

Opinion of Mr Advocate General Elmer delivered on 12 June 1997

Salvatore Baldone v Institut national d'assurance maladie-invalidité (INAMI)

Reference for a preliminary ruling: Tribunal du travail de Bruxelles - Belgium

Article 95a of Regulation (EEC) no 1408/71 - Regulation (EEC) No 1248/92 - Transitional provisions - Recalculation of a benefit on the competent institution's own initiative - Rights of persons concerned

Case C-307/96

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Opinion of the Advocate-General

Introduction

1 In this case the Tribunal du Travail, Brussels, seeks the Court's interpretation of the transitional provisions contained in a regulation amending Regulation (EEC) No 1408/71 of the Council 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) ('Regulation No 1408/71'), with regard to the calculation of invalidity benefits.

The relevant Community rules

2 Regulation No 1408/71 lays down rules concerning, inter alia, the rights to benefits of employed or self-employed persons who have been subject, in succession or alternately, to the legislation of two or more Member States. Article 46 of the Regulation laid down the detailed rules for awarding and calculating those benefits.

3 Regulation No 1408/71 was amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (2) ('the amending Regulation') which, in particular, amended the wording of Article 46 and thereby the method of calculating benefit payments. In addition, the amending Regulation contains the following transitional provision:

Article 95a

Transitional provisions for application of [the amending Regulation]

1. Under [the amending Regulation], no right shall be acquired for a period prior to 1 June 1992.
2. All insurance periods or periods of residence completed under the legislation of a Member State before 1 June 1992 shall be taken into consideration for the determination of rights to benefits pursuant to [the amending Regulation].
3. Subject to paragraph 1, a right shall be acquired under [the amending Regulation] even though relating to a contingency which materialized prior to 1 June 1992.
4. The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of [the amending Regulation].
5. If an application referred to in paragraph 4 is submitted within two years from 1 June 1992, the rights acquired under [the amending Regulation] shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.
6. If the application referred to in paragraph 4 is submitted after the expiry of the two-year period after 1 June 1992, rights which have not been forfeited or not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.'

Proceedings in the main action and questions referred

4 Salvatore Baldone became incapacitated for work in Belgium on 4 May 1970 and has been entitled to invalidity benefits since 4 May 1971. He was previously insured successively in Italy (169 weeks), the Federal Republic of Germany (30 months) and Belgium (2 366 days).

5 His rights to benefits were examined by Italy, Germany and Belgium under Article 40 of Regulation No 1408/71 and were determined in accordance with Article 46 of that Regulation. The Institut National d'Assurance Maladie-Invalidité ('INAMI') gave a decision on the amount of the Belgian benefit on 13 September 1985.

6 On 1 October 1985 Mr Baldone brought an action before the Tribunal du Travail, Brussels, against INAMI, claiming that the benefit had not been correctly calculated. However, the court stayed judgment pending a

decision by the Court of Justice in a similar case. By judgment of 18 February 1993 (3) the Court ruled that the Belgian authorities had not calculated correctly the invalidity benefits granted to migrant workers.

7 Following that judgment, on 4 May 1994 INAMI annulled the decision originally notified and rectified the amount of Mr Baldone's invalidity benefit to comply with the judgment. The result of the recalculation in accordance with the rules of Regulation No 1408/71 which had hitherto applied was favourable to Mr Baldone, by comparison with the amount previously paid. However, INAMI granted him the increased benefit only for the period up to 31 May 1992. For the period after that date, the benefit was calculated in accordance with the new rules in the amending Regulation.

8 On 30 May 1994 Mr Baldone brought a second action against INAMI before the Tribunal du Travail, Brussels. He considers that the decision of 4 May 1994 cannot be regarded as the first decision to grant a right to benefits so that, under Article 95a(4) to (6) of the amending Regulation, the competent institution cannot on its own initiative reduce his benefit. INAMI, however, takes the view that the decision of 4 May 1994 is the first correct decision determining Mr Baldone's right to benefits so that, pursuant to Article 95a(1) to (3) of the amending Regulation, the new rules of calculation must be applied.

9 The Tribunal du Travail, Brussels, accordingly decided, by order of 5 September 1996, to stay the proceedings and to refer the following questions to the Court:

1. Are paragraphs 1 to 3 of Article 95a of [the amending Regulation] to be interpreted as meaning that if an institution of a Member State after 31 May 1992 calculates the rights of an invalid under the regulations, it must apply, for the period ending on 31 May 1992, the provisions of Regulation No 1408/71 (in particular Article 46) ... and, from 1 June 1992, the provisions of [the amending Regulation]?

