proceedings and referred the following questions to the Court for a preliminary ruling:

1. What is the period of limitation for actions under the law of the Community?
2. When does the period begin to run?
3. In what circumstances may the period be interrupted?

The judgment making the reference was registered at the Court of Justice on 24 May 1974.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by D. Rossini on behalf of Mr Rzepa and by the Commission's Legal Adviser, Norbert Koch, acting as agent, on behalf of the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

Taking his stand on Article 53 (4) of Regulation No 3, *Mr Rzepa* argues that the Belgian insurer was not entitled to review his rights, which were acquired prior to the entry into force of Regulation No 3, unless, as was not

done in this case, he applied for a review within two years after the Regulation came into force.

As regards the questions put to the Court, Mr Rzepa takes the view that if the periods of limitation under Belgian law are not applicable in the case of recoverable advances within the meaning of Article 34 (3) of Regulation No 4 of the Council, it must first be decided what interpretation must be placed on recoverable advances.

In his view, the term 'recoverable advance' cannot be applied to a benefit which was paid in respect of existing rights solely on the basis of periods of insurance completed under the legislation of a Member State and when the person concerned has not been informed that the benefit is a provisional one. The organization making the payment should have drawn the insured's attention to the provisional nature of the payment, as currently required under Article 45 (4) of Regulation No 574/72, and, at the same time, it should have informed the competent institutions of the other States concerned and requested them to hold unpaid benefits on its behalf.

Finally, Mr Rzepa submits that the Court should reply as follows to the questions referred by the Belgian Labour Court:

Where, at the time when first payment is made, the person drawing benefit is not expressly informed that the benefits granted to him are of a provisional nature and liable, therefore, to be reduced, and where the organization making the payment fails to ask the competent institution of the other State in good time to hold on its behalf all arrears up to an amount corresponding to the recoverable advances, the consequential overpayments create no right to repayment.

In these cases the periods of limitation provided for under national legislations alone apply.

The Commission prefaces its observations by raising the question whether after Regulation No 3 had come into force, the Belgian insurer had any right to review the entitlements of the person concerned.

In the Commission's view, the Belgian insurer had no right to aggregate the insured's entitlements and recalculate them on a proportionate basis and there is, consequently, no question of an overpayment or a recoverable advance.

The Commission refers to the precedents established by the Court on the applicability of Articles 27 and 28 of Regulation No 3 and, particularly, the judgments in Cases 100/63 *(Van der Veen,* [1964] E.C.R. 565) and 140/73 *(Mancuso,* [1973] E.C.R. 1449), to demonstrate that apportionment of benefits may only take place if, in order to give rise to entitlement, it has been necessary to aggregate beforehand the periods completed under different legislations.

In the present case, it would appear that ever since the insured became incapable of work he has received from the Assurance Maladie Invalidité benefits which were paid and made available only by virtue of the provisions of the relevant Belgian legislation. Once the entitlement was acquired, without it being necessary to aggregate the periods completed under different legislations, there was no need to apportion the benefits due after 1 January 1959.

With regard to this question, the Commission concludes that the Belgian insurer ought not to have recalculated the benefit and that consequently, from 1 January 1959 to 31 October 1959, the said insurer did not pay the insured recoverable advances under Article 34 (3) but benefits to which he was entitled by virtue of Belgian legislation and of Regulation No 3, as interpreted by the Court.

As regards the questions submitted for a preliminary ruling by the Court the Commission points out that Article 51 of the Treaty does not make provision for harmonization of the legislations and that the system provided for and em-

bodied in Regulations Nos 3 and 4 rests, 'in the absence of a common social security scheme', on a simple coordination of national legislations: judgment in *Mancuso* (Case 140/73, cited above). The Regulations have allowed the continuance of separate systems creating separate claims against separate institutions, against whom the insured has directly enforceable rights under both national law alone and national law supplemented if necessary by the system for aggregating insured periods provided for under Article 51 of the Treaty: judgment in *De Moor* (Case 2/67, Rec. 1967, p. 256).

Called upon, in *Hessische Knappschaft* (Case 44/65, Rec. 1965, p. 1200), to interpret Article 52 of Regulation No 3, the Court declared that Article 52 'in no way modifies the conditions governing the creation and the limits of extra-contractual liability, which remains subject solely to national law'.

The Commission concludes that Article 34 (3) can in no way modify the provisions of national law on limitation of actions.

Article 53 of Regulation No 3 which appears under Head V 'Transitional and final provisions' deals with the question of rights acquired by those concerned before the Regulation came into force, especially, in paragraph (3), the question of benefits which had not yet been paid when the Regulation came into force and, in paragraph (4), the right of persons entitled to a pension to apply for their pension to be reviewed on the basis of the Regulation.

Article 53 (5) provides as follows: 'As regards rights arising from the implementation of paragraphs (3) and (4) of this Article, the provisions laid down in the legislation of Member States, respecting the extinction and limitation of claims shall not apply to the persons concerned . . .'.

The exception thus provided for serves only to underline the principle that, except in the cases expressly referred to in Regulation No 3 and, particularly, in Article 53, the legislative provisions of the Member States on extinction and limitation may be invoked against those concerned.

There can be not limitation in the absence of any express rule on the subject in Community law. If national legislation were not involved and the conclusion accordingly drawn that there was no limitation, it still ought not to be possible for the insurance organization to move against the insured. It is nearly 15 years since payment of the last of the benefits which could be the subject of recovery, and the paramount need for legal certainty does not allow an organization to defer exercising its right of action indefinitely.

The Commission believes that the questions which have been put to the Court could be answered as follows:

'The benefits of which, before Regulation No 3 came into force, the worker was in receipt solely under the legislative provisions of a Member State governing sickness and invalidity insurance and which he continued to receive while he was subject to the Regulation, constitute benefits which that State was in fact under an obligation to pay and cannot, therefore, create entitlement to recovery. If this were not the case, the period of limitation to be applied to an action for recovery, the time from which it runs, and the circumstances in which the period can be interrupted would be governed by the legislative provisions of the Member State concerned.'

III — Oral procedure

Fresh considerations were drawn to the attention of the Court at the hearing on 22 October 1974.

On behalf of the Institut National d'Assurance Maladie Invalidité, Maître Paternostre states that it follows from the judgment of the Court, already quoted, in *Mancuso* (Case 140/73) that,

as Mr Rzepa became entitled to Belgian invalidity allowances without the need to aggregate the German periods of insurance, Belgium cannot apply Articles 27 and 28 of Regulation No 3 or apportion its benefits. In these circumstances, however, the Belgian benefit is reduced by the amount of foreign benefits by virtue of Article 95 of the Royal Constitutional Decree of 22 September 1955, which deals with overlapping pensions.

For Mr Rzepa, Maître Rossini stresses that the benefits described by the Belgian institution as 'recoverable advances' are, in reality, benefits granted under the national Belgian scheme since entitlement depended wholly upon the periods of insurance completed in Belgium. The provisions of Article 111 (2) of Regulation No 574/72 and the absence of any clear requirements in the old Regulations, Nos 3 and 4, enables the conclusion to be drawn that, on the subject of recovery of overpayments, the rules and periods of limitation of national legislations alone apply.

The expression 'national legislations' must be understood as meaning the provisions of social legislation dealing with that branch of social security in which the obligation to pay benefits arose and not the provisions of ordinary law. Subject to this, the defendant expresses himself to be in agreement with the arguments developed by the Commission.

The oral observations of the Commission were submitted by Mlle M.-J. Jonczy.

The Advocate-General presented his opinion at the hearing on 23 October.

Law

1 By judgment of 2 May 1974, registered at the Court of Justice on 24 May 1974, the Labour Court of Mons, under Article 177 of the Treaty, referred questions concerning the limitation of an action for repayment of advances made under Article 34 (3) of Regulation No 4 of the Council (Official Journal 1958, p. 597).

2 The documents in the case show that the defendant in the main action, a refugee within the meaning of Articles 1 (j) and 4 (1) of Regulation No 3 of the Council (Official Journal 1958, p. 561), was in receipt of invalidity benefit from 9 January 1953, under Belgian legislation on invalidity benefits, to which Annex F of the Regulation refers as being of type A, which means that benefits do not depend on the length of completed insurance periods.

3 Subsequently, however, from 1 January 1959, he was in receipt of an invalidity pension in Germany under German legislation referred to as being of type B, which means that, in principle, benefits are calculated after taking the length of completed periods into account.

4 It was essential to apply Article 27 of Regulation No 3 before an entitlement to benefit could arise under German legislation.

5 The Belgian insurer, maintaining that the proportion of the Belgian benefit corresponding to the benefits granted by the German insurer for one and the same incapacity was no more than a recoverable advance within the meaning of Article 34 (3) of Regulation No 4, brought an action for repayment (but only in 1972) of part of the sums paid between 1 January 1959 and 31 Oktober 1959.

6 The questions to be answered are: what is the period of limitation to be applied to the action under the law of the Community; when does this period begin to run; and in what circumstances may the period be interrupted?

7 In asking these questions the national court can be referring only to an action for repayment of sums paid pursuant to Article 34 (3) of Regulation No 4 of the Council and not to those paid under the provisions of national law.

8 Article 34 (3) provides as follows: 'Before determining the benefit in accordance with Articles 26 to 28 of the Regulation, and in cases which might lead to delay, the scrutineer institution shall make a recoverable advance, calculated on the basis of the amount of benefit which would be payable under the national legislation applied by the said institution, taking account of the provisions of the Regulation'.

9 Application by analogy of Articles 27 and 28 of Regulation No 3 to the cases referred to under Article 26 (1) means that apportionment of benefits may not be made unless it has been necessary, in order to give rise to entitlement, to aggregate beforehand the periods completed under different legislations.

10 It follows that Article 34 (3) is applicable only in cases where prior aggregation is an essential condition of entitlement.

11 This position cannot arise in a case concerning an invalidity benefit in a Member State with a type A invalidity insurance scheme, which does not take the length of completed periods into account.

12 In any case, as the system embodied in Regulations Nos 3 and 4 rests on mere coordination of national legislation in the field of social security and does not affect the rules on limitation laid down by such legislations, it was not absolutely necessary that these Regulations should lay down rules either on limitation or on time limits.

13 As Article 34 (3) is integrated with the provisions of national social security laws and supplements them, payments made on this dual basis do not arise only by virtue of Community law, from which it follows that any limitation or time limit which may apply must, in the present state of the law, be dictated by national social security law.

Costs

14 The costs incurred by the Commission of the European Communities which has submitted observations to the Court, are not recoverable.

15 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the Labour Court of Mons, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Labour Court of Mons by order of that court dated 2 May 1974, hereby rules:

As Article 34 (3) of Regulation No 4 is integrated with the provisions of national social security laws and supplements them, payments made on this dual basis do not arise only by virtue of Community law, from which it follows that any limitation or time limit which may apply must, in the present state of the law, be dictated by national social security law.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 12 November 1974.

A. Van Houtte
Registrar

R. Lecourt
President