JUDGMENT OF THE COURT (Second Chamber)

20 January 2005 *

In Case C-306/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social n° 3 de Orense (Spain), made by decision of 24 June 2003, received at the Court on 16 July 2003, in the proceedings

Cristalina Salgado Alonso

v

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2004,

after considering the observations submitted on behalf of:

— Mrs Salgado Alonso, by A. Vázquez Conde, abogado,

— Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS), by A.R. Trillo García and A. Llorente Alvarez, acting as Agents,

— the Spanish Government, by E. Braquehais Conesa, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 39 EC and 42 EC and of Articles 45 and 48(1) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71').

2 The reference was made in the course of proceedings between Mrs Salgado Alonso and the Instituto Nacional de la Seguridad Social (National Institute of Social Security, 'INSS') and the Tesorería General de la Seguridad Social (Social Security General Fund, 'TGSS') concerning the award of a retirement pension under the Spanish legislation.

Legal background

Community legislation

3 Article 1(r) of Regulation No 1408/71 defines 'periods of insurance' as follows:

'[P]eriods of contribution or periods of employment or self-employment as defined or recognised as period[s] 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'.

4 Article 3(1) of Regulation No 1408/71 provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.'

5 Article 45(1) of the regulation lays down the principle of the aggregation of periods of insurance for the acquisition, retention or recovery of the right to benefits, in the following terms:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraphs 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.'

6 Article 46(2) of Regulation No 1408/71 provides:

'Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and/or Article 40(3), the following rules shall apply:

(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.'

7 Article 48(1) of Regulation No 1408/71 lays down an exception, as regards the award of a pension, for periods of insurance of less than one year's duration, in the following terms:

'Notwithstanding Article 46(2), the institution of a Member State shall not be required to award benefits in respect of periods completed under the legislation it administers which are taken into account when the risk materialises, if:

— the duration of the said periods does not amount to one year,

and

— taking only these periods into consideration, no right to benefit is acquired by virtue of the provisions of that legislation.'

National legislation

8 Article 161(1)(b) of the General Law on Social Security, in the codified version of Royal Legislative Decree 1/94 of 20 June 1994 (BOE No 154, 29 June 1994), as

amended by Law No 50/98 of 30 December 1998 relating to fiscal, administrative and social measures (BOE, 31 December 1998) ('the General Social Security Law') makes the grant of a contributory retirement pension conditional on the completion of a minimum period of contribution of 15 years, at least two of which must have been completed within the period of 15 years immediately preceding the occurrence of the fact giving rise to entitlement to the benefit.

9 Article 218 of the General Social Security Law states that, where the insured person is in receipt of an unemployment benefit, the Instituto Nacional de Empleo (National Institute of Employment, 'INEM') is to pay the social security scheme contributions in various respects, depending on the nature of the benefit granted. Thus under Article 218(2):

'In the case of an unemployment allowance for workers over 52 years of age, the benefit agency must also contribute to old-age insurance.'

10 Under Article 215(1)(3) of the General Social Security Law, that unemployment allowance is payable to an unemployed worker who has contributed to unemployment insurance for six years and satisfies all the conditions, except the age requirement, for obtaining a contributory retirement pension under the Spanish social security scheme.

11 Finally, the 28th Additional Provision of the General Social Security Law, which entered into force on 1 January 1999, following the promulgation of Law No 50/98, reads as follows:

'Retirement contributions paid by the benefit agency in accordance with Article 218 (2) of this law shall be taken into account in calculating the basic amount of the retirement pension and the percentage to be applied to it. Such contributions shall in no case have validity and legal effect for the purpose of accrediting the minimum period of contribution required under Article 161(1)(b) of this law, which, in accordance with Article 215(1)(3), must have been completed by the time an application is made for the [unemployment] allowance for [unemployed] persons over 52 years of age.'

The main proceedings and the questions referred for a preliminary ruling

12 Mrs Salgado Alonso, who was born on 30 May 1936, applied to INEM on 7 August 1992 for the special unemployment allowance for unemployed persons over 52 years of age. At the time, she was able to establish actual periods of insurance of 74 months — more than six years — under German legislation, between 29 June 1964 and 30 July 1970, of 26 months under Swiss legislation, between 1 December 1971 and 31 March 1975, and 182 days under Spanish legislation, between 8 January and 7 July 1992.

13 INEM initially refused to grant her the special unemployment allowance, on the ground that she had not completed in Spain the necessary minimum qualifying period of 15 years.

14 Mrs Salgado Alonso thereupon brought proceedings against that decision before the Juzgado de lo Social n° 2 de Orense (Social Court No 2, Orense, Spain), which by judgment of 22 June 1993 ruled that she was entitled to that allowance. INSS and TGSS and the Spanish Government explain that judgment essentially by reference to the fact that, in accordance with the Spanish case-law at the time, even qualifying

periods of shorter duration completed abroad were recognised as equivalent to the qualifying period of 15 years required by Article 161(1)(b) of the General Social Security Law. That national case-law had, however, been altered in the meantime to take account of the Court's judgments in Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869 and Case C-320/95 *Ferreiro Alvite* [1999] ECR I-951.

