JUDGMENT OF THE COURT OF 14 MARCH 1978 [1]

Bestuur van de Sociale Verzekeringsbank v Mrs Boerboom-Kersjes, a widow (preliminary ruling requested by the Centrale Raad van Beroep, Utrecht)

"Social Security"

Case 105/77

Social security for migrant workers — Benefits — Overlapping — Entitlement under national legislation alone — Provisions for reduction or suspension — Applicability — Position under Community rules more favourable — Preference
(Regulation No 1408/71 of the Council, Arts. 12 (2) and 46)

So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules laid down by Article 46 of Regulation No 1408/71 the provisions of that article must be applied.

In Case 105/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep (Court of last instance in social security matters), Utrecht, for a preliminary ruling in the action pending before that court between

BESTUUR VAN DE SOCIALE VERZEKERINGSBANK (Board of Management of the Social Insurance Bank), Amsterdam,

and

MRS BOERBOOM-KERSJES, A WIDOW, Nijmegen

1 — Language of the Case: Dutch.

on the interpretation of Articles 12 (2) and 46 of Regulation 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

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Following the death of her husband in April 1973 Mrs Boerboom-Kersjes, who was resident in the Netherlands, was granted as his widow a survivor's pension as from the same month under the Netherlands Law on general insurance for widows and orphans (Algemene Weduwen- en Wezenwet, hereinafter referred to as "the AWW").

She was entitled in addition under the Law on general old-age insurance to be paid until 1 October 1973 the pension due to her husband.

Since the latter had also been insured in the Federal Republic of Germany in respect of a period of eight years' employment in that country, Mrs Boerboom-Kersjes was also entitled, as from 1 May 1973, to survivor's benefit under German legislation.

The competent Netherlands institution, the Bestuur van de Sociale Verzekeringsbank (the Board of Management of the Social Insurance Bank), pursuant to a decision of 7 March 1975 notified Mrs Boerboom-Kersjes of the amounts of survivor's pension to which she was entitled for the period from 1 April 1973 to 1 January 1974 under the AWW and pursuant to Article 46 of Regulation No 1408/71.

Mrs Boerboom-Kersjes challenged this decision before the Raad van Beroep (Social Security Court), Arnhem, which

by its judgment of 6 May 1976 annulled the said decision and ruled that the Board of Management of the Social Insurance Bank had to make another decision on the ground that the benefit accruing under the AWW had been reduced for the period from 1 August to 30 September 1973 pursuant to Article 46 (3) of the before-mentioned regulation, whereas on the authority of the judgment of the Court of 21 October 1975 in Case 24/75 *(Teresa and Silvana Petroni* v *Office Nationale des Pensions pour Travailleurs Salariés* [1975] ECR 1149), this provision had to be regarded as inapplicable so that in the case under review the survivor's pension had to be granted without any reduction.

The Netherlands institution then appealed against this decision to the Centrale Raad van Beroep which, by an order of 9 August 1977 sent to the Court by a letter of 25 August 1977 from its President, decided to stay proceedings and refer to the Court of Justice of the European Communities, pursuant to Article 177 of the EEC Treaty the following question for a preliminary ruling:

"Where a worker has been subject to the legislation of two or more Member States, to what extent do Articles 12 (2) and 46 of Regulation No 1408/71 prevent the application of national rules against the overlapping of benefits such as those in force pursuant to the AWW, when entitlement to benefit has been obtained pursuant to national legislation alone without its being necessary to apply the regulation for that purpose?"

The order of the Centrale Raad van Beroep was received at the Court on 29 August 1977.

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

II — Summary of written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Board of Management of the Social Insurance Bank* refers to its application amplifying its original case and to the transcripts of the proceedings before the Centrale Raad van Beroep.

In cases of the overlapping of one or more foreign benefits awarded to the survivor the AWW only provides for a reduction of the fixed amount of the pension depending on the ratio between the total duration of the periods which lead to entitlement to these rights of the same kind in other Member States and the duration of the period between the date when the insured attained the age of 15 and the date of his death. In this connexion the periods completed by the deceased abroad do not count, in so far as the deceased was during the same period insured under the AWW. Consequently all the periods completed pursuant to the AWW as well as those during which the deceased was not insured anywhere are the responsibility of the AWW. Therefore the AWW's rules against the overlapping of benefits do not bring about any such loss of rights as Article 51 of the Treaty is designed to prevent.

In the judgment in Case 50/75 *(Caisse de Pension des Employés Privés* v *Helga Massonet* [1975] ECR 1473 at p. 1484) the Court stated clearly that the Member States are free to adopt measures with a view to preventing unjustified cumulation, if the entitlement to benefit exists without its being necessary to apply the process of aggregation. The case-law of the Court makes it clear that as a rule it is the responsibility of the national and not the Community authorities to adopt the necessary measures with a view to eliminating the unjustified advantages

arising out of that case-law. Therefore Articles 46 and 12 (2) of Regulation No 1408/71 cannot be so interpreted as to preclude in any way the application of the AWW's rules against the overlapping of benefits in cases such as this one where the right to a widow's pension has already derived from the application of the national legislation, since the purpose of these rules against the overlapping of benefits is simply to prevent the granting of unfair advantages.

In this connexion it is immaterial that in the main action the application of the national rules against the overlapping of benefits yields a lower figure than the one which would be produced by applying Article 46, including paragraph (3) thereof.

Mrs Boerboom-Kersjes in a letter to the Registrar of the Court submits that she is not the respondent in the main action and that it has long since been settled.

The *Commission* points out that the issue in the main action is the same as that in Case 98/77 *(Max Schaap* v *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen Groothandel en Vrije Beroepen* at present *sub judice),* Case 22/77 *(Fonds National de Retraite des Ouvriers Mineurs* v *Giovanni Mura* [1977] ECR 1699) and Case 37/77 *(Fernando Greco* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711). It emerges from the judgments of the Court in these last two cases that the social security institutions of the Member States are entitled to apply the rules against the overlapping of benefits laid down by their national legislation. The Commission believes that the application of this rule is nevertheless subject to certain conditions.

In the first place the said rules are applicable *"so long* as a worker is receiving a pension by virtue of national legislation alone ...". The Court appears to have intended to limit the application of the rules against the overlapping of benefits to those cases only where the payment of the pension is effected on the basis of national law alone. Thus the only applicable rules against the overlapping of benefits are those of the legislation of the Member State where the worker or the person entitled in his right resides. In the main action only the provision against the overlapping of benefits laid down by Netherlands legislation is applicable and any such provisions which may be laid down by German legislation cannot be applied to Mrs Boerboom-Kersjes.

If this were not the case the whole process of awarding pensions would be an insoluble problem and the level of the reduction completely unjustified.

On the other hand the institutions of the Member States can only apply provisions against the overlapping of benefits laid down by their domestic legislation in so far as the amount of the pension resulting from the application of such provisions is greater than the sum which would result from the application of aggregation and apportionment. The proportions allowed pursuant to Article 46 (1), that is to say in lieu of a pension granted under the legislation of one Member State reduced on the basis of the domestic provisions against the overlapping of benefits cannot themselves be reduced on the basis of a system similar to that of Article 46 (3), since it has not been necessary to resort to the system of aggregation of periods of insurance in order to establish entitlement to pension.

Even though the principle of the application of national rules against the overlapping of benefits is restricted in its scope it is not without its disadvantages. It does not guarantee to the worker that a reduction will only be made from the date when the total benefits exceed the highest theoretical sum and within the limits of this sum, which is what the Community legislature intended.

In the end a pension *acquired* only under the legislation of one Member State always had to be reduced. Why should Member States which do not have rules against the overlapping of benefits always be responsible for the payment of benefits whereas those which do have them can, without suffering any loss, avoid paying the whole or part of any benefits acquired on the basis only of the periods completed under that legislation? Apart from the fact that Member States which do not have such rules would incorporate them into their legislation, the rule for reduction of benefits, which is a national rule and has not been coordinated even at Community level, could vary considerably from one State to another and call in question if not nullify the very effectiveness of Article 51 of the Treaty.

The Government of the Italian Republic, represented by O. Fiumara, Deputy State Advocate, acting as Agent, the Commission of the European Communities, represented by A. Haagsma of the Legal Department of the Commission, presented oral argument at the hearing on 17 January 1978.

The Advocate General delivered his opinion at the hearing on 15 February 1978.

Decision

1 By an order of 9 August 1977 which was received at the Court on 29 August 1977 the Centrale Raad van Beroep referred to the Court, pursuant to Article 177 of the EEC Treaty, for a preliminary ruling, a question relating to the interpretation of Articles 12 (2) and 46 of Regulation 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 This question has been raised in an action concerning the calculation by the competent Netherlands institution of the survivor's pension of a Netherlands national, the respondent in the main action, whose husband had completed insurance periods in the Netherlands and in the Federal Republic of Germany.

3 At his death the husband had fulfilled in the Netherlands all the conditions required under the national legislation for entitlement to an old-age pension.

4 The Netherlands institution pursuant to the Algemene Weduwen- en Wezenwet (law on general insurance for widows and orphans) (AWW),

relying on the rule for the limitation of benefits laid down in Article 46 (3) of Regulation No 1408/71, reduced the benefit payable under this legislation by the amount of the benefit paid under German legislation.

5 Mrs Boerboom-Kersjes, the party concerned, challenged this decision before the Raad van Beroep, Amsterdam, which annulled it on the basis of the judgment of the Court in Case 24/75 *(Teresa and Silvana Petroni* v *Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149).

6 The Netherlands institution then appealed against the judgment of the Raad van Beroep to the Centrale Raad van Beroep.

7 The question referred is:

"Where a worker has been subject to the legislation of two or more Member States, to what extent do Articles 12 (2) and 46 of the Regulation No 1408/71 prevent the application of national rules against the overlapping of benefits such as those in force pursuant to the AWW, where entitlement to benefit has been obtained pursuant to national legislation alone without its being necessary to apply the regulation for that purpose?"

8 The Court has already held in its judgment of 13 October 1977 (Case 33/77 *Fernando Greco* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711) that so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied.

9 It follows that if the provisions of Regulation No 1408/71 are more favourable to the worker than the national legislation they must be applied.

Costs

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

11 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

in answer to the question referred to it by the Centrale Raad van Beroep by order of 9 August 1977, hereby rules:

So long as a worker is receiving a pension by virtue of national legislation alone the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules laid down by Article 46 of Regulation No 1408/71 the provisions of that article must be applied.

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 14 March 1978.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE GENERAL WARNER
(see Case 83/77, p. 694)