Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 December 2013 *

(Request for a preliminary ruling — Article 11(2) of Annex VIII to the Staff Regulations — Regulation (EEC, Euratom, ECSC) No 259/68 and Regulation (EC, Euratom) No 723/2004 — Officials of the European Union — Pension rights in the national scheme — Transfer to the European Union pension scheme — Calculation method — Concept of 'capital value of pension rights')

In Case C-166/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Praze (Czech Republic), made by decision of 27 March 2012, received at the Court on 3 April 2012, in the proceedings

Radek Časta

v

Česká správa sociálního zabezpečení,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2013,

after considering the observations submitted on behalf of:

— Mr Časta, by himself,

— the Česká správa sociálního zabezpečení, by J. Laumannová, advokátka,

— the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

— the European Commission, by D. Martin and P. Němečková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2013,

gives the following

* Language of the case: Czech.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11(2) of Annex VIII to Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ 1968 L 56, p. 1), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1) ('the Staff Regulations'), and of Article 4(3) TEU.

2 The request has been made in the context of proceedings between Mr Časta and the Česká správa sociálního zabezpečení (social security authorities of the Czech Republic) ('the ČSSZ') concerning the calculation of the capital value of the pension rights acquired by him in the national pension scheme that may be transferred, on his behalf, into the European Union pension scheme.

Legal context

European Union law

3 Article 11(2) of Annex VIII to the Staff Regulations, in the version resulting from Council Regulation (EEC, Euratom, ECSC) No 571/92 of 2 March 1992 amending the Staff Regulations of Officials of the European Communities (OJ 1992 L 62, p. 1), was worded as follows:

'An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation;

or

— pursuing an activity in an employed or self-employed capacity;

shall be entitled upon establishment to have paid to the Communities either the actuarial equivalent or the flat rate redemption value of retirement pension rights acquired by virtue of such service or activities.

…'

4 In the version resulting from Regulation No 723/2004, Article 11(2) of Annex VIII to the Staff Regulations states:

'An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation;

— pursuing an activity in an employed or self-employed capacity;

shall be entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the Communities the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

In such case the institution in which the official serves shall, taking into account the official's basic salary [and] age and [the] exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Community pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.

Officials may make use of this arrangement once only for each Member State and pension fund concerned.'

5 Article 6 of Commission Decision of 28 April 2004 on the general provisions for the implementation of Articles 11 and 12 of Annex VIII to the Staff Regulations (Administrative Notices No 60-2004 of 9 June 2004) provides:

'Any amount to be transferred, from the servant's pension fund, must be certified as being the updated capital value of pension rights acquired before entering the service of the Communities, or, in the case of an application under Article 11(3) of Annex VIII to the Staff Regulations, before his reinstatement.

The amount to be transferred must correspond to the sum of that capital. It may correspond to rights resulting from periods completed in the service of several administrations, organisations or in respect of several activities pursued in an employed or self-employed capacity.'

Czech law

6 Under Paragraphs 3 to 5 of Law No 589/1992 on social security contributions and contributions to national employment policy, as amended, employers and employees pay social contributions into the Czech pension scheme. Between 1996 and 2003, the employers' contribution rate was 19.5% of the basis of calculation, and since 2004 it has been 21.5%, the basis of calculation of employers' contributions being equal to the sum of the calculation bases for all the employees employed by the employer concerned. During that period, the rate of employees' contributions was 6.5% of the basis of calculation.

7 It follows from Paragraphs 33 to 36 of Law No 155/1995 on old-age pensions, as amended ('Law No 155/1995'), that the amount of the old age pension is equal to the sum of a basic amount, identical for all applicants, and a variable amount dependent on the applicant's total insurance period and on the level of the basis of calculation.

8 Under Paragraph 34(1) of that law, the amount of the variable amount for each full year is 1.5% per month of the basis of calculation. Periods in which the insured person in general received no income capable of being taken into account ('substitute insurance periods'), covering, for example, parental leave and study periods, etc., are included in the insurance period at the rate of 80%.

9 Under Paragraph 15 of Law No 155/1995, the basis of calculation is determined according to the employee's personal basis of assessment. Under Paragraph 16 of that law, the latter is equal to the average of the monthly income, updated at the time of calculation, liable for mandatory pension contributions over the whole insurance period, but which is, however, limited to the preceding 30 years. Up to and including 10 000 Czech crowns (CZK), the basis of calculation is the same as the personal basis of assessment. 30% of amounts exceeding that ceiling, and up to CZK 24 800, and 10% of those amounts exceeding the latter ceiling, are included in the basis of calculation.

10 Substitute insurance periods count towards the insurance period. In order to calculate the personal basis of assessment, periods referred to as 'excluded', essentially corresponding to substitute insurance periods, are deducted from the period concerned.

11 Under Paragraph 105a(1) and (4) of Law 155/1995, which implements the Staff Regulations, insured persons who have become officials or other servants of the Communities, and who have ceased gainful employment in the Czech Republic, have the right to transfer pension rights acquired in the Czech Republic to the pension scheme of the European Communities if they have not been granted a pension under the Czech old-age pension scheme, it being stated that 'pension rights shall mean the amount determined as the actuarial equivalent depending on the completed insurance periods and the bases for calculation'.

12 Government Regulation No 587/2006 establishing detailed rules relating to the reciprocal transfer of pension rights vis-à-vis the pension scheme of the European Communities ('Government Regulation No 587/2006') includes detailed provisions relating to the transfer of the pension rights of a Czech official who has entered into the service of the European Communities. Paragraph 2 thereof lays down the rules for calculating the amount to be transferred as pension rights acquired in the Czech Republic in the following terms:

'(1) The amount of the pension rights acquired in the Czech Republic to be transferred shall be calculated by multiplying the unit value of the deferred pension by the sum of the projected variable amount of the retirement pension and a proportionate part of the basic amount of the retirement pension.

(2) The projected variable amount of the retirement pension shall be calculated according to the method set out in paragraph 34(1) of the law on old-age pensions on the basis that the period of insurance and the basis for calculation are to be determined at the relevant date; the relevant date shall mean the date the application for transfer of pension rights was presented to the competent institution of the European Communities … For the purposes of determining the personal basis of assessment, the period of affiliation to the pension scheme of the European Communities shall be deemed to be an excluded period …

(3) The proportionate part of the basic amount of the retirement pension shall be calculated by multiplying the basic amount of the retirement pension applicable on the relevant date by the quotient of the insurance period completed in the Czech pension system on the relevant date in relation to the sum of the insurance periods completed in the Czech pension system on the relevant date and insurance periods completed from the relevant date to the date on which the applicant for the transfer of pension rights … attained the pensionable age in accordance with the provisions applicable on the relevant date …

(4) The unit value of the deferred pension shall be determined according to the age of the applicant on the relevant date …, on the basis of the mortality tables applicable on the relevant date and 70% of the value of the maximum actuarial interest rate set by a specific legal provision for insurance purposes …

(5) In order to determine the unit value of the deferred pension, the mortality tables of the Ministry for Work and Social Affairs are used, which are uniform for men and women and are always laid down for consecutive periods of five calendar years.

(6) The amount calculated in accordance with paragraphs 1 to 5 shall be increased by an amount determined by way of interest on the sum calculated pursuant to paragraphs 1 to 5 for the period from the relevant date to the date preceding the date on which the sum of money is transferred … to the account of the pension scheme of the European Communities …'

13 The annex to Government Regulation No 587/2006 contains a formula for calculating the unit value of the deferred pension. The maximum actuarial interest rate is determined in the first sentence of paragraph 12(1) of Government Regulation No 434/2009 depending on the average yields from Government bonds.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Mr Časta, an official of the European Commission, was, before taking up his duties for the Commission on 1 December 2006, insured under the Czech old-age insurance scheme. The relevant contributions were paid into that scheme.

15 On 28 November 2008, Mr Časta applied to the Commission to have his pension rights acquired in the Czech Republic transferred, pursuant to Article 11(2) of Annex VIII to the Staff Regulations.

16 That application was forwarded to the ČSSZ, which adopted, on 8 February 2011, a decision offering to transfer CZK 523 584, an amount calculated in accordance with national legislation. That amount was less than half the total contributions paid up to that date into the Czech pension scheme for Mr Časta.

17 Mr Časta lodged a complaint against that decision. In his view, the calculation method provided for in Czech law infringes Article 11(2) of Annex VIII to the Staff Regulations read in conjunction with Article 4(3) TEU. He claimed that the amount to be transferred should correspond to, or exceed, the total amount of contributions paid. Mr Časta also invoked an infringement of the principle of equal treatment. In addition, he claimed that the calculation of his pension rights did not take account of the period during which he contributed to the European Union pension scheme.

18 The ČSSZ dismissed that complaint by decision of 10 May 2011. On 12 May 2011, Mr Časta brought an action for annulment of that decision before the Krajský soud v Praze (Prague district court).

19 In those circumstances, the Krajský soud v Praze decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. How must the concept of “capital value of pension rights” in Article 11(2) of Annex VIII to [the Staff Regulations] be understood? Does that concept include the level of pension rights determined both in the form of the actuarial equivalent and in the form of the flat-rate redemption value as defined in Article 11(2) of Annex VIII to the Staff Regulations, in its version before the entry into effect of Regulation No 723/2004, or must it be identified with only one of those concepts, and if not, how does it differ from those concepts?

2. Does Article 11(2) of Annex VIII to the Staff Regulations, in conjunction with Article 4(3) of the [TEU] …, preclude application of the method for calculating pension rights provided for in Paragraph 105a(1) of Law No 155/1995 on pension insurance and in Government Regulation No 587/2006 …? In this context, is it relevant that that calculation method results, in a specific case, in the setting of pension rights offered for transfer to the EU pension scheme at a level of not even half the amount of the contributions paid by an official to the national pension scheme?

3. Must the judgment … in Case C-293/03 [*My* [2004] ECR I-12013] be interpreted as meaning that, for the purposes of calculating the value of pension rights to be transferred to the EU pension scheme by means of an actuarial method dependent on the period of insurance, the personal basis of assessment must also include the period during which, before the date of submission of an application for the transfer of pension rights, the European Union official has already participated in the European Union pension scheme?’

Consideration of the questions referred

Question 1

20 By its first question, the referring court asks, in essence, whether, on a proper construction of Article 11(2) of Annex VIII to the Staff Regulations, a Member State may determine the amount of the capital value of pension rights by means of the actuarial equivalent or of the flat-rate redemption value, provided for by that provision of the Staff Regulations before it was amended by Regulation No 723/2004, or whether it must apply only one of those methods.

21 Article 11(2) of Annex VIII to the Staff Regulations, in its version before being amended by Regulation No 723/2004, which resulted from Regulation No 571/92, provided that an official who enters the service of the Communities after leaving the service of a government administration or of a national or international organisation, or after pursuing an activity in an employed or self-employed capacity, was entitled upon establishment to have paid to the Communities either the actuarial equivalent or the flat rate redemption value of retirement pension rights acquired by virtue of such service or activities.

22 That provision offered the Member States an alternative with respect to fulfilling their obligation to adopt national measures necessary in order to ensure that it was possible for officials to have their retirement pension rights transferred into the Community pension scheme. Therefore, since they are not obliged to grant officials the option to choose between the transfer of the actuarial equivalent and the flat-rate redemption value, the Member States were free to use one of those two methods of calculation (see, to that effect, Case 315/85 *Commission* v *Luxembourg* [1987] ECR 5391, paragraphs 20 to 22).

23 That freedom of choice available to the Member States was widened as a result of the amendment of the Staff Regulations by Regulation No 723/2004, following which Article 11(2) of Annex VIII provides that an official who enters the service of the Communities is entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the pension scheme of the Communities the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of his previous activities.

24 By now employing the sole concept of 'capital value of acquired pension rights', the European Union legislator authorised the Member States to apply the method of their choice in order to determine the amount to transfer into the European Union pension scheme in so far as that amount actually represents the pension rights acquired with respect to the previous activities of the official concerned.

25 Consequently, the Member States may apply the method referred to as 'the actuarial equivalent', which is used to calculate the current value of a future and contingent pension benefit, the amount of which is normally reduced in order to take account of early payment and the risk of death before the due date, or the method referred to as the 'flat-rate redemption value', by which that value is obtained by adding up the contributions paid by the insured person and by his employer, to which interest may be added (see, concerning those methods of calculation, Case 212/81 *Bodson* [1982] ECR 1019, paragraphs 7 and 8), or also other methods.

26 In those circumstances, the answer to Question 1 is that on a proper construction of Article 11(2) of Annex VIII to the Staff Regulations, a Member State may determine the amount of the capital value of pension rights by means of the actuarial equivalent, the flat-rate redemption value or by means of other methods, in so far as the amount to be transferred actually represents the pension rights acquired by virtue of the previous activities of the official concerned.

