JUDGMENT OF THE COURT (Fifth Chamber)
25 February 1999 *

In Case C-320/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Juzgado de lo Social de Santiago de Compostela, Spain, for a preliminary ruling in the proceedings pending before that court between

José Ferreiro Alvite

and

Instituto Nacional de Empleo (Inem),

Instituto Nacional de la Seguridad Social (INSS)

on the interpretation of Article 51 of the EC Treaty and Article 67 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, acting for the President of the Chamber, C. Gulmann, D. A. O. Edward (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Spanish Government, by Paloma Plaza García, Abogado del Estado, acting as Agent,

— the Commission of the European Communities, by Maria Patakia and Isabel Martínez del Peral, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of José Ferreiro Alvite, represented by Abelardo Vázquez Conde, of the Orense Bar, the Spanish Government, represented by Nuria Díaz Abad, Abogado del Estado, acting as Agent, the United Kingdom Government, represented by Sarah Moore, Barrister, and the Commission, represented by Isabel Martínez del Peral, at the hearing on 30 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1998,

gives the following

Judgment

1 By order of 21 September 1995, received at the Court on 16 October 1995 and amended by order of 30 April 1997 received at the Court on 12 May 1997, the Juzgado de lo Social (Social Court), Santiago de Compostela, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 51 of that Treaty and Article 67 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), (hereinafter 'Regulation No 1408/71').

2 The questions were raised in proceedings between Mr Ferreiro Alvite, on the one hand, and the Instituto Nacional de Empleo (Inem) and the Instituto Nacional de la Seguridad Social (INSS), on the other, concerning payment of unemployment allowance provided for by Spanish law for claimants of more than 52 years of age.

Community legislation

3 Article 67 of Chapter 6 (entitled 'Unemployment') of Title III, which contains special provisions relating to the various categories of benefit governed by Regulation No 1408/71, provides as follows:

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of

periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. ... application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

— in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

...'

Spanish legislation

4 Under Article 215(3) of the Spanish General Law on Social Security, as codified by Royal Legislative Decree No 1/94 of 20 June 1994 (BOE No 154 of 29 June 1994, hereinafter 'the Spanish Law'), unemployed persons who have paid six years' unemployment insurance contributions and satisfy all the conditions, with the exception of the age requirement, for obtaining a contributory retirement pension under the social security scheme are eligible for the unemployment allowance for claimants of more than 52 years of age.

5 Article 161(1)(b) of that Law makes the award of a contributory retirement pension dependent upon completion of a minimum period of 15 years' contributions, of which at least two years' contributions must have been made in the eight years immediately preceding the event giving entitlement to the benefit.

The main proceedings

6 It appears from the file in the main proceedings that Mr Ferreiro Alvite, who was born on 10 February 1936, made contributions as an employee to the United Kingdom social security scheme for 1 303 weeks, but did not complete any period of insurance under the Spanish social security system during his working life. For six months he received the unemployment allowance for migrant workers returning to Spain. During that period, the competent administrative institution under the Spanish Law paid contributions on his behalf to the sickness insurance and family benefit schemes.

7 On 11 April 1994 he applied for the unemployment allowance for claimants of more than 52 years of age. His application was dismissed by a decision of 5 August

1994 on the ground that he had not completed the minimum contribution period required in order to be entitled to the retirement pension provided for under the Spanish social security scheme. On 19 September 1994 he made a preliminary administrative complaint which was dismissed by decision of 28 October 1994.

8 He then appealed to the Juzgado de lo Social, Santiago de Compostela, which raised the possible application to the case of Article 48(1) and the proper construction of Article 67 of Regulation No 1408/71. Accordingly, it decided to stay proceedings and refer three questions to the Court of Justice for a preliminary ruling.

9 Since those questions were the same as the second and fourth questions before the Court in Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* v *Inem and INSS*, which were referred by the same court, the President of the Court decided on 19 October 1995 to stay proceedings in the present case until judgment had been delivered in *Martínez Losada*.

10 On 20 February 1997 the Court gave judgment in *Martínez Losada* ([1997] ECR I-869) and asked the Juzgado de lo Social, Santiago de Compostela, whether it wished to maintain its reference for a preliminary ruling in this case.

11 The Spanish court indicated that it wished to maintain the reference subject to reformulating the questions, since some doubt remained as to the proper construction of the relevant Community provisions.

12 It considers that the statements made by the Spanish Government before the Court in *Martínez Losada* are inconsistent with the way in which the Spanish authorities

apply the Spanish Law when considering an application for unemployment allowance by migrant workers.

13 It points out that the Court observed at paragraph 41 of the judgment in *Martínez Losada* that the Spanish Government expressly accepted in its written observations that entitlement to the allowance granted to claimants of more than 52 years of age is not conditional on retirement pension contributions having been paid for the requisite period under the Spanish social security scheme, and that it is sufficient for those concerned to have paid 15 years' contributions to the social security scheme of another Member State or for them to have paid contributions for that period in part to the Spanish scheme and in part to the scheme of another Member State. The national court observes that the Spanish Government continues, notwithstanding that statement, to refuse the allowance in question on the ground that the claimant must have been insured for a particular period in Spain under the old-age insurance scheme.

The questions

14 In those circumstances, the national court, by an order of 30 April 1997 received at the Court on 12 May 1997, reformulated the questions referred as follows:

'1. Is Article 67(1) of Regulation No 1408/71 (in its present version) to be interpreted, as regards the particular facts to which it is to be applied, as meaning that periods of insurance or of employment completed under the legislation of any other Member State must be taken into account for the purposes of obtaining the unemployment allowance for persons over 52 years of age provided for by Article 215(3) of Royal Legislative Decree No 1/94 of 20 June 1994, which approves the consolidated version of the General Law on Social

Security, to the extent that, subject toage requirement, contributions paid during such periods give a right to a retirement pension in a Member State other than that of the competent institution?

2. If the provisions of Article 67 of Regulation (EEC) No 1408/71 are not applicable because the requirement to be met is one which is necessary in order to be entitled to a retirement pension, should Article 51 of the Treaty establishing the European Community apply directly so that the competent institution is obliged to take account of future retirement pension rights acquired in another Member State when deciding whether the requirement laid down in Article 215 of the consolidated version of the General Law on Social Security, that the claimant must, subject to age requirements, be entitled to a retirement pension, is met?

3. Whether Article 67 of Regulation (EEC) No 1408/71 or Article 51 of the EC Treaty applies, if the competent institution is obliged to take account of future retirement pension rights acquired in another Member State, provided that the worker has been entitled to social security benefits, either under the national rules alone or pursuant to the Community rules, would it be sufficient in order to obtain the unemployment allowance for persons of more than 52 years of age, for a worker to have completed, either through contributions made in another Member State alone or by cumulating those made in Spain with those made in such other Member State or States, the qualifying period required by one or other Member State or, on the contrary, would it be necessary to complete the qualifying periods laid down in Article 161(1)(b) of the consolidated version of the General Law on Social Security?'

15 It is clear at the outset that the first question is identical to the second question to which the Court replied in *Martínez Losada* and that the second question in this case, to the extent that it is not merely hypothetical, was also answered in that case. In order to give the national court an answer which will be helpful in deciding the case before it, it is therefore necessary to reformulate the questions.

16 In *Martínez Losada* the Court held that an allowance such as that provided for by the Spanish Law for unemployed persons of more than 52 years of age constitutes an unemployment benefit within the meaning of Regulation No 1408/71. Under Article 67 of that regulation, the award of unemployment benefits is subject to two types of condition: first, the condition set out in Article 67(3) ('the Community condition') and secondly the condition or conditions provided for under national law ('the national conditions').

17 In the present case, the Community condition is fulfilled only if the claimant has contributed or is deemed to have contributed to the Spanish social security scheme. As the Court stated in paragraph 37 of the judgment in *Martínez Losada*, it is for the national court to determine whether the periods for which the competent Spanish institution paid contributions to the sickness insurance and family benefits schemes on behalf of the applicant in the main proceedings constitute periods of insurance under its domestic legislation.

18 If contributions were neither paid nor deemed to have been paid in the last instance to the Spanish social security scheme, there is no entitlement to the allowance in dispute either under Article 67 of Regulation No 1408/71 or under Article 51 of the Treaty. However, if the claimant paid contributions or is deemed to have paid contributions in the last instance to the Spanish social security scheme, it must be ascertained whether the national conditions are fulfilled. In that respect, it must be stressed that the question to be determined is not whether the claimant is entitled to a retirement pension in Spain but whether he fulfils the conditions, other than the condition relating to age, provided for under Spanish law for the award of a retirement pension.

19 It follows that the issue raised by the national court is essentially whether the qualifying period which must be completed in order to be eligible for an unemployment allowance such as that provided for under the Spanish Law for unemployed persons of more than 52 years of age is determined solely by reference to the law

of that Member State or by the law of the Member State or Member States to whose social security schemes the person concerned contributed. In addition, the national court asks whether it is possible for the period of insurance required under Spanish law to be completed by contributions paid in whole or in part to the social security schemes of one or more other Member States.

20 The Spanish Government argues that in order to be entitled to the unemployment allowance introduced by Article 215(3) of the Spanish Law for unemployed persons of over 52 years of age, the person concerned must have completed the insurance periods provided for under Article 161(1)(b) of that Law.

21 The Commission considers that the condition imposed by the Spanish Law that award of the unemployment allowance for unemployed persons of over 52 years of age is conditional upon payment of contributions to a retirement pension scheme for a period of 15 years is compatible with Articles 48 and 51 of the Treaty and with Regulation No 1408/71 provided that the contributions can, during that period, have been paid in whole or in part to the social security scheme of another Member State.

22 In its reply to the fourth question in *Martínez Losada* the Court held that it is not contrary to Articles 48 and 51 of the Treaty, or to Regulation No 1408/71, for national legislation to require the claimant to have paid contributions for 15 years to a pension scheme in one or more Member States in order to qualify for the grant of an unemployment allowance for claimants of over 52 years of age.

23 It is settled case-law that the Member States retain jurisdiction to determine the conditions for granting social security benefits, even if they make them more strict,

provided that the new requirements do not give rise to overt or disguised discrimination between Community workers (see to that effect Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27).

24 The competent authority is therefore entitled to impose, in accordance with its domestic law, any qualifying period provided for thereunder.

25 However, as the Commission rightly pointed out, the contributions may be paid in whole or in part to the social security scheme of another Member State for that period.

26 The reply to the questions referred is therefore that the qualifying period which must have been completed in order to be eligible for an unemployment allowance such as that introduced by the Spanish Law for unemployed persons of over 52 years of age is determined by the legislation of that Member State, provided that contributions paid in whole or in part to the social security schemes of one or more other Member States are also deemed to count towards that period.

Costs

27 The costs incurred by the Spanish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Juzgado de lo Social de Santiago de Compostela by orders of 21 September 1995 and 30 April 1997, hereby rules:

The qualifying period which must have been completed in order to be eligible for an unemployment allowance such as that introduced by the Spanish General Law on Social Security, as codified by Royal Legislative Decree No 1/94 of 20 June 1994, for unemployed persons of over 52 years of age is determined by the legislation of that Member State, provided that contributions paid in whole or in part to the social security schemes of one or more other Member States are also deemed to count towards that period.

Mointinho de Almeida Gulmann Edward

Sevón Wathelet

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber