Opinion of Advocate General Alber delivered on 18 May 1999

Jozef van Coile v Rijksdienst voor Pensioenen

Reference for a preliminary ruling: Arbeidsrechtbank Brugge – Belgium

Social security - Regulation (EEC) No 1408/71 (as amended by Regulation (EEC) No 1248/92) - Benefits of the same kind payable under the legislation of two or more Member States - Provision on reduction, suspension or withdrawal laid down by the legislation of a Member State - National legislation acknowledging periods in accordance with a legal presumption ("war years presumption") where no pension right payable under another scheme (including a foreign scheme) is established for them)

Case C-442/97

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Opinion of the Advocate-General

A - Introduction

1 This reference for a preliminary ruling from the Arbeidsrechtbank Brugge, Afdeling Ostende (Labour Court, Bruges, Ostend Division), in connection with the calculation of a Belgian employed person's pension, concerns the interpretation of Article 46b(2) in conjunction with Article 46(1)(a)(i) of 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. (1)

2 The plaintiff in the main proceedings (hereinafter `the plaintiff') is drawing a German pension for periods of employment between 1938 and 1945. Following acknowledgment of the German pension by the German institution, the Belgian institution scheme recalculated his Belgian pension.

3 The relevant Belgian provision (2) contains a presumption, called the `war years presumption' whereby, if evidence is provided of normal and principal employment and of payment of the relevant social security contributions for at least one year between 1938 and 1945, contributions will be deemed to have been paid in respect of such employment for the remainder of that period. This presumption is rebutted in respect of periods of employment for which the person concerned can claim a pension, under a foreign pension scheme for example. (3) The question raised in the reference for a preliminary ruling is whether this regulation constitutes a provision on reduction within the meaning of Regulation No 1408/71.

4 The case was in the context of the following dispute: the plaintiff is seeking to have the years 1943 and 1944 taken into account pro rata in the determination of the `national' Belgian pension. The defendant in the main proceedings, the Rijksdienst voor Pensioenen (National Pensions Office) (hereinafter `the defendant') takes the view that it cannot comply with that request because it has been shown that the plaintiff was employed in Germany during that period.

5 The plaintiff, born on 11 August 1924, submitted a claim on 22 September 1988 for an employed person's pension as from 1 September 1989 (that is to say, during the calendar month after that in which his 65th birthday fell). In his application he stated that he had been employed in Germany from the end of March 1943 to the beginning of May 1945. He had worked for Siemens, initially in Nuremberg and afterwards in the Dresden area.

6 By a provisional decision of 6 March 1989, the Belgian institution awarded him a pension calculated on the basis of a fraction of 42/45. By decision of 29 January 1990 the German institution, the Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office for Rhine Province), acknowledged liability for payment of benefit for a period of employment of eight months, i.e. for the period in which the plaintiff had worked in Nuremberg, disregarding the subsequent periods in employment on the territory of the future (now former) GDR. The Belgian institution then took a final decision on 20 April 1990, awarding a pension on the basis 41/45.

7 Following Germany reunification in 1990, the plaintiff lodged an application for review, seeking to have the insurance periods completed in East Germany, in the territory of the former GDR, taken into account for pension purposes. By decision of 19 June 1995 the German institution acknowledged that Germany was liable for payment of a benefit of DEM 903.12 with effect from 1 January 1995, calculated on the basis of a period of employment of 29 months (26 months of employment from 30 March 1943 to 30 April 1945, plus three months added by way of a fixed supplement).

8 The recalculation of pension entitlement by the German institution prompted the Belgian institution in turn to recalculate its award. By decision of 26 July 1995, communicated to the plaintiff on 4 August, the Belgian institution determined his entitlement with effect from 1 January 1995 on a reduced basis, namely 40/45. The plaintiff appealed against that decision.

9 The national court referred the following question 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 workers 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)?

10 The defendant and the Commission participated in the procedure. The arguments of the parties will be considered in the context of the legal analysis.

B - Analysis

11 According to the national court, there is no dispute concerning the insurance period that would have had to be taken into account for the calculation of the Belgian pension if the plaintiff had not been in receipt of a German pension. The years from 1942 to 1945 were therefore taken into account in the provisional decision of 6 March 1989, partly on the basis of pension contributions and partly on the basis of the so-called `war years presumption' laid down in the fifth paragraph of Article 32b of the Royal Decree of 21 December 1967. (4) Pursuant to the sixth paragraph of Article 32b of that decree, that presumption 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 another State.

12 The national court points out that, with regard to Article 46(1) of Regulation No 1408/71, in the version applicable on 1 June 1992, (5) the Court has repeatedly stated, that on the basis of Article 12(2) of the Regulation, in the case of benefits of the same kind national rules against overlapping external benefits had to be left out of account. That is to say, it was necessary to calculate the amount of the pension which could be claimed under national law as if the person concerned was not in receipt of a pension under a scheme of another Member State. It may be inferred from this that any provision which is designed to take into account a pension received by the person concerned under a scheme of another Member State constitutes a national provision against overlapping external benefits. That being so, the sixth paragraph of Article 32b of the Belgian General Rules on Workers' Pensions could therefore be regarded as a national provision against overlapping external benefits.

13 In those circumstances, it follows that, pursuant to Article 46b(2) of Regulation No 1408/71, the sixth paragraph of Article 32b of those General Rules may not be applied in calculating the benefits in accordance with Article 46(1)(a)(i) of Regulation No 1408/71.

14 The national court notes however that the Arbeidshof Gent (High Labour Court, Ghent) had already upheld the defendant's contention that the rebuttal of the war years presumption is not a provision on overlapping benefits in the event of the person concerned being in receipt of a pension under the scheme of another Member State.

15 The defendant, having clarified the temporal scope of the relevant provisions, discusses the content and purpose of the provision in question. It contends that the intention of the Belgian legislature in introducing the war years presumption was to ensure that workers whose employment and social security contribution record had been interrupted because of wartime events would not forfeit subsequent pension entitlement. However, the presumption established for this purpose may be rebutted. Under the sixth paragraph of Article 32b, it may be rebutted for periods during which the person concerned can claim a pension under another Belgian or foreign pension scheme. The legislature's aim in introducing the rule was to avoid pension being paid twice in respect of the same period. This applied regardless of the reasons for which a worker's career was interrupted and the reasons why he or she may have acquired another type of pension entitlement.

16 Indeed, similar provisions applied before the rule in question came into force. Under both the earlier and the later rules, it claims, periods not accounted for were treated as periods of employment.

17 According to the defendant, Article 32b concerns the conditions for entitlement to benefit, specifically the manner in which evidence can be furnished of pensionable employment, and how far periods not credited can be recognised as periods of employment. In its view, it is for the Belgian legislature alone to determine the conditions governing evidence of employment. In deciding that pension entitlement may arise only in respect of periods for which there is no pension entitlement under another national or foreign system, the legislature was not laying down a rule against overlapping benefits.

18 According to the defendant, it does not follow from the relevant provisions that a `completed year' (6) should not be recognised, because of a foreign pension claim but that the foreign pension precludes recognition of a year unaccounted for as a period of employment. If a pension is to be calculated exclusively under Belgian pension law (within the meaning of Article 46(1)(a)(i)), periods for which a German pension is granted cannot

therefore be treated as equivalent. Since this is not a matter of overlapping benefits of the same kind under the legislation of two Member States, Article 46b of Regulation No 1408/71 is not applicable.

19 The defendant proposes that the question referred for a preliminary ruling should be answered as follows:

A provision such as the sixth paragraph of Article 32b of the Royal Decree of 21 December 1967 does not constitute 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.

20 The Commission states, first, that the pension benefits in question are undoubtedly benefits of the same kind within the meaning of Regulation No 1408/71. It then compares the relevant provisions in the versions preceding and subsequent to 1 July 1992, and concludes that neither permits application of `provisions on reduction, suspension or withdrawal' for the purpose of calculating a Belgian national pension. The only point to be determined is therefore whether the fifth and sixth paragraphs of Article 32b of the Royal Decree of 21 December 1967 (7) constitute a provision on overlapping, within the meaning of Article 46b of Regulation No 1408/71.

21 In order to answer this question, the Commission considers in detail the Romano (8) and Conti (9) cases. In those cases, national years (10) and a supplement (11) had been reduced by years of actual employment completed under another scheme and by an entitlement obtained under similar circumstances respectively. The Court held that these calculation procedures constitute provisions on overlapping within the meaning of Regulation No 1408/71. In the Commission's view, that ruling cannot be transposed automatically to the present case. The provision at issue in the present case does not provide for national years, in the sense of periods that could not be `localised in time'. (12) On the contrary, there is a presumption that the beneficiary was employed in Belgium for a certain length of time. That presumption can be rebutted. Ultimately, what is involved here is a rule of evidence.

22 The Commission proposes the following reply to the question referred for a preliminary ruling:

Provisions such as those contained in the sixth paragraph of Article 32b of the Royal Decree of 21 December 1967 are not provisions 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, such as may not be applied in calculating a benefit under Article 46(1)(a)(i).

Law

23 Under Article 46(1)(a)(i) of Regulation No 1408/71, the competent institution initially calculates the amount of benefit that would be due under the provisions of the legalisation which it administrates. Under Article 46b(2) of the regulation, the provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State apply to a benefit calculated in accordance with Article 46(1)(a)(i) only under specific conditions, clearly defined in paragraph 2(a) and (b), (13) which are not fulfilled in this instance.

24 It therefore appears that provisions on reduction, suspension or withdrawal within the meaning of that provision do not apply to the calculation of the Belgian pension. It must accordingly be determined whether the national provision, under which the so-called `war years presumption' may be rebutted in respect of insurance periods for which a pension can also be claimed under another national or foreign pension scheme, is to be qualified as a provision on reduction.

25 In its judgment of 22 October 1998 in Conti, (14) the Court defined a provision on reduction in the following terms:

`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.' (15)

26 However, in the present case it must first be ascertained how far the person concerned has a `claim'. The first step must therefore be to define the conditions for entitlement before proceeding to the second, which involves calculating any reduction in line with this definition.

27 In the main proceedings, it appeared that the plaintiff was first awarded, and even paid, for a number of years, a Belgian pension which was reduced on account of the German pension granted subsequently. In the light of its outcome, this situation might at first sight appear to result from a `provision on reduction'. However, it should not be forgotten that the sequence of events was an inevitable consequence of the political developments associated with the reunification of Germany. It is not an inherent element of the provisions governing the calculation of benefits. In order to arrive at a proper appraisal of these provisions, it is legitimate to ask how the pension would have been calculated if, when the application was made, there had been a corresponding pension entitlement for all periods of employment in German territory.

28 It seems beyond question that in that event, not merely the eight months' employment in Nuremberg, but the 29 months' employment validated by the German pension fund would have been taken into account from the outset, so that the war years presumption contained in the Belgian rule would not have been applicable to these definable periods of time. A fraction of only 40/45 would then have been taken as a basis for the Belgian pension from the beginning and no reduction, even of a purely computational kind, would have been made in the amount of pension initially fixed.

29 Since there is always a calculation involved in determining the amount of the pension to be paid, it is important to ensure that a comparatively lower pension is not merely the result of applying a rule for calculating the amount. In its judgment in Conti, the Court stated:

`... national 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'. (16)

30 There is no such risk in the case to be decided here, since the war years presumption comes into play at a stage preceding the actual pension calculation. The first step in the process of awarding a pension is to establish all the periods which are relevant for pension insurance purposes, i.e. periods of employment covered by a compulsory social security scheme and periods treated as equivalent. (17) It is at this point that the war years presumption under the Belgian scheme comes into play. If the worker is unable, for various reasons which may be factual or administrative, to furnish evidence for all the war years of periods of employment that are relevant for pension insurance purposes, as long as a minimum period of employment has been completed the worker will be deemed in accordance with the war year presumption to have been in employment covered by a compulsory social security scheme for the duration of the war.

31 This arrangement to the worker's advantage which is designed to establish an insurance record as free from gaps as possible and which is necessitated by the difficult conditions prevailing during the war, can be dispensed with if it can be shown that the worker has completed relevant periods of employment for pension insurance purposes, under another national or foreign scheme, which itself gives rise to a pension entitlement.

32 Considered in isolation this criterion for a valid pension claim - undoubtedly introduced for the worker's benefit - may be misleading, in as much as it could be construed as meaning that a foreign pension is to be deducted from a national pension entitlement. Such an approach should not however be allowed to obscure the fact that the war years presumption takes effect systematically at the stage when the pension is determined. By establishing the qualitative criterion of a `pensionable period of employment' the Belgian legislature is merely ensuring that such periods, to be credited to the employee for pension purposes, are treated as sufficient evidence of a period of employment.

33 The war years presumption is therefore to be regarded as a rule of evidence, necessitated by the conditions which prevailed during the war, for substantiating periods relevant for pension purposes, a rule which will not come into play if another kind of pension insurance cover has been shown to exist. The definition of the war years presumption as a rule of evidence cannot be seriously challenged on the ground that, in the main proceedings, the Belgian pension was retroactively reduced because of the actual conditions and political circumstances prevailing in Germany.

34 As regards the Court's definition of a provision on reduction, cited in point 25 above, it should be noted that the mechanism of the war years presumption and its rebuttal comes into play at the stage when it is determined whether the conditions for a pension claim are met.

35 In support of the view advanced here, it should be pointed out that the structure of the Belgian pension rules at issue in Romano, (18) Di Crescenzo (19) and Conti, (20) which the Court defined as provisions on reduction, is essentially different from that of the provision at issue here. Those three cases concerned a fixed increase designed - by mean of national years or a supplement - to bring the pension paid in respect of periods actually completed up to the level payable in respect of a full employment record in each case. In the present case, by contrast, the question is how to fill gaps in the record which can be accurately localised in time.

36 The purpose of the two sets of rules is also quite different. Whereas in those three cases (21) the rules that gave rise to the judgments were intended to `compensate' for factors associated with the person of the beneficiary and the work done (at least 25 years underground in the mining industry) in the present case a rule of evidence is required to mitigate the problems of maintaining regular employment in the difficult social and political conditions which prevailed during the war, on the one hand, and providing evidence of such regular employment, on the other. The earlier judgments do not therefore mean that the national provision at issue in the present case must be held to be a provision on reduction within the meaning of Regulation No 1408/71.

Conclusion

37 In the light of the foregoing remarks, I propose that the Court give the following answer to the question referred for a preliminary ruling:

A provision such as that contained in the sixth paragraph of Article 32b of the Royal Decree of 21 December 1967, under which the `war years presumption' (being a presumption of uninterrupted employment subject to compulsory social security contributions throughout the Second World War) may be rebutted by periods in respect of which there is a pension entitlement under the scheme of another Member State, is not to be regarded as a provision on reduction, suspension or withdrawal laid down by the legislation of a Member State which, in that case, would not apply to the calculation of a pension under Article 46(1)(a)(i) of Regulation (EEC) No 1408/71 pursuant to Article 46b(2) of the regulation.

(1) - Consolidated version of Council Regulation (EEC) No 1408/71 of 14 June 1971 (OJ 1992 C 325, p. 1).

(2) - This is the fifth paragraph of Article 32b of the Royal Decree of 21 December 1967, as amended by the Royal Decree of 5 April 1976, Moniteur belge of 8 April 1976 (although Article 32b was repealed by Article 50 of the Royal Decree of 4 December 1990, but remained applicable to, pensions which - as in the present case - actually became payable before 1 June 1991, which reads, in the version applicable to the present dispute, as follows:

`De werknemer welke in die hoedanigheid een arbeid heeft uitgeoefend tijdens de periode begrepen tussen 1 januari 1938 en 1 januari 1945 en waarvoor een storting werd verricht waarvan het bedrag het in het tweede lid genoemd jaarbedrag bereikt, wordt geacht voldoende stortingen verricht te hebben, opdat een gewoonlijke en

hoofdzakelijke tewerkstelling bewezen zou zijn gedurende de ganse periode begrepen tussen de datum waarop de bewezen tewerkstelling een einde nam en 1 januari 1946.'

`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.'

(3) - See the sixth paragraph of Article 32b, which provides as follows:

`Het vermoeden voorzien in de twee voorgaande leden is slechts weerlegd voor de perioden van tewerkstelling waarvoor belanghebbende aanspraak kan maken op een pensioen krachtens een andere Belgische pensioenregeling, met uitzondering van die voor de zelfstandigen, of van een regeling van een vreemd land. Het is eveneens weerlegd wanneer de betrokkene een tewerkstelling bewijst als mijnwerker, zeeman of zeevisser.'

`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.'

(4) - Cited in footnote 2.

(5) - OJ 1992 C 325.

(6) - A proven year.

(7) - Cited in footnotes 2 and 3.

(8) - Case 58/84 [1985] ECR 1679.

(9) - Case C-143/97 [1998] ECR I-6365.

(10) - See Romano, cited in footnote 8.

(11) - See Conti, cited in footnote 9.

(12) - Specified periods.

(13) - `... 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 ...'.

(14) - Case C-143/97, cited in footnote 9.

(15) - Case C-143/97, cited in footnote 9, paragraph 25.

(16) - See judgment in Case C-143/97 cited in footnote 9, paragraph 24.

(17) - For instance, periods of sickness, invalidity or unemployment.

(18) - Case 58/84, cited in footnote 8.

(19) - Joined Cases C-90/91 and C-91/91 [1992] ECR I-3851.

(20) - Case C-143/97, cited in footnote 9.

(21) - Case 58/84, cited in footnote 8; Joined Cases C-90/91 and C-91/91, cited in footnote 18 and Case C-143/97, cited in footnote 9.