JUDGMENT OF THE COURT (Fifth Chamber)

12 February 1998 *

In Case C-366/96,

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

Louisette Cordelle

and

Office National des Pensions (ONP)

on the interpretation of Article 12(2) of Council Regulation (EEC) No 1408/71 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), and of Article 46a of Regulation No 1408/71, as amended and updated by Regulation No 2001/83 and subsequently 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 (Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Office National des Pensions, by Gabriel Perl, General Administrator,

— the Belgian Government, by Anne-Marie Snyers, General Adviser in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, and

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

having regard to the Report for the Hearing,

after hearing the oral observations of the Office National des Pensions, represented by Jean-Paul Lheureux, Deputy Advisor, and of the Commission, represented by Maria Patakia, at the hearing on 1 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

1 By judgment of 7 November 1996, received at the Court on 21 November 1996, the Tribunal du Travail (Labour Court), Charleroi, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 12(2) of Council Regulation (EEC) No 1408/71 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), and of Article 46a of Regulation No 1408/71, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7).

2 That question was raised in proceedings between Ms Cordelle and the Office National des Pensions (National Pensions Office; 'the ONP') concerning the application of the Belgian rules against overlapping.

3 Since 1989, Ms Cordelle has received a survivor's pension, calculated on the basis of her late husband's full working career, paid by the Belgian employees' pension scheme ('the Belgian survivor's pension'), and three pensions in her own right, of which two — an 'employee's retirement pension' and a 'self-employed person's retirement pension' — are paid by the Belgian scheme and the third — an old-age pension ('the French old-age pension') — is paid by the French scheme.

4 The French old-age pension was calculated on the basis of a working career of 27 trimesters, plus 48 trimesters attributed to Ms Cordelle by reason of her having brought up six children. The amount obtained was further increased by 10% for having brought up children.

5 On 3 October 1994, the ONP claimed repayment of BFR 42 460 from Ms Cordelle on the ground that the French old-age pension had not been taken into account when the Belgian survivor's pension was calculated in 1989. Once apprised of the amount of the former pension, it had recalculated the latter correctly by applying the rule against overlapping in Article 52 of the Royal Decree of 21 December 1967 laying down general rules for the retirement and survivors' pensions of employed persons ('the Belgian rule against overlapping').

6 Under that rule, an employee's survivor's pension is subject to a certain ceiling where it is received concurrently with one or more retirement pensions or any other equivalent benefit, paid under Belgian legislation or that of any other country. That ceiling is set at 110% of the survivor's pension awarded to the surviving spouse, multiplied by the reciprocal of the fraction, not exceeding 1, used to calculate the retirement pension on which the survivor's pension is based.

7 Ms Cordelle challenged the ONP's decision on the ground that Article 52 of the Royal Decree of 21 December 1967 was not applicable since the extension by 48 trimesters of the period on which the French old-age pension was based did not constitute a 'retirement pension or other equivalent benefit' within the meaning of the Belgian rule against overlapping but a benefit for which there was no equivalent in Belgium.

8 The Tribunal du Travail, Charleroi, then raised the question whether the French old-age pension, calculated on the basis of a working career which had been extended by reason of the plaintiff's motherhood, should be treated, in its entirety, as a retirement pension or other equivalent benefit and thus whether the Belgian

rule against overlapping should be applied in the light of the Community legislation. It therefore stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Having regard to the benefits paid in accordance with French law by the Caisse Régionale d'Assurance Maladie Nord Picardie and to the retirement pension payable under Belgian law, is the rule preventing the overlapping of benefits laid down by Article 52 of the Royal Decree of 21 December 1967 applicable in the light of the Community rules?'

9 It should be recalled first of all that in proceedings brought under Article 177 of the Treaty the Court has no jurisdiction to apply the rules of Community law to a specific case or, consequently, to classify provisions of national law with respect to such a rule. It may, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful in assessing the effects of such provisions of national law (see, in particular, Case 37/86 *van Gastel* v *Rijksdienst and Rijkskas* [1987] ECR 3589, paragraph 8).

10 In the light of the documents in the main case, therefore, the national court's question must be interpreted as seeking in substance to ascertain, in the first place, whether Regulation No 1408/71 precludes a Member State from applying a rule against overlapping under which, when calculating a survivor's pension awarded under its own legislation on the basis of the deceased spouse's career, account is to be taken of benefits to which the survivor is entitled in his or her own right in another Member State where those benefits are to be classified as retirement pensions or other equivalent benefits under the legislation of the first Member State. If not, the question seeks to ascertain, in the second place, whether an old-age pension calculated in accordance with the legislation of another Member State on the basis of a working career extended by reason of the plaintiff's motherhood is to be treated in its entirety as a retirement pension or other equivalent benefit within the meaning of the legislation of the first Member State.

11 Under Article 12(2) of Regulation No 1408/71, as applicable at the time when the survivor's pension at issue in the main proceedings was first calculated by the Belgian institution, 'the provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60(1)(b)'.

12 Regulation No 1248/92 made a number of amendments to that provision which do not affect its principle but which specify the precise limits for the application of national rules against overlapping in the context of the calculation of pensions.

13 Article 12(2) of Regulation No 1408/71, as amended by Regulation No 1248/92, no longer contains the exception relating to benefits of the same kind, and now comprises the following single paragraph:

'Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.'

14 In addition, Article 46a was added to Regulation No 1408/71, paragraph (3)(d) of which provides in particular that where rules against overlapping are applicable

under the legislation of only one Member State on account of the fact that the person concerned receives benefits of a different kind payable under the legislation of other Member States, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation of other Member States.

15 Pursuant to that rule, the Belgian survivor's pension could only be reduced within the limit of the amount of the French old-age pension.

16 In that regard, however, it must be noted that, as regards benefits already awarded before the amending Regulation came into force on 1 June 1992, Article 95a(4) of Regulation No 1408/71, introduced by Regulation No 1248/92, provides that the rights thereto may be reviewed on the application of the person concerned. However, in Case C-307/96 *Baldone* v *INAMI* [1997] ECR I-5123 that provision was held to preclude the competent institution of a Member State from applying, on its own initiative, the calculation rules contained in Regulation No 1248/92 to the detriment of the person concerned in the event that the person concerned had been awarded a pension before that Regulation entered into force on 1 June 1992.

17 In a case such as that in the main proceedings, the person concerned, having been awarded a Belgian survivor's pension before 1 June 1992, would thus be able to apply for his or her rights to be reviewed in accordance with the new rule introduced into Regulation No 1408/71 by the amending Regulation, in particular by Article 46a(3)(d). However, it does not appear from the case-file that any such application has been made.

18 It is therefore necessary to consider whether a survivor's pension awarded under the legislation of one Member State, calculated on the basis of the working career of the deceased spouse, and an old-age pension awarded in the recipient's own right under the legislation of another Member State are 'benefits of the same kind' within the meaning of Article 12(2) of Regulation No 1408/71.

19 The Court has consistently held that social security benefits must be regarded as being of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical (Case C-98/94 *Schmidt* v *Rijksdienst voor Pensioenen* [1995] ECR I-2559, paragraph 24).

20 In Case 197/85 *ONTPS* v *Stefanutti* [1987] ECR 3855, at paragraph 13, the Court considered that a personal invalidity pension based on the recipient's own employment record in one Member State and a survivor's pension based on the employment record of the recipient's deceased husband in another Member State were not of the same kind.

21 It must thus be held that benefits calculated on the basis of periods of insurance completed by different persons cannot be treated as benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 and, therefore, that Regulation No 1408/71 does not preclude the application of a national rule against overlapping such as that referred to by the national court.

22 It then remains to be determined whether, for the purpose of applying the legislation of one Member State, an old-age pension calculated in accordance with the legislation of another Member State on the basis of a working career extended by reason of motherhood is to be treated in its entirety as a retirement pension or other equivalent benefit within the meaning of the legislation of the first Member State.

23 It must be stressed that, irrespective of whether that question is answered in the affirmative or the negative for the purpose of applying the Belgian legislation, the French old-age pension must in any event be classified as a 'benefit of a different kind' for the purposes of Article 12 of Regulation No 1408/71.

24 It is therefore for the national court to decide on the classification, for the purpose of applying the rule against overlapping provided in its domestic legislation regarding retirement pensions or equivalent benefits, of an old-age benefit calculated in accordance with the legislation of another Member State on the basis of a working career extended by reason of motherhood.

25 The answer to the national court's question must therefore be that Article 12(2) of Regulation No 1408/71 does not preclude a Member State from applying a rule against overlapping under which, when calculating a survivor's pension awarded under its own legislation on the basis of the deceased spouse's career, account is to be taken of benefits to which the survivor is entitled in his or her own right in another Member State where those benefits are to be classified as retirement pensions or other equivalent benefits under the legislation of the first Member State. It is for the national court to decide on the classification, for the purpose of applying that rule against overlapping, of the benefits in question.

Costs

26 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunal du Travail, Charleroi, by judgment of 7 November 1996, hereby rules:

Article 12(2) of Council Regulation (EEC) No 1408/71 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, does not preclude a Member State from applying a rule against overlapping under which, when calculating a survivor's pension awarded under its own legislation on the basis of the deceased spouse's working life, account is to be taken of benefits to which the survivor is entitled in his or her own right in another Member State where those benefits are to be classified as retirement pensions or other equivalent benefits under the legislation of the first Member State. It is for the national court to decide on the classification, for the purpose of applying that rule against overlapping, of the benefits in question.

Wathelet Moitinho de Almeida Edward

Jann Sevón

Delivered in open court in Luxembourg on 12 February 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber