JUDGMENT OF THE COURT
13 OCTOBER 1977 [1]

Fonds National de Retraite des Ouvriers Mineurs v Giovanni Mura (preliminary ruling requested by the Cour du Travail, Mons)

Case 22/77

Social security for migrant workers — Social security benefits — Entitlement by virtue of national legislation alone — Full application of the latter — Advantages of the system — Aggregation and apportionment — Preference
Regulation No 1408/71, Article 46 (1)

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.

In Case 22/77

Reference to the Court under Article 177 of the EEC Treaty by the Cour du Travail (Labour Court), Mons, for a preliminary ruling in the action pending before that court between

FONDS NATIONAL DE RETRAITE DES OUVRIERS MINEURS, Brussels,

and

GIOVANNI MURA, Boussu (Belgium),

on the interpretation of Article 12 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 (OJ, English Special Edition 1971 (II), p. 416),

1 — Language of the Case: French.

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and issues

The facts, the procedure and the 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

Mr Mura, an Italian national, who is the defendant in the main action, worked as a miner in France from 1958 to 1962 (that is, for four years, five months and 14 days) and in Belgium from 1962 to 1973 (that is, for 11 years).

He has received a Belgian invalidity pension since 1 November 1973. The requirement governing the length of the period of employment contained in Article 1 (2) of the Belgian Royal Decree of 19 November 1970 was satisfied by the insurance periods completed in Belgium alone. Since 1 November 1973 Mr Mura has also received a proportionate part of the French invalidity pension, his entitlement to which was acquired through the aggregation of the periods of employment in both Belgium and France, since it could not be acquired on the basis of the insurance periods completed in France alone.

On being informed of the award of the French pension the plaintiff in the main action, the Fonds National de Retraite des Ouvriers Mineurs (National Pension Fund for Mine Workers, hereinafter referred to as the 'FNROM'), reduced the Belgian pension by the appropriate amount, absorbed the arrears of the French pension for the period from 1 November 1973 to 31 March 1975 (that is, BF 20 745) and claimed from the defendant the repayment of the sum of BF 10 181 paid in excess.

That reduction was made in pursuance of national rules against the overlapping of benefits (Article 23 (1) of the aforementioned Royal Decree) and of Article 46 (3) of Regulation No 1408/71.

Basing his entitlement to receive the Belgian pension without reduction chiefly on the judgment of the Court of Justice in Case 24/75 *(Petroni* v *Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149) Mr Mura brought an action before the Tribunal du

Travail (Labour Tribunal), Mons, in which he was successful. The FNROM appealed to the Cour du Travail, Mons, which by judgment of 21 January 1977 stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Must Article 12 of Regulation (EEC) No 1408/71 authorizing the overlapping of benefits take precedence over national rules against overlapping in cases in which the Community provisions result in a migrant worker being placed in a more favourable position than a non-migrant worker?'

The judgment referring the case was received at the Court on 10 February 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 the written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

In the opinion of the FNROM the rules against the overlapping of benefits laid down by Article 12 (1) and (2) of Regulation No 1408/71 do not apply to benefits calculated in accordance with Article 46, because the unjustified overlapping of benefits which that article seeks to avoid is prevented by Article 46 (3).

However, the consequence of deciding that the correction provided for by the latter provision is incompatible with Article 51 of the Treaty would be:

— that Article 46 introduces discrimination against non-migrant workers;
— that Article 12 is also incompatible with the first subparagraph of Article 46 (1);
— that Article 12 must be declared incompatible with Articles 7, 48 and 51 of the Treaty and cannot therefore prevail over internal rules against the overlapping of benefits.

Mr Mura makes two preliminary observations:

— Although the French fund awarded him a proportionate part of the pension amounting to FF 2 003·81 per year, the sum taken into account by the Belgian institution in reducing the Belgian pension was FF 2 603·45. It is for that reason that the arrears of the French pension have not compensated for the sums allegedly paid on a provisional basis by the Belgian fund and that the defendant in the main action is required to repay a sum paid in excess;
— It emerges from Article 1 (2) of the Royal Decree of 19 November 1970, which fixes at 10 years the minimum duration of the insurance periods required for the grant of the full invalidity pension under the special scheme for mine workers, and from Article 46 (2) (c) of Regulation No 1408/71, that the defendant in the main action was entitled to a full Belgian pension without reduction.

On the substance of the preliminary question Mr Mura observes, first, that in several cases the Court has stated that the fact that in some cases the migrant worker has an advantage over nationals of the country in which he works follows from the system at present in force, which rests on a simple coordination of national legislations which have not yet been harmonized.

The Belgian institution may apply the national rules against the overlapping of benefits only in conjunction with Article 12 of Regulation No 1408/71. However, that provision does not permit such application in order to reduce benefits of the same kind calculated on the basis of Article 46.

In its observations in Case 112/76 *(Manzoni* v *Fonds National de Retraite des Ouvriers Mineurs)* the Belgian Government concluded on the basis of the judgments in *Petroni* (cited above) and *Strehl* v *Nationaal Pensioenfonds voor Mijnwerkers* (Case 62/76 [1977] ECR 211) — according to which Article 46 (3) of Regulation No 1408/71 is incompatible with Article 51 of the Treaty — that Article 12 of the aforementioned regulation is itself incompatible with Articles 7 and 48 of the Treaty, since it creates discrimination between migrant workers and those who have been employed in one State. Articles 7 and 48 forbid all discrimination based on nationality. However, Article 12 gives rise to no discrimination on the basis of the nationality of workers.

The Court stated in Case 34/69 *(Caisse d'Assurance Vieillesse des Travailleurs Salariés de Paris* v *Jeanne Duffy* [1969] ECR 597) and Case 184/73 *(Bestuur van de Nieuwe Algemene Bedrijfsvereniging* v *Kaufmann* [1974] I ECR 517), when interpreting Article 11 of Regulation No 3, which laid down more restrictive rules against overlapping than those contained in Article 12 of Regulation No 1408/71, that 'Provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social insurance benefits only apply ... to insured persons if they are in receipt of benefits which they acquired through the application of the [European regulations]. In the case in point in the main action entitlement to the Belgian pension was acquired independently of the rules on aggregation laid down by those regulations. As against the principles laid down by the Court in those two judgments, certain institutions refer to two other judgments (judgment of 6 December 1973 in the case of *Mancuso,* Case 140/73, [1973] II ECR 1449 and judgment of 25 November 1975, *Caisse de Pension des Employés Privés* v *Massonet,* Case 50/75, [1975] ECR 1473), in which it was stated that the national legislations may deal with the problem of overlapping of pensions under Article 11 of Regulation No 3 if it is a question of benefits acquired outside the application of the Community regulations. Those institutions thus believe themselves justified in applying national rules against the overlapping of benefits to reduce pensions payable under their own legislation. However, the application of those rules generally gives rise to paradoxical and unfair situations. It is therefore necessary that the problem of the overlapping of pensions should also be governed by a Community rule which may be relied on before the national courts and submitted to the Court of Justice for review.

The defendant in the main action therefore proposes to reply that:

'The institutions of the Member States are not entitled to rely upon national rules against overlapping to reduce benefits calculated pursuant to Community law. Under the present European rules Article 12 of Regulation No 1408/71 does not allow the reduction of benefits of the same kind acquired either under the internal legislation of one State alone or as a result of the aggregation of insurance periods'.

The *Belgian Government* refers to its arguments in the *Manzoni* case and otherwise submits the same observations as the FNROM.

The *Italian Government* observes that as the defendant receives two benefits of the same kind Article 12 (2) of Regulation No 1408/71 is applicable. Since the interpretation of the text of that provision can only lead to an affirmative reply to the question referred it must be assumed that the court *a quo* intended to raise doubts as to the applicability, in the absence of a Community rule against overlapping, of that provision, which may in appropriate circimstances give the migrant worker an advantage over the national worker.

