JUDGMENT OF THE COURT (Fifth Chamber)

18 November 1999 *

In Case C-442/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arbeidsrechtbank, Bruges, Belgium, for a preliminary ruling in the proceedings pending before that court between

Jozef Van Coile

and

Rijksdienst voor Pensioenen

on the interpretation 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

* Language of the case: Dutch.

Community, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, J.C. Moitinho de Almeida, L. Sevón, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Rijksdienst voor Pensioenen, by G. Perl, General Administrator,

— the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Rijksdienst voor Pensioenen, represented by J.C.A. De Clerck, Assistant Adviser, and of the Commission, represented by P.J. Kuijper, at the hearing on 24 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

1 By order of 22 December 1997, received at the Court on 30 December 1997, the Arbeidsrechtbank (Labour Court), Bruges, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation 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 by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7; 'Regulation No 1408/71').

2 That question was raised in proceedings between Mr Van Coile and the Rijksdienst voor Pensioenen (the National Pensions Office, hereinafter 'the RVP') concerning the award of an old-age pension.

Community law

3 Article 46(1) of Regulation No 1408/71 states:

'1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45

[consideration of other periods of insurance or of residence] or Article 40(3) [invalidity benefits], the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

(ii) on the other hand ...'.

4 Regulation No 1248/92 inserted, *inter alia*, Article 46b in Regulation No 1408/71, which contains special provisions applicable in the case of overlapping of benefits of the same kind payable under the legislation of two or more Member States. Article 46b(2) provides:

'The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall apply to a benefit calculated in accordance with Article 46(1)(a)(i) only if the benefit concerned is:

(a) either a benefit, which is referred to in Annex IV, part D, the amount of which does not depend on the length of the periods of insurance or of residence completed; or

(b) a benefit, the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialised and a later date. In the latter case, the said provisions shall apply in the case of overlapping of such a benefit:

(i) either with a benefit of the same kind, except where an agreement has been concluded between two or more Member States providing that one and the same credited period may not be taken into account two or more times;

(ii) or with a benefit of the type referred to in (a).

The benefits and agreements referred to in (b) are mentioned in Annex IV, part D.'

5 The amendments made by Regulation No 1248/92 to Regulation No 1408/71 were concerned with delimiting the application of national rules against overlapping benefits and did not affect the principle of their operation (Case C-143/97 *ONP* v *Conti* [1998] ECR I-6365, paragraph 19).

Belgian law

6 The main proceedings concern the application of Article 32b of the Royal Decree of 21 December 1967 laying down general rules concerning retirement and

survivor's pensions for employed persons, as amended by the Royal Decree of 5 April 1976 (*Moniteur Belge* of 8 April 1976).

7 Article 15(3) of Royal Decree No 50 of 24 October 1967 (*Moniteur Belge* of 27 October 1967) provides:

'The King shall determine the way in which evidence is to be adduced of employment giving entitlement to a retirement pension and the arrangements under which periods not established are assimilated to periods of employment.'

8 The fifth and sixth paragraphs of Article 32b of the Royal Decree of 21 December 1967, adopted pursuant to Royal Decree No 50, provide:

'An employed person who was in employment during the period between 1 January 1938 and 1 January 1945 in respect of which a contribution was paid of an amount equivalent to the annual amount referred to in the second paragraph shall be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and 1 January 1946.

The presumption laid down in the two previous paragraphs may be rebutted only in respect of periods of employment for which the person concerned can claim a pension under another Belgian scheme, with the exception of the scheme for self-employed persons, or under a scheme of a foreign country. It may also be rebutted

where the person concerned provides evidence of employment as a mineworker, seaman or fisherman.'

9 The presumption thus laid down is called 'the [statutory] war years presumption'.

10 The provisions of Article 32b of the Royal Decree of 21 December 1967 were repealed by Article 50(1)(1) of the Royal Decree of 4 December 1990 (*Moniteur Belge* of 20 December 1990), but remained applicable to pensions which, like Mr Van Coile's pension, actually became payable before 1 January 1991.

The main proceedings

11 Mr Van Coile, who was born in 1924, worked in Belgium from October 1941 until March 1943, and then from October 1945. In addition, he worked in Germany from March 1943 until May 1945, first in Nuremberg, and then in the Dresden area.

12 On 22 September 1988, Mr Van Coile submitted a claim for a Belgian employed person's pension as from 1 September 1989. At about the same time, he also submitted a claim to the competent institutions of the Federal Republic of Germany for an employed person's pension in respect of the period during which he had worked in Nuremberg.

13 By a provisional decision of 6 March 1989, the RVP granted Mr Van Coile a pension calculated on the basis of an employment record of 42/45ths, taking into

consideration, in particular, the years from 1943 to 1945, in whole or in part on the basis of the war years presumption.

14 By decision of 29 January 1990, the Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office for Rhine Province) awarded Mr Van Coile a pension payable by the Federal Republic of Germany in respect of the period during which he had worked in Nuremberg in 1943. The RVP then took a final decision on 20 April 1990 and awarded a pension in respect of the employment record of the person concerned as from October 1941, on the basis of a fraction of 41/45, including the period during which he had worked in the Dresden area.

15 On 12 January 1995, following German reunification in 1990, Mr Van Coile lodged at the Landesversicherungsanstalt Rheinprovinz an application for review seeking a German pension also in respect of his period of employment in the former German Democratic Republic. By decision of 19 June 1995, the Landesversicherungsanstalt Rheinprovinz awarded him a pension as from 1 January 1995 calculated on the basis of all the periods of employment which he had completed in Germany, including those completed in the former German Democratic Republic.

16 On 26 July 1995, following that award, the RVP recalculated Mr Van Coile's Belgian pension. Contrary to the RVP's previous decision, the amount of the pension was thus calculated on the basis of a fraction of 40/45 and not 41/45, in the light of the rebuttal of the war years presumption for the periods in respect of which Mr Van Coile can claim a German pension. Since the sum of the Belgian and German pensions was higher than the 'domestic law' pension, the RVP, pursuant to Article 50 of Regulation No 1408/71, did not award a supplement.

17 Mr Van Coile challenged the RVP's decision before the Arbeidsrechtbank, Bruges. Relying on Community law and the case-law of the Court of Justice he sought to

show that the reduction in his Belgian pension was incompatible with the rules on provisions against overlapping in Regulation No 1408/71 and, in particular, Article 46b(2) of that regulation.

18 In those circumstances, the Arbeidsrechtbank, Bruges, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'The fifth paragraph of Article 32b of the Royal Decree of 21 December 1967 laying down general rules concerning retirement and survivor's pensions for employed persons provides as follows: "An employed person who was in employment during the period between 1 January 1938 and 1 January 1945 in respect of which a contribution was paid of an amount equivalent to the annual amount referred to in the second paragraph shall be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and 1 January 1946."

The sixth paragraph of Article 32b of the aforesaid Royal Decree of 21 December 1967 provides as follows: "The presumption laid down in the two previous paragraphs may be rebutted only in respect of periods of employment for which the person concerned can claim a pension under another Belgian scheme, with the exception of the scheme for self-employed persons, or under a scheme of a foreign country."

Is a provision such as the sixth paragraph of Article 32b of the Royal Decree of 21 December 1967 a provision on reduction, suspension or withdrawal laid down by the legislation of a Member State, as referred to in Article 46b(2) of

Regulation No 1408/71, which does not apply to a benefit calculated in accordance with Article 46(1)(a)(i)?'

The question referred for a preliminary ruling

19 By its question the national court asks in substance whether a national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 1 January 1945, was in employment in respect of which minimum contributions were paid under a social security scheme of the State concerned is to be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and 1 January 1946, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, constitutes a provision on reduction, suspension or withdrawal within the meaning of Regulation No 1408/71.

20 The RVP and the Commission take the view that this question should be answered in the negative.

21 The RVP contends, in particular, that, in laying down the war years presumption, the Belgian legislature sought to ensure that a person who worked as an employed person before the War and who, as a result of the events of the War, was obliged to interrupt that employment, so that he is not able to establish that he continued during that period to contribute to his pension rights as before, does not suffer from that situation.

22 However, in order to avoid the award of two pensions in respect of the same period, that presumption is deemed to be rebutted if the award of a pension

payable by another State in respect of the same period shows that the person concerned did not work in Belgium under the employed persons' scheme during the said period. According to the RVP, it is therefore a question of proof which is resolved by means of a rebuttable presumption which cannot be treated as a provision on reduction.

23 The Commission adds that the present case is clearly different from Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679 and *ONP* v *Conti*, cited above, in which it had supported the argument that the national provisions then at issue had to be treated as provisions on reduction. The first case concerned the question whether a national provision which reduced the number of notional years credited, which were required in order to reach a full employment record of 30 years, by the number of years in respect of which the person concerned could claim a pension in another Member State constituted a provision on reduction. The second case concerned the characterisation of a provision which reduced a supplement to the partial pension of a mineworker who had worked for at least 25 years as an underground mineworker because of other pensions drawn under another Belgian or foreign scheme.

24 According to the Commission, the 'periods' of notional years or of supplement could not be localised in time. There was no question, therefore, of double application of two sets of legislation during 'the same period'. By contrast, in the present case, there is a presumption which is related to a specific period (the Second World War) and is rebuttable by the production of evidence. The provision at issue here in the main proceedings does not, therefore, according to the Commission, constitute a provision on reduction.

25 It should be recalled first of all that the Court has held that a national rule must be regarded as a provision for reduction of benefit if the calculation which it requires to be made has the effect of reducing the amount of pension which the

person concerned may claim because he receives a benefit from another Member State (*ONP* v *Conti*, paragraph 25).

26 In that same judgment, the Court stressed that provisions for reduction of benefits cannot be rendered exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules for calculating the amount payable (*Conti*, paragraph 24).

27 Such national provisions cannot, furthermore, be exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules of evidence.

28 However, in the present case, the war years presumption is part of legislation whose purpose is to reduce the damaging effects of the Second World War on the pension rights of workers subject to Belgian legislation.

29 To that end, an employed person who held employment in Belgium during the period between 1 January 1938 and 1 January 1945 in respect of which minimum contributions were paid under a national social security scheme is deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the employment established came to an end and 1 January 1946.

30 That presumption operates, in particular, in favour of a worker who, having worked in Belgium, is not in a position to provide evidence of having paid sufficient contributions during all the years at issue because of the destruction or

loss of documents and of a person who, as a result of the events of the War, could not continue his employment record in Belgium.

31 It should be emphasised that the presumption at issue is a presumption that contributions were paid into the Belgian scheme under consideration and not a presumption of employment in Belgium. In a case such as that of the applicant in the main proceedings, the presumption could not therefore be rebutted by the mere fact that it was not contested that he had worked in Germany for a certain time. On the other hand, once a pension had been awarded to him in respect of the periods of employment in Germany, the considerations which led the Belgian legislature to lay down the war years presumption for his benefit ceased to be valid for him.

32 In those circumstances, a national provision which in such a situation provides that the war years presumption is not applicable to periods of employment in respect of which the person concerned receives a pension under another social security scheme cannot be categorised as a provision on 'reduction' within the meaning of Regulation No 1408/71. Such a provision merely gives due effect to the fact that, for all or part of the periods of employment in respect of which the person concerned is not in a position to prove payment of sufficient social security contributions under the Belgian scheme in question, he is already receiving a pension under another scheme.

33 The answer to the question must therefore be that a national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 1 January 1945, was in employment in respect of which minimum contributions were paid under a social security scheme of the State concerned is to be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and

1 January 1946, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, does not constitute a provision on reduction, suspension or withdrawal within the meaning of Regulation No 1408/71.

Costs

34 The costs incurred by the Commission, which has 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 (Fifth Chamber),

in answer to the question referred to it by the Arbeidsrechtbank, Bruges, by order of 22 December 1997, hereby rules:

A national provision such as that at issue in the main proceedings under which an employed person who, between 1 January 1938 and 1 January 1945, was in employment in respect of which minimum contributions were paid under a social

security scheme of the State concerned is to be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and 1 January 1946, but under which that presumption is not applicable to periods of employment for which the person concerned receives a pension under a scheme of another State, does not constitute a provision on reduction, suspension or withdrawal within the meaning 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 by Council Regulation (EEC) No 1248/92 of 30 April 1992.

Edward Moitinho de Almeida Sevón

Puissochet Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber