JUDGMENT OF THE COURT (First Chamber)
17 December 1987 *

In Case 323/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal du travail, Nivelles, Belgium, for a preliminary ruling in the proceedings pending before that court between

Giuseppe Collini

and

Office national des pensions pour travailleurs salariés (ONPTS)

on the interpretation of Article 46 (3) of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community,

THE COURT (First Chamber),

composed of: G. Bosco, President of Chamber, R. Joliet and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, administrator

after considering the observations submitted on behalf of

Giuseppe Collini, the plaintiff in the remaining proceedings, by D. Rossini, trade-union representative,

Office national des pensions pour travailleurs salariés, the defendant in the main proceedings, in the written procedure by M. Lardinois, of the Brussels Bar and in the oral procedure by J. Peltot,

* Language of the Case: French.

the Italian Government by P. G. Ferri, Avvocato dello Stato, acting as Agent,

the Commission of the European Communities, by its Legal Adviser, D. Gouloussis, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 8 October 1987,

after hearing the opinion of the Advocate General delivered at the sitting on 19 November 1987,

gives the following

Judgment

1 By a judgment of 16 December 1986, the tribunal du travail (Labour Tribunal), Nivelles, referred two questions to the Court of Justice for a preliminary ruling on the interpretation of Article 46 (3) of Regulation No 1408/71 of the Council of 14 June 1971 (Official Journal, English Special Edition 1971 (II) p. 416) on the application of social security schemes to employed persons and their families moving within the Community.

2 The questions were raised in proceedings brought by Giuseppe Collini, an Italian migrant worker, against the Office national belge des pensions pour travailleurs salariés (National Pensions Office for Employed Persons, hereinafter referred to as the 'ONPTS'). Mr Collini's working life comprised seven years of employment in Italy and 35 years of employment in Belgium. He criticizes the ONPTS for calculating his Belgian pension pursuant to the rule for preventing the overlapping of benefits contained in Article 11 ter of Royal Decree No 50 on retirement pensions and survivors' pensions for employed persons. According to Mr Collini, the ONPTS should have applied the anti-overlapping rule contained in Article 46 (3) of Regulation No 1408/71.

3 Mr Collini's 35 years of employment in Belgium alone would have entitled him to a pension of BFR 326 389. The ONPTS calculated that pension by adding eight years of notional insurance cover to the 35 years, pursuant to Article 11 bis of Royal Decree No 50. However, in view of Mr Collini's period of employment in Italy, the ONPTS, applying the anti-overlapping rule contained in Article 11 ter of Royal Decree No 50, reduced the number of years of notional insurance cover from eight to three and, consequently, granted Mr Collini a pension of only BFR 300 490.

4 In addition to that Belgian pension, Mr Collini receives an Italian pension. His seven years of employment in Italy would not of themselves have entitled Mr Collini to a pension. However, the competent Italian institution was able to grant him a pension of BFR 23 829 by taking account of the total duration of the insurance periods completed by Mr Collini in Italy and Belgium.

5 The Belgian pension of BFR 326 389 constitutes an independent benefit of the kind referred to in Article 46 (1) of Regulation No 1408/71, whereas the Italian pension of BFR 23 829 constitutes a pro rata pension of the kind referred to in Article 46 (2) (b) of the same regulation.

6 It is apparent from the foregoing that the sum of the Belgian pension, reduced by application of the anti-overlapping rule contained in Article 11 ter of Royal Decree No 50 (BFR 300 490), and of the pro rata Italian pension (BFR 23 829), is lower than the amount of the independent Belgian pension to which Mr Collini would have been entitled under Article 11 bis of Royal Decree No 50 if his working life had been limited to 35 years of employment in Belgium (BFR 326 389). Mr Collini, who worked for seven years in Italy and for 35 years in Belgium, has thus received a lower pension than he would have received if he had worked for only 35 years in Belgium. This he considers to be an infringement of the rights which he has acquired under the Belgian legislation and he seeks to have his Belgian pension calculated in accordance with Article 46 of Regulation No 1408/71, and in particular with the rule for preventing the overlapping of benefits contained in Article 46 (3).

7 In those circumstances, the tribunal du travail, Nivelles, submitted the following two questions to the Court on the interpretation of the Community anti-overlapping rule contained in Article 46 (3) of Regulation No 1408/71:

'(1) In the cases in which a benefit determined under Article 46 (1) of Regulation No 1408/71 is subject to the reduction provided for in Article 46 (3), must that reduction always be applied, or only where insurance periods are duplicated, as the preamble to the regulation (eighth recital) would appear to suggest?

(2) Having regard to the fact that the first subparagraph of Article 46 (3) refers to Article 46 (1) and (2) whilst the second subparagraph refers only to Article 46 (1), how exactly is the adjustment factor to be determined when only one of the benefits in question is determined according to the provisions of Article 46 (1)?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the arguments of the parties.

The first question

9 In its first question, the national court seeks essentially to determine whether the sum of the benefits calculated in accordance with Article 46 (1) and (2) of Regulation No 1408/71 must be reduced in all cases in which it exceeds the ceiling referred to in Article 46 (3) or only in cases in which that ceiling is exceeded because of the duplication of insurance periods.

