JUDGMENT OF THE COURT OF 30 OCTOBER 1975 [1]

Benito Galati v Landesversicherungsanstalt Schwaben (preliminary ruling requested by the Sozialgericht Augsburg)

Case 33/75

Summary

Social security for migrant workers — Invalidity insurance — Insurance periods — Aggregation — Conversion into months — Period rounded up to a month in accordance with legislation of a Member State — Period completed in another Member State — Identical treatment

(Council Regulation No 574/72, Article 15 (3)

If an insurance period of less than one month completed in the Federal Republic of Germany must, under German legislation, be treated as a whole month, an insurance period completed in accordance with the legislation of another Member State and which, on conversion into months for the purpose of aggregation, produces a decimal fraction, must also be rounded up to the next highest figure in months, in order to ensure that employed workers do not, because of emigration, lose the rights which they have acquired in their country of origin.

In Case 33/75

Reference to the Court under Article 177 of the EEC Treaty by the Sozialgericht Augsburg for a preliminary ruling in the action pending before that court between

BENITO GALATI, Terrasini,

and

LANDESVERSICHERUNGSANSTALT SCHWABEN, Augsburg,

on the interpretation of Article 45 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and of

1 — Language of the Case: German.

Article 15 (3) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71.

THE COURT

composed of: R. Lecourt, President, R. Monaco and H. Kutscher, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe (Rapporteur), Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By order of 27 January 1975 the Sozialgericht Augsburg requested the Court of Justice to rule on the following questions:

1. When insurance periods which are expressed in weeks are converted into periods which are expressed in months (Article 15 (3) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, OJ L 74 of 27. 3. 1972, p. 1), is any decimal fraction which may be left over to be disregarded in the aggregation of insurance periods or is it to be taken into account by the competent institution as a full month or one which has started to run?
2. Is the last phrase of Article 45 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149 of 5. 7. 1971, p. 2) to be interpreted as constituting a fiction in the sense that insurance periods in another Member State which can be counted towards the qualifying period are treated without examination by the competent institution as insurance periods completed in its own State which can be counted as aforesaid, or is it permissible to examine the insurance periods completed in the other Member State in the light of the legislation which the institution administers?

The plaintiff in the main action, an Italian national residing in Italy, became incapable of work in January 1971. He had completed 27 insurance months in the Federal Republic of Germany and, up to January 1971, had paid 142 weeks' compulsory contributions in Italy; he later paid two weeks' voluntary contributions (27. 6. 1971 to 4. 7. 1971), with the permission of the Istituto nazionale della previdenza sociale pursuant to Article 1 of Decree No 1432 of 31 December 1971 (Gazzetta Ufficiale No 131 of 22. 5. 1972, p. 3859).

The applicant applied to the defendant in the main action for a part pension from the German pensions insurance scheme on account of incapacity for work, or alternatively, occupational invalidity. His application was rejected on 14 August 1973 on the ground that the qualifying period of 60 calendar months for these risks had not been completed even if account were taken of periods completed in Italy. The defendant has, in effect, argued that, although periods completed in Italy must be taken into account in applying Article 45 (1) of Regulation (EEC) No 1408/71, only national law can determine in each case whether these insurance periods can be taken into account towards the qualifying period. (In fact, under paragraphs 1246 (3) and 1247 (2) of the Reichversicherungsordnung, only periods completed before the risk materialized can count and, under paragraph 1255 (8) of the Reichversicherungsordnung, only contributions paid before the risk materialized are taken into account in calculating the pension).

The Sozialgericht is in the first place of the opinion that the answer to the question in the present case depends on the interpretation of Article 15 (3) of Regulation (EEC) No 574/72. In that court's view, there are three possible answers to the question what ought to be done in cases where the conversion from days into months produces decimal fractions:

- to disregard the partially completed month (which is the view of the defendant in the main action; or
- to treat the partially completed month as a full month for the purposes of conversion (which is the practice of all the insurance schemes in the Community); or
- to treat the period expressed as a decimal fraction as a partially completed German monthly contribution period, in other words, to round up the resultant figures in accordance with paragraph 1250 (3) of the Reichversicherungsordnung (which is the answer favoured by the court making the reference).

The Sozialgericht emphasizes moreover that the disadvantages arising from leaving the decimal fractions out of account are caused entirely by the emigration of the insured worker and that it is these very disadvantages which Article 45 (1) of Regulation (EEC) No 1408/71 is designed to avoid.

The order making the reference was registered at the Court Registry on 24 March 1975.

Written observations were lodged by the defendant in the main action and by the Commission of the European Communities in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

(a) Observations submitted by the defendant in the main action

First question

Calculated on the basis of a six-day week in accordance with Article 15 (3) of

Regulation (EEC) No 574/72 and Article 13 (4) of Regulation No 4, the conversion into months of the 142 weeks completed in Italy gives a total of 32.77 months.

EEC regulations prescribe a specific conversion procedure but contain no express provision for the way in which decimal fractions should be treated. The qualifying period of 60 calendar months required by German legislation was not completed in accordance with Article 15 (3) of Regulation (EEC) No 574/72, which prescribes the conversion procedure for periods completed under the legislation of another Member State and which must be taken into account within the meaning of Article 45 (1) of Regulation (EEC) No 1408/71.

An explanatory memorandum[1] concerning the said Article 15 reads as follows:

'Where insurance periods completed under the legislation of two or more Member States are expressed in different units of time, all States must follow uniform conversion rules when the periods are *aggregated*.'

In the absence of any rule covering a period less than the unit of time used under the scheme concerned, this period ought not to be taken into account when the insurance periods completed under the legislation of the other Member States are calculated. When the Community legislation was drafted, the absence of a provision enabling the total to be rounded up was not considered to be a lacuna in the law which needed to be filled.

The conversion procedure followed by the defendant in the main action does not result in placing the foreign migrant worker at a disadvantage. In the case of a German insured worker, too, the conversion of the insurance periods completed under Italian legislation is carried out in accordance with the rules laid down in Article 15 (3), abovementioned, and not in accordance with German law. As Article 51 of the EEC Treaty merely provides that the disadvantages which emigration may entail for workers must be avoided, it cannot result in a additional privilege for them. This applies in the present case because separate calculation of insurance periods could give a migrant worker an advantage as a result of rounding up the total once more when the periods are converted.

Such an interpretation of Article 15 (3) accords best with the principle of equal treatment and with the harmonization measures of the Member States.

Second question

The legal conditions which apply under the legislation of one Member State (specifically, under German law, completion of the qualifying period and materialization of the risk) cannot, by means of a fiction, result in the grant of a benefit in another Member State. Like Regulations Nos 3 and 4, Regulations Nos 1408/71 and 574/72 fail to make any particular provisions concerning the qualifying period within the meaning of German legislation on social insurance. This is because benefits 'subject to a qualifying period' do not exist in all the Member States. Even if, within the framework of Community provisions, account must be taken of all insurance periods completed in the Member States, national law alone is conclusive with regard to the 'qualifying period'. Article 28 (1) of Regulation No 3 provides that 'The institution of each of the Member States shall, in accordance with its own legislation, determine whether the person concerned satisfies the conditions for entitlement to the benefits prescribed in that legislation ...'; similarly, Article 45 (1) of Regulation No 1408/71, which refers to it, must be interpreted as meaning that insurance periods other

1 — *Translator's note:* this accompanied the draft regulation submitted to the Council.

than those completed in Germany must be taken into account as though they were periods completed in accordance with German legislation. A decision whether, on the basis of these periods, the 'qualifying period' has been completed must clearly be taken in accordance with the German rules.

The concept of materialization of the risk, which is inherent in German legislation, is of fundamental importance. It means that for the purposes of completion of the qualifying period in a case of occupational invalidity or physical incapacity only the periods prior to materialization of the risk may be taken into account. In contrast, therefore, to Italian legislation, the risk of occupational invalidity materializes regardless of the wishes of the assured, who can neither decide upon it arbitrarily nor alter the date thereof by lodging a pension application. But the Community regulations on social security are also designed to avoid placing individuals at a disadvantage. It follows that, in the present case, an Italian cannot receive less favourable treatment than a German. This would not, in any case, have occurred since the importance attached to the German principle concerning risk would have affected them both. If Article 45 (1) of Regulation (EEC) No 1408/71 were to be given the meaning favoured by the court making the reference, the result would be that, because it is possible in Italy to defer the risk and to complete the qualifying period by paying voluntary contributions, an Italian could receive better treatment than a German.

This interpretation would also lead to conflict with German constitutional law, more specifically, with the principle of equality enshrined in Article 3 of the Basic Law. Decision No 55 of the Administrative Committee, which interpreted Article 28 (1) (b) of Regulation No 3, contains nothing which conflicts with the maintenance in force, in the Community context, of the German principle concerning risk. Under Article 28 (1), in conjunction with Article 27, it is for the institution of each Member State, independently and in accordance with its own legislation, to determine whether the qualifying period has been completed, and whether and when the 'invalidity' risk materializes.

In the present case, therefore, the competent institution can examine the periods completed in another Member State in the light of the legislation which the institution administers.

(b) Observations submitted by the Commission

First question

Since the Community provisions applicable in the present case do not specify what is to be done with decimal fractions which may be produced as the result of the conversion, it follows that they must be neither ignored nor rounded up but, quite simply, taken into account as they are during aggregation, in this case as 59·77 months. The question whether the result of that aggregation is sufficient for the purposes of acquiring a pension right must be settled by applying the provisions of national law. If the latter makes it possible to round up the decimal fractions, (which is the case under paragraph 1250 (3) of the Reichsversicherungsordnung migrant workers must enjoy the same rights as the nationals of the State concerned.