2. If so, are the provisions applicable in the same way:

(a) if the decision in question is the first calculation of the insured person's rights under the regulations by that institution;

(b) if a first decision made before 1 June 1992 did not correctly calculate the rights under the regulations and has to be annulled and replaced after 1 June 1992 by a rectification decision, the latter thus being the first to calculate the rights under the regulation correctly;

(c) if a first decision made before 1 June 1992 and otherwise correct has to be annulled and replaced after 1 June 1992 because another institution concerned has made a rectification decision?

3. If the first two questions are answered in the affirmative, may the recalculation of the benefit on 1 June 1992 have the consequence of reducing the benefit due, compared with the amount due on 31 May 1992 on the basis of the provisions applicable until that date, given that Regulation No 1248/92 did not amend or supplement the provisions of Articles 118 to 119a of Regulation No 574/72 (4) to make them applicable on 1 June 1992?

10 With these questions, the national court in reality seeks to ascertain which rules are applicable in determining the rights of a person entitled to invalidity benefits where the person concerned was awarded the right to such benefits before 31 May 1992 in accordance with the rules of Regulation No 1408/71 which were applicable at that time, but where the benefits were rectified by the decision in question after 31 May 1992 as a result of the Court's finding that the original calculation was incorrect.

Procedure before the Court

11 Mr Baldone contends that where, because of an earlier mistake in the calculation of benefits, a competent institution is obliged to review, after 1 June 1992, a worker's rights to invalidity benefits previously awarded on the basis of the rules of Regulation No 1408/71, that institution cannot, for the period after 1 June 1992, reduce, on its own initiative and on the basis of the new rules of the amending Regulation, the benefit previously awarded.

12 INAMI and the Belgian Government point out that where, after 31 May 1992, a competent institution of a Member State determines the rights of a person entitled to invalidity benefits, it must, with regard to the period up to 31 May 1992, apply the provisions of Regulation No 1408/71 which were previously in force and, with regard to the period subsequent to 1 June 1992, apply the new provisions of the amending Regulation. This applies even if a decision previously taken is rescinded after 1 June 1992 and replaced by a rectification decision.

13 The Commission takes the view that the rules in question in Article 95a(1) to (3), of the amending Regulation do not apply to benefits awarded before 1 June 1992 and that the rule in Article 95a(4) means that a competent institution cannot on its own initiative review rights to benefits awarded before that date.

Observations

14 The first three paragraphs of Article 95a of the amending Regulation provide that no right to benefits can be acquired under the amending Regulation for the period prior to the entry into force of the Regulation (paragraph 1), but that rights in the course of being acquired before that date in respect of insurance periods or periods of residence (paragraph 2) or of a contingency which materializes (paragraph 3) must be taken into consideration for the determination of rights to benefits pursuant to the amending Regulation. Therefore these rules relate to benefits which are to be awarded for the first time at a date after the entry into force of the amending Regulation.

15 On the other hand, Article 95a(4) to (6) of the amending Regulation relate to rights already awarded prior to the entry into force of the amending Regulation. Under paragraph 4, benefits awarded under the rules previously in force are not affected by the amended rules, save where the persons concerned themselves apply for a review of benefits awarded under the rules previously in force. Such application must be submitted within two years. If the application is submitted after the expiry of that period, rights are to have effect from the date on which the application was submitted, provided that the rights have not been forfeited or barred by limitation by that time (paragraphs 5 and 6).

16 Therefore the question whether a particular situation is governed by paragraphs 1 to 3 or paragraphs 4 to 6 of Article 95a of the amending Regulation depends on the date when the authorities of a Member State took a decision on whether a former worker has a right to benefits or not. Where, prior to the entry into force of Article 95a of the amending Regulation, a decision was taken to the effect that the person concerned has such a right, paragraphs 4 to 6 apply. In this connection it must be deemed immaterial that the authorities of the Member State subsequently rectify their assessment of the right to benefits. For example, it is possible to imagine a situation where the authorities of a Member State found, before the amending Regulation came into force, that a former worker was entitled to benefits, but that the amount of those benefits at the time in question was nil. If circumstances were to change in the future, assessment of his entitlement could also undergo a change, since the right to benefits continues to exist.

17 Under Article 95a(4) of the amending Regulation, the person concerned must himself submit an application for review of the benefits previously awarded in order for the new calculation rules of the amending Regulation to apply to rights awarded before it came into force. It is clear that the new method of calculation may entail an increase or a reduction in the benefits previously paid. The rules for calculating benefits for workers who have previously been employed in more than one Member State are very complicated under both Article 46 of Regulation No 1408/71 and Article 46 of the amending Regulation. Therefore the person concerned can hardly be expected to master those rules himself and to know whether a calculation under the new rules will produce a favourable outcome. In my opinion, therefore, a person with a right to benefits must be able to submit a conditional application for review, which means that he would ask for the benefit previously paid to be reassessed only if the amount of the benefit is higher under the new calculation rules.

18 Consequently it follows from Article 95a that paragraphs 1 to 3 envisage rights to be awarded after 1 June 1992, whereas paragraphs 4 to 6 envisage rights awarded before that date. It appears, from the information supplied by the national court in the present case, that Mr Baldone was awarded a right to benefits by INAMI's decision of 13 December 1985, but that the calculation (assessment) was incorrect. If a question concerning the calculation of the benefit in accordance with the rules applying up to that date had not been pending, and the benefit had been correctly determined from the beginning, the Belgian authorities would not have had occasion to re-examine the benefit paid to Mr Baldone after 1 June 1992 because there had been no change in his situation. The benefit which had been awarded would simply have had to be continued. In such a case, there would be no doubt that the situation fell within Article 95a(4) to (6).

19 In my opinion, the circumstance that at a later date - nine full years after Mr Baldone brought an action concerning the calculation of his benefits - after 1 June 1992, when the amending Regulation came into force, the Belgian authorities realized that the original calculation of the rights to benefit awarded to the person concerned was wrong, cannot alter the fact that the rights were awarded as early as 1985. INAMI's decision of 4 May 1994 only meant that the Belgian authorities awarded Mr Baldone a benefit calculated in accordance with what he had always been entitled to under Community law. The decision did not alter the fact that he had been awarded a right to benefit with effect from 1985. The fact that the Belgian authorities originally miscalculated the benefit and waited nine years before rectifying the error must not have an adverse effect for the person concerned.

20 I therefore consider that the present case falls within the transitional provision of Article 95a(4), because the award to Mr Baldone of rights to benefits dates back to (well) before 1 June 1992. As stated above, in a case of that kind only the person entitled to the benefits can apply for a review of the benefits awarded. On the other hand, the abovementioned provision does not confer power on the competent authority to reduce on its own initiative a benefit already granted under the rules which previously applied.

21 In accordance with the above, in a judgment of 13 October 1976, (5) in a case concerning the interpretation of Article 94(5) of Regulation No 1408/71, which was in identical terms to Article 95a(4) the Court stated as follows:

‘The transitional provisions of the [R]egulation, including the abovementioned paragraph, are based on the principle that benefits awarded under [the rules previously in force], which are more favourable than those payable under the new [R]egulation, shall not be reduced (paragraph 15).

The aim of the provision is to give a person to whom benefits were awarded under the old regulation the right to request the review, in his favour, of such benefits (paragraph 16).

It would be contrary to this aim to acknowledge that the competent institution has the power to review such benefits of its own motion and to the detriment of the person concerned (paragraph 17).

The reply to be given to the ... question referred is, therefore, that Article 94(5), must be interpreted as meaning that the competent institution of a Member State is not entitled to substitute itself for an insured person with regard to the review of the rights which that person acquired before the [R]egulation came into force' (paragraph 18).

22 For the sake of completeness, I should mention that, in the course of the proceedings, the parties referred to Article 51 of Regulation No 1408/71. However, I consider that it is unnecessary to examine this provision in detail since, according to the information available, there has been no change in the Belgian rules relating to the determination or calculation of benefits.

Conclusion

23 In view of the foregoing, I propose that the Court reply as follows to the questions from the national court:

The rules contained in Article 95a(1) to (3) of Council Regulation (EEC) No 1248/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 must be interpreted as not applying where the right to a benefit was awarded before the abovementioned Regulation came into force, notwithstanding the fact that the decision to that effect was subsequently rescinded and replaced by another decision in order to rectify an incorrect calculation of the amount of the benefits under the rules previously applicable.

The rule in Article 95a(4) of Regulation No 1248/92 precludes the authorities of a Member State from reducing on their own initiative benefits granted before the Regulation came into force.

(1) - OJ, English Special Edition 1971 (II), p. 416) in the version of Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6.

(2) - OJ 1992 L 136, p. 7.

(3) - Case C-193/92 Bogana [1993] ECR I-755.

(4) - The national court is no doubt referring to Council Regulation (EEC) No 574/72, as amended on 2 June 1983, laying down the procedure for implementing 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 (OJ 1983 L 230, p. 6).

(5) - Case 32/76 Saieva [1976] ECR 1523.