JUDGMENT OF THE COURT (First Chamber)
25 September 1997 *

In Case C-307/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal du Travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

Salvatore Baldone

and

Institut National d'Assurance Maladie-Invalidité (INAMI)

on the interpretation of Article 95a of 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 (OJ, English Special Edition 1971 (II), p. 416), as 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),

* Language of the case: French.

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, D. A. O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Salvatore Baldone, by Daniel Rossini, Union Delegate of the Confédération des Syndicats Chrétiens,

— the Institut National d'Assurance Maladie-Invalidité, by Jean-Jacques Masquelin, of the Brussels Bar,

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

— the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 June 1997,

gives the following

Judgment

1 By order of 5 September 1996, received at the Court on 29 September 1996, the Tribunal du Travail (Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 95a of 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 (OJ, English Special Edition 1971 (II), p. 16), as 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) (hereinafter 'the amending Regulation').

2 The questions were raised in proceedings between Mr Baldone and the Institut National d'Assurance Maladie-Invalidité (INAMI) (hereinafter 'INAMI') concerning the decision by which the latter recalculated the invalidity benefit due to Mr Baldone as from 1 June 1992, the date on which the amending Regulation entered into force.

3 On 4 May 1970 Mr Baldone became incapacitated for work in Belgium. Since he had been insured successively in Italy (169 weeks), in Germany (30 months) and in Belgium (2 366 days), his entitlements to invalidity benefits were examined by the competent Italian, German and Belgian institutions pursuant to Article 40 of Regulation No 1408/71 and calculated pursuant to Article 46 of that regulation.

4 INAMI determined the amount of the Belgian benefit on 13 September 1985; that benefit, which was awarded under the rules of Belgian legislation alone, had been adapted, in accordance with that same legislation, to reflect amendments to the foreign benefits and variations in exchange rates.

5 On 1 October 1985 Mr Baldone brought proceedings in the Tribunal du Travail, Brussels, against INAMI's decision of 13 September 1985, maintaining that the amount of the benefit had not been correctly calculated. In the course of those proceedings, Mr Baldone relied on Case C-193/92 *Bogana* [1993] ECR I-755, according to which readjustment of an invalidity benefit attributable in particular to fluctuations in average exchange rates or the general evolution of the economic and social situation in the Member States in question must not be carried out according to national law but according to Article 51(1) of Regulation No 1408/71.

6 Following that judgment, on 4 May 1994 INAMI corrected the amount of the invalidity pension in favour of Mr Baldone and notified the decision of rectification to him, with effect from 1 October 1972. INAMI awarded him that revalued benefit, however, only for the period prior to 31 May 1992. From that date INAMI, on its own initiative, reduced the amount of the benefit in accordance with the new rules contained in the amending Regulation. That regulation, which amended the terms of Article 46 of Regulation No 1408/71, and thereby the method of calculating pension benefits, was in fact less favourable to Mr Baldone.

7 On 30 May 1994, Mr Baldone brought fresh proceedings in the Tribunal du Travail, Brussels, against the rectification decision of 4 May 1994, claiming that, in carrying out a new calculation of the pension benefit on its own initiative, INAMI had infringed Article 95a(4) to (6) of Regulation No 1408/71, introduced by the amending Regulation. INAMI, however, considered that the decision of 4 May 1994, since it was the first decision to determine Mr Baldone's pension entitlement correctly, must be regarded as a new decision awarding the pension, so that, pursuant to Article 95a(1) to (3) of Regulation No 1408/71, the calculation rules introduced by the amending Regulation must be applied.

8 Article 95a of Regulation No 1408/71, introduced by the amending Regulation, provides:

'Transitional provisions for application of Regulation (EEC) No 1248/92

1. Under Regulation (EEC) No 1248/92, no right shall be acquired for a period prior to 1 June 1992.

2. All insurance periods or periods of residence completed under the legislation of a Member State before 1 June 1992 shall be taken into consideration for the determination of rights to benefits pursuant to Regulation (EEC) No 1248/92.

3. Subject to paragraph 1, a right shall be acquired under Regulation (EEC) No 1248/92 even though relating to a contingency which materialized prior to 1 June 1992.

4. The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of Regulation (EEC) No 1248/92.

5. If an application referred to in paragraph 4 is submitted within two years from 1 June 1992, the rights acquired under Regulation (EEC) No 1248/92 shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.

6. If the application referred to in paragraph 4 is submitted after the expiry of the two-year period after 1 June 1992, rights which have not been forfeited or not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.'

9 Since it was in doubt as to how that provision should be interpreted, the Tribunal du Travail, Brussels, stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Are paragraphs 1 to 3 of Article 95a of Regulation No 1408/71, inserted by Regulation No 1248/92, to be interpreted as meaning that if an institution of a Member State after 31 May 1992 calculates the rights of an invalid under the regulations, it must apply, for the period ending on 31 May 1992, the provisions of Regulation No 1408/71 (in particular Article 46) in the codified version of Regulation No 2001/83 of 2 June 1983 and, from 1 June 1992, the provisions of Regulation No 1408/71 as amended by Regulation No 1248/92?

2. If so, are the provisions applicable in the same way:

(a) if the decision in question is the first calculation of the insured persons's rights under the regulations by that institution;

(b) if a first decision made before 1 June 1992 did not correctly calculate the rights under the regulations and has to be annulled and replaced after 1 June 1992 by a rectification decision, the latter thus being the first to calculate the rights under the regulations correctly;

(c) if a first decision made before 1 June 1992 and otherwise correct has to be annulled and replaced after 1 June 1992 because another institution concerned has made a rectification decision?

3. If the first two questions are answered in the affirmative, may the recalculation of the benefit on 1 June 1992 have the consequence of reducing the benefit due, compared with the amount due on 31 May 1992 on the basis of the provisions applicable until that date, given that Regulation No 1248/92 did not amend or supplement the provisions of Articles 118 to 119a of Regulation No 574/72 to make them applicable on 1 June 1992?'

10 By its questions, which will be examined together, the national court asks essentially whether Article 95a of Regulation No 1408/71, inserted by the amending Regulation, precludes the competent institution of a Member State from applying on its own initiative the calculation rules contained in the amending Regulation to the detriment of the person concerned when the latter has, before that regulation entered into force on 1 June 1992, been awarded an invalidity pension in accordance with the provisions of Regulation No 1408/71 that were applicable prior to that date and the decision concerning the pension was rectified after 31 May 1992.

11 It should be noted that, when an invalidity benefit has been awarded prior to the entry into force of the amending Regulation, Article 95a(1) to (3) of Regulation No 1408/71, as amended, is not applicable.

12 Such situations fall instead under Article 95a(4) to (6) thereof.

13 Those latter provisions are applicable in a case such as that at issue in the main proceedings. The fact that, following an erroneous calculation of the benefit due, the competent authorities of a Member State, after the entry into force of the amending Regulation, recalculate a benefit and correct the amount due cannot give rise to a new right but has the effect solely of determining correctly the amount of the benefit, entitlement to which had previously been acquired.

14 Article 95a(4) provides expressly that the rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of the amending Regulation. Article 95a(5) and (6) then lays down the rules to be applied according to whether such an application is submitted within two years from 1 June 1992 or after the expiry of that period.

15 The purpose of Article 95a(4) is to enable the person concerned to ask for the benefits awarded under the unamended Regulation to be reviewed where it appears that the rules of the amending Regulation are more favourable to him and to benefit from the benefits awarded in accordance with the provisions of the unamended Regulation being maintained where they appear more advantageous than those resulting from the amending Regulation.

16 It is thus clear both from the terms and the structure of Article 95a(4) that application of the provisions of the amending Regulation to pension rights acquired before 1 June 1992 is subject to an express application being made by the person concerned. The competent institution is not therefore entitled to substitute itself for an insured person, especially where review by that institution of its own motion would operate to the detriment of the person concerned (see Case 32/76 *Saieva* [1976] ECR 1523, paragraphs 15 to 17).

17 Review by the competent institution, on its own initiative, of an invalidity benefit awarded prior to the amending Regulation would constitute the very negation of the right of initiative granted by Article 95a(4) solely to the person concerned.

18 The answer to the questions referred by the national court must therefore be that Article 95a of Regulation No 1408/71, inserted by the amending Regulation, precludes the competent institution of a Member State from applying on its own initiative the calculation rules contained in the amending Regulation to the

detriment of the person concerned when the latter has, before that Regulation entered into force on 1 June 1992, been awarded an invalidity pension in accordance with the provisions of Regulation No 1408/71 that were applicable prior to that date and the decision concerning the pension was rectified after 31 May 1992.

Costs

19 The costs incurred by the Belgian Government and by the Commission of the European Communities, 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 (First Chamber),

in answer to the questions referred to it by the Tribunal du Travail, Brussels, by order of 5 September 1996, hereby rules:

Article 95a of 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 (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, precludes the competent institution of a Member State from applying on its own initiative the calculation rules contained in the amending Regulation to

the detriment of the person concerned when the latter has, before that Regulation entered into force on 1 June 1992, been awarded an invalidity pension in accordance with the provisions of Regulation No 1408/71 that were applicable prior to that date and the decision concerning the pension was rectified after 31 May 1992.

Sevón Edward Jann

Delivered in open court in Luxembourg on 25 September 1997.

R. Grass L. Sevón

Registrar President of the First Chamber