JUDGMENT OF THE COURT (First Chamber)

3 October 2002 *

In Case C-347/00,

REFERENCE to the Court under Article 234 EC by the Juzgado de lo Social No 3 de Orense (Spain) for a preliminary ruling in the proceedings pending before that court between

Ángel Barreira Pérez

and

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

on the interpretation of Article 1(r) and (s) and Article 46(2) of 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

* Language of the case: Spanish.

of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, M. Wathelet (Rapporteur) and A. Rosas, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Barreira Pérez, by A. Vázquez Conde, abogado,

— the Spanish Government, by M. López-Monís Gallego, acting as Agent,

— the Commission of the European Communities, by H. Michard and I. Martínez del Peral, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Barreira Pérez, represented by A. Vázquez' Conde, of the Instituto Nacional de la Seguridad Social (INSS), represented by A.J. Cea Ayala, abogado, of the Spanish Government, represented by L. Fraguas Gadea, acting as Agent, and of the Commission, represented by I. Martínez del Peral, at the hearing on 7 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2002,

gives the following

Judgment

1 By order of 17 July 2000, received at the Court on 20 September 2000, the Juzgado de lo Social (Social Court) No 3, Orense, referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1(r) and (s) and Article 46(2) of 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; 'Regulation No 1408/71').

2 Those questions were raised in proceedings between Mr Barreira Pérez and the Instituto Nacional de la Seguridad Social (National Social Security Institute) ('the INSS') concerning the award of his old-age pension rights under Spanish legislation.

Legislation

National legislation

3 Article 161(1)(b) of the General Social Security Law, as amended, approved by Royal Legislative Decree 1/1994 of 20 June 1994 (BOE No 154 of 29 June 1994, 'the General Social Security Law'), makes entitlement to an old-age pension conditional upon having paid contributions for at least 15 years, two of which must fall within the 15-year period immediately preceding the date on which entitlement to a pension arises.

4 The amount of the old-age pension will depend on the contributions paid by the insured person and on the length of the periods completed. Under Article 163 of the General Social Security Law, the amount is to be determined by applying the following percentages to the relevant basis of assessment:

— 50% for the first 15 years;

— 3% for each additional year in which contributions are paid, between the 16th and 25th year inclusive;

— 2% for each additional year in which contributions are paid, commencing with the 26th year;

provided that the total percentage applicable to the basis of assessment does not exceed 100%.

5 Article 9(4) of the Ministerial Order of 18 January 1967 concerning the application and payment of old-age benefits (BOE No 22 of 26 January 1967, 'the Ministerial Order') provides:

'Each worker's years of contribution shall be determined on the basis of periods of contribution to the current General Scheme since 1 January 1967, increased, where necessary, by periods of contribution to the previous Old-age and Invalidity Insurance and Workers' Mutual Insurance Schemes.

The periods of contribution to the previous Old-Age and Invalidity Insurance and Workers' Mutual Insurance Schemes shall be calculated in accordance with the rules laid down in the second transitional provision.'

6 As regards periods of contribution prior to 1 January 1967, paragraph 3 of the second transitional provision of the Ministerial Order provides:

'(a) those contributions shall be calculated on the basis of contributions actually paid during the period falling between 1 January 1960 and 31 December 1966 to one or both of the abovementioned schemes but contributions which overlap shall be taken into account only once;

(b) where appropriate, the number of years and fractions of years attributed to the worker by reference to his age on 1 January 1967 shall be added to the number of days of contribution referred to in subparagraph (a) above, in accordance with the scale set out below...;

(c) the number of days of contribution in the period referred to in subparagraph (a) above increased, where appropriate, by the days corresponding to the fraction of years resulting from application of the scale set out in subparagraph (b) above and by the days in respect of which contributions have been paid under the General Social Security Scheme since 1 January 1967 shall be divided by 365 in order to determine the number of years of contribution, by reference to which the percentage of the pension is determined, and the fraction of the year, if there is one, shall be deemed to be a full year of contribution, regardless of the number of days it comprises.'

7 The scale referred to above attributes to the worker by reference to his age on 1 January 1967 a number of days and years of contribution between 30 years and 318 days (for a worker aged 65) and 250 days (for a worker aged 21).

8 Those years and fractions of years are not taken into account in the calculation of the 15-year qualifying period for entitlement to an old-age pension.

