JUDGMENT OF THE COURT
1 DECEMBER 1970[1]

Union Nationale des Mutualités Socialistes v Mrs Stéphanie Cacciatore, née La Marca (Reference for a preliminary ruling by the Commission de Réclamation de Liège en matière d'assurance obligatoire contre la maladie et l'invalidité)

Case 32/70

Summary

Social security for migrant workers — Invalidity, old-age and death insurance — Aggregation of completed insurance periods — Application of Article 28 (2) of Regulation No 4 — Purpose — Limits

As the object of Article 28 (2) of Regulation No 4 is to simplify administration it cannot affect adversely the rights stemming from Article 51 of the EEC Treaty in favour of individuals. Where a period of less than six months cannot be taken into account in another Member State for lack of sufficient insurance periods completed under its legislation an essential prerequisite for the application of this provision is lacking. In this case the conditions relating to the acquisition by the migrant worker of the right to old-age, death and invalidity benefits are solely governed by the general provisions of Articles 26 to 28 of Regulation No 3.

In Case 32/70

Reference to the Court under Article 177 of the EEC Treaty by the Commission de réclamation de Liège en matière d'Assurance Obligatoire contre la Maladie et l'Invalidité for a preliminary ruling in the action pending before that court between

UNION NATIONALE DES MUTUALITÉS SOCIALISTES, Brussels,

and

STÉPHANIE CACCIATORE, NÉE LA MARCA, 1, Quai Sainte-Barbe, Liège,

1 — Language of the Case: French.

on the interpretation of certain provisions of Regulation No 4 of the EEC on Implementing Procedures and Supplementary Provisions in respect of Regulation No 3 concerning Social Security for Migrant Workers,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

1. From 27 August 1965 to 24 April 1967 Mrs Stéphanie Cacciatore, née La Marca, worked in the Federal Republic of Germany and from 27 April 1967 to 6 May 1967 she worked in Belgium. She finished work on that date because of illness and she received from the Union Nationale des Mutualités Socialistes (hereinafter referred to as 'the UNMS'):

— for 12 months, the benefits in respect of primary incapacity for work. In order to enable these benefits to be paid the Belgian institution had to apply the aggregation provided for by Article 17 of Regulation No 3 of the EEC;

— from the thirteenth month until 29 September 1969, benefits in respect of extended incapacity amounting to Bf. 63 738.

All these benefits were paid to her by virtue of the Belgian Law of 9 August 1963 (Pasinomie belge, Volume II, p. 1067) which provides for three types of allowances for incapacity for work:

— a primary incapacity allowance for 12 months from the beginning of the incapacity for work;

— an extended incapacity allowance, as from the thirteenth month following the period of primary incapacity and for a period of two years;

— an invalidity allowance thereafter. Under the Law of 27 June 1969 (Pasinomie belge, May–June 1969, p. 698) the last allowance replaces the extended incapacity allowance so that from the end of the first year of illness the worker receives an invalidity allowance.

On 8 January 1969 Mrs Cacciatore asked

the Institut National d'Assurance Maladie-Invalidité (hereafter referred to as 'the INAMI') in Brussels to grant her an invalidity pension.

The INAMI sent the file on Mrs Cacciatore to the German institution, the LVA Rheinprovinz. Moreover on 22 June 1969, the INAMI informed the UNMS that Mrs Cacciatore was entitled to the benefits in respect of primary incapacity but could not receive the benefits in respect of extended incapacity or invalidity. In support of this conclusion it relied on Article 146 of the Law of 9 August 1963 and Article 28 (2) of Regulation No 4 of the EEC.

On 13 November 1969 the German authorities informed the INAMI of their decision, which was that Mrs Cacciatore could not be recognized as an invalid under German law as she had insufficient insurance periods.

Since it could not therefore recover from the amounts which might be paid by the German authorities the extended incapacity allowance which had been paid to Mrs Cacciatore, the INAMI asked the UNMS on 12 December 1969 to recover the money from the insured directly and also notified Mrs Cacciatore that she had no right to an invalidity pension from the Belgian authorities. By a letter of 23 December 1969 the UNMS through its Liège office asked Mrs Cacciatore to repay the money.

As she did not comply with this request on 20 January 1970 the UNMS applied to the Commission de réclamation de Liège for an order enforceable against Mrs Cacciatore for the repayment of the money.

By a decision of 3 June 1970 that court stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

'Are the provisions of Article 28 (2) of Regulation No 4 applicable to a worker subject to Type A legislation in one Member State, who acquires in that State (in the present case, Belgium) the right to sickness and invalidity insurance benefits by relying on insurance periods completed in another Member State in accordance with the provisions of Articles 16 and 17 of Regulation No 3, and who subsequently becomes an invalid before completing six months' work in the State where he is subject to Type A legislation, in view of the fact that no benefits can be granted by the other Member State (in this case the Federal Republic of Germany) for lack of sufficient insurance periods?'

2. The order making the reference was received at the Court Registry on 3 July 1970.

The Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided not to hold a preparatory inquiry.

The Commission and the INAMI, an intervening party in the main action, submitted their oral observations at the hearing on 21 October 1970.

The Advocate-General delivered his opinion on 11 November 1970.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

A — *Oral observations submitted by the Institut National d'Assurance Maladie-Invalidité (INAMI)*

The INAMI maintains that since the insurance periods completed by Mrs Cacciatore in Belgium do not amount to six months the provisions of Article 28 (2) of Regulation No 4 do not allow her to receive invalidity benefits. In these circumstances the insured has no right to receive from the Belgian authorities benefits under the invalidity scheme. In addition she has no right to the benefits in respect of extended incapacity as the scheme relating

to extended incapacity comes under that relating to invalidity.
The INAMI states in this respect that the distinction made until the entry into force of the Law of 27 June 1969 between the period of extended incapacity and that of invalidity was made for practical reasons and not because of any substantial differences between the two systems. The main reason was the fact that the part of the benefits in respect of extended incapacity and invalidity paid by the INAMI that was refunded by the Belgian State was different for the two periods. Moreover the extended incapacity scheme was regarded as coming under that relating to invalidity so that the Law of 27 June 1969 which abolished as from that date the first period did not make any real change in substance.
The INAMI further observes that there are no grounds to interpret Article 146 of the Law of 9 August 1963 on which, in conjunction with Regulation No 4 (Article 28 (2)),[9] its refusal to grant the allowance in question is based. It is a provision of domestic law and as such its interpretation is not within the jurisdiction of the Court of Justice.

B — *Written observations submitted by the Commission of the European Communities*

In the view of the *Commission* the aim of Article 28 (2) of Regulation No 4 was to make easier for institutions paying benefits and to avoid the expenses of calculation and transmission being higher than the benefits themselves as the proportionate amounts in respect of periods less than six months are very small. The Commission points out that so that workers do not lose the benefit of any period, however small, the abovementioned article provides that these periods shall be taken into account by the 'other Member States' in order to determine the amount for accounting purposes. The fraction of the amount for accounting purposes which makes up the amount actually to be paid does not always include these periods in its denominator. Therefore as a result of this provision the benefit paid by other countries is to some extent increased in comparison with what would be payable by the mere application of Article 28 (1) (b) of Regulation No 3. The Commission maintains that Article 28 (2) contains some idea of compensation so that without it the first sentence of the article would no longer apply. This also means that if the conditions set out in this article are not all satisfied then the general rules as to aggregation in Article 51 of the EEC Treaty, implemented in respect of invalidity by Articles 26, 27 and 28 of Regulation No 3, would be applicable. In this case, since Mrs Cacciatore only worked in Belgium for eight days, that is, a period which Belgian law regards as insufficient to give rise to a right to benefit, the precise question is whether the first sentence of Article 28 (2) of Regulation No 4 is applicable to her. This is not possible here because even by the aggregation of the period completed in Belgium with that completed in Germany the total period would not be sufficient to give Mrs Cacciatore the right to benefits in Germany. Consequently, as the compensation mentioned above does not apply it must follow that Article 28 (2) of Regulation No 4 is not applicable in this case and that the invalidity benefits payable to Mrs Cacciatore should be calculated by the aggregation rule in Regulation No 3.
The Commission observes that these conclusions are only justified in so far as ths system of invalidity is applicable, which is apparently taken for granted by the court making the reference, and it adds that in order to deal with the concerns on the part of the Belgian court and to give it all the necessary information to make its decision in the main action another problem should perhaps be examined which is more directly related th the subject-matter of the dispute. Such an examination appears to the Commission to be admissible in the present case. It bases its argument on the decided cases of the Court relating to subparagraph (a) of the second paragraph of Article 177 of the Treaty.
The Commission recalls the provisions of the Law of 9 August 1963 establishing three kinds of allowance for incapacity for work including the primary incapacity

allowance and the *extended* incapacity allowance and observes that in this case Mrs Cacciatore received the 'primary incapacity' allowance under Article 17 of Regulation No 3 but may not receive the extended incapacity allowance. There is a 'strange' (étrange) distinction between the two periods, that of primary incapacity and that of extended incapacity, which seems to be because the Belgian institution links the extended incapacity allowance to invalidity allowances and not to sickness allowances by virtue of Article 146 of the Law of 9 August 1963 which is as follows:

> 'The provisions of this law shall not prejudice the provisions of international social security conventions in force in Belgium. For the purposes of the application of the provisions of these conventions the extended incapacity allowance shall be regarded as an invalidity allowance.'

The Commission takes the view that the fact that the article refers to the application of international conventions means that it does not apply where Community regulations are concerned. In this regard it recalls that at Strasbourg, in the Council of Europe, Community regulations were never regarded as international conventions and it does not accept that this article, which constitutes an exception to the general rule, can be applicable outside international conventions *stricto sensu*. In addition this article provides for different treatment for national workers and for those covered by international conventions. Since the case in point does in fact involve a worker from another Member State the application to her of the abovementioned Article 146(2) would be contrary to Regulations Nos 3 and 4 of the Council implementing Article 51 of the EEC Treaty the aim of which is to guarantee to all nationals of Member States equality of treatment under the different national laws and the benefit of social security payments whatever their place of work or place of permanent residence.