However, the doubt expressed by the Belgian court is unfounded. On the ground that the aim of the Community rules would not be attained if, as a consequence of their application, a worker were to lose rights acquired under the laws of a single Member State, the Court has held, in dealing with rules whose necessity is accepted, not for the purpose of enacting independent Community legislation, but in order to co-ordinate and harmonize the national laws, that the Community rules against the overlapping of benefits are incompatible with Article 51 of the Treaty. The result of the inapplicability of Article 12 (2) and the consequent possibility of applying national rules against the overlapping of benefits is to give effect once again in another form to the Community provision which has been declared to be unlawful. Until Community rules covering every possibility are adopted, it is less prejudicial to be able to give an advantage to a migrant worker under the Community provisions in force than to run the risk of creating a situation which is entirely unfavourable to him (cf. opinion of Mr Advocate General Warner in Case 62/76, *Strehl*).

In this instance there is no duplication of actual or fictitious periods, since the Belgian pension was awarded in pursuance of legislation based upon risk, on the sole condition that the recipient had been employed for a period of ten years (cf. Case 50/75).

The *Netherlands Government* takes the view that the definition of the exception created by the second sentence of Article 12 (2) to the principal rule laid down in the first sentence of that paragraph is such that the exception does not apply to national provisions for reduction. That exception applies only where, in accordance with the provisions of Article 46, benefits of the same kind are awarded by the institutions of two or more Member States. Benefits to which there is already an entitlement under national law cannot be included amongst those awarded 'in accordance with the provisions of Article 46'; consequently, national benefits, which are at issue in the main instance, do not come within the exception created by the second sentence of Article 12 (2).

Furthermore, there is no substantial difference between Article 12 (2) of Regulation No 1408/71 and Article 11 (2) of Regulation No 3. Therefore the consequence of the limitation placed on the ambit of Article 46 (3) by the *Petroni* judgment is that the line followed in the case-law of the Court concerning Regulation No 3 may continued (cf. Cases 140/73 and 50/75); this clearly implies that in the case of an overlapping of benefits such as that in issue in the main action national provisions for reduction should be introduced. If it were not possible to introduce such provisions that part of the benefit which would not be granted thereunder would nevertheless have to be paid by virtue of the regulation, which, in the light of the *Petroni* judgment, would mean that there would be no obstacle to applying the provisions of Article 46 (3) thereto. Therefore, in practice, the relationship which exists between the second sentence of Article 12 (2) and Article 46 (3) implies that it must always be possible to make a reduction under one of those two provisions.

Finally, Articles 48 and 51 of the Treaty cannot result in the person concerned's being entitled to benefits which, together, would exceed the sum which he was paid when he was working. Furthermore, the principle of equality of treatment would be infringed if the benefits granted under the legislation of a third State were reduced. On that point the Netherlands Government draws attention to the questions referred to the Court for a preliminary ruling by the Sozialgericht Augsburg in Case 32/77 (*Giuliani* v *Landesversicherungsanstalt Schwaben*).

The *Government of the United Kingdom* considers that if the principle established in the *Petroni* case is to be confirmed as establishing that Article 46 (3) can never operate to allow any reduction of a benefit by reference to some additional advantage conferred by the EEC Regulation, where the benefit in question is guaranteed by laws of a single Member State whether or not independently of the duration of periods of insurance or employment, Regulation No 1408/71 must have the effect of enabling a person to obtain benefit in full in country A and a *pro rata* benefit from country B taking into account periods of insurance completed in both countries, without any provision for reduction by country A by reason of overlapping of the benefits. In such a situation country A is responsible for an unreasonable proportion of the benefit payable.

In the light of the judgment in the aforementioned Case 34/69 and to the extent that Article 46 (3) permits a reduction in the amount of the benefit acquired under national legislation alone, being a reduction not greater than the amount of benefit acquired solely through the application of Regulation No 1408/71, it does not appear to be incompatible with the objects of Article 51 of the Treaty of Rome.

