JUDGMENT OF THE COURT (Fifth Chamber)
17 December 1998 *

In Case C-153/97,

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

Aristóteles Grajera Rodríguez

and

Instituto Nacional de la Seguridad Social (INSS), and

Tesorería General de la Seguridad Social (TGSS),

on the validity of heading D, paragraph 4, of Annex VI to 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 (OJ 1983 L 230, p. 6), as adapted by part VIII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) and as subsequently amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), and on the interpretation of that regulation,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, D. A. O. Edward and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Grajera Rodríguez, by Roque Méndez Robleda and Benjamín Mayo Martínez, of the Orense Bar,

— the Spanish Government, by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent,

— the Council of the European Union, by Diego Canga Fano and Anna Lo Monaco, of its Legal Service, acting as Agents, and

— the Commission of the European Communities, by Peter Hillenkamp, Legal Adviser, 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 Mr Grajera Rodríguez, of the Spanish Government, of the Council and of the Commission at the hearing on 16 July 1998,

after hearing the Opinion of the Advocate General at the sitting on 15 October 1998,

gives the following

Judgment

1 By order of 17 March 1997, received at the Court on 23 April 1997, the Tribunal Supremo (Supreme Court of Spain) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the validity of heading D, paragraph 4, of Annex VI to 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 (OJ 1983 L 230, p. 6), as adapted by part VIII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) and as subsequently amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), and on the interpretation of that regulation.

2 Those questions were raised in proceedings brought by Mr Grajera Rodríguez against the Instituto Nacional de la Seguridad Social (National Social Security Institute, 'the INSS') and the Tesorería General de la Seguridad Social (General Social Security Fund, 'the TGSS') concerning the calculation of Mr Grajera Rodríguez's old-age pension.

3 Article 46 of Regulation No 1408/71 lays down the rules for the award of the benefits provided for in the chapter on old-age pensions. Article 46(2) provides, *inter alia*, as follows:

'(a) the competent institution shall calculate the theoretical amount of the benefit to which the persons concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislations of the Member States to which the employed person or self-employed person was

subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph.'

4 Article 47 lays down additional rules for calculating benefits. Article 47(1) deals specifically with the calculation of the theoretical amount referred to in Article 46(2)(a), and includes the following provision:

'(g) where, under the legislation of a Member State, benefits are calculated on the basis of average contributions, the competent institution shall determine that average by reference only to those periods of insurance completed under the legislation of the said State.'

5 Finally, Annex VI to Regulation No 1408/71, which, in accordance with Article 89 thereof, sets out special procedures for applying the legislations of certain Member States, includes the following two subparagraphs in paragraph 4 under heading D (Spain):

'(a) Under Article 47 of the Regulation, the calculation of the theoretical Spanish benefit shall be carried out on the basis of the actual contributions of the insured person during the years immediately preceding payment of the last contribution to the Spanish social security.

(b) The amount of the pension obtained shall be increased by the amount of the increases and revalorisations calculated for each year after and up to the year preceding the materialisation of the risk for pensions of the same kind.'

6 It appears from the documents before the Court that, under Spanish legislation, the amount of employed persons' old-age and permanent invalidity pensions does not vary in amount according to the number of contribution periods or the length of employment of the person concerned, but is calculated from an average contribution basis corresponding to the salary received over a certain number of years preceding the retirement or the onset of the invalidity. More particularly, pursuant to Article 3 of Law No 26/85 of 31 July 1985, which was in force at the material time and the terms of which were essentially reproduced in Paragraphs 140 and 160 of the revised Ley General de Seguridad Social (General Law on Social Security) approved by Royal Legislative Decree 1/1994 of 20 June 1994, the basis of assessment for such pensions is to be equal to the quotient obtained by dividing by 112 the contribution bases of the person concerned during the 96 months immediately preceding the month in which the risk materialised (application for retirement or declaration of permanent disability). Under those provisions, the bases for the 24 months prior to the month in which the risk materialised are calculated at their face value, whilst the others are updated in accordance with the consumer price index. Moreover, if a contribution obligation is lacking for all or part of the period under consideration, the gaps are filled by applying the minimum bases applicable to workers aged over 18 years. Finally, the basis for contribution can in no event be lower than the minimum basis provided for by the legislation in force or higher than the maximum basis.

7 Mr Grajera Rodríguez, a worker of Spanish nationality, was employed both in Spain, from 1953 to 1961 and from 1967 to 1969, and in Germany, from 1961 to 1967 and from 1969 to 1993.

8 In 1993 the INSS awarded him a monthly retirement pension of PTA 5 141 calculated on the basis of the contributions paid in Spain before 1969, with revalorisation, under a calculation method conforming to the rules entailed by heading D, paragraph 4, of Annex VI to Regulation No 1408/71. Mr Grajera Rodríguez disputed the amount of that pension, arguing that the reference period to be taken as a basis was that between 1985 and 1992, that is to say, the eight years before his retirement.

9 By judgment of 24 January 1995 the Juzgado de lo Social (Social Court) No 30, Madrid, granted Mr Grajera Rodríguez's application and ordered the INSS to pay him a pension calculated on the basis of the ceilings for contributions applicable for manual workers in Spain during that period, amounting, with certain supplements, to PTA 18 517.

10 On appeal by the INSS, the Tribunal Superior de Justicia (High Court of Justice), Madrid, quashed that judgment on 9 April 1996 and declared that the old-age pension should be calculated on the basis of the contributions for the eight years before 1969, the last year of contribution to the Spanish social security scheme, with the revalorisations applicable since then until his retirement.

11 On further appeal, the Tribunal Supremo had doubts as to the validity, in the light of Articles 48 and 51 of the EC Treaty, of the system of calculation entailed by heading D, paragraph 4, of Annex VI to Regulation No 1408/71. Although it acknowledged that the Court had already ruled on a similar question in Case C-251/94 *Lafuente Nieto* v *INSS and TGSS* [1996] ECR I-4187, the Spanish supreme court considered that some uncertainty remained on the question and decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the calculation method laid down in heading D, paragraph 4, of Annex VI to Regulation No 1408/71, as amended by Regulation No 1248/92 — under which the Spanish theoretical pension is determined on the basis of the worker's contributions during the calculation period immediately preceding payment of his last contribution to the Spanish social security, with revalorisation of the resultant theoretical pension on the same terms as those which, under Spanish national legislation, would have been applied to revalorisation of a pension becoming payable at the time of payment of the last contribution in Spain — be regarded as contrary to Articles 48 and 51 of the Treaty establishing the European Community?

(2) In order to guarantee equal treatment for migrant workers in matters of social security, must the basis for determining the Spanish pension be calculated by reference to what would have been the bases for the migrant worker's contribu-

tions if he had stayed in Spain during the calculation period preceding materialisation of the risk provided for on a general basis by Spanish legislation?'

12 By those two questions, which should be considered together, the referring court is asking whether the system of calculation deriving from heading D, paragraph 4, of Annex VI to Regulation No 1408/71 (hereinafter 'the contested annex') must be considered contrary to Articles 48 and 51 of the Treaty and whether the basis for determining the Spanish pension must be calculated from the theoretical bases on which the migrant worker would have contributed if he had remained in Spain during the period immediately preceding the materialisation of the risk.

13 It appears from the order for reference that the national court considers that only the updating of the contribution basis conforms to the principles of Community law, while the revalorisation of the amount of the pension as provided for in the contested annex does not. It considers that, in order not to penalise or favour a migrant worker who has paid no contributions in Spain during the reference period laid down by the Spanish legislation, it is preferable to 'take, as the basis for calculation, the average bases for the calculation period prior to materialisation of the risk, that is to say the average of the minimum and maximum bases of the contribution bracket corresponding to the worker's occupational category over the last eight years'.

14 Mr Grajera Rodríguez submits that the system of calculation set up by the contested annex is contrary to Articles 48 and 51 of the Treaty *inter alia* because it is practically impossible to implement without any data being available as to the actual contribution bases of the insured person and because it manifestly discriminates against migrant workers. He considers that account must be taken, in calculating the basis for determining the pension, of the amounts actually paid to the worker during the eight years immediately preceding the materialisation of the risk (even if they were paid in another Member State), subject to the limits fixed by Spanish law. In the alternative, he proposes that the basis for determining the Spanish pension should be calculated from the bases on which the migrant worker would have paid contributions had he remained in Spain during the calculation period preceding the materialisation of the risk, as generally provided for by the Spanish legislation.

15 The Spanish Government submits, however, referring *inter alia* to the judgment in *Lafuente Nieto*, cited above, that the purpose of the contested annex is precisely to ensure the compatibility of Article 47(1)(g) with the objectives of the Treaty. It takes the view that the system of calculation laid down reflects the general principles governing the social security system in Spain and it points out that there is twofold updating in the sense that both the contribution bases and the resulting pension are updated in order to ensure a proper revalorisation of contribution bases used in the distant past.

16 The Council and the Commission also advocate abiding by the principles outlined by the Court in the judgment in *Lafuente Nieto*, cited above, according to which the contested provisions imply that the theoretical amount of the benefit, calculated on the basis of the contributions actually paid by the insured under the Spanish legislation, should be duly revalorised and increased as though the person concerned had continued to work under the same conditions in Spain. They submit that the problems of interpretation of the national legislation raised by the referring court should be solved on the basis of those principles. In addition, the Council and the Commission do not rule out the possibility that the convention on social security concluded between the Federal Republic of Germany and the Kingdom of Spain on 4 December 1973, which entered into force on 1 November 1977 (hereinafter 'the convention'), should be applied where this proves more advantageous for the person concerned than the application of the Regulation.

17 It should be noted that Article 47 of Regulation No 1408/71, the contested annex to which lays down the implementing rules for Spain, constitutes an additional rule for the calculation of the theoretical amount referred to in Article 46(2)(a). It must therefore be interpreted in the light both of that provision and, as the Court held in Case C-406/93 *Reichling* v *INAMI* [1994] ECR I-4061, of the objective laid down by Article 51 of the Treaty, which implies in particular that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement.

18 Nevertheless, contrary to what the plaintiff in the main proceedings maintains, the obligation not to put migrant workers who have availed themselves of their right of free movement at a disadvantage does not mean that the contested provision is necessarily contrary to the objective laid down in Article 51 of the Treaty because it does not allow the amount of contributions paid in another Member State to be taken into account in order to determine the average contribution basis. That obligation merely implies that the basis must be the same for the migrant worker as it would have been if he had not availed himself of his right of free movement (Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* v *INSS* [1997] ECR I-5501, paragraph 21).

19 In circumstances such as those at issue in the main proceedings, therefore, although account is to be taken, under the provisions of Article 47(1)(g) of Regulation No 1408/71, only of the amount of the contributions paid under the legislation concerned, that amount must be updated and revalorised so as to correspond with what the person concerned would have paid had he continued to work under the same conditions in the Member State in question (judgment in *Lafuente Nieto*, cited above, paragraphs 39 and 40).

20 The Court has already stated, both in the judgment in *Lafuente Nieto*, cited above (paragraphs 41 and 42), and in the judgment in *Naranjo Arjona and Others*, cited above (paragraphs 23 and 24), that the new provisions which Regulation No 1248/92 introduced into heading D, paragraph 4, of Annex VI to Regulation No 1408/71 are consistent with that interpretation: they merely provide additional clarification of the detailed rules set out in that regulation under which the average contribution basis is to be determined with sole reference to insurance periods completed under the legislation concerned, whilst leaving the content of Article 47(1)(g) unaltered, and are intended only to ensure the compatibility thereof with the principles set out in Article 51 of the Treaty.

21 In the light of the above, there is no need to distinguish, from the point of view of the principles of Community law, between the updating of the contribution basis and the revalorisation of the amount of the pension. In both cases the objective is the same — to arrive at an amount of pension equivalent to that which the migrant worker would have received had he continued to work under the same conditions

in the Member State in question starting from the basis of the insured person's actual contributions before he went abroad, with effective updating taking account of the rise in the cost of living and the increases in benefits of the same kind.

22 In that connection, as the Advocate General has observed at point 18 of his Opinion, the practical difficulties in implementing the rules laid down by the contested annex, arising *inter alia* from the possible absence of reliable data on contribution bases in the past, are not such as to affect the validity of those rules: those rules do not lay down either a particular method for determining contribution bases or any method for updating those bases or the pension derived from them. They are merely intended to achieve the objective described in the previous paragraph while respecting the requirement, laid down in Article 47(1)(g) of Regulation No 1408/71, that account is to be taken only of periods of insurance completed under the relevant legislation.

23 A method of calculation such as that advocated by the referring court does not allow that requirement to be met inasmuch as it takes as a reference period a period during which the migrant worker did not actually contribute to the national social security scheme and which has, moreover, already been taken into account under the legislation of the other Member State in which the person concerned has worked.

24 The contested annex thus implies that the calculation of the contribution basis is determined by the amount of the contributions paid under Spanish legislation only and that the theoretical amount of the benefit must be updated and revalorised as though the person concerned had continued to work under the same conditions in Spain. Accordingly, in the event of a dispute over the rules for determining the initial contribution bases to be taken into account and the method for updating those bases and revalorising the resulting amount of pension, it is for the national court to determine what are the most appropriate means in national law of achieving that end.

25 Finally, it should be borne in mind that, as the Council pointed out at the hearing, the contested annex has been adapted by Council Regulation (EC) No 1223/98 of 4 June 1998 (OJ 1998 L 168, p. 1), so as to delete in subparagraph (b) the phrase 'and up to the year preceding the materialisation of the risk'. As the Advocate General has observed at point 21 of his Opinion, it is clear from recital 8 in the preamble to that regulation, which expressly refers to the judgment in *Lafuente Nieto*, cited above, that the adaptation is intended to allow the overall updating of the theoretical amount of the benefit.

26 However, it cannot be inferred merely on the basis of that adaptation that the limitation of the period for updating in the previous version of the contested annex, which has, moreover, not been called into question on that point either by the referring court or by the parties concerned, is invalid in the light of the objective described in paragraph 21 above. Even if the Council considered that the deletion of the phrase in question was more appropriate in the light of the case-law, that phrase has only a limited application inasmuch as, under a fairly widespread simplified procedure, it takes account only of updating on a 'full year' basis and therefore limits that updating to the last year preceding that in which the risk materialises. In any event, such a choice, in view of its minimal effect on the amount of the pension, must be viewed as falling within the normal discretion which the Council enjoys in establishing rules for coordinating the social security schemes of the different Member States.

27 That being so, as the Council and the Commission have pointed out, the contested provisions of the Regulation must not stand in the way of the possible application of the convention mentioned in paragraph 16 above, where that convention might be relied on to his advantage by the person concerned.

28 In that connection, it must be borne in mind that, in Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, the Court ruled that Articles 48 and 51 of the Treaty preclude the loss of social security advantages which would result from the inapplicability, following the entry into force of Council Regulation (EEC) No 1408/71, of conventions operating between two or more Member States and incorporated in their national law. In Case C-475/93

Thévenon v *Landesversicherungsanstalt Rheinland Pfalz* [1995] ECR I-3813, the Court specified, however, that the principle could not apply to workers who did not exercise their right to freedom of movement until after the entry into force of that regulation.

29 In the proceedings in the national court it is common ground that Mr Grajera Rodríguez was already working in Germany before the entry into force in Spain, on 1 January 1986, of Regulation No 1408/71, the provisions of which replaced those of the convention, unless otherwise provided. It is unacceptable that he should thereby be deprived of any rights and advantages conferred on him by the convention

30 As the Court pointed out in paragraph 28 of the judgment in *Naranjo Arjona*, cited above, the updating of the contributions, in accordance with the provisions of Regulation No 1408/71 as interpreted by the Court, pursues the same objectives as the convention and should normally permit them to be attained. However, it is possible that the application of the rules of the convention, which allow the level of the contribution basis which a worker reaches at the end of his working life in Germany to be taken into account, whilst at the same time referring to the contribution bases in force in Spain for the professional category concerned, might lead to a more favourable result for the person concerned than that entailed by the contested provisions.

31 It is therefore for the national court to verify whether application of that convention would in practice be more advantageous for the workers concerned than would application of the Regulation. If so, by way of exception and in accordance with the principle stated in the *Rönfeldt* judgment, cited above, the rules laid down by the convention will have to be applied. If not, the rules laid down by the Regulation, as interpreted by the Court, must be applied.

32 The answer to be given to the national court must therefore be that consideration of the questions referred for a preliminary ruling has revealed nothing of such a kind as to affect the validity of the contested annex.

Costs

33 The costs incurred by the Spanish Government, the Council and the Commission, 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 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 Tribunal Supremo by order of 17 March 1997, hereby rules:

Consideration of the questions referred for a preliminary ruling has revealed nothing of such a kind as to affect the validity of heading D, paragraph 4, of Annex VI to 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, as adapted by part VIII of Annex I to the Act concerning the conditions of

accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties and as subsequently amended by Council Regulation (EEC) No 1248/92 of 30 April 1992.

Puissochet Moitinho de Almeida Gulmann

Edward Wathelet

Delivered in open court in Luxembourg on 17 December 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber