JUDGMENT OF THE COURT OF 13 JULY 1976 [1]

Pietro Triches v Caisse de compensation pour allocations familiales de la région liégeoise (preliminary ruling requested by the Cour de Cassation of Belgium)

Case 19/76

Summary

1. *Social security for migrant workers — Invalidity insurance — Pensions payable under the legislation of several Member States — Family allowances — Determination — Payment — System*
   (Regulation No 3, Article 42 (2) as amended by Article 1 of Regulation No 1/64 of the Council)

2. *Social security for migrant workers — Rights acquired under the legislation of only one Member State — Guarantee — Measures of the Council pursuant to Article 51 of the EEC Treaty — Choice — Means justified — Inequalities between workers due to disparities between the national schemes in question — Possibility — Acceptability*

1. Article 42 (2) of Regulation No 3 as amended by Article 1 of Regulation No 1/64 of the Council concerning the right of beneficiaries of a pension due in pursuance of the legislation of several Member States to family allowances is valid.

2. Although the measures taken by the Council pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked, no provision of the Treaty restricts the freedom conferred on the Council by Article 51 to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possiblity of inequality between workers arising by reason of disparities between the national schemes in question.

In Case 19/76

Reference to the Court under Article 177 of the EEC Treaty by the Cour de Cassation of Belgium for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

PIETRO TRICHES, residing at Belluno, Italy,

and

CAISSE DE COMPENSATION POUR ALLOCATIONS FAMILIALES DE LA RÉGION LIÉGEOISE (Equalization Fund for Family Allowances, Liège area),

on the validity of Article 42 (2) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (JO 1958, p. 561) and in particular on the compatibility of the said provision with Articles 3, 48, 51 and 117 of the EEC Treaty,

THE COURT

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

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference 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

Mr Triches, an Italian national, worked in Italy in the building industry from 1938 to 1945 and then was a mine worker in Belgium from 1946 to 1960. He became disabled, and from 1960 onwards was entitled to two invalidity pensions: one under Belgian legislation and the other under Italian legislation. He also received family allowances from the Caisse de compensation de la région liégeoise, until his departure for Italy in 1962, and again from 1 February 1964 to 31 March 1969, while the Italian State Insurance Scheme paid him a supplement to his pension on the basis of his family responsibilities.

The Fund came to the conclusion that on the basis of Article 42 (2) of Regulation No 3, as amended by Article 1 of Regulation No 1/64 of 18 December 1963 (JO 1964, p. 1) which, since February 1964, contains the law applicable to the granting of family allowances to beneficiaries of a pension, it had no obligation to pay family allowances to Mr Triches after that date, and asked him to make a repayment.

In order to prevent the existence of a double right to family allowances or the loss of this right, the aforesaid Article 42 (2) provides that: 'Beneficiaries of pensions in pursuance of the legislation of several Member States are entitled to family allowances in accordance with the legislation: (a) of the country of their permanent residence, if they permanently reside in the territory of a Member State where there is one of the institutions liable for the payment of their pension ...'.

Mr Triches refused to make the repayment demanded and the case came before the Cour du Travail, Liège. Mr Triches argued before the court that the provisions of Article 42 (2) were not valid and could not be applied because they created inequalities of treatment and were therefore incompatible with Articles 2, 48, 51 and 117 of the EEC Treaty. In a judgment of 11 September 1973, the Cour du Travail, Liège, rejected this submission and decided that Mr Triches could not, in addition to the supplement to his pension which had been granted to him in Italy, receive the difference between that supplementary pension and the amount of the family allowances payable under Belgian legislation.

Mr Triches appealed against this judgment to the Cour de cassation, which, by judgment of 4 February 1976, decided to stay its proceedings and to make a reference to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling on 'the validity of Article 42 (2) of Regulation No. 3 of 25 September 1958, as amended by Article 1 of the Regulation of 18 December 1963, now repealed, and in particular on the compatibility of the abovementioned Article 42 (2) with Articles 3, 48, 51 and 117 of the Treaty in that the effect of this provision was to create inequalities between workers which constituted an obstacle to the free movement of persons'.

A copy of the judgment of the Cour de cassation reached the Court on 23 February 1976.

Mr Tiches, represented by D. Rossini, Director of 'Patronato ACLI', which is a social service, the Belgian Government, represented by the Minister for Social Security, P. De Paepe, the Italian Government, represented by its Ambassador, A. Maresca, acting as Agent, assisted by I. M. Braguglia, Deputy State Advocate-General, and the Commission of the EC, represented by its Legal Adviser, Miss M. J. Jonczy, acting as Agent, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon reading the report of the Judge-Rapporteur, and upon hearing the Advocate-General, the Court decided to open the oral procedure without any prior preparatory inquiry.

II — Summmary of the written observations

Mr Triches denies the validity of Article 42 (2) of Regulation No 3 in that its provisions are incompatible with:

(a) Articles 3 (c) and 48 (3) (b) of the EEC Treaty:

He claims that the practical application of Article 42 (2) has the effect of depriving certain migrant workers of a part of their rights. It constitutes an obstacle to the free

movement of persons within the Community, by encouraging beneficiaries of a pension to remain in the territory of the State which gives them the most favourable benefits;

(b) Article 51 (b) of the EEC Treaty, which according to him ensures that the payment of benefits to which entitlement has arisen in one Member State shall be payable in the territories of the other Member States;

(c) Article 117 of the EEC Treaty:

He further claims that it is apparent from the first recital to Regulation No 1/64 of the Council that the decision to make only one country bear the cost of paying family allowances to which beneficiaries of pensions are entitled was taken for the purposes of simplification. However, such a purpose ought not to have the effect of creating inequalities of treatment incompatible with the objectives of 'harmonization while ... improvement is being maintained' mentioned in Article 117 of the Treaty. It is argued that this Article envisages 'harmonization from above', whereas Article 42 (2) has the opposite effect. Take, for example, two Italian workers of whom one has worked exclusively in Belgium for ten years, and the other for ten years in Belgium and five years in Italy; the first simply receives the Belgian invalidity pension and continues to receive, if he changes his residence to Italy, the family allowances under the Belgian system; the second receives an invalidity pension apportioned between Belgium and Italy and, if he changes his residence to Italy, loses the benefit of the Belgian family allowances which are more advantageous than those under the Italian scheme.

Mr Triches points out that Article 77 (2) of Regulation No 1408/71, in force since 1 October 1972, creates the same inequalities, and that it would be useful if the Court were to extend its interpretation to this provision.

The *Belgian Government* argues first that Article 42 does not base the determination of the legislation applicable on nationality. The criterion of country of residence is the most convenient solution because expenditure on education for the children can best be evaluated in the country where the members of the family reside and in which the family allowances must be used.

Since Article 42 does not infringe Article 48 of the Treaty, there is no obstacle to freedom of movement within the meaning of Articles 3 and 51 of the Treaty.

Article 117 of the Treaty is directed at the harmonization of the internal legislation of the Member States; Article 42 is a Community provision laying down rules to determine what national legislation is applicable.

The same conslusions can be drawn from the judgment of the Court of 17 June 1970 in Case 3/70 [1970] ECR 415.

The *Italian Government* is of the opinion that the aim of co-ordination set out in Article 42 is justified under Article 51 of the Treaty. Without Article 42, there would often be accumulation of two or more family benefits. However, in assimilating family benefits to increases in pensions, Article 42 deprives the worker in some cases of family benefits to which he has become entitled on the basis of the legislation of a given Member State, when that right is not replaced by another right having the same effect. It is therefore incompatible with Article 51 of the Treaty that, by the mere fact of having transferred his permanent residence, the same worker — by virtue of the rule against accumulation in Article 42 (2) — receives the lowest of the benefits to which he is entitled on the basis of the national laws.

It is a fundamental rule of Community law on social security that pension benefits may not be reduced, suspended, or altered by reason of the fact that the beneficiary resides permanently in a country other than the one where the institution liable for payment is situated.

Finally, it is argued, the fact of having worked in several Member States cannot, without infringing Article 48 of the Treaty, entail a loss vis-à-vis those who have worked in only one Member State.

The *Commission* points out first of all that there can be no question of the validity of Article 42 (2) of Regulation No 3 as regards Articles 3 and 117 EEC. This is because the Court has repeatedly asserted that the regulations on social security are founded on, governed by and limited by Articles 48 to 51 of the EEC Treaty and also because Article 3 of the Treaty, which defines the activities of the Community, refers to the said articles, and because Article 117 of the Treaty is outside the context of freedom of movement.

In its original form Article 42 (2) provided that the beneficiary of a pension under the legislation of a Member State had the right to the family allowances provided for by its legislation if he was permanently resident in the territory of the competent State or of another Member State, but in the latter case up to the amount of family allowances or pension supplements in respect of children payable under the legislation of the country of permanent residence, or up to the total amount of those benefits if the said legislation provided for the simultaneous payment of both kinds of benefits. The determination of the amount of the family allowances to be transferred by the competent State was extremely complicated, and caused considerable delays in the payment of benefits because they had to be recalculated frequently and the final result was that Member States often had to pay very trivial benefits out of all proportion to the administrative costs involved.

Under the system introduced by Regulation No 1/64, the right to family allowances, to which supplements or increases in pension for dependent children are assimilated, is determined by reference to the legislation of only one country, and according to criteria analogous to those used for the granting of benefits in the nature of sickness insurance for beneficiaries of pensions: if the worker is the beneficiary of a pension in pursuance of the legislation of one Member State only, it is the legislation of that Member State which is applicable; if the worker is the beneficiary of a pension in pursuance of the legislation of several Member States, it is the legislation of the country of permanent residence which is applicable when the worker is the beneficiary of a pension payable by that country, and it is the legislation of the Member State in the territory of which the worker has completed the longest old-age insurance period which is applicable when the worker is permanently resident in the territory of a Member State other than those States which are liable to pay a pension.

For as long as Mr Triches resided in Belgium he received, in addition to two invalidity pensions, the Italian pension supplement for dependent children, which was sent to him on the same footing as the Italian invalidity pension itself, and the Belgian family allowances. When he returned to Italy, his right to the transfer of the Belgian family allowances became subject to the application of Article 42 (2) of Regulation No 3. This meant that the said allowances could not exceed the amount representing the Italian pension supplement for accounting purposes and had to be calculated within the limits fixed by Article 70 (6) of Regulation No 4, that is to say, this amount could not be higher than the Belgian family allowances less the Italian pension

supplement actually paid, or than the Italian pension supplement for accounting purposes less the Italian pension supplement actually paid. Therefore the Belgian Fund could only be exonerated from all payments of family allowances to Mr Triches if the amount resulting from one of the two calculations described above was equal to zero.

As from 1 February 1964, the rights of Mr Triches were determined exclusively by Italian law, as if he had spent his whole working life in Italy, and the Italian institution was alone liable for payment, that is to say, he was ensured of benefits equal to the amount of the Italian pension supplement for accounting purposes.

The purpose of Regulation No 1/64 was to introduce a simpler and more flexible system than the previous one, which had rendered the legislation of several countries applicable and had thus given rise to considerable delays. Apart from the fact that the choice of the legislation of the country of permanent residence as the legislation applicable for the granting of benefits for family commitments is the easiest solution when the country of permanent residence is also a competent country, because it is the institution of that country which is responsible for making enquiries and determining the rights of the persons concerned, it should be borne in mind that the migrant workers to whom Article 42 (2) applies receive all the benefits payable under the legislation applicable as if they had spent their whole working life under that one legislation, and this is the position even if aggregation was necessary in order to establish the right to a pension. Thus the migrant worker is not placed at a disadvantage by reason of his migration. Therefore the system introduced by Article 42 (2) does not discriminate on grounds of nationality and is not an obstacle to freedom of movement, offending against Article 48 of the EEC Treaty.

Nevertheless in certain cases Article 42 (2) might result in a worker entitled to claim benefits under the legislation of several countries receiving the benefits payable under the least favourable legislation, and might be contrary to Article 51 of the EEC Treaty. But such an assertion might be subject to reservations. The simultaneous application of the legislation of two or more countries would lead to a more accurate calculation of the amount of the benefits to which the person concerned is entitled, taking into account the insurance periods completed in each country, but all the problems which gave rise to the revision of Article 42 (2) would reappear and they would be even more complicated at the present time because of currency instability. And it would be that system which, whilst perhaps more accurate as to the calculation of the amount of benefits, but of such a nature as to bring about considerable delays in payment, which would be an obstacle to freedom of movement for workers within the Community, and would be contrary to Article 51 of the EEC Treaty.

Therefore the Commission is of the opinion that the system introduced by Article 42 (2) of Regulation No 3 as amended by Regulation No 1/64, which ensures in all circumstances that family allowances are paid by reference to insurance periods completed by beneficiaries of pensions in one or several Member States, wherever their permanent residence may be, is not incompatible with Articles 48 and 51 of the EEC Treaty.

At the hearing on 15 June 1976, the appellant in the main action, represented by Mr Rossini, and the Commission, represented by its Agent, Miss Jonczy, elaborated on the arguments set out in the written procedure.

The Advocate-General delivered his opinion on 6 July 1976.

Law

1 By order of 4 February 1976, which reached the Court on 23 February, the Cour de cassation of Belgium has referred a question under Article 177 of the EEC Treaty on the validity of Article 42 (2) of Regulation No 3 of the Council concerning social security for migrant workers (JO No 30 of 16. 12. 1958, p. 561), as amended by Article 1 of Regulation No 1/64/EEC of the Council of 18 December 1963 (JO No 1 of 8. 1. 1964, p. 1), now repealed, and in particular on the compatibility of the said Article 42 (2) with Articles 3, 48, 51 and 117 of the EEC Treaty.

2 This question has been raised in relation to a dispute concerning the right of an Italian national to family allowances. He is the appellant in the main action. He worked first in Italy from 1938 to 1945 and then in Belgium from 1946 to 1960. He became disabled during this latter time, and he is entitled to two invalidity pensions, one under Belgian legislation and the other under Italian legislation.

3 Article 42 (1) of Regulation No 3 as amended by Regulation No 1/64 provides that: 'Beneficiaries of a pension due in pursuance of the legislation of one Member State only, and who permanently reside in the territory of another Member State are entitled to family allowances in accordance with the provisions of the legislation of the country liable for payment of the pension as though they were permanently resident in that country.'

4 As regards beneficiaries of pensions due under the legislation of several Member States, Article 42 (2) provides that they 'are entitled to family allowances in accordance with the legislation

(a) Of the country of their permanent residence, if they permanently reside in the territory of a Member State where there is one of the institutions liable for the payment of their pension;

(b) Of the Member State in which they have completed the longest old-age insurance period, if they are permanently resident in the territory of a Member State where there is no institution liable for the payment of their pensions, as though they were permanently resident in the territory of the former State.

If the legislation applicable in pursuance of this paragraph does not provide for family allowances for beneficiaries of pensions, supplements or increases in pensions for children provided for by this legislation shall be assimilated to family allowances and paid in full in derogation from the provisions of Article 28 (1) (b), second sentence of this regulation'.

5 Since the appellant in the main action did not receive payment of the Italian invalidity pension until 1969, the respondent in the main action acted on the basis that the said appellant was entitled only to a Belgian pension and paid him Belgian family allowances pursuant to Article 42 (1) for the period from 1 February 1964 to 31 March 1969.

6 When the appellant in the main action was granted his Italian pension, the respondent in the main action, on the basis of Article 42 (2) of Regulation No 3, asked him for repayment of the family allowances which it had paid to him during the aforementioned period.

7 According to the provisions of the last subparagraph of Article 42 (2), the appellant in the main action is entitled to the Italian pension supplements for children calculated in accordance with the provisions of Article 28 of Regulation No 3, but without apportionment.

8 Since the said supplements did not appear to be so high as the Belgian family allowances, the appellant in the main action has contested the validity of the new Article 42 (2) of Regulation No 3.

9 He argues that this provision is incompatible with Articles 3, 48, 51 and 117 of the EEC Treaty, in that the effect of it is to create inequalities between workers, which constitute an obstacle to the free movement of persons within the Community.

10 It is argued that the effect of the said Article 42 (2) is that by comparison with an Italian worker who has only worked in Belgium, a worker who has worked in Italy and in Belgium is placed at a disadvantage because upon returning disabled to their country of origin, the first receives the Belgian family allowances, and the second only receives the Italian pension supplement for children.

11 Article 3 of the EEC Treaty provides that the activities of the Community shall include *inter alia* the abolition of obstacles to freedom of movement for persons.

12 Article 48 provides that freedom of movement for persons shall be secured within the Community.

13 Article 51 is worded as follows:

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

14 The wording of the first paragraph of Article 117 is as follows: 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.'

15 It is settled that Belgian legislation alone does not give any right to Belgian family allowances to a worker who, having worked in Belgium, becomes disabled and leaves Belgium to return to his country of origin.

16 The provisions at issue have the effect of ensuring that the period of work in Belgium shall be taken into account without apportionment when the amount of the Italian pension supplement for children is calculated.

17 As appears from the first recital to Regulation No 1/64, Article 42 of Regulation No 3 in its earlier form had proved too complicated to apply. The purpose of the new Article 42 was, therefore, to simplify the system for co-ordinating family allowances, and to ensure, so far as possible, that migrant workers receive the payments to which they would have been entitled if they had worked in only one Member State.

18 Although the measures taken by the Council pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked, none of the aforementioned provisions of the Treaty restricts the freedom conferred on the Council by Article 51 to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reason of disparities between the national schemes in question.

19 It appears from what has been said above that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of the provisions at issue.

Costs

20 The costs incurred by the Belgian Government, the Italian Government and the Commission, which have submitted observations to the Court are not recoverable.

21 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

THE COURT

in answer to the question referred to it by the Cour de cassation of Belgium by order of that court of 4 February 1976, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of the provision at issue.

Lecourt Kutscher O'Keeffe

Mertens de Wilmars Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 13 July 1976.

A. Van Houtte — Registrar

R. Lecourt — President