JUDGMENT OF THE COURT
7 June 1988 *

In Case 20/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht (Federal Social Court) for a preliminary ruling in the proceedings pending before that court between

Mario Roviello

and

Landesversicherungsanstalt Schwaben (Regional Insurance Office, Schwaben),

on the interpretation of Point 15 of Section C in Annex VI to Regulation No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT,

composed of: G. Bosco, President of Chamber, acting as President, O. Due and J. C. Moitinho de Almeida (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Mario Roviello, the plaintiff in the main proceedings, by K. Leingärtner and W. Elsner, members of the Legal Department of the Deutscher Gewerkschaftsbund (German Trade Union Federation), Kassel, during the written procedure, and by K. Leingärtner during the oral procedure,

* Language of the Case: German.

the Landesversicherungsanstalt Schwaben, the defendant in the main proceedings, by W. Wanders, Manager,

the Council of the European Communities, by G. Peeters, Legal Adviser,

the European Parliament, by Francesco Pasetti-Bombardella, Jurisconsult of the Parliament, and Johann Schoo, a member of its Legal Department,

the Commission of the European Communities, by Norbert Koch, Legal Adviser, assisted by Bernd Schulte, of the Max-Planck-Institut für ausländisches und internationales Sozialrecht, Munich,

having regard to the Report for the Hearing as supplemented after the hearing on 8 April 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 October 1987,

gives the following

Judgment

1 By an order of 28 November 1984, which was received at the Court on 24 January 1985, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Point 15 of Section C in Annex VI to Regulation No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416), as amended by Council Regulation No 2000/83 of 2 June 1983 (Official Journal L 230, p. 1) (hereinafter referred to as 'Point 15').

2 The questions arose in the course of proceedings concerning the refusal of the Landesversicherungsanstalt Schwaben to grant Mr Roviello, the plaintiff in the main proceedings, an occupational invalidity pension.

3 It is apparent from the documents before the Court that Paragraph 1246 of the Reichsversicherungsordnung (German Social Insurance Code) provides that an occupational invalidity pension is due to an insured person (a) whose occupation or activity prior to the materialization of the risk was subject to compulsory insurance for at least 36 of the preceding 60 months; (b) who has completed a waiting period of at least 60 months of insurance; and (c) whose earning capacity has been reduced at least by half having regard to the occupation pursued up to that time.

4 With regard to the finding that there had been a reduction in the plaintiff's capacity to earn his living, it appears that there is a system for classifying applicants with a view to assigning them to other activities. There are four categories of workers, namely (a) foremen and highly skilled workers, (b) skilled workers, (c) semi-skilled workers and (d) unskilled workers. An occupational invalidity pension may be refused if the applicant's incapacity is such that he could reasonably be assigned to a job forming part of the activities characteristic of the category immediately below that which covered the occupation which he pursued until that time. If his incapacity is such that he can only be assigned to work covered by a category other than that immediately below or is wholly unable to work, he is granted a pension.

5 It appears from the file that that system of classification often caused the competent German institutions to carry out long and difficult enquiries in the country of origin in order to determine the exact nature of the qualification which migrant workers whose invalidity arose when they were working in the Federal Republic of Germany claimed to have. Those difficulties led to the insertion, by means of Regulation No 2000/83, of Point 15 of Section C in Annex VI to Regulation No 1408/71. It reads as follows:

'Where under German legislation account must be taken of the occupation hitherto pursued by the person concerned for the purpose of determining his entitlement to a pension in respect of occupational invalidity or incapacity for work, or

a miner's pension in respect of a reduction in his capacity to work as a miner, or a miner's pension in respect of occupational invalidity or incapacity for work, that occupation shall be determined by taking account only of insurable activities under German legislation.'

6 Mr Roviello, an Italian national, declared that he had worked as a tiler in Italy from 1960 to 1974 and was subject to compulsory insurance as an employed person there and later worked as a self-employed person. Subsequently, he went to the Federal Republic of Germany, worked there intermittently from 4 May 1976 to June 1980 and was there subject to a compulsory insurance scheme. He therefore completed 48 months of employment subject to compulsory insurance in that country. Following the rejection of his application for an occupational invalidity pension, he brought legal proceedings but the Landessozialgericht (Higher Social Court) found that for the purposes of German legislation, the plaintiff had no qualification as a tiler and had not pursued that occupation continuously. He could not therefore be regarded as a skilled worker but only as a semi-skilled worker. On the basis of the system of classification described above, he could be assigned to work as an unskilled worker, which was the category immediately below that of semi-skilled worker, and therefore was not entitled to a pension. Mr Roviello appealed to the Bundessozialgericht.

7 Since it considered that the dispute raised questions concerning the interpretation of Community law, the Bundessozialgericht stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) For the purpose of determining entitlement to an occupational invalidity pension, is Point 15 of Section C in Annex VI of Regulation No 1408/71, as amended by Regulation (EEC) No 2000/83 (Official Journal L 230, 22.8.1983, p. 1) and by Regulation (EEC) No 2001/83 (Official Journal L 230, 22.8.1983, p. 6), to be interpreted as meaning that account must be taken of the occupation hitherto pursued by an insured person only where the periods of insurance necessary for the acquisition of entitlement to that pension were completed solely in activities subject to compulsory insurance under German legislation?

(2) If the first question is answered in the affirmative, is Point 15 also applicable to contingencies which materialized before the rule entered into force (1 July 1982)?

(3) If the second question is answered in the negative, does it follow from Point 15 that entitlement to a pension which arises as a result of the materialization of such a contingency but which has not yet been established must be restricted to the period prior to the date on which the rule entered into force (1 July 1982)?'

8 Reference is made to the Report for the Hearing for a fuller account of the national legislation at issue, the facts of the case, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It must first be observed, as the Bundessozialgericht points out, that Point 15 was inserted in Regulation No 2000/83 after a proposal which did not contain it had been submitted both to the Economic and Social Committee and to the Parliament. The Committee of Permanent Representatives therefore added Point 15 and thus amended the text approved by the Parliament. That text was finally adopted by the Council without having been once again submitted to the Parliament. The plaintiff in the main proceedings claims that Point 15 is for that reason vitiated by a breach of essential procedural requirements and is therefore void.

10 Since the question of the compatibility of Point 15 with Article 51 of the EEC Treaty was raised in the observations submitted to the Court, that issue should be considered first.

11 The plaintiff in the main proceedings claims that Point 15 is void because it must be interpreted as meaning that only the occupation insured in the Federal Republic of Germany is taken into account in determining entitlement to an occupational invalidity pension, which makes it incompatible with Article 51 of the Treaty. In particular, the effect of the waiting period required as a condition for the acquisition of entitlement to a pension as described above is that account is taken only of insurance periods completed in an occupation subject to German legislation.

12 The Landesversicherungsanstalt Schwaben, the defendant in the main proceedings, and the Commission contend, however, that Point 15 must be interpreted as meaning that it applies only to the determination of the occupation pursued until that time by the applicant and requires that that determination be made on the basis only of work performed in the Federal Republic of Germany.

13 The interpretation put forward by the plaintiff in the main proceedings cannot be accepted. In accordance with its terms, Point 15 must be interpreted as meaning that when the nature of the qualification previously obtained determines, under German legislation, entitlement to an occupational invalidity pension or any other pension covered by that point, only activities subject to compulsory insurance under that legislation may be taken into account in determining the qualification.

14 The question therefore arises whether Point 15, thus interpreted, is compatible with Article 51 of the Treaty. In that regard, it must be observed, as the Court has held on several occasions, that the principle of equal treatment prohibits not merely overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

15 However, it must be observed, in the first place, that although the criterion laid down in Point 15 applies independently of the nationality of the worker it is, by its very nature, concerned essentially with migrant workers coming from other Member States who have been employed successively in those States and in the Federal Republic of Germany.

16 It must be noted, secondly, that the provisions of Point 15, combined with those of the German legislation, work to the disadvantage of certain migrant workers who have obtained in another Member State a qualification higher than that which they have in the Federal Republic of Germany, who are unable to obtain recognition of that qualification and may therefore find themselves refused a pension to which

they would have been entitled if Point 15 had not been adopted. The fact that other migrant workers, in other circumstances, may derive an advantage from Point 15 can neither eliminate nor compensate for the discrimination which has just been described.

17 In those circumstances, it must be accepted that Point 15 is not of such a nature as to guarantee the equal treatment required by Article 48 of the Treaty and therefore has no place in the coordination of national laws provided for in Article 51 of the Treaty in order to promote freedom of movement for workers in the Community.

18 It follows that Point 15 of Section C in Annex VI to Regulation No 1408/71 is invalid in so far as it provides, in regard to entitlement to a pension in respect of occupational invalidity or incapacity for work, or a miner's pension in respect of a reduction in his capacity to work as a miner, or a miner's pension in respect of occupational invalidity or incapacity for work, that, where under German legislation account must be taken of the occupation hitherto pursued by the person concerned, that entitlement is to be determined by taking account only of activities subject to compulsory insurance under German legislation.

19 Since Point 15 has been declared void, there is no need to consider whether the essential procedural requirements were fulfilled at the time of its adoption or to reply to the national court's questions as to its interpretation.

Costs

20 The costs incurred by the European Parliament, the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since 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,

in answer to the questions referred to it by the Bundessozialgericht, by order of 28 November 1984, hereby rules:

Point 15 of Section C in Annex VI to Regulation No 1408/71 is invalid in so far as it provides, in regard to entitlement to a pension in respect of occupational invalidity or incapacity for work, or a miner's pension in respect of a reduction in his capacity to work as a miner, or a miner's pension in respect of occupational invalidity or incapacity for work, that, where under German legislation account must be taken of the occupation hitherto pursued by the person concerned, that entitlement is to be determined by taking account only of activities subject to compulsory insurance under German legislation.

Bosco Due Moitinho de Almeida Koopmans Everling

Bahlmann Galmot Kakouris Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 7 June 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President