Second question

The expression in Article 45, ... as though they had been completed under the legislation which it administers', must not be interpreted as limiting the duty, laid down in the same article, to take into account insurance periods completed in other Member States to the effect that this expression compels the competent institution to verify whether the insurance periods completed abroad

comply with the provisions of the national legislation which it administers. The expression 'insurance periods' used in Article 45 (1) and defined in Article 1 (r) of Regulation (EEC) No 1408/71 means contribution periods or periods of employment as defined or recognized as insurance periods 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 insurance periods. The competent institution must, therefore, refer to the legislation under which these periods were completed. The Court reached a similar conclusion in its judgment of 6 June 1972 (Case 2/72, *Murru* v *Caisse régionale d'assurance maladie de Paris,* Rec. 1972, p. 333), although in that case it would have been better for the migrant worker concerned if the competent institution had referred to its own legislation. However, it may be asked whether the question how contributions paid after the risk materializes should be counted again falls within the sphere of problems which, under Regulation No 1408/71, must be solved by reference to the legislation of the place where the worker is employed, and whether the problem is that of defining the qualifying period within the meaning of paragraphs 1246 (3) and 1247 (3) of the Reichsversicherungsordnung and, consequently, the problem of interpreting and applying the provisions of German legislation. This would be contrary to the basic principle laid down in Article 45 (1) and that laid down in Article 51 of the EEC Treaty. In order to ensure freedom of movement for workers it is not enough to guarantee that migrant workers will receive treatment equal to that accorded to national workers, but they must be safeguarded against any adverse consequences or loss which emigration may entail. In consequence, if, pursuant to Article 1 of the Italian Decree of 31 December 1971, permission has been given to pay voluntary contributions to the invalidity and old-age insurance scheme, even for the period after the risk materialized, and if the voluntary contributions have been paid, the competent German institution must take these contributions into account without prior examination.

The defendant in the main action, represented by its manager, Mr Wanders, and the Commission, represented by its Legal Adviser, Mr Koch, acting as Agent, submitted their observations at the hearing on 25 September 1975.

The Advocate-General delivered his opinion at the hearing on 15 October 1975.

Law

1 By order of 27 January 1975, received at the Court on the following 24 March, the Sozialgericht Augsburg referred to the Court under Article 177 of the EEC Treaty two questions on the interpretation of provisions of Community law concerning social security for migrant workers.

These questions were raised in the context of proceedings concerning the application for a part pension from the German pensions insurance scheme on account of incapacity for earning or, alternatively, occupational invalidity which was sent to the Landesversicherungsanstalt Schwaben by an Italian national, the plaintiff in the main action, who had completed 27 insurance

months in the Federal Republic of Germany and had paid 142 weeks' compulsory contributions and two weeks' voluntary contributions in Italy.

The defendant in the main action rejected that application on the ground that the qualifying period of 60 calendar months required under German legislation for these risks had not been completed, even if account was taken of the insurance periods completed in Italy.

In particular, the defendant contended that, although in application of Article 45 (1) of Regulation (EEC) No 1408/71, periods completed in the other Member States must be taken into account, only national law can, in each case, determine whether these insurance periods can be counted towards the qualifying period for the acquisition of the right to a pension.

2 The first question asks whether, when insurance periods which are expressed in weeks are converted into periods which are expressed in months (Article 15 (3) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, OJ L 74 of 27. 3. 1972, p. 1, English Special Edition 1972 (I), p. 159), any decimal fraction which may be left over is to be disregarded in the aggregation of insurance periods or whether it is to be taken into account by the competent institution as a full month or one which has started to run.

The second question asks whether the last phrase of Article 45 (1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149 of 5. 7. 1971, English Special Edition 1971 (II), p. 416), is to be interpreted as constituting a legal fiction in the sense that insurance periods in another Member State which can be counted towards the qualifying period must be considered, without any examination, by the competent institution as insurance periods completed in its own State which can be counted as aforesaid, or whether it is permissible to examine the insurance periods completed in the other Member State in the light of the legislation which the institution administers.

If, as the Sozialgericht Augsburg holds, an insurance period of less than one month completed in the Federal Republic of Germany must, under German legislation, be treated as a whole month, an insurance period completed in accordance with the legislation of another Member State and which, on conversion into months for the purpose of aggregation, produces a decimal fraction, must also be rounded up to the next highest figure in months, in order to ensure that employed workers do not, because of emigration, lose the rights which they have acquired in their country of origin.

4 In view of the answer given to the first question, the second question has no purpose.

Costs

5 The costs incurred by the Commission of the European Communities, which submitted its observations to the Court, are not recoverable and, as these proceedings are, in so far as the parties to the main action are concerned, a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Sozialgericht Augsburg by order of that court dated 27 January 1975, hereby rules:

If an insurance period of less than one month completed in the Federal Republic of Germany must, under German legislation, be treated as a whole month, an insurance period completed in accordance with the legislation of another Member State and which, on conversion into months for the purpose of aggregation, produces a decimal fraction, must also be rounded up to the next highest figure in months, in order to ensure that employed workers do not, because of emigration, lose the rights which they have acquired in their country of origin.

Lecourt Monaco Kutscher Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 30 October 1975.

A. Van Houtte
Registrar

R. Lecourt
President