15 Mrs Salgado Alonso thus received the unemployment allowance for unemployed persons over 52 years of age from 7 August 1992 to 30 May 2001, that is, a period of 3 219 days during which old-age insurance contributions were paid on her behalf by INEM.

16 In May 2001, on reaching the age of 65, Mrs Salgado Alonso applied for the award of the pension she was entitled to under the German, Swiss and Spanish social security schemes. While she was granted pensions in Germany and Switzerland, INSS, by decision of 21 March 2002, rejected her application on the ground that she had not completed in Spain the minimum contribution period necessary for acquiring the right to a pension and that Article 46(2) of Regulation No 1408/71 on the aggregation of periods of insurance was not applicable, in accordance with Article 48 (1) of that regulation, since the period of insurance completed in Spain was less than one year. INSS also based its refusal on the 28th Additional Provision of the General Social Security Law.

17 On 13 February 2002, Mrs Salgado Alonso brought proceedings against INSS and TGSS before the Juzgado de lo Social n° 3 de Orense (Social Court No 3, Orense), seeking a declaration that she was entitled to receive a retirement pension under the Spanish legislation from 31 May 2001.

18 In support of her application, she submitted essentially that there should be taken into consideration not only the initial period of 182 days of contribution she had

completed in Spain but also the entire period during which INEM had paid contributions on her behalf to the statutory old-age insurance scheme while she was receiving the special unemployment allowance, so that she could now rely in Spain on a total of 3 401 days of contribution, a period of more than nine years and three months of contribution.

19 According to the national court, the question arises whether, first, the 28th Additional Provision of the General Social Security Law can validly exclude the taking into account of those 3 219 days of contribution for the purpose of ascertaining whether the period of insurance in question exceeds one year, so that, if it can validly do so, in accordance with Article 48(1) of Regulation No 1408/71 INSS is not obliged to grant benefits relating solely to that period.

20 The question arises, second, whether that additional provision, in that it excludes the taking into account of certain contributions, such as those paid solely in respect of old-age insurance, for the calculation of the qualifying periods laid down in Article 161(1)(b) of that law, discriminates against migrant workers, given that those periods must have been completed on the date of making the application for the unemployment allowance for an unemployed person over 52 years of age.

21 The national court refers in this respect to the case of workers who have received those unemployment allowances by establishing the qualifying period as a result of the taking into consideration of periods of insurance completed under the legislation of one or more other Member States, in accordance with the Court's case-law (see *Martínez Losada and Others* and *Ferreiro Alvite*).

22 Those workers cannot claim to have the social security contributions paid by INEM in respect of old-age insurance, during the period in which they received the unemployment allowance, taken into account in order to satisfy the condition concerning the minimum period of insurance laid down in Article 161(1)(b) of the General Social Security Law.

23 In those circumstances, the Juzgado de lo Social n° 3 de Orense decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Do Article 12 EC and Articles 39 EC to 42 EC ... and Article 45 of ... Regulation ... No 1408/71 ... preclude a national provision under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of completing the various qualifying periods established in the national legislation and of conferring entitlement to the old-age pension, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which are invalidated by law, with the result that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 45 of the aforementioned ... regulation, those qualifying periods would have to be regarded as completed?

2. Do Article 12 EC and Articles 39 EC to 42 EC ... and Article 48(1) of ... Regulation ... No 1408/71 ... preclude national provisions under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of

determining whether the total duration of insurance periods or periods of residence covered by the legislation of that Member State amounts to one year, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which fall due and are paid during unemployment, so that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 48(1) of the aforementioned ... regulation, the national benefit agency could not be relieved of the obligation to award national benefits?'

24 By letter of 29 September 2003, INSS informed the Court that on 10 September 2003 a further decision unfavourable to Mrs Salgado Alonso had been taken. That decision replaces the one of 21 March 2002 and bases the refusal of the old-age pension on the fact that she 'has not completed the minimum period of contribution of 15 years nor, within that period, the period of two years immediately preceding the date of making the application, those being periods completion of which is under Article 161(1)(b) of the General Social Security Law ... a condition for the right to a retirement pension.

As regards elements subsequent to 1 January 1999, it follows from the 28th Additional Provision [of the General Social Security Law] that contributions paid by the benefit agency in respect of retirement insurance during the period in which the insured person received the unemployment allowance for unemployed persons over 52 years of age are to be taken into account for determining the basis of calculation and the percentage to be applied to it. In no case are those contributions to have legal validity and effect for accrediting the minimum period of contributions.'

25 It follows from this fresh decision of INSS that the rejection of Mrs Salgado Alonso's application for a pension is no longer based on Article 48 of Regulation No 1408/71.

The first question

26 By its first question, the national court essentially asks whether Articles 12 EC, 39 EC and 42 EC and Article 45 of Regulation No 1408/71 must be interpreted as precluding a national provision, such as that in the 28th Additional Provision of the General Social Security Law, which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit agency, such periods being taken into consideration solely for the calculation of the amount of that pension.

27 It should be recalled that the Court has consistently held that the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between Community workers (see, to that effect, Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27; *Martínez Losada and Others*, paragraph 43; and *Ferreiro Alvite*, paragraph 23).

28 A Member State is thus entitled to lay down a qualifying period, such as that referred to in Article 161(1)(b) of the General Social Security Law, for the acquisition of the right to a retirement pension.

29 In this respect, Article 42(a) EC states the principle of aggregation of insurance, residence or employment periods, which is implemented in particular by Article 45 of Regulation No 1408/71 in relation to old-age insurance. This is one of the basic principles governing Community coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see, inter alia, Case C-481/93 *Moscato* [1995] ECR I-3525, paragraph 28).

30 Regulation No 1408/71 does not, however, determine the conditions governing the constitution of periods of employment or insurance. Those conditions, as is apparent from Article 1(r) of that regulation, are defined exclusively by the legislation of the Member State under which the periods in question are completed.

31 Consequently, a Member State is entitled not only to impose a qualifying period for the acquisition of a right to a pension provided for by national legislation, but also to determine the kind of insurance periods which may be taken into account for that purpose, provided that, in accordance with Article 45 of Regulation No 1408/71, periods completed under the legislation of any other Member State are also taken into consideration under the same conditions, as if they were completed under national legislation.

32 In the main proceedings, the dispute between Mrs Salgado Alonso and INSS and TGSS does not concern periods said to have been completed under the legislation of

a Member State other than that in which the pension was claimed, but certain periods completed in the latter Member State, namely the Kingdom of Spain, at a time when the person concerned was in receipt of the special unemployment allowance for unemployed persons over 52 years of age. Such a dispute does not come under Article 45 of Regulation No 1408/71.

33 The claimant in the main proceedings submits, however, that only workers who have exercised their right to freedom of movement are affected by the 28th Additional Provision of the General Social Security Law which excludes the taking into account, for the acquisition of a pension right, of the periods during which the insured person has received the special unemployment allowance, even though contributions to old-age insurance were paid on behalf of the insured person by INEM. She submits that the provision is therefore contrary to Article 39 EC.

34 On this point, it is clear, as the Advocate General observes in points 39 and 40 of her Opinion, that a national rule such as that set out in the 28th Additional Provision of the General Social Security Law applies without distinction to workers who have spent all their working life on national territory and those who have also worked in other Member States.

35 It has not been established before the Court that workers who have exercised their right to freedom of movement are, on their return to Spain, exposed to the risk of long-term unemployment more often than workers who have worked only in that Member State, with the consequence that they are more affected by the restriction in that additional provision.

36 In those circumstances, the argument before the Court has not established that a national rule such as that set out in the 28th Additional Provision of the General Social Security Law is indirectly discriminatory within the meaning of Article 39 EC.

37 Finally, since Article 39 EC, which is the specific provision, is applicable in a situation such as that at issue in the main proceedings, there is no need for the Court to interpret the more general provision in Article 12 EC.

38 In the light of the foregoing, the answer to the first question must be that Articles 39 EC and 42 EC and Article 45 of Regulation No 1408/71 must be interpreted as not precluding a national provision, such as that set out in the 28th Additional Provision of the General Social Security Law, which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit agency, such periods being taken into consideration solely for the calculation of the amount of that pension.

The second question

39 By its second question, the national court essentially asks whether, in order to determine for the purposes of the application of Article 48(1) of Regulation No

1408/71 whether the duration of the periods of insurance completed under the legislation applied by the institution of a Member State amounts to one year, that institution must take into account not only the periods of insurance necessary for acquiring the right to a pension but also those which affect only the calculation of the amount of the benefits.

40 It should be recalled that, according to settled case-law, the procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, inter alia, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17; and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41).

41 Thus it is clear from both the wording and the scheme of Article 234 EC that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see, to that effect, Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 28, and *Djabali*, paragraph 18).

42 The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (*Djabali*, paragraph 19; *Bacardi-Martini and Cellier des Dauphins*, paragraph 42; and Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 72).

43 In the case at issue in the main proceedings, after the Juzgado de lo Social n° 3 de Orense made its reference to the Court for a preliminary ruling, it is common ground that a fresh decision rejecting Mrs Salgado Alonso's application for a pension was taken by INSS which is no longer based on Article 48 of Regulation No 1408/71.

44 The conclusion must therefore be that an answer of the Court to the second question put by the Juzgado de lo Social n° 3 de Orense would now be of no use to that court.

45 Consequently, there is no need to answer the second question.

Costs

46 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 (Second Chamber) rules as follows:

Articles 39 EC and 42 EC and Article 45 of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be interpreted as not precluding a national provision, such as that set out in the 28th Additional Provision of the General Social Security Law, which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit agency, such periods being taken into consideration solely for the calculation of the amount of that pension.

[Signatures]