The Commission concludes that a negative answer must be given to the question referred by the Belgian court.

Grounds of judgment

1 By a decision of 3 June 1970 the Commission de réclamation de Liège en matière d'Assurance obligatoire contre la maladie et l'invalidité referred to the Court of Justice, pursuant to Article 177 of the Treaty establishing the European Economic Community, the following question: 'Are the provisions of Article 28 (2) of Regulation No 4 applicable to a worker subject to Type A legislation in one Member State, who acquires in that State (in the present case, Belgium) the right to sickness and invalidity insurance benefits by relying on insurance periods completed in another Member State in accordance with the provisions of Articles 16 and 17 of Regulation No 3, and who subsequently becomes an invalid before completing six months' work in the State where he is subject to Type A legislation, in view of the fact that no benefits can be granted by the other Member State (in this case the Federal Republic of Germany) for lack of sufficient insurance periods?'

2 Article 28 (2) of Regulation No 4 provides:

> 'If the insurance periods and assimilated periods completed under the legislation of one Member State do not together total six months no benefit shall be granted

under the said legislation; in that case, the abovementioned periods shall be taken into account for the acquisition, maintenance and recovery of the right to benefits from other Member States, but not for determining the proportionate amount due in accordance with Article 28 (1) (b) of the Regulation (No 3 concerning social security for migrant workers) ...'.

3 Regulation No 4 provides implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers.

4 According to the terms of the heading of Chapter 2 in which it appears, Article 28 (2) of Regulation No 4 is concerned with the implementation of the provisions of Articles 26 to 28 of Regulation No 3 which were issued in application of Article 51 of the Treaty.

5 It is therefore in this context and taking account of the principles contained in these provisions that Article 28 (2) must be interpreted.

6 Apart from the instance given in Article 25, Article 26 of Regulation No 3 extends to incapacitated migrant workers the benefit of aggregation of insurance periods and assimilated periods provided by Article 51 of the Treaty and by Articles 27 and 28 of the said regulation for the acquisition, maintenance or recovery of pensions for old-age and death.

7 Article 28 (2) of Regulation No 4 lays down the detailed rules of application of Articles 26 to 28 of Regulation No 3 in the particular case in which the insurance periods and assimilated periods, completed under the legislation of one Member State, do not together total six months.

8 The aim of the provision is, by preventing the institutions paying the benefits from having to incur expenses of calculation and transmission greater than the benefits themselves, to simplify the application of the aggregation mechanism in particular in view of the very small proportionate amounts payable in respect of those periods.

9 Nevertheless in order not to deprive migrant workers of the advantages of aggregation, Article 28 (2) of Regulation No 4 provides that these same periods shall be taken into account for the acquisition, maintenance and recovery of the right to benefits from other Member States.

10 Although, moreover, the object of Article 28 (2) of Regulation No 4 is to simplify administration, this can only be done, no matter what the circumstances, within the

context and limits of the obligation to undertake an aggregation imposed by Article 51 of the Treaty and it cannot be allowed to affect adversely the rights stemming from that Article in favour of individuals.

11 Therefore in cases in which a period of less than six months cannot be taken into account by another Member State for lack of sufficient insurance periods completed under the legislation of that State, an essential prerequisite for the application of Article 28 (2) of Regulation No 4 is lacking.

12 In this case the conditions relating to the acquisition by the migrant worker of the right to old-age, death and invalidity benefits are solely governed by the general provisions of Articles 26 to 28 of Regulation No 3.

13 Therefore the provisions of Article 28 (2) of Regulation No 4 are not applicable to a worker subject to Type A legislation in one Member State who acquires in that State (in the present case, Belgium) the right to sickness and invalidity insurance benefits by relying on insurance periods completed in another Member State in accordance with the provisions of Articles 16 and 17 of Regulation No 3, and who subsequently becomes incapacitated before completing six months' work in the State in which he is subject to Type A legislation, when no benefits can be granted by the other Member State (in this case the Federal Republic of Germany) for lack of sufficient insurance periods.

Costs

14 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable.

15 As these proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Commission de réclamation de Liège, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon reading the report of the Judge-Rapporteur;

Upon hearing the oral observations of the plaintiff in the main action, the intervening party in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 51;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers;
Having regard to Regulation No 4 of the Council on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers;
Having regard to the Protocol on the Statute of the Court of Justice, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it by the Commission de réclamation de Liège by an order of that court of 3 June 1970, hereby rules:

The provisions of Article 28 (2) of Regulation No 4 are not applicable to a worker subject to Type A legislation in one Member State who acquires in that State (in the present case, Belgium) the right to sickness and invalidity insurance benefits by relying on insurance periods completed in another Member State in accordance with the provisions of Articles 16 and 17 of Regulation No 3, and who subsequently becomes incapacitated before completing six months' work in the State in which he is subject to Type A legislation, when no benefits can be granted by the other Member State (in this case the Federal Republic of Germany) for lack of sufficient insurance periods.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 1 December 1970.

A. Van Houtte — Registrar

R. Lecourt — President