JUDGMENT OF THE COURT
OF 28 MAY 1974 [1]

Rudolf Niemann
v Bundesversicherungsanstalt für Angestellte
(preliminary ruling requested by the Sozialgericht Freiburg)

Case 191/73

Summary

1. *Social Security for migrant workers — Old-age and life insurance — Insurance periods — Aggregation — Apportionment — Benefits — Total amount less than amount of benefit to which insured entitled under legislation of one Member State — Article 28 (3) of Regulation No 3 — Incompatibility with Article 51 of EEC Treaty — Invalidity*

2. *Social Security for migrant workers — Old-age and life insurance — Right to pension existing without recourse to insurance periods in another Member State — Article 13 (1) (b) and (5) of Regulation No 4 — Inapplicability*

1. Article 28 (3) of Regulation No 3, to the extent to which it implies an aggregation of periods and a consecutive apportionment, resulting in the grant of several benefits paid by different Member States, the total amount of which is however less than that of the benefit to which the worker is already entitled by virtue solely of the laws of one Member State, is incompatible with Article 51 and accordingly to that extent void.

2. The provisions of Article 13 (1) (b) and (5) of Regulation No 4 do not concern cases in which the right to a maximum pension exists without recourse to insurance periods in another Member State.

In Case 191/73

Reference to the Court under Article 177 of the EEC Treaty by the Sozialgericht, Freiburg, for a preliminary ruling in the action pending before that court between

RUDOLF NIEMANN of Müllheim

and

1 — Language of the Case: German.

BUNDESVERSICHERUNGSANSTALT FÜR ANGESTELLTE, Berlin,

on the validity of the first sentence of Article 28 (3) of Regulation No 3 of the Council concerning social security for migrant workers (OJ No 30 of 16 December 1958, p. 561/58) and of Article 13 (1) (b) and (5) of Regulation No 4 of the Council (OJ No 30 of 16 December 1958, p. 597/58) on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers,

THE COURT

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

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

gives the following

JUDGMENT

Facts

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

I — Facts and procedure

Rudolf Niemann, of German nationality, completed insurance periods during his career corresponding to 575 months of insurance, 437 months of which were in Germany and 138 months in France where he worked from 1 July 1947 to 31 December 1948 and from 1 January 1950 to 31 December 1959. During the periods when he worked in France Mr Niemann continued to pay voluntary contributions in Germany in addition to the compulsory contributions in France.

On reaching the age of 65 on 23 May 1970, Mr Niemann asked the Bundesversicherungsanstalt (hereinafter referred to as 'BVA') to grant him old age pensions calculated in accordance with the German and French provisions respectively.

By a decision of 17 August 1970 the BVA fixed the German old age pension at 1 001·11 DM (excluding family allowance), applying, for the determination of this amount, Article 28 (1) (b) of Regulation No 3 of the Council concerning social security for migrant workers (OJ No 30 of 16 December

1958, p. 561/58) and thus granted for the periods completed in Germany only a *pro rata* portion of the pension (76 %). Further, in making the aggregation prior to this apportionment, it refused to take account for the aggregation calculation of the periods of voluntary contributions paid to it for more than nine years whilst Mr Niemann was working in France. On this point it relied on Article 13 (1) (b) of Regulation No 4 of the Council on implementing procedures and supplementary provisions in respect of Regulation No 3 (OJ No 30 of 16 December 1958, p. 597/58), according to which: 'When a completed insurance period, by way of compulsory insurance under the legislation of one Member State, coincides with a completed insurance period by way of voluntary or optional continued insurance under the legislation of another Member State, only the former shall be taken into account'. These voluntary contributions were regarded only as contributions towards a supplementary insurance within the meaning of paragraph (5) of the same Article.

For this reason the German pension, calculated after apportionment, is less than the German pension calculated exclusively on the basis of national legislation.

After the Caisse Régionale d'Assurance, Strasbourg, had for its part fixed Mr Niemann's pension rights with respect to French social security (162·83 FF = 107·29 DM per month) by the application of Articles 27 and 28 of Regulation No 3 and after it had become apparent that the total amount of the two pensions (1108·40 DM) was less than the pension which Mr Niemann could have received by application of the German legislation alone (1142·77 DM), the BVA, by a decision of 4 November 1970, granted a supplement equal to the difference (34·37 DM) in accordance with the first sentence of Article 28 (3) of Regulation No 3.

A decision of the BVA of 23 March 1971 confirmed, in its conclusion and in its statement of reasons, the decision of 17 August 1970.