The *Commission* observes, first of all, that it may be assumed that there was in fact a double overlapping of benefits and thus a double reduction of them. The decision adopted by the FNROM is based not only on Article 46 (3) but also on Article 12 of Regulation No 1408/71, Article 7 of Regulation No 574/72 and Article 23 of the Belgian Royal Decree of 19 November 1970. The latter provision governs reduction in the case of the overlapping of different types of benefit. Mr Mura may therefore be assumed to be in receipt of a pension in respect of accident at work or occupational disease from Belgium in addition to his Belgian and French invalidity pensions. The real question which arises does not concern the application, where benefits of the same kind are awarded in accordance with Article 46, of the rule against overlapping laid down by Belgian legislation, despite the prohibition on the application of such a rule contained in Article 12 of Regulation No 1408/71, but rather the application of Article 46 (3) and the judgment of the Court in the aforementioned *Petroni* case, as confirmed by the judgment of 3 February 1977 in the *Strehl* case.

It appears therefore that independently of the interpretation of Article 12 of Regulation No 1408/71 which the Court is asked to provide and the literal text of that provision, it must be asked whether a provision which allows the application of internal rules against the overlapping of benefits is compatible with Article 51 of the Treaty.

Article 12 first of all lays down the principle that national legislative provisions against the overlapping of benefits may be applied to workers covered by Regulation No 1408/71, except in the case of certain benefits of the same kind, in particular invalidity benefits awarded in accordance with Article 46. The court referring the case asks whether, where the application of Article 12 results in migrant workers being placed in a more favourable position than non-migrant workers, the application of the Community rule must nevertheless prevail over the application of the internal rule against the overlapping of benefits. Such a question challenges the basic principle of the precedence of Community law over national law. The close relationship between the principle of the direct applicability of the provisions of the Treaty and, *a fortiori*, of the Community regulations and the principle of the precedence of those rules and regulations has, however, been particularly emphasized by the Court in several cases. Nevertheless, the number of cases referred to the Court shows that the Member States are stubbornly resisting

the principle that there shall be no limitation on separately acquired pensions.

The Court has, however, stated in Case 1/67 *(Ciechelski,* [1967] ECR 181) and in Case 2/67 *(de Moor,* [1967] ECR 197) that a pension may be reduced where there is duplication of insurance periods, that is to say, if the benefit relates to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State. Examples given by the Commission show that the overlapping of pensions may result not only in the award of an amount of benefit exceeding the highest theoretical amount but also in an amount which may greatly exceed the wage previously paid to the person concerned. The difficulty is therefore to decide on the threshold beyond which there is undue overlapping of benefits and whether it is for the Community legislature or for the national legislature to determine that threshold and the manner in which a reduction, once accepted, may be carried out.

The Court has recognized that in certain cases other than that of a duplication of insurance periods its interpretation of Article 51 may result in an accumulation of pensions, but it has stated that 'this consequence follows not from the interpretation of Community law but from the system at present in force which, in the absence of a common social security scheme, rests on a simple co-ordination of national legislations which have not yet been harmonized' (Case 50/75). In the course of his opinion in that case Mr Advocate General Trabucchi analysed the judgment in Case 140/73 *(Mancuso),* in which the same observation already appeared, and stated that, in dealing with questions concerning invalidity benefits: 'Of the two possibilities, namely, the danger of insufficient protection which might arise in certain cases by the adoption of the general principle of excluding, on grounds of overlap, national benefits acquired without recourse to aggregation and the possibility of too great a degree of protection for the worker, the Court has invariably opted in favour of the second alternative'. However, the Court stated both in Case 50/75 and in Case 140/73 that: 'It follows from Article 11 of Regulation No 3 that the national legislations could deal with this situation [the overlapping of pensions] if it is a question of benefits acquired outside the application of Articles 27 and 28 of this regulation'. Does that mean that the Court regards the application of internal rules against the overlapping of benefits, in order to reduce a benefit acquired under national legislation alone and without recourse to aggregation, as compatible with Article 51 of the Treaty? If the Court were so to hold, that would confirm that national laws are alone applicable to the reduction of separately acquired pensions. It would, furthermore, encourage those Member States which have no rules against the overlapping of benefits to introduce such rules into their legislation. Finally, there would be a risk of excessive reductions if Member States had sole power in that area. It is, of course, possible to conceive of co-ordination at a Community level in the application of those rules against the overlapping of benefits, but in addition to the fact that the already complex process of the award of benefits would be further complicated and the delays in making such awards still more protracted the final result of such a solution would be the same as under the system established by Article 46 (3), which the Court has regarded as incompatible with Article 51 of the Treaty. The Commission considered that it had found a solution to that problem in its proposal for a regulation submitted to the Council on 20 November 1968.

The Commission therefore considers that the following reply may be given to the question referred:

'The basic principle of the precedence of Community law over national law

implies that a rule of internal law may not be applied where the Community rules forbid it, even where the application of the Community rule results in migrant workers being placed in a more favourable position than non-migrant workers.'

The plaintiff in the main action, represented by Mr Mariscal, the defendant in the main action, represented by Mr Rossini, Director of the Italian welfare service 'Patronato ACLI', the Belgian Government, represented by Mr Donis, acting as Agent, the Italian Government, represented by Mr Fiumara, acting as Agent, and the Commission of the European Communities, represented by Miss Jonczy, acting as Agent, submitted oral argument at the hearing on 8 June 1977.

The Advocate General delivered his opinion at the hearing on 20 September 1977.

Decision

1 By a judgment of 21 January 1977, received at the Court Registry on the following 10 February, the Cour du Travail, Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 12 of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

2 That question has been referred in the context of an action concerning the way in which the competent Belgian institution calculated the invalidity pension of an Italian national, the defendant in the main action, who had worked as a mine worker first in France and then in Belgium.

3 In Belgium that worker satisfied all the conditions laid down by the national legislation for entitlement to an invalidity pension under the scheme for mine workers.

4 On the other hand, for his entitlement to benefit in France, he had to have recourse to the provisions of Article 45 of Regulation No 1408/71; for the purposes of calculating that benefit, the periods actually completed in both Member States were aggregated and the French benefit was apportioned.

5 Applying the national rules against the overlapping of benefits, the Belgian institution then deducted the apportioned amount of the French benefit from the invalidity pension and asked the person concerned to refund the sum overpaid.

6 The defendant in the main action claims that when the Belgian institution applied the national rules against the overlapping of benefits it deducted not the apportioned amount of the French pension (FF 2 003·81 per year) but rather the theoretical amount of the French pension (FF 2 603·45).

7 It is for the national court to consider that situation in connexion with the application of the national rules against overlapping of benefits.

8 The question asks whether Article 12 of Regulation No 1408/71 authorizing the overlapping of benefits must take precedence over national rules against overlapping in cases in which the Community provisions result in a migrant worker being placed in a more favourable position than a non-migrant worker.

9 The charge that migrant workers obtain an advantage over workers who have never left their own country cannot be accepted, since no discrimination can arise in legal situations which are not comparable.

10 Any differences which may exist to the benefit of migrant workers do not result from the interpretation of Community law but rather from the lack of any common social security system or of any harmonization of the existing national schemes, which cannot be mitigated by the mere co-ordination at present practised.

11 Article 12 (2) of Regulation No 1408/71 provides that 'The legislative provisions 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 Articles 46, 50, 51 or Article 60 (1) (b)'.

12 As the Court has already ruled in its judgment of 21 October 1975 (Case 24/75, *Petroni* v *ONPTS*, [1975] ECR 1149), Article 46 (3) is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on benefits acquired in different Member States by a reduction in the amount of the benefit acquired under national legislation alone.

13 It follows that the provisions of that paragraph are not applicable where they bring about a reduction in the benefit acquired by virtue of a Member State's national legislation alone and that, where that is the case, the second sentence of Article 12 (2) is inapplicable.

14 When the second sentence is not applicable, the first sentence applies, with the consequence that national legislative provisions for reduction, suspension or withdrawal of benefit may be invoked.

15 However, it appears from Article 46 (1) that if the application of national provisions on entitlement and calculation alone is less advantageous for the worker than the application of the rules for aggregation and apportionment, the latter must be applied.

16 Therefore the answer should be 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.

Costs

17 The costs incurred by the Belgian Government, the Italian Government, the Netherlands Government, the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

18 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 Cour du Travail, Mons, by a judgment of 21 January 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 regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 13 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER
(see case 112/76, p. 1657)