Community legislation

9 Article 1(r) of Regulation No 1408/71 includes the following definition:

'*periods of insurance* means periods of contribution or period[s] of employment or self-employment as defined or recognised as periods of insurance by the

legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

10 As regards the definition of 'periods of employment' and 'periods of self-employment', Article 1(s) of that regulation refers in the same terms to the national legislation under which those periods were completed.

11 Article 45 of Regulation No 1408/71, which is part of Chapter 3 'Old Age and Death (Pensions)' of Title III of that regulation, lays down the principle of the aggregation of periods of insurance completed under the legislation of any Member State for the acquisition, retention or recovery of the right to benefits.

12 Article 46 of that regulation defines the rules relating to the award of pensions. Where a person's entitlement to a benefit arises in a Member State only by having recourse to the aggregation of periods of insurance or of residence completed in two or more Member States, Article 46(2) provides:

'(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation 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;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.'

The dispute before the national court

13 Mr Barreira Pérez, who is of Spanish nationality, has worked in Germany and Spain. In October 1999, aged 65, he asserted his rights to a retirement pension under German and Spanish legislation.

14 Since he had paid contributions in Germany in respect of 4 051 days between June 1963 and March 1975, Mr Barreira Pérez was entitled to an independent German old-age pension, that is to say without periods of insurance completed under Spanish legislation being taken into account and, therefore, without application of the rules on aggregation and apportionment set out in Article 46(2) of Regulation No 1408/71.

15 However, in order for an entitlement to a Spanish pension to arise, it was necessary to aggregate all of the periods of insurance completed in Germany and Spain pursuant to Article 45 of Regulation No 1408/71, owing to the fact that the periods completed in Spain did not add up to the 15-year qualifying period.

16 The periods of insurance completed in Spain thus amount to 5 344 days, to which 3 005 days must be added in respect of notional contributions, attributed to Mr Barreira Pérez by reference to his age on 1 January 1967, in accordance with paragraph 3(b) of the second transitional provision of the Ministerial Order.

17 Under Article 46(2)(a) of Regulation No 1408/71, the INSS calculated the theoretical amount of the benefit, adding to the 9 395 days of actual contribution completed in Spain and Germany (5 344 + 4 051) the 3 005 days of notional contribution attributed to Mr Barreira Pérez under Spanish legislation, as described in paragraph 16 of this judgment.

18 However, the INSS did not take that period of notional contribution into account in the calculation of the *pro rata* benefit under Article 46(2)(b) of Regulation No 1408/71. Accordingly, that period was added neither to the 5 344 days of contribution completed in Spain, referred to in the numerator, nor to the 9 395 days of contribution completed in the two Member States, referred to in the denominator of the coefficient by which the theoretical amount of the old-age benefit is multiplied in order to determine the actual amount of benefit: as a result the coefficient used by the INSS was lower than the one which would have been applied if the period of notional contribution had been taken into account when the apportionment rule was applied.

19 Mr Barreira Pérez brought an action against the INSS's decision determining his old-age pension on that basis.

20 Since it took the view that the case before it turned on an interpretation of the relevant Community law, the Juzgado de lo Social No 3, Orense, decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'1. Must Article 1(r) and (s) [of Regulation No 1408/71] be interpreted as meaning that periods of notional, equivalent contribution, which may be taken into account under the legislation of a Member State for the purpose of determining the number of years of contribution by reference to which the amount of old-age pension is determined under domestic legislation, are also to be considered from a legal viewpoint as "periods of insurance"?

2. If the answer to the first question is in the affirmative, is the proper construction of Article 46(2)(b) [of Regulation No 1408/71] that "the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which [the competent institution of a Member State] administers" also includes those periods of notional contribution corresponding to periods prior to materialisation of the risk which, under the legislation of the Member State concerned, are to be taken into account as periods of contribution for the purpose of determining the amount of old-age pension?'

The first question

21 By its first question the national court is essentially seeking to ascertain whether the proper construction of Article 1(r) and (s) of Regulation No 1408/71 is that additional periods such as those provided for by Spanish legislation, attributed

when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be regarded as periods of insurance within the meaning of that regulation.

22 'Periods of insurance' is defined in Article 1(r) of Regulation No 1408/71 as 'periods of contribution or period[s] of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

23 It follows that that definition encompasses periods of insurance determined under national legislation alone, in particular periods treated by that legislation as periods of insurance, provided, however, that Articles 39 EC and 42 EC are observed.

24 In that regard, it is apparent from the documents before the Court that the grant of additional periods provided for in paragraph 3 of the second transitional provision of the Ministerial Order is intended, generally speaking, to protect, by reference to the recipient's age on 1 January 1967 and in accordance with a fixed scale provided for that purpose, rights which were in the course of being acquired under previous insurance schemes and which the worker would otherwise have lost.

25 Although they are not taken into account in the calculation of the qualifying period for entitlement to an old-age pension, those additional periods are nevertheless added to periods of actual insurance in the calculation of the amount of the pension.

26 In those circumstances, the additional periods at issue in the main proceedings must be described as periods of insurance for the purposes of Article 1(r) of Regulation No 1408/71.

27 Furthermore, that interpretation is borne out by the fact that the competent Spanish authorities take into account the additional periods at issue in the main proceedings in the calculation of the theoretical amount of the old-age pension in accordance with Article 46(2)(a) of Regulation No 1408/71.

28 Under Article 46(2)(a) the theoretical amount of the old-age benefit is to be calculated as if all the periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, had been completed in the Member State in question under the legislation which the competent institution of that Member State administers on the date of the award of the benefit. When Article 46(2) of Regulation No 1408/71 is applied, it is necessary to refer to the definition of 'periods of insurance' in Article 1(r) of that regulation (see Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraphs 17 and 19). As the Advocate General has stated in point 39 of his Opinion, if the additional periods at issue in the main proceedings were not regarded as periods of insurance, it would not be necessary to take them into account in the calculation of the theoretical amount.

29 Consequently, the answer to the first question must be that the proper construction of Article 1(r) of Regulation No 1408/71 is that additional periods such as those provided for by Spanish legislation, attributed when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be regarded as periods of insurance within the meaning of that regulation.

The second question

30 By its second question, the national court is essentially seeking to ascertain whether the proper construction of Article 46(2)(b) of Regulation No 1408/71 is that additional periods such as those provided for by Spanish legislation, attributed when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be taken into account in the calculation of the actual amount of the pension.

31 The INSS and the Spanish Government submit that the additional periods at issue in the main proceedings do not as such relate to a particular time. However, since they are added to periods of actual insurance at the time when the entitlement to a pension arises, they should be regarded as occurring after the risk has materialised.

32 In those circumstances, reference should be made to Case 793/79 *Menzies* [1980] ECR 2085, in which the Court ruled that a supplementary period which the legislation of a Member State adds to the periods of insurance completed before the risk materialised in order to evaluate the benefit awarded in the event of the premature invalidity or the premature death of an insured person must be taken into account in the calculation of the theoretical amount referred to in Article 46(2)(a) but not in the calculation of the actual amount referred to in Article 46(2)(b) of Regulation No 1408/71.

33 The Spanish Government adds that treating the additional periods at issue in the main proceedings as periods of insurance for the purposes of calculating the

Spanish *pro rata* pension risks bringing about a serious economic imbalance and making the Spanish social security system into a magnet for people trying to obtain an appreciable increase in their pension.

34 In that regard, contrary to the view expressed by the INSS and the Spanish Government, additional periods such as those at issue in the main proceedings are periods of insurance completed before materialisation of the risk for the purposes of Article 46(2)(b) of Regulation No 1408/71.

35 As was apparent from paragraph 24 above, the grant of additional periods provided for by the Spanish transitional legislation in point before the national court is intended specifically to protect rights which were in the course of being acquired under previous old-age insurance schemes. Hence those periods necessarily occur prior to retirement age.

36 The fact that those periods are attributed only at the time when pension rights are awarded is not at variance with that analysis, since the same is true of any periods of actual insurance which are taken into account in the calculation of the theoretical amount and the actual amount in accordance with Article 46(2) of Regulation No 1408/71.

37 Similarly, the fact that the additional periods at issue in the main proceedings cannot be related to a particular time, with the result that those periods might overlap with periods of insurance completed under the legislation of another Member State, does not prevent them from being taken into account for the purposes of calculating the pension. Under Article 15(1)(e) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by

Regulation No 118/97, where it is not possible to determine accurately the period of time in which certain periods of insurance or residence were completed under the legislation of one Member State, such periods are to be presumed not to overlap with periods of insurance or residence completed under the legislation of another Member State and are, where advantageous, to be taken into account.

38 The Court therefore concludes that in a case such as that in the main proceedings where the additional periods recognised by the applicable national legislation occur prior to the materialisation of the risk, those periods must be taken into account not only in the calculation of the theoretical amount under Article 46(2)(a) of Regulation No 1408/71 but also in the calculation of the actual amount of the benefit, as is, moreover, apparent from the express terms 'periods of insurance... completed before the materialisation of the risk' in Article 46(2)(b) of that regulation (see, to that effect, Case C-5/91 *Di Prinzio* [1992] ECR I-897, paragraph 54).

39 Accordingly, when the actual amount is calculated, account must be taken of all the periods of notional contribution, such as the additional periods at issue in the main proceedings, prior to the materialisation of the risk, which are added to periods of actual insurance or periods treated as such by the legislation applied by the competent institution.

40 Furthermore, the failure to take account of the additional periods at issue in the main proceedings in the calculation of the actual amount would penalise a worker who, like Mr Barreira Pérez, has exercised his right to freedom of movement and whose award of pension rights depends on the aggregation of periods of insurance completed in two or more Member States. The person concerned would be deprived of the additional amount which would have been attributed to him if he had completed his working life under the legislation of the competent Member State — something which in this instance would result, as the national court has observed, in the coefficient used in the calculation of the *pro rata* benefit being set at 0.5685 instead of 0.6733.

41 It is settled case-law that the aim of Articles 39 EC to 42 EC would not be attained if, as a consequence of exercising the right to freedom of movement, Community workers were to lose the advantages in the field of social security guaranteed to them by the legislation of a Member State. Such a consequence could deter those workers from exercising that right and would therefore constitute an obstacle to that freedom (see, in particular, Case C-302/90 *Faux* [1991] ECR I-4875, paragraph 27).

42 Consequently, the answer to the second question must be that the proper construction of Article 46(2)(b) of Regulation No 1408/71 is that additional periods such as those provided for by Spanish legislation, attributed when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be taken into account in the calculation of the actual amount of the pension.

Temporal limitation on the effects of the judgment

43 The Spanish Government requests a ruling from the Court to the effect that, if the Court answers the questions referred for a preliminary ruling in the affirmative, the judgment will not have retroactive effect, the Government submitting that such answers risk giving rise to a serious economic imbalance for the social security system. It states that persons who paid contributions between 1960 and 1966 in a Member State will be able to obtain an appreciable increase in the pension to which they are entitled in Spain.

44 In that connection, regard must be had to the case-law of the Court to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines

the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied (see, in particular, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 107).

45 It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith (*Sürül*, cited above, paragraph 108).

46 In the present case, the Court finds, irrespective of the scope and duration of the adverse financial effects which the Spanish Government alleges will ensue for the national social security system, that since *Di Prinzio*, cited above, the effects of which, moreover, are not subject to any temporal restriction, there has been, as regards the circumstances in which periods of notional insurance are to be taken into account in the calculation of the *pro rata* benefit, no legal uncertainty as to the interpretation of Article 46(2)(b) of Regulation No 1408/71 which is such that the relevant persons might have laboured under a misconception as to the scope of Community law. Furthermore, Article 1(r) and (s) of Regulation No 1408/71, which, as is apparent from paragraph 23 of this judgment, specifically refers to national legislation, has been the subject of a long and consistent line of decided cases.

47 Accordingly, there is no need for the effects of this judgment to be limited in time.

Costs

48 The costs incurred by the Spanish Government and by 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 (First Chamber),

in answer to the questions referred to it by the Juzgado de lo Social No 3, Orense, by order of 17 July 2000, hereby rules:

1. The proper construction of Article 1(r) of 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 (EC) No 118/97 of 2 December 1996, is that additional periods

such as those provided for by Spanish legislation, attributed when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be regarded as periods of insurance within the meaning of that regulation.

2. The proper construction of Article 46(2)(b) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, is that additional periods such as those provided for by Spanish legislation, attributed when pension rights are awarded in order to take account of rights which were in the course of being acquired under previous old-age insurance schemes which have now been discontinued, are to be taken into account in the calculation of the actual amount of the pension.

Jann Wathelet Rosas

Delivered in open court in Luxembourg on 3 October 2002.

R. Grass

Registrar

P. Jann

President of the First Chamber