10 It must be remembered, in the first place, that the first subparagraph of Article 46 (3) fixes the ceiling up to which a migrant worker is entitled to the sum of the benefits calculated in accordance with Article 46 (1) and (2), that is to say the sum of the autonomous and pro rata benefits. According to that article, the ceiling corresponds to 'the limit of the highest' theoretical amount of the pensions, that is to say the amount to which the worker would have been entitled if he had completed all the insurance periods in question not in different Member States but in the Member State whose legislation would have given him the highest pension. It is agreed that in this case that ceiling corresponds to the amount of the Belgian pension to which Mr Collini would have been entitled if he had worked for 42 years in Belgium and that the theoretical Belgian pension, calculated in accordance

with Article 46 (2) (a) and (c), amounts to BFR 336 748. It is therefore within the limits of that ceiling that Mr Collini is entitled to the sum of the independent Belgian benefit (BFR 326 389) and the pro rata Italian benefit (BFR 23 829).

11 It must then be observed that, as the Court recalled in its judgment of 13 March 1986 in Case 296/84 *Sinatra* v *FNROM* [1986] ECR 1047, paragraph 19, under Article 40 (1) of Regulation No 1408/71, Article 46, including the anti-overlapping rule contained in paragraph (3) thereof, is applicable by analogy to invalidity benefits where a worker has been subject to the legislation of two or more Member States, and the legislation of at least one of those Member States makes the amount of the benefits dependent on the length of the insurance periods. Article 46 applies, therefore, in cases in which the worker is subject to two bodies of legislation, one of which makes the amount of the benefits dependent upon the length of the insurance periods ('type B' legislation) whereas the other does not, provided that the minimum qualifying period for entitlement to the benefit has been completed ('type A' legislation). Although in such cases the overlapping does not derive from a duplication of insurance periods, Article 46 applies. This shows that Article 46 (3) applies where the sum of the benefits concerned exceeds the ceiling laid down therein, even if the exceeding of that ceiling is not due to the duplication of insurance periods.

12 It must also be borne in mind that, according to the eighth recital of the preamble to Regulation No 1408/71, the ceiling provided for in Article 46 (3) is necessary 'to avoid unjustified overlapping of benefits which could result in particular from the duplication of insurance periods'. That recital merely confirms the fact that the rule for preventing the overlapping of benefits contained in Article 46 (3) does not apply exclusively to cases in which the ceiling is exceeded because of a duplication of insurance periods.

13 In those circumstances, it must be stated in reply to the first question that the anti-overlapping rule in Article 46 (3) applies in all cases in which the total sum of the benefits calculated in accordance with Article 46 (1) and (2) exceeds the limit

of the highest theoretical amount of pension, even if the exceeding of that limit is not due to the duplication of insurance periods.

The second question

14 The national court's second question is essentially concerned with the way in which the amount of benefit must be adjusted pursuant to the second subparagraph of Article 46 (3) of Regulation No 1408/71 in the event of the ceiling referred to in the foregoing subparagraph being exceeded, where only one institution provides an independent benefit.

15 The second subparagraph of Article 46 (3) provides that: 'any institution applying paragraph (1) shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with . . . paragraph (1)'. Where several institutions provide independent benefits, that provision thus requires each of them to adjust its benefit by an amount corresponding to the proportion which the amount of its benefit bears to the total sum of the independent benefits. The second subparagraph of Article 46 (3) is thus intended to apportion the amount by which the ceiling referred in the first subparagraph is exceeded amongst the various institutions paying independent benefits. That apportionment entails the determination of reduction factors depending on the proportion which each independent benefit bears to the total sum of the independent benefits.

16 It follows that such an apportionment is unnecessary where only one institution pays an independent benefit. In such a case, 'the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with . . . paragraph (1)' referred to in the second subparagraph of Article 46 (3) is, by definition, equal to one. In those circumstances, the sole institution paying an independent benefit must adjust it by reducing it by the full amount by which the sum of the independent benefit and the pro rata benefit exceeds the ceiling referred to in the first subparagraph of Article 46 (3).

17 Moreover, the application of the adjustments provided for in the second subparagraph of Article 46 (3) is based on the principle that the total sum of the benefits calculated in accordance with Article 46 (1) and (2) may not exceed the ceiling laid down in the first subparagraph of Article 46 (3). That principle is laid

down in the very wording of the first subparagraph. It is apparent from that provision that the entitlement of the migrant worker to the total sum of the benefits concerned is subject to the limit of the ceiling prescribed in that provision.

18 It must therefore be stated in reply to the second question that where there is only one institution providing an independent benefit for the purposes of Article 46 (1), that institution alone must reduce its benefit pursuant to the second subparagraph of Article 46 (3), and must reduce it by the full amount by which the total sum of the benefits calculated in accordance with Article 46 (1) and (2) exceeds the limit referred to in the first subparagraph of Article 46 (3).

Costs

19 The costs incurred by the Commission of the European Communities and the Italian Government, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings 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 (First Chamber),

in reply to the questions submitted to it by the tribunal du travail, Nivelles, by judgment of 16 December 1986, hereby rules:

(1) The anti-overlapping rule in Article 46 (3) of Regulation No 1408/71 applies in all cases in which the total sum of the benefits calculated in accordance with Article 46 (1) and (2) exceeds the limit of the highest theoretical amount of pension, even if the exceeding of that limit is not due to the duplication of insurance periods.

(2) Where there is only one institution providing an independent benefit for the purposes of Article 46 (1) of Regulation No 1408/71, that institution alone must reduce its benefit pursuant to the second subparagraph of Article 46 (3), and must reduce it by the full amount by which the total sum of the benefits calculated in accordance with Article 46 (1) and (2) exceeds the limit referred to in the first subparagraph of Article 46 (3).

Bosco Joliet Schockweiler

Delivered in open court in Luxembourg on 17 December 1987.

P. Heim
Registrar

G. Bosco
President of the First Chamber