

Judgment of the Court (Second Chamber) of 7 March 2002

Caterina Insalaca v Office national des pensions (ONP)

Reference for a preliminary ruling: Tribunal du travail de Mons – Belgium

Social security - Articles 46 to 46c of Regulation (EEC) No 1408/71 - National rules against overlapping - Benefits of the same kind

Case C-107/00

European Court reports 2002 Page I-02403

In Case C-107/00,

REFERENCE to the Court under Article 234 EC by the Tribunal du travail de Mons (Belgium) for a preliminary ruling in the proceedings pending before that court between

Caterina Insalaca

and

Office national des pensions (ONP),

on the interpretation of Articles 46a and 46b 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

THE COURT (Second Chamber),

composed of: N. Colneric, President of the Chamber, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mrs Insalaca, by D. Rossini, trade union representative,
- the Office national des pensions (ONP), by G. Perl, acting as Agent,
- the Belgian Government, by A. Snoecx, acting as Agent,
- the Commission of the European Communities, by P. Hillenkamp and H. Michard, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Insalaca, represented by D. Rossini, the Office national des pensions (ONP), represented by J.-P. Lheureux, acting as Agent, and the Commission, represented by H. Michard, at the hearing on 5 April 2001,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2001,

gives the following

Judgment

Grounds

1 By judgment of 13 March 2000, received at the Court of Justice on 22 March 2000, the Tribunal du travail (Labour Court), Mons, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 46a and 46b 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7, hereinafter Regulation No 1408/71).

2 Those questions were raised in proceedings between Caterina Insalaca and the Office national des pensions (the National Pensions Office, hereinafter the ONP) concerning the taking into account of an Italian survivor's pension in the determination of the ceiling for the Belgian retirement and survivor's pensions which she can claim.

Legal background

Community legislation

3 Under Article 12(2) of Regulation No 1408/71:

Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.

4 Article 46(1) to (3) of Regulation No 1408/71, provides:

1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied ..., 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, pursuant to paragraph 2;

...

2. 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 persons concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislations 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.

3. The person concerned shall be entitled to the highest amount calculated in accordance with paragraphs 1 and 2 from the competent institution of each Member State without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which this benefit is due.

Where that is the case, the comparison to be carried out shall relate to the amounts determined after the application of the said provisions.

5 Article 46a of Regulation No 1408/71, which contains general provisions relating to reduction, suspension or withdrawal applicable to benefits in respect of invalidity, old age and survivors under the legislations of the Member States, provides:

1. ... overlapping of benefits of the same kind shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. ... overlapping of benefits of different kinds means: all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.

3. The following rules shall be applicable for the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

(a) account shall be taken of the benefits acquired under the legislation of another Member State or of other income acquired in another Member State only where the legislation of the first Member State provides for the taking into account of benefits or income acquired abroad;

...

6 Article 46b of the same regulation, concerning special provisions applicable in the case of overlapping of benefits of the same kind under the legislation of two or more Member States, reads as follows:

1. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall not be applicable to a benefit calculated in accordance with Article 46(2).

2. 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).

...

7 Article 46c of Regulation 1408/71 contains special provisions applicable in the case of overlapping of one or more benefits referred to in Article 46a(1) with one or more benefits of a different kind or with other income, where two or more Member States are concerned.

Belgian legislation

8 Under the first paragraph of Article 20 of Royal Decree No 50 of 24 October 1967 on retirement and survivor's pensions of employed workers (Moniteur Belge of 27 October 1967), a survivor's pension may not be aggregated with a retirement pension or with any other benefit taking the place of a retirement pension, save up to such amount as may be determined by the King.

9 Article 52(1) of the Royal Decree of 21 December 1967 on the general regulation of the retirement and survivor's pension scheme for employed workers (Moniteur Belge of 16 January 1968), as amended by the Royal Decree of 9 July 1997 (Moniteur Belge of 9 August 1997, hereinafter the Royal Decree of 21 December 1967), provides:

Where the surviving spouse can claim both a survivor's pension under the pension scheme for employed workers and one or more retirement pensions, or any other benefit taking the place thereof under the pension scheme for employed workers or one or more other pension schemes, the survivor's pension may be aggregated with the said retirement pensions only up to a sum equal to 110% of the amount of the survivor's pension which would have been awarded to the surviving spouse for a complete contributions record.

Where the spouse mentioned in the first subparagraph can also claim one or more survivor's pensions or other benefits taking their place within the meaning of Article 10a of Royal Decree No 50 of 24 October 1967, the survivor's pension may not be greater than the difference between, first, 110% of the amount of the survivor's pension for a complete contributions record and, secondly, the total of the amounts of the retirement pensions, or other benefits taking their place mentioned in the first subparagraph, and an amount equal to the survivor's pension of an employed worker for a complete contributions record, multiplied by the fraction or the sum of the fractions which express the amount of the survivor's pensions in the other pension schemes, excluding the scheme for self-employed workers. Those fractions are the ones which have been or would have been laid down for the application of the said Article 10a.

The application of second subparagraph shall not result in a reduction of the survivor's pension to an amount lower than the difference between the amount of the survivor's pension available before the application of the preceding subparagraphs, and the total of the amounts of the retirement pensions and other benefits taking their place, mentioned in the first subparagraph.

...

The dispute in the main proceedings and the questions referred

10 On 28 October 1997, Mrs Insalaca, who has received a survivor's pension from the competent Italian institution since 1981, claimed a retirement and survivor's pension from the ONP, which awarded her, from 1 December 1998, a retirement pension from the Belgian pension scheme for employed workers.

11 By decision of 2 July 1998, the ONP also awarded her a survivor's pension with effect from 1 December 1998.

12 In calculating the amount of the Belgian survivor's pension, the ONP applied the rules against overlapping contained in Article 52(1) of the Royal Decree of 21 December 1967 and Article 46c of Regulation No 1408/71. It took into account in that regard the Italian survivor's pension which Mrs Insalaca was receiving. That method of calculation resulted in a reduction of the Belgian survivor's pension awarded to Mrs Insalaca.

13 Mrs Insalaca challenged the decision of 2 July 1998 of the ONP before the Tribunal du travail de Mons claiming, *inter alia*, that Article 52(1) of the Royal Decree of 21 December 1967, as it had been applied, was contrary to Articles 46a and 46b of Regulation No 1408/71.

14 Before the referring court the ONP maintained that, in the case in the main proceedings, the reduction in the Belgian survivor's pension had not come about because of the existence of the Italian survivor's pension, but because of the overlapping of the Belgian survivor's and retirement pensions.

15 It was in those circumstances that the Tribunal du travail de Mons decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Does the national rule governing the calculation of a survivor's pension and establishing a restriction of the ceiling in respect of overlapping of old-age and survivor's pensions where the surviving spouse can claim a survivor's pension payable by another Member State constitute a provision on reduction within the meaning of Articles 46a and 46b of Regulation No 1408/71 of 14 June 1971?

2. If so, must Articles 46a and 46b be interpreted as authorising the national institution which applies the provision against overlapping to take account of the survivor's pension granted under the scheme of another Member State in order to reduce the ceiling in respect of overlapping of old-age and survivor's pensions provided for by national legislation?

The first question

16 The Court has consistently held that a national rule must be regarded as a provision on reduction of benefit, within the meaning of Regulation No 1408/71, if the calculation which it requires to be made has the effect of reducing the amount of the pension which the person concerned may claim, because he receives a benefit from another Member State (see, in particular, Case C-442/97 Van Coile [1999] ECR I-8093, paragraph 25, and Case C-161/98 Platbrood [1999] ECR I-8195, paragraph 25).

17 In the case in the main proceedings, it should first be observed, it is clear from the referring judgment that the Tribunal du Travail de Mons considers that the ONP applied the second subparagraph of Article 52(1) of the Royal Decree of 21 December 1967 only because of the existence of a benefit for which another Member State is responsible and, with regard to national law, correctly applied that provision.

18 It follows that the national rule in issue in the main proceedings must be regarded as covering, at least implicitly, benefits which the person concerned receives in another Member State.

19 Second, as the Advocate General pointed out at Points 40 and 41 of his Opinion, it is not in dispute that the application of the rule of calculation set out in the second subparagraph of Article 52(1) of the Royal Decree of 21 December 1967 leads to a reduction of the total amount of the benefits which the person concerned can claim.

20 In those circumstances, the reply to the first question must be that the legislation of a Member State governing the calculation of a survivor's pension and establishing a restriction of the ceiling fixed for the overlapping of a retirement pension and a survivor's pension where the surviving spouse can claim a survivor's pension payable by another Member State is a provision on reduction within the meaning of Articles 46a and 46b of Regulation No 1408/71.