Question 2

27 By its second question, the referring court asks, in essence, whether Article 11(2) of Annex VIII to the Staff Regulations and Article 4(3) TEU must be interpreted as precluding application of a method for calculating the capital value of pension rights acquired in the national pension scheme with respect to earlier activities such as that defined in Czech law, and whether the answer to such a question is affected by the fact that that method results in the amount of capital to be transferred into the European Union pension scheme being set at a level of not even half the amount of the contributions paid by the official into the national pension scheme.

28 In order to ensure coordination of the national and European Union pension schemes, it is necessary to carry out two consecutive operations, the second of them consisting in converting the capital value of pension rights acquired in the national system into pensionable years of service to be taken into account in the European Union pension scheme. That conversion is carried out by the institutions of the European Union, in accordance with the general provisions implementing Article 11 determined by those institutions. That operation is governed by European Union law.

29 On the other hand, the first operation falls within the sole competence of the national authority administering the pension scheme with which the interested person was insured before he entered into the service of the European Union, such an operation determining the capital value of pension rights acquired in the national scheme under the relevant legislation of the Member State concerned (see Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and Others* v *Commission* [1989] ECR 3599, paragraph 17).

30 It should be noted with regard to the various national rules that the European Union legislator did not intend, by Article 11(2) of Annex VIII to the Staff Regulations, to harmonise the various national provisions in the field of pensions, which are characterised by a great diversity and complexity (see *Commission* v *Luxembourg*, paragraph 21). Moreover, as was stated by the Advocate General in point 43 of his Opinion, it follows from Article 48 TFEU and Article 153(4) TFEU that the right of the Member States to define the fundamental principles of their social security systems is recognised by European Union law.

31 It follows that the Member States enjoy broad discretion in adopting their national legislation implementing Article 11(2) of Annex VIII to the Staff Regulations.

32 This is most particularly so in the case of the Member States' method for determining the amount of the capital value of pension rights acquired in the national scheme and intended to be taken into account by the European Union pension scheme. That method must, however, be established in accordance with the nature of the principles and rules governing their pension system.

33 In general, the Member States have the option of establishing, in particular, a funded pension scheme providing old-age pensions proportional to contributions or, on the other hand, a scheme based on a certain degree of solidarity, which envisages that pensions paid in the context of such a scheme are not necessarily proportionate to contributions.

34 It is apparent from the order for reference that, in the national pension system at issue in the main proceedings, the amounts of the pensions to which retired persons are entitled are calculated by applying a formula which takes account of the total period of contribution to old-age insurance and the levels of income, although in the latter case in a manner that is markedly degressive. In that system, it is true that a higher income gives the right to a higher pension, but amounts over and above certain income limits are taken into account only on a reduced basis.

35 In such a pay-as-you-go system which is strongly based on solidarity, it is clear that the capital value of acquired pension rights does not correspond to the total contributions paid by the employer to his employee with respect to the latter's old-age insurance.

36 If the calculation of the capital value of pension rights stems logically from the nature, principles and rules of the pension system in force in a Member State, the consistency of that method with European Union law cannot be called into question. It is only in the case in which the method for calculating that capital significantly diverges, to the advantage or disadvantage of the official, from the nature of the principles and rules of the national pension system that the legislation of the Member State concerned is likely to constitute a barrier to the free movement of workers guaranteed by Article 45 TFEU or to infringe the obligations provided for in Article 4(3) TEU.

37 It should be noted, first, that according to the Court's settled case-law, an official of the European Union has the status of a migrant worker (see *My*, paragraph 37 and case-law cited; Case C-185/04 *Öberg* [2006] ECR I-1453, paragraph 12; and Case C-233/12 *Gardella* [2013] ECR, paragraph 25) and, secondly, the Member States' obligation to make it possible to transfer to the European Union pension scheme pension rights acquired by European Union officials with respect to their earlier duties and to establish in that regard a calculation method falls within the scope of application of Article 4(3) TEU (see, to that effect, Case C-52/96 *Commission* v *Spain* [1997] ECR I-4637, paragraph 9).

38 The national legislation at issue in the main proceedings, as set out in paragraphs 11 and 12 of the present judgment, would appear not to diverge from the nature of the principles and rules of the national pension scheme. Nevertheless, it is for the national court to determine whether that is indeed the case, in particular where an applicant presents serious evidence to the contrary, and to determine, in cases in which national provisions permit the transfer of pension rights into another national scheme or into the scheme of an international organisation, whether the calculation of the sum to be transferred into the European Union pension scheme is not performed in a way unfavourable in relation to the calculation of the sum to be transferred into such other schemes. The mere fact that the calculation method results in a sum to be transferred that is less than half of the contributions paid by the official and his former employer into the national pension scheme does not constitute such evidence. Furthermore, there is nothing in the file submitted to the Court to indicate that the national provisions permit the transfer of pension rights into another national or international scheme.

39 In addition, an official applying for the transfer of his pension rights acquired in a pension scheme of a Member State into the European Union pension scheme cannot usefully rely on unlawful discrimination in relation to officials of the European Union from other Member States arising from the use of a different method for calculating the capital to be transferred. In such a case, the difference in treatment is the consequence of the Member States' power to arrange their pension systems and their discretion in that regard.

40 In those circumstances, the answer to Question 2 is that Article 11(2) of Annex VIII to the Staff Regulations and Article 4(3) TEU must be interpreted as not precluding application of the method for calculating the capital value of pension rights acquired earlier, such as that defined in Czech law, even where that method results in the amount of capital to be transferred into the European Union pension scheme being set at a level of not even half the amount of the contributions paid by the official and his former employer into the national pension scheme.

Question 3

41 By its third question, the referring court asks, in essence, whether Article 11(2) of Annex VIII to the Staff Regulations and Article 4(3) TEU must be interpreted as meaning that, for the purposes of calculating the amount of the capital value of pension rights acquired earlier and intended to be transferred into the European Union pension scheme, it is necessary to take account of the period during which official had already participated in that scheme.

42 First, it should be noted, as regards the judgment in *My* relied on by the referring court in the context of its third question, that the Court held, in paragraph 49 of that judgment, that Article 4(3) TEU, in conjunction with the Staff Regulations, precludes national legislation that does not permit years of employment completed by a European Union citizen in the service of a European Union institution to be taken into account for the purposes of entitlement to a retirement pension under his national scheme.

43 However, while the case giving rise to the judgment in *My* concerned periods of employment completed in the service of the European Union institutions to be taken into account for the purposes of entitlement to a retirement pension under the national pension scheme, the applicant in the main proceedings requests, before the referring court, that the period of employment completed as a Commission official be taken into account in the Member State concerned for the purposes of calculating the amount to be transferred from the national pension scheme into the European Union pension scheme.

44 Given that the situation that gave rise to the judgment in *My* is different from that in the main proceedings, that judgment cannot provide arguments for the purposes of answering Question 3.

45 Secondly, it is unequivocally apparent from Article 11(2) of Annex VIII to the Staff Regulations that the pension rights that an official is entitled to have transferred into the European Union pension scheme from the pension scheme in force in a Member State are those acquired by virtue of only those activities exercised before he entered into the service of the European Union.

46 That provision is, moreover, explained in Commission Decision of 28 April 2004 on the general provisions for the implementation of Articles 11 and 12 of Annex VIII to the Staff Regulations, which provides, in the first subparagraph of Article 6, that '[a]ny amount to be transferred, from the servant's pension fund, must be certified as being the updated capital value of pension rights acquired before entering the service of the Communities'.

47 In view of the foregoing, the answer to Question 3 is that Article 11(2) of Annex VIII to the Staff Regulations and Article 4(3) TEU must be interpreted as meaning that, for the purposes of calculating the amount of the capital value of pension rights acquired under the national pension scheme and intended to be transferred into the European Union pension scheme, account is not to be taken of the period during which the official had already participated in that scheme.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **On a proper construction of Article 11(2) of Annex VIII to Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, a Member State may determine the amount of the capital value of pension rights by means of the actuarial equivalent, the flat-rate redemption value or by means of other methods, in so far as the amount to be transferred actually represents the pension rights acquired by virtue of the previous activities of the official concerned.**

2. **Article 11(2) of Annex VIII to Regulation No 259/68, as amended by Regulation No 723/2004, and Article 4(3) TEU must be interpreted as not precluding application of the method for calculating the capital value of pension rights acquired earlier, such as that defined in Czech law, even where that method results in the amount of capital to be transferred into the European Union pension scheme being set at a level of not even half the amount of the contributions paid by the official and his former employer into the national pension scheme.**

3. **Article 11(2) of Annex VIII to Regulation No 259/68, as amended by Regulation No 723/2004, and Article 4(3) TEU must be interpreted as meaning that, for the purposes of calculating the amount of the capital value of pension rights acquired under the national pension scheme and intended to be transferred into the European Union pension scheme, account is not to be taken of the period during which the official had already participated in that scheme.**

[Signatures]