Mr Niemann, believing that he would have a higher German pension if his pension rights acquired in France and in Germany had been calculated separately, brought an action before the Sozialgericht, Freiburg, in which he contested the application of Regulations Nos 3 and 4 to his case.

By order of 15 November 1973 the Sozialgericht, Freiburg, put the following question to the Court:

'Are the provisions of the first sentence of Article 28 (3) of Regulation No 3 of the Council of the European Economic Community of 25 September 1958, concerning social security for migrant workers, and of Article 13 (1) (b) and (5) of Regulation No 4 of the Council of the European Economic Community of 25 September 1958, concerning social security for migrant workers, compatible with Article 51 of the Treaty establishing the European Economic Community of 25 March 1957?'

The order containing the reference was lodged at the Court Registry on 18 December 1973.

The Commission, the Bundesversicherungsanstalt für Angestellte and Mr Niemann submitted written observations.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided that there was no need to undertake a preparatory inquiry.

II — Observations submitted under Article 20 of the Statute of the Court of Justice of the European Economic Community

A — Observations of Mr Niemann

Mr Niemann points out that, having worked in France from 1947 to 1960

almost without interruption, he made contributions at the maximum rate to the pension scheme in that State in accordance with the laws and provisions in force there. The result was that up to 31 December 1958 he was entitled to two separate pensions. The entry into force of Regulations Nos 3 and 4 as from 1 January 1959 reduced the net amount of his pension to a level below that of the German pension alone, although the Treaty in its preamble had promised noticeable improvements in the condition of those covered by social insurance, especially frontier workers. In fact the application of Community provisions made by the BVA was a violation of the principle of the non-retroactive nature of laws, which forbids the application of laws to 'past acts', namely in this specific case voluntary insurance contributions paid during periods of work in France. Furthermore this application constitutes an infringement of a right comparable with the proprietary right protected by Article 14 of the Federal Constitution.

Mr Niemann contests the arguments put forward by the BVA in a letter of 26 July 1971, in particular the comparison of his situation to that of workers who before 1 January 1957 paid contributions simultaneously to voluntary insurance and compulsory insurance, a comparison which resulted, in his case, in the application of Article 2 (15) of the Angestelltenversicherungs-Neuregelungsgesetz of 23 February 1957 (BGBl. 1957, p. 119), which specifies that voluntary contributions are in such a case to be considered as contributions to supplementary insurance. According to him his situation is not comparable with that to which it has been likened, in particular because he was *obliged* to undertake parallel insurance and because the total amount of the pension which he is receiving does not even reach the level of the pension to which he would have been entitled on the basis of the contributions paid to the German insurance fund alone. The 'voluntary' contribution could not therefore have subsequently been transformed into a 'supplementary insurance contribution'.

In any event Mr Niemann claims the benefit of the exceptions referred to in Article 17 of Regulation No 1408/71 of the Council of 14 June 1971 (OJ No L 149 of 5 July 1971, p. 10), which has taken the place of Regulation No 3, and the benefit of Article 15 of Regulation No 1408/71, according to which, in particular in the field of pensions, the overlapping of voluntary insurance in one Member State with compulsory insurance in another is permissible to the extent that the first Member State explicitly or implicitly admits such overlapping.

Similarly with a view to the consolidation of his vested rights he relies on the saving clause in respect of rights acquired before 1 October 1972, contained in Article 118 (1) of Regulation No 574/72 of the Council of 21 March 1972 (OJ No L 74 of 27 March 1972, p. 40), fixing the procedure for implementing Regulation No 1408/71, a saving clause not provided by Regulations Nos 3 and 4.

B — Observations of the Bundesversicherungsanstalt für Angestellte

The *Bundesversicherungsanstalt für Angestellte* concedes that Mr Niemann could validly claim a pension under German insurance without its being necessary to aggregate the insurance periods on the basis of Article 27 of Regulation No 3. The calculation of the German pension should however be made on the basis of Article 28 (1) (b) of Regulation No 3 and consequently taking Article 13 (1) of Regulation No 4 into account.

With reference to the application of the rule for apportionment set out in Article 28 (1) (b) it is of little importance for the calculation of a pension when a person is insured according to the legislation of several Member States, whether or not aggregation must be resorted to for the

acquisition of the entitlement. The only exception to the general obligation to aggregate is found in Article 28 (1) (f), according to which the amount of the pension is calculated solely in accordance with national legislation in the case — but only in the case — where the conditions for entitlement to a pension are fulfilled without need of recourse to Article 27 of Regulation No 3 and where, furthermore, there exists no right to a pension in any other Member State under national legislation.

The apportionment provided for in Article 28 (1) (b) is warranted by the concern to avoid the unjustified duplication of pensions. It was with good reason that the Court of Justice approved the application of Article 28 (1) (b) of Regulation No 3, at least in cases where the insurance periods completed in several Member States overlap (Judgments of 5 July 1967, Case 1/67, *Ciechelski v Caisse régionale de sécurité sociale du centre d'Orléans,* Rec. 1967, p. 235; Case 2/67, *De Moor v Caisse de pension des employés privés,* Rec. 1967, p. 255).

Article 46 (3) of Regulation No 1408/71 confirms the possibility and conformity with the Treaty of the reduction of rights, even when they are acquired without there being any need for recourse to aggregation. This Article provides, in fact, for a reduction of national benefits, to the extent to which the combined amount of those benefits is greater than the highest theoretical amount calculated by means of applying one system of legislation only to all the periods completed.

Mr Niemann is mistaken, furthermore, in considering that Article 13 (1) (b) can only apply to insurance periods completed after 1 January 1959. In accordance with Article 53 (2) of Regulation No 3 insurance periods completed before 1 January 1959 must be assessed in accordance with all the provisions of Regulations Nos 3 and 4 and in particular by applying Article 13 (1) of Regulation No 4.

Nor can Mr Niemann maintain that Regulation Nos 3 and 4 have reduced the rights to a pension which he had acquired up to 31 December 1958. On the one hand he had no right to a pension at the time of the entry into force of Regulations Nos 3 and 4 and on the other hand the Franco-German social security Convention which applied to the applicant until 31 December 1958 could no longer be applied to the risk pertaining to age, which materialized on 22 May 1970. The Judgment of the Court of 7 June 1973 (Case 82/72, *Walder v Bestuur der Sociale Verzekeringsbank,* Rec. 1973 p. 599) in fact made it clear that: 'Regulations Nos 3 and 1408/71 of the Council replace, in respect of persons covered by them, the social security Conventions concluded between Member States which are not mentioned in Articles 6 and 7 or in Annexes D and II of the said Regulations respectively, even if the application of the Convention is more advantageous to persons entitled to benefits than the said Regulations'.

C — Observations of the Commission

According to the *Commission* it is first of all necessary to examine whether the interpretation of Articles 27 and 28 of Regulation No 3 requires apportionment in cases such as the one under consideration.

Both the BVA and Mr Niemann start from the premise that the answer is affirmative, the former believing this interpretation to be not only accurate but in accordance with Article 51 of the Treaty, the latter maintaining that in these circumstances Regulation No 3 is illegal. It appears that the national court itself also tends towards an affirmative answer by virtue of the wording of Article 28 (3) of Regulation No 3, but raises the question of the compatibility of this provision with Article 51 of the Treaty.

However, this interpretation is inexact. The BVA's objection, according to

which the rule evolved in the case-law of the Court of Justice, to the effect that apportionment can be effected only if it has previously been necessary to make an aggregation, is incompatible with Article 28, cannot be upheld. Similarly it is necessary to reject its claim that, at the very least, by virtue of the Judgments of the Court of 5 July 1967 in Cases 1/67 *(Ciechelski,* Rec. 1967, p. 236) and 2/67 *(De Moor,* Rec. 1957, p. 256), the rule referred to above is not applicable where periods completed in one Member State run concurrently at a given time with periods completed in another Member State.

The case-law in question should not be interpreted in this way. In Case 1/67 the Court imposed a restriction only in the sense that Article 51 of the EEC Treaty is not intended to allow the person insured to claim separate benefits stemming from one and the same period of insurance. The Court made this case-law more explicit in Cases 2/67 (already cited), 12/67 (Judgment of 13 December 1967, *Guissart v Belgian State,* Rec. 1967, pp. 551 et seq.), 27/71 (Judgment of 10 November 1971, *Keller v Caisse régionale d'assurance vieillesse des travailleurs salariés de Strasbourg,* Rec. 1971, p. 885), and 140/73 (Judgment of 6 December 1973, *Direction régionale de la sécurité sociale de la région parisienne v Mancuso, not* yet reported). It declared (in Case 2/67) that the duplication of pensions is not prohibited by any provision of Regulation No 3 but is, on the contrary, specially provided for by Article 11 (1) of that Regulation. The duplication of a benefit acquired on the basis of contribution periods completed under the legislation of one Member State by a benefit which could only be acquired in another Member State by means of aggregation in accordance with Article 27 of Regulation No 3 does not, according to the Judgment in Case 2/67, amount to an advantage contrary to Community rules, *but only in so far as* the periods do not run concurrently. The Court of Justice has nowhere said that recourse must be had automatically to apportionment in all cases of concurrence. It has simply said that the duplication of benefits which may result from its case-law is unjustified to the extent to which concurrent insurance periods are taken into consideration as the basis for rights in several Member States. If, on the other hand, periods simultaneously completed in one Member State are not taken into consideration as the basis for a right in another Member State, the reservation indicated by the Court of Justice in the judgments cited by the defendant cannot take effect. The pension must then be calculated solely in accordance with the procedures of domestic law, regard being had both to periods of compulsory insurance and to periods of voluntary contribution.

The Commission therefore takes the view that the German insurance institution should have calculated the pension solely according to German law and that, consequently, there were no grounds for having recourse to Articles 27 and 28 of Regulation No 3 or, consequently, to Article 13 of Regulation No 4.

Having stated the matter thus, the Commission examines the question put by the Sozialgericht, Freiburg.

(a) As regards the first sentence of Article 28 (3) of Regulation No 3

The first sentence of Article 28 (3) of Regulation No 3 deals with the case of the grant of a supplement in cases of apportionment where there is no need to aggregate, that is to say, in cases where the right to a pension exists on the basis of national periods alone. It therefore implies, contrary to the interpretation given to Article 27 and the remainder of Article 28 by the case-law of the Court, the possibility of apportionment without the necessity for aggregation. It must be concluded that it is incompatible with Article 51 of the Treaty.

(b) As regards Article 13 (1) (b) and (5) of Regulation No 4

It emerges from Mr Niemann's observations that he considers it as an attack on his 'vested rights' not to take into account, by virtue of the said Article 13 (1), the periods of voluntary contribution completed by him during the years 1947 to 1959 as normal periods which should be included in the aggregation calculation, but only as contributions of a reduced value by way of supplementary insurance under paragraph (5) of the same Article 13.

The Commission takes the view that the application of Article 13 presupposes the possibility of an aggregation of insurance periods such that, regard being had to the above observations, the problem of the application of this provision does not arise in this case.

Having made this point, the Commission declares itself unable to see how Article 13 (1) and (5) infringes Article 51 of the Treaty. These provisions in fact only repeat the reservation already formulated in Article 27 (1) of Regulation No 3 regarding the concurrence of periods. As this reservation has been expressly recognized as being compatible with Article 51 by the Judgments of the Court in Cases 1/67 *(Ciechelski)* and 2/67 *(De Moor)* cited above, the position is necessarily the same for Article 13 (1) (b) and (5). As it is not one of the objectives of Article 51 of Treaty to guarantee an insured person, as against the institutions of the various States, various rights to benefits relating to one and the same period, it is impossible to see in Article 13 an infringement of a higher rule.

In the course of the oral procedure on 3 April 1974 the parties expanded the arguments put forward in the course of the written procedure.

The Commission, represented by its agent, Mr Karpenstein, elaborated the arguments put forward in its written statement of case.

The Advocate-General delivered his opinion at the hearing on 2 May 1974.

Law

1 By order of 15 November 1973, registered at the Court on 17 December, the Sozialgericht, Freiburg, in pursuance of Article 177 of the EEC Treaty, asked whether the first sentence of Article 28 (3) of Regulation No 3 of 25 September 1958 (OJ No 30 of 16 December 1958, p. 561/58) and Article 13 (1) (b) and (5) of Regulation No 4 of the same date (OJ No 30 of 16 December 1958, p. 597/58), both concerning social security for migrant workers, are compatible with Article 51 of the Treaty.

2 This question is raised in the context of an action relating to the determination of the rights with regard to old age pensions of a German citizen who, having worked successively in the Federal Republic of Germany and in France, completed 437 months' insurance in the first Member State and 138 in the second, and who, in addition, continued to pay voluntary contributions in Germany during the periods in which he worked in France.

In spite of the fact that in Germany a right to a pension, having regard to the periods completed there, was acquired without its being necessary to take into account those completed in France, the German insurance organization:

1. aggregated the German and French periods for the calculation of this pension;
2. in doing this, refused to take into account the periods of voluntary contribution;
3. undertook an apportionment of this pension; and
4. in view of the fact that the German and French pensions together, after apportionment, did not attain the level of the pension which would have been granted on the basis of German legislation alone, granted a supplement to bring them to that level.

To justify this method of calculation, the organization relies, so far as aggregation, apportionment and the grant of a supplement are concerned, on Article 28 (3) of Regulation No 3 and, so far as the refusal to take account of the voluntary contributions is concerned, on Article 13 (1) (b) and (5) of Regulation No 4.

