JUDGMENT OF THE COURT (Third Chamber)
18 April 1989 *

In Case 128/88

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

Di Felice

and

Institut national d'assurances sociales pour travailleurs indépendants (National social insurance institute for self-employed persons)

on the interpretation of the first paragraph of Article 7, the second paragraph of Article 52 and Article 53 of the Treaty and Articles 12(1) and (2), 44(1) and (2) and 46 of Regulation No 1408/78 of the Council, as amended by Council Regulation No 2001/83 of 2 June 1983 (Official Journal, L 230, p. 8)

THE COURT (Third Chamber)

composed of: F. Grévisse, President of the Third Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

the Institut national d'assurances social pour travailleurs indépendants, by Ludo Paeme, General Manager,

* Language of the case: French.

the Commission, by Dimitrios Gouloussis, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 24 January 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 February 1989,

gives the following

Judgment

1 By judgment of 21 April 1988, which was received at the Court on 27 April 1988, the tribunal du travail, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of the first paragraph of Article 7, the second paragraph of Article 52, and Article 53 of the Treaty and Articles 12(1) and (2), 44(1) and (2) and 46 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, as amended by Council Regulation No 2001/83 of 2 June 1983 (Official Journal 1983, L 230, p. 8).

2 Those questions arose in proceedings between Mr Di Felice, an Italian national residing in Italy, and the Institut national d'assurances sociales pour travailleurs indépendants (hereinafter referred to as 'the Institute').

3 Mr Di Felice worked as a self-employed person in Belgium from 1950 to 1964. On 24 November 1983, Mr Di Felice, who had been receiving an invalidity pension under the Italian legislation since 1969, applied to the Institute, on the basis of the contribution periods he had completed in Belgium, for an early retirement pension with effect from 28 April 1984, his 60th birthday. Although accepting that Mr Di Felice was entitled to such a pension, fixed at BFR 36 568 per annum, on the basis of 16/45ths of a complete career, reduced by 5% per annum for each year from

the date of the grant of the early pension until his 65th birthday, the Institute refused to pay the pension on the basis of the provisions of Belgian legislation against overlapping.

4 That refusal was based on Article 30 bis of Royal Decree No 72, according to which a retirement pension is payable to a self-employed person 'only if the recipient does not exercise an occupational activity and is not in receipt of an allowance for illness, invalidity or involuntary unemployment under Belgian or foreign social security legislation or under the rules applicable to the staff of an institution subject to public international law'.

5 The national court, after determining that Mr Di Felice was entitled to a self-employed person's retirement pension and fixing the amount thereof at BFR 39 007 per annum, considered that, before ruling on the actual payment of the pension, it should stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(i) Do the continuing lack of provision in Belgian national legislation with regard to overlapping pensions (in this case, individual old-age pensions) for self-employed persons with other "retirement benefits or . . . an advantage taking the place thereof (in this case, an invalidity allowance) granted under a foreign old-age pension scheme . . . " and the practice consequently adopted by the competent national paying body

(ii) constitute, or could they constitute, "discrimination on grounds of nationality" as referred to in the first paragraph of Article 7 of the Treaty, whether direct or indirect or based on nationality, through the application of criteria neutral in form but leading in practice to the same result, which is that non-nationals are placed at a disadvantage owing to a disproportionate obstacle,

(iii) fall, or could they fall, under the second paragraph of Article 52 and Article 53 of the Treaty and Articles 12(1) and (2) and 43 of Regulation (EEC) No 1408/71 of the Council 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 well as Chapter III of that regulation, in particular Articles 44(1) and (2) and 46 thereof,

(iv) are, in fact, the Italian invalidity pension (in this case *"ab initio"* not yet converted into an old-age pension) and the Belgian early retirement pension for a self-employed person to be regarded as "benefits of the same kind"?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of and the legal background to the main proceedings and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first two questions

7 Having regard to the terms of the first two questions referred to the Court, it should be pointed out firstly that in proceedings under Article 177 of the EEC Treaty the Court has no jurisdiction to apply the rules of Community law to a particular case or to judge the compatibility of provisions of national law with those rules. However, it may provide a national court with all the elements relating to the interpretation of Community law which may be useful to it in assessing the effects of the provisions of that law.

8 It can be seen from the grounds of the national court's judgment that the first two questions must be understood as intended in substance to obtain a ruling from the Court as to whether the provisions of Regulation No 1408/71, extended to self-employed persons and to members of their families by Council Regulation No 1390/81 of 12 May 1981 (Official Journal, L 143, p. 1), preclude the application of national legislation under which an old-age pension may not be paid if the insured person is receiving an invalidity pension under the legislation of another Member State if that legislation is less favourable to him than the provisions of Regulation No 1408/71.

9 It should be borne in mind that, as the Court has consistently held (see in particular the judgment of 5 May 1983 in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385), where a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not preclude that legislation, including the national rules against the overlapping of

benefits, from being applied to him in its entirety. If, however, the application of that national legislation is less favourable to the worker than the application of Article 46 of Regulation No 1408/71, the provisions of that article must be applied. If those provisions fall to be applied, paragraph (3) of Article 46, which limits the overlapping of benefits acquired, is applicable to the exclusion of rules against overlapping laid down in the national legislation.

10 In applying the Community provisions, the national court must take account, in particular, of the fact that, according to Article 12(2) of Regulation No 1408/71, the legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits acquired in that Member State or under the legislation of that or another Member State do not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of the Member States concerned, in accordance, in particular, with Article 46 of that regulation.

11 It follows from the foregoing that, without its being necessary to take into account the other provisions of Community law referred to by the national court, the reply to the first two questions referred to the Court must therefore be that the provisions of Regulation No 1408/71, extended to self-employed persons and members of their families by Regulation No 1390/81, must be interpreted as precluding the application of national legislation according to which a retirement pension may not be paid if the person entitled is in receipt of an invalidity pension under the legislation of another Member State, provided that the application of that legislation is less favourable to the person concerned than the application of Article 46 of Regulation No 1408/71.

Third question

12 In its third question, the national court seeks to ascertain whether an early retirement pension obtained under the legislation of one Member State and an invalidity pension obtained under the legislation of another Member State are to be regarded as 'benefits of the same kind' within the meaning of Article 12(2) of Regulation No 1408/71.

13 It should be pointed out in that regard that, according to previous decisions of the Court, where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind (see, most recently, the judgment of 2 July 1981 in Joined Cases 116, 117, 119, 120 and 121/80 *RWP* v *Celestre* [1981] ECR 1737).

14 Those decisions also apply in cases in which old-age (retirement) pensions due under the legislation of a Member State do not arise as a result of the conversion of invalidity benefits, provided that an old-age pension, whether or not arising from such a conversion, is of the same kind as an invalidity pension.

15 That interpretation of Article 12(2) of Regulation No 1408/71 cannot be altered in the case of the payment of an early retirement pension, in so far as the only effect of early payment is to reduce the amount of the pension.

16 The reply to the third question must therefore be that an early retirement pension acquired under the legislation of one Member State and an invalidity pension acquired under the legislation of another Member State are to be regarded as benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71.

Costs

17 The costs incurred by the Commission of the European Communities, which has 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 (Third Chamber),

in answer to the questions submitted to it by the tribunal du travail, Brussels, by judgment of 21 April 1988, hereby rules:

(1) The provisions of Regulation No 1408/71, extended to self-employed persons and members of their families by Regulation No 1390/81, must be interpreted as precluding the application of national legislation according to which a retirement pension may not be paid if the person entitled is in receipt of an invalidity pension under the legislation of another Member State, provided that the application of that legislation is less favourable to the person concerned than the application of Article 46 of Regulation No 1408/71.

(2) An early retirement pension acquired under the legislation of one Member State and an invalidity pension acquired under the legislation of another Member State are to be regarded as benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71.

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 18 April 1989.

J.-G. Giraud
Registrar

F. Grévisse
President of the Third Chamber