The second question

21 By its second question, the national court is asking, in essence, whether Articles 46a and 46b of Regulation No 1408/71 preclude the application of the legislation of a Member State containing a provision against overlapping under which a survivor's pension received in that Member State must be reduced because of the existence of a survivor's pension acquired under the legislation of another Member State.

22 In replying to that question it must be borne in mind at the outset that it follows from Article 12(2) of Regulation No 1408/71 that provisions on reduction laid down in the legislation of a Member State may, unless that regulation provides otherwise, be invoked against persons who receive a benefit from that Member State if they can claim other social security benefits, even when those benefits are acquired under the legislation of another Member State.

23 An exception to the principle laid down in Article 12(2) of Regulation No 1408/71 is contained in Article 46b(1) of that regulation, which provides that, in the case of overlapping of benefits of the same kind, provisions on reduction laid down by the legislation of a Member State do not apply to benefits calculated in accordance with Article 46(2) of that regulation.

24 In that regard, first, the Court has consistently held that social security benefits must be regarded as being of the same kind when their purpose and object, as well as the basis on which they are calculated and the conditions for granting them, are identical (see, in particular, Case C-366/96 Cordelle [1998] ECR I-583, paragraph 19). Consequently, the Belgian and Italian pensions for survivors which are at issue in the main proceedings constitute benefits of the same kind within the meaning of Regulation No 1408/71.

25 Second, as the Advocate General noted at point 48 of his Opinion, in the case in the main proceedings the ONP has determined the amount of the benefits in accordance with Article 46(2) of Regulation No 1408/71.

26 It follows that the Belgian and Italian pensions for survivors which are at issue in the main proceedings fall within the exception laid down in Article 46b(1) of Regulation No 1408/71, and that, accordingly, a provision on reduction, such as that in issue in the main proceedings, may not be applied in the calculation of benefits under Article 46(2) of that regulation.

27 However, it follows from the case-law of the Court that the provisions of Article 46 of Regulation No 1408/71 must be applied in their entirety if the application of the legislation of the Member State in question alone proves less favourable to the person concerned than that of the Community scheme set out in that article (see, in particular, Joined Cases C-90/91 and C-91/91 Di Crescenzo and Casagrande [1992] ECR I-3851, paragraph 16).

28 The calculation of the amount of benefits under Article 46 of Regulation No 1408/71 must be carried out in three stages. First, the competent institution calculates the autonomous benefit in accordance with Article 46(1)(a)(i) of that regulation. Secondly, it calculates, under Article 46(1)(a)(ii) of that regulation, the amount of the proportional benefit, in accordance with the provisions of paragraph 2 of that article. Thirdly, the competent institution compares, in accordance with Article 46(3) of the regulation, the amount of the autonomous benefit with that of the proportional benefit, and adopts the higher of the two amounts.

29 The competent institution must therefore compare the benefits which would be payable in application of the national legislation alone, including its rules against overlapping, with those which would be payable in application of Community law, and award to the person concerned the benefits which yield the higher amount.

30 In the light of all the foregoing considerations, the answer to the second question must be that Articles 46a and 46b of Regulation No 1408/71 preclude the application of the legislation of a Member State containing a provision against overlapping under which a survivor's pension received in that Member State must be reduced because of the existence of a survivor's pension acquired under the legislation of another Member State, where the benefits payable in application of the legislation of the first Member State are less favourable than those determined in application of Article 46 of that regulation.

Decision on costs

Costs

31 The costs incurred by the Belgian 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Tribunal du travail de Mons by judgment of 13 March 2000, hereby rules:

1. The legislation of a Member State governing the calculation of a survivor's pension and establishing a restriction of the ceiling fixed for the overlapping of a retirement and a survivor's pension where the surviving spouse can claim a survivor's pension payable by another Member State is a provision on reduction within the meaning of Articles 46a and 46b 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 (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992.

2. Articles 46a and 46b of Regulation No 1408/71 of 14 June 1971, as amended and updated by Regulation No 2001/83, as amended by Regulation No 1248/92, preclude the application of the legislation of a Member State containing a provision against overlapping under which a survivor's pension received in that Member State must be reduced because of a survivor's pension acquired in another Member State, where the benefits payable in application of the legislation of the first Member State are less favourable than those determined in application of Article 46 of that regulation.