3 According to Article 28 (3) of Regulation No 3: 'If the amount of benefit which may be claimed independently of the provisions of Article 27, in respect of the insurance periods and assimilated periods completed under the legislation of one Member States, is greater than the total benefits resulting from implementing the foregoing paragraphs of this Article, the person concerned shall be entitled to receive from the institution of that State a supplement equal to the difference.'

According to Article 13 (1) (b) of Regulation No 4, aggregation of insurance periods referred to in Article 27 of Regulation No 3 shall be governed by the rule that: 'When a completed insurance period, by way of compulsory insurance under the legislation of one Member State, coincides with a completed insurance period by way of voluntary or optional continued insurance under the legislation of another Member State, only the former shall be taken into account'.

Finally, according to Article 13 (5) of the same Regulation: 'If by virtue of subparagraph (1) (b) of this Article, completed insurance periods by way of voluntary or optional continued insurance under the legislation of a Member State covering invalidity, old-age/death (pensions) insurance are not counted, the relevant contributions for such periods shall be regarded as entitling

to increase of the benefits due under the said legislation. If such legislation provides for supplementary insurance, the said contributions shall be taken into account in calculating the benefits due under such insurance'.

4 For the national court it is essentially a question of whether the application which has been made of the provisions relied on is based on an accurate interpretation of their tenor and if so whether these provisions are compatible with Article 51 of the Treaty.

5 The regulations in the field of social security for migrant workers have as their basis, their framework and their bounds Articles 48 to 51 of the Treaty.

Article 51 requires the Council to adopt in the field of social security measures as are 'necessary' to provide freedom of movement for workers, providing for the aggregation, in particular for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries.

The aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State.

6 Article 51 of the Treaty deals essentially with the case in which the laws of one Member State do not by themselves allow the person concerned the right to benefits by reason of the insufficient number of periods completed under its laws, or only allow him benefits which are less than the maximum.

To remedy this situation it provides, in respect of a worker who has been successively or alternately subject to the laws of two or more Member States, for aggregation of the insurance periods completed under the laws of each of such States.

The aggregation and apportionment provided for by Articles 27 and 28 of Regulation No 3 cannot therefore be carried out if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws, always provided that this method cannot lead to a duplication of benefits for one and the same period.

7 Aggregation is not applied even in cases where insurance periods completed in the State concerned coincide with insurance periods completed in another Member State.

In fact, if the laws of one Member State allow such a double affiliation there are no grounds based on the objectives of Article 51 which make it permissible to refuse to a worker who does not need to have recourse to Regulations Nos 3 and 4 the advantages of the application *in toto* of the laws of that State.

8 It follows from the foregoing considerations that Article 28 (3) of Regulation No 3, to the extent to which it implies an aggregation of periods and a consecutive apportionment, resulting in the grant of several benefits paid by the different Member States, the total amount of which is however less than that of the benefit to which the worker is already entitled by virtue solely of the laws of one Member State, is incompatible with Article 51 and moreover devoid of any purpose, taking into account the entitlement of the worker concerned to the maximum benefit on the basis solely of the laws of the Member State concerned.

9 Article 13 (1) (b) and (5) of Regulation No 4, implementing Articles 27 and 28 of Regulation No 3, lays down certain rules for the calculation of the aggregation of periods — when this is necessary for the acquisition of the right or the enjoyment of the maximum benefit — particularly in the event of a period of compulsory payment of contributions in one Member State coinciding with a period of voluntary payment of contributions in another.

The provisions of the said Article 13 do not concern cases like the present one in which the right to a maximum pension exists without recourse to insurance periods in another Member State.

The question relating to the validity of these provisions is therefore devoid of object, and examination of it has not revealed any factors capable of affecting their validity.

Costs

10 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable.

As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

THE COURT

in answer to the question referred to it by the Sozialgericht, Freiburg, by order of 15 November 1973, hereby rules

1. **Article 28 (3) of Regulation No 3, to the extent to which it implies an aggregation of periods and a consecutive apportionment, resulting in the grant of several benefits paid by different Member States, the total amount of which is however less than that of the benefit to which the worker is already entitled by virtue solely of the laws of one Member State, is incompatible with Article 51 and accordingly to that extent void.**

2. **The provisions of Article 13 (1) (b) and (5) of Regulation No 4 do not concern cases in which the right to a maximum pension exists without recourse to insurance periods in another Member State; the question relating to the validity of these provisions is therefore devoid of object.**

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

Delivered in open court in Luxembourg on 28 May 1974.

A. Van Houtte
Registrar

R. Lecourt
President