JUDGMENT OF THE COURT OF 26 JUNE 1975 [1]

Ulrich Horst v Bundesknappschaft (preliminary ruling requested by the Bundessozialgericht)

Case 6/75

Summary

Social security — Migrant workers — Algeria — Pensions — Calculation — Insurance periods completed before 19 January 1965 — Taking into consideration (Regulation No 109/65 of the Council, Article 16 (2))

In so far as is necessary for the acquisition, the maintenance or the recovery of the right to benefits, insurance periods completed in Algeria before 19 January 1965 must be taken into consideration in calculating the pensions referred to in Chapters 2 and 3 of Regulation No 3 even if the risk materializes and the claim for a pension is made after that date.

In Case 6/75

Reference to the Court under Article 177 of the EEC Treaty by the Vth Senate of the Bundessozialgericht for a preliminary ruling in the action pending before that court between:

ULRICH HORST, Hannover-Buchholz

and

BUNDESKNAPPSCHAFT, Bochum

on the interpretation of Chapters 2 and 3, and Article 8 of Regulation No 3 of the Council concerning social security for migrant workers

1 — Language of the Case: German.

THE COURT

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

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By an order made on 4 December 1974, the Vth Senate of the Bundessozialgericht (Federal Social Court) asked the Court of Justice for a preliminary ruling on the following questions:

(a) Are pension rights which have accrued by virtue of contributions paid by a German in Algeria before 19 January 1965 to the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie also to be taken into account when determining a pension under Chapters 2 and 3 of Regulation No 3 of the Council of the EEC even when the risk insured against materializes and the claim of the insured person now resident in the Federal Republic of Germany is made only after this date?

(b) Does the principle of equality of treatment provided for by Article 8 of Regulation No 3 mean that the provisions of a national law of a Member State, which stipulate the taking into account and adjustment of accrued rights and social security benefits in respect of the insurance periods completed in a part of that State which has in the meantime become independent, also apply to all nationals of another Member State of the Community, who are resident in the territory of one of the other Member States?

The order of the Bundessozialgericht rests on the following facts:

On 21 March 1960 the appellant in the main action (hereafter referred to as 'the appellant'), a German engineer born on 14 June 1908 and residing in the Federal Republic of Germany, requested the Bundesknappschaft (Federal Mineworkers Association hereinafter referred to as 'the Association') of Hanover to grant a federal mineworker's disablement pension (Knappschaftsrente) and, on 13 January 1962, should this not be granted

to him, he sought the grant of a mineworker's pension (Bergmannsrente) arising in December 1961.

On 5 April 1967 the Association recognized before a court the appellant's right to a mineworker's pension for diminished capacity to work, which it granted to him by a decision of 17 May 1967, with retroactive effect to 1 January 1962.

However it refused to take into consideration in calculating the pension, the insurance periods completed by the plaintiff in Algeria.

From 1 July 1960 to 31 July 1962 the appellant had been employed by the National Algerian Oil Company, S.N. Repal, the registered office of which was in Paris. He had worked as a palynologist in Algeria until the end of June 1962 and then at the office in Paris until the end of July 1962. Pension contributions had been paid on his behalf to the 'Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie' for the period from 1 July 1960 to 30 June 1962.

On 6 April 1967, the appellant asked the respondent in the main action (hereafter referred to as 'the respondent') to take into account the insurance periods completed in Algeria, in accordance with Regulation Nos 3 and 4 of the EEC, for the calculation of his pension under the German pensions insurance scheme.

The respondent asked the Caisse autonome nationale de la sécurite sociale dans les mines in Paris to take into account the periods completed in Algeria, but the latter refused on the ground that the plaintiff did not come within the class of persons referred to by the French Law No 64-1330 of 26 December 1964.

In its turn, by a decision of 9 December 1969, the respondent refused to take into consideration the insurance periods in question in view of the fact that since Algeria had become independent on 1 July 1962. Regulations Nos 3 and 4 had no longer been applicable to is as from the deletion of the reference to Algeria from their area of application on 19 January 1965 and that there was no bilateral social security agreement between the Federal Republic of Germany and Algeria and that no agreement had been made relating to pension rights acquired in Algeria. The appellant's objection that the insurance periods completed were French not Algerian and that, in any case, pension rights had accrued to him up to 19 January 1965 was rejected by the respondent in a decision of 26 January 1970.

On an application brought before it the Sozialgericht (Social Court) Hanover annulled both decision of the respondent by a judgment of 3 March 1971 and ordered it to increase the appellant's pension by an amount proportionate to the periods completed in Algeria, on the ground that they were French insurance periods.

By a decision of 29 June 1971 the respondent, upon a request made by the appellant on 1 April 1970, converted the mineworkers pension for diminished capacity to work into a miner's disablement pension treated as coming into force in July 1971, while still refusing to take into consideration the period from 1 July 1960 to 31 July 1962.

By a judgment of 27 October 1971 the Landessozialgericht Niedersachsen (Higher Social Court), on an appeal brought by the respondent, annulled the judgment of the Sozialgericht for the following principal reasons:

— Regulation No 3 did not establish a common system of social security which conferred upon the recipient of benefits a single entitlement but on the contrary left in existence separate insurance schemes which create separate entitlements from independent institutions;

— only the insurance periods completed before the realization of the risk materialized (December 1961) are to be taken into consideration;
— the insurance period is not a French period since the institution which received the contributions was Algerian. While the risk covered materialized before 18 January 1965 the right to a benefit was only recognized after this date;
— the risk of total incapacity for work covered only materialized after 18 January 1965.

The appellant then appealed against this judgment relying on the fact that the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie was a French institution until 1 July 1962 and maintaining that the mere deletion of the reference to Algeria from the area of application of Regulations Nos 3 and 4 of the EEC could only affect insurance periods completed in Algeria after 18 January 1965.

As against this, the respondent maintains that Article 1 (p) of Regulation No 3 of the EEC prohibits it from giving a personal interpretation. The Bundessozialgericht (Federal Social Court) stresses that the materialization of the risk of diminishment of the capacity for work in the mines goes back to a time when Algeria was still apart of France and thus of the EEC, whilst on the other hand the materialization of the risk of total incapacity and the corresponding request for a pension occurred after 19 January 1965. The judgment of the Court of 10 October 1973 (Fiege, 110/73 [ECR] 1973 1001) according to which Annex A to Regulation No 3, in its first version, obliges the French institutions to honour rights acquired in Algeria by a migrant worker before 19 January 1965 does not decide whether rights acquired before this date also include potential rights.

If the first question is answered in the affirmative the Bundessozialgericht considers that it is no longer necessary to reply to the second question. If the second question is answered in the affirmative this would mean that the appellant would have the Algerian contributions taken into consideration by the German institution once the French legislature, having regard to the judgment given by the Court, had extended the taking into account and the adjustment of the social security rights and benefits for insurance periods completed in Algeria to nationals of a Member State of the EEC, resident in another Member State.

The order of the Vth Senate of the Bundessozialgericht was entered at the Court Registry on 22 January 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the respondent in the main action and the Commission of the European Communities.

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 — Written observations submitted to the Court

(a) Observations of the Commission

The *Commission* first of all points out that the case solely relates to the question whether the 24 months completed by the appellant in Algeria should be taken into account in aggregating the insurance periods.

The questions of the Bundessozialgericht relate to the appellant's disablement pension, since the calculation of the pension for diminished capacity to work does not pose any particular problem in

view of the fact that the payment of contributions, the materialization of the risk and the submission of the claim for a pension occurred before 19 January 1965 and that the insurance period completed before the materialization of the risk (December 1961) should therefore be taken into account in calculating the pension.

Although the Commission is not bound to give its opinion on the legal interest of the appellant in the declaration sought, which is simply recognized *in abstracto* by the court making the reference, nevertheless it observes that the aggregation of the insurance periods no longer serves any purpose once the acquisition of the right to benefits is already guaranteed by the national law, without recourse to aggregation.

The first question

Contrary to the opinion of the Bundessozialgericht, the question whether the insurance periods completed in Algeria may or must be taken into consideration for the purposes of the acquisition of rights to benefits in another Member State is different from the question whether, as the Court adjudged in Case 110/73, French institutions are obliged to honour the rights to benefits resulting from these insurance periods. Indeed, if for example one Member State left the Community and refused to honour the rights to benefit of migrant workers and if, in addition, no Member State undertook the obligations of the Member State leaving the Community, the Member States would still not be exempt from the obligation of taking into consideration, for the purposes of aggregation of pension, the insurance periods completed in the Member State leaving the Community. Article 27 of Regulation No 3 makes the aggregation of insurance periods subject to the sole condition that the insured has been subject to the legislation of two or more Member States.

As to the ambit of Regulation Nos 3 and 4 as defined in the annexes thereto, the name of Algeria was removed from the definition of French territory by Regulation No 109/65 of the Council with effect on 19 January 1965, and without prejudice to rights acquired before 1 August 1965.

Therefore three periods may be distinguished:

(i) The period ending on 30 June 1962, where the insurance periods completed in Algeria before this date, which are French insurance periods completed under French legislation, are necessary for the acquisition of a right to benefits valid in regard to the institution of another Member State, they must therefore automatically be taken into consideration, subject to the sole condition that the relevant contributions have been paid. The date of the materialization of the risk or of the making of the claim do not enter into consideration;

(ii) The period between 1 July 1962 and 18 January 1965 during which, in spite of its independence and departure from the Community, Algeria continued to be included in the geographical ambit of Regulation No 3, the provisions of which were fully applicable to nationals of Member States and to the institutions of the Community. Any more restrictive interpretation would adversely affect the principle of legal certainty, and one is therefore bound in view of the absence of any transitional provisions which stipulate any measures of derogation by the same conclusions as those in respect of the period before 30 June 1962;

(iii) The period from 19 January 1965 to 31 July 1965: as from 19 January 1965 Algeria ceased to be included in the ambit of Regulation No 3 but by virtue of the transitional rules laid down by Article 16 (2) of Regulation No 109/65, rights already accrued were not affected before 1 August 1965.

In application of the internationally recognized principles of social security whereby rights in the course of being acquired are deemed to be accrued rights in the narrow sense, as is shown by Article 22 (2) of the International Convention on Work No 48 on the preservation of pension rights of migrant workers of 1935 and in accordance with the case-law of the Court (Judgment of 15 July 1964, *Van Der Veen,* 100 [1964] ECR 565) it should be implied that the rights acquired within the meaning of Regulation No 109/65 refer not only to those legal situations where the materialization of the risk has already given rise to rights to benefit but also to rights in the course of being acquired arising from the payment of contributions which deserve a similar protection.

The first question should therefore be answered in the affirmative, even if it were necessary to accept the Bundessozialgericht's view that the taking into account of insurance periods completed in Algeria is subject to the existence of a right to draw benefits from French institutions. Since the Court of Justice has decided that Annex A to Regulation No 3, in its original version, obliges the French institution to respect rights accrued in Algeria before 19 January 1965 to a migrant worker (Case 110/73) there are no grounds for giving the expression 'accrued rights' a meaning other than that which implies their being taken into consideration for the purposes of determining pensions.

If the appellant were to claim rights to benefit against French based on risks which have already materialized, the question would be whether this claim was barred as being out of time which has not been proved in this case.

The second question

The Bundessozialgericht takes the view that if the first question is answered in the negative it would still be possible to allow the insurance periods completed in Algeria to be taken into account on the grounds that the principle of equality of treatment stated in Article 8 of Regulation No 3 obliges France to include migrant workers of other Member States within the scope of its law No 64/1330 of 26 December 1964. This Law grants to French nationals residing in France (with the possibility of extension to foreigners residing in France) a full and complete 'validation' of their insurance periods completed in Algeria before 30 June 1962.

If one were to accept the hypothesis of the Bundessozialgericht that the taking into account presupposes the existence of a right to benefits, one would be led to doubt whether the obligations of France in respect of migrant workers who have acquired rights to benefits, one would be led to doubt whether the obligations of France in respect of migrant workers who have acquired rights in Algeria could by virtue of the principle of equality of treatment, be more extensive than those which are imposed upon it directly by virtue of Annex A to Regulation No 3.

If the responsibility for replacement of insurance periods completed in Algeria which France has assumed in respect of its nationals extends beyond the obligation incumbent upon it, by virtue of Annex A to Regulation No 3, to respect the rights acquired by migrant workers belonging to other Member States, it cannot be held liable to assume this responsibility in respect of migrant workers from other Member States merely by virtue of the principle of equality of treatment.

If one accepted France's responsibility in respect of insurance periods completed in Algeria by the appellant, the application of Article 8 of Regulation No 3 would run into a fresh difficulty in that

the French Law No 64-1330 is intended to be a compensatory measure directed to events which have already occurred. The inclusion of migrant workers within its scope would therefore have no effect on their freedom to move within the Community.

The answer to be given must categorically be in the negative if the Bundessozialgericht seeks to ascertain by means of the second question whether Article 8 of Regulation No 3 imposes on the Federal Republic of Germany an obligation to protect its nationals against the loss of insurance periods completed in Algeria on the model of France's conduct in respect of its nationals by means of its Law No 64-1330. The principle of equality of treatment stated in Article 8 of Regulation No 3 cannot be interpreted so as to impose on other Member States the obligation to give the widest protection provided by one Member State for its nationals. To sum up, the questions submitted by the court making the reference may be answered as follows:

'in so far as is required by the acquisition, the maintenance or the recovery of the right to benefits, the insurance periods completed in Algeria before 1 August 1965 must be taken into consideration for the purposes of determining the pensions referred to in Chapters 2 and 3 of Regulation No 3 of the Council, even if the risk materialized and the request for a pension was submitted after that date'.

(b) Observations of the respondent in the main action

The *respondent* points out that the institution of a Member State is not itself competent to determine whether certain periods constitute, according to the national law of another Member State, insurance periods of that State. This follows both from the case-law of the Court of Justice, according to which the regulations permitted the continued existence of the particular schemes of each Member State, which give rise to separate claims against separate insurance institutions, and from the general structure of Regulation No 3.

Since the contribution periods completed in Algeria are not completed, defined or taken into consideration as insurance periods under the German legislation, it is not for a German institution to decide whether these contributions give rise to a right to a pension, that is to say, whether they legally establish the prospect of receiving benefits if the risk covered materializes, nor to decide whether these periods may be taken into consideration as insurance periods of a Member State of the European Communities. This decision is exclusively for the competent French insurance institution since at the time Algeria was a part of France.

The Commission of the European Communities, represented by its Legal Adviser, Mr Norbert Koch, submitted the oral observations at the hearing on 14 May 1975.

The Advocate-General delivered his opinion at the hearing on 10 June 1975.

Grounds of judgment

1 By an order dated 4 December 1974, which reached the Court Registry on 22 January 1975, the Bundessozialgericht requested the Court of Justice to give a preliminary ruling on two questions relating to the interpretation of Chapters 2 and 3 and Article 8 of Regulations No 3 of the Council, concerning social security for migrant workers.

2 These arguments were raised in the course of a case relating to a request for insurance periods completed by a German worker in Algeria to be taken into account in calculating his pension for total disability.

The first question

3 In the first question it is asked whether pension rights accrued as the result of contributions paid by a German in Algeria before 19 January 1965 to the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie are also to be taken into consideration for calculating a pension under Chapters 2 and 3 of Regulation No 3 of the Council of the EEC, when the risk insured against materializes, and the claim of the insured person, who now resides in the Federal Republic of Germany, is made only after this date.

4 The provisions of the abovementioned Chapters 2 and 3 regulate the determination of the benefits which an insured person may claim.

5 In particular Article 27 provides that 'for the acquisition, maintenance or recovery of the right to benefit, where an insured person has been successively or alternatively subject to the legislation of two or more Member States, the insurance periods and assimilated periods completed under the legislation of each of the Member States shall be aggregated in so far as they do not overlap'.

6 Although Algeria gained its independence on 1 July 1962, it only ceased to be regarded as coming within the scope of Regulation No 3 by virtue of Regulation No 109/65 which deleted the reference to Algeria in the annexes to Regulation Nos 3 and 4 with effect from 19 January 1965.

7 Article 16 (2) of Regulation No 109/65 expressly states that this deletion was made 'without prejudice to accrued rights'.

8 Therefore the concept 'accrued rights' must be interpreted as meaning that as far as is necessary for the acquisition, maintenance or recovery of the right to benefit the insurance periods completed in Algeria before 19 January 1965 must be taken into consideration for determining the pensions referred to in Chapters 2 and 3 of Regulation No 3, even if the risk materializes and the claim for the pension is made after that date.

The second question

9 In the second question it is asked whether the principle of equality of treatment provided for by Article 8 of Regulation No 3 of the EEC means that the provisions of a national law of a Member State, which stipulate the taking into account and adjustment of accrued rights and social security benefits in respect of the insurance periods completed in a part of that State which has in the meantime become independent, also apply to all nationals of another Member State of the Community, who are resident in the territory of one of the other Member States.

10 In view of the answer given to the first question, the second question is superfluous.

Costs

11 The costs incurred by the Commission of the European Communities which submitted observations to the Court are not recoverable and since these proceedings are, in so far as the parties to the main are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On these grounds,

THE COURT

in answer to the questions referred to it by the Bundessozialgericht by its order of 4 December 1974, hereby rules:

In so far as is necessary for the acquisition, the maintenance of the recovery of the right to benefits, insurance periods completed in Algeria before 19 January 1965 must be taken into

consideration in calculating the pensions referred to in Chapters 2 and 3 of Regulation No 3 even if the risk materializes and the claim for a pension is made after that date.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 26 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 10 JUNE 1975 [1]

Mr President,
Members of the Court,

The proceedings for a preliminary ruling, in which I am today giving my opinion, relate to the interpretation of Regulation No 3 concerning social security for migrant workers. A decision is sought as to whether certain insurance periods completed by a German in Algeria are to be taken into consideration for the purposes of the abovementioned regulation.

I should first like to recall the findings in an earlier case, 110/72 *(Fiege v Assurance Maladie Strasbourg* [1973] ECR 1001).

Until Algeria gained its independence on 1 July 1962, it was a part of the territory of France and was included within the scope of Regulation No 3. This appears from Annex A to Regulation No 3 containing the 'Definition of territories and nationals to which and to whom the regulation applies'. In addition to Metropolitan France under the title 'France' Algeria and the Overseas Departments were included. In Annex B to Regulation No 3, which, according to Article 3 of that regulation, 'specifies, for each Member State, the social security legislation in force in its territory, at the date of adoption of this Regulation, to which the Regulation applies', includes under the heading 'France', amongst the legislation applicable in Algeria 'special social security schemes, *inter alia,* the mines' scheme'. These provisions at first remained in existence after Algeria was granted independence. Reference to Algeria was only deleted from Annex A of Regulation No 3 by Article 5 of Regulation No 109/65 of the Council of 30 June 1965 (OJ No 125 of 9.7.1965) which under Article 16 thereof came into

1 — Translated from the German.