Case C-866/19

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 November 2019

Referring court:

Sąd Najwyższy (Supreme Court, Poland)

Date of the decision to refer:

19 September 2019

Applicant:

SC

Defendant:

Zakład Ubezpieczeń Społecznych I Oddział w Warszawie Wydział Realizacji Umów Międzynarodowych (Social Insurance Institution, Branch No 1 in Warsaw, International Agreement Department)

Subject matter of the case in the main proceedings

Proceedings in the case brought by SC against the Social Insurance Institution, Branch No 1 in Warsaw, International Agreement Department, concerning the amount of retirement pension.

Subject matter and legal basis of the reference

Subject matter: the interpretation of Article 52(1)(b) of Regulation (EC) No 883/04 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Legal basis: Article 267 of the Treaty on the Functioning of the European Union.

Question referred

Should Article 52(1)(b) of Regulation (EC) No 883/04 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems be interpreted as meaning that the competent institution:

(a) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States both for the purpose of determining the theoretical amount (point (i)) and the actual amount (point (ii)) of the benefit; or

(b) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States only for the purpose of determining the theoretical amount (point (i)) but not for the purpose of establishing the actual amount (point (ii)) of the benefit; or

(c) does not take into account, either for the purpose of determining the theoretical amount (point (i)) or the actual amount (point (ii)) of the benefit, periods of insurance in another Member State when calculating the limit on non-contribution periods under national law?

Applicable provisions of EU law

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) ('Regulation 883/2004').

Council Regulation (EC) 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 (OJ [2006] L 392, p. 1) ('Regulation 1408/71').

Decision No H6 of 16 December 2010 concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2011 C 45, p. 5) ('Decision H6').

Applicable provisions of national law

Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law of 17 December 1998 on Retirement and Other Pensions Provided by the Social Insurance Fund (Dz. U. of 2018, item 1270, as amended) ('Law on Pensions').

Succinct presentation of the facts and procedure in the main proceedings

1 In its decision of 24 February 2014, Zakład Ubezpieczeń Społecznych, I Oddział w Warszawie (Social Insurance Institution, Branch No 1 in Warsaw, 'the pension authority') granted a retirement pension to SC (the insured person) as of 5 November 2013 pursuant to the provisions of the Law on Pensions and Regulation 883/2004.

2 In determining SC's entitlement to a retirement pension, the pension authority used the following method: First, it determined the Polish contribution periods (104 months). Second, it included in the insurance period Polish non-contribution periods in an amount corresponding to one third of the Polish contribution periods (34 months). Third, in view of the fact that the insured person failed to reach the minimum insurance period on the basis of the Polish periods of insurance, the pension authority added to SC's national insurance period the contribution periods completed in the Netherlands (269 months) in order to grant him a retirement pension.

3 The insurance period thus determined (national contribution periods + national non-contribution periods + foreign contribution periods) was subsequently taken into account when calculating the theoretical amount of the benefit under Article 52(1)(b) of Regulation 883/2004. In turn, the actual amount of the benefit was calculated in the following proportion: 138 months of Polish periods of insurance (contribution periods plus non-contribution periods amounting to one third of national contribution periods) to 407 (in aggregate) Polish and foreign (Dutch) periods of insurance. On that basis it was calculated that out of the theoretical benefit of PLN 974.78, the insured person should be paid 33.9% of this amount, that is, PLN 335.81.

4 The insured person appealed against the decision; in his appeal, he requested, inter alia, that more Polish non-contribution periods be taken into account. The Sąd Okręgowy w Warszawie (Regional Court in Warsaw, Poland) dismissed the appeal in its judgment of 19 November 2015.

5 The insured person appealed against the judgment of the Sąd Okręgowy w Warszawie (Regional Court in Warsaw). In its judgment of 9 August 2017, the Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw, Poland), relying on the judgment of the Court of Justice of 3 March 2011, *Tomaszewska*, C-440/09, EU:C:2011:114 ('the *Tomaszewska* judgment'), amended the contested judgment as follows: for the purposes of calculating the amount of the benefit to which the insured person is entitled, the court recognised as proven non-contribution periods in the amount of one third of contribution periods calculated as the sum of contribution periods completed in Poland and in the Netherlands.

6 The pension authority brought an appeal on a point of law, challenging the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw) in so far as the court ordered the pension authority, when calculating the benefit due to

the insured person under Article 52(1)(b) of Regulation 883/2004, to take into account more Polish non-contribution periods.

Essential arguments of the parties to the main proceedings

7 The insured person alleges that in determining the amount of the benefit to be paid to him, the pension authority failed to apply Article 45 of Regulation 1408/71 as interpreted in the *Tomaszewska* judgment, since it only took into account non-contribution periods which amounted to one third of contribution periods completed in Poland, and according to the *Tomaszewska* judgment, it should have taken into account non-contribution periods which amounted to one third of aggregated contribution periods completed in Poland and in the Netherlands.

8 However, the pension authority claims, firstly, that the interpretation of Article 45 of Regulation 1408/71 does not apply to the present case, as in order for the insured person to acquire the entitlement to a pension, it proved sufficient to add to the Polish periods of insurance (both contribution periods and non-contribution periods amounting to one third of national contribution periods) the periods of insurance completed in another Member State. According to the pension authority, the *Tomaszewska* judgment only applies if, after using the method for calculating the insurance period adopted in the present case, it is found that the insured person has not reached the required minimum insurance period. It is only then that foreign contribution periods can be added to national contribution periods and the maximum share of domestic non-contribution periods (one third of contribution periods) can be calculated on the basis of aggregated (national and foreign) periods of insurance. Secondly, the *Tomaszewska* judgment concerns the interpretation of Article 45(1) of Regulation 1408/71 (the equivalent of which is Article 6 of Regulation 883/2004) rather than Article 46(2) of Regulation 1408/71 (the equivalent of which is Article 52 of Regulation 883/2004). Thirdly, the application of the interpretation of Article 45(1) of Regulation No 1408/71 adopted in the *Tomaszewska* judgment would result in more Polish non-contribution periods being taken into account than under Polish law, which would in turn lead, on the one hand, to an increase in the contribution of the Polish social security system to the benefit due to the insured person and, on the other, to a decrease in the contribution to the funding of that benefit by the insurance system of another Member State to which the insured person’s contributions were paid for much longer than to the Polish system. Fourthly, it follows from point 2 of Decision H6 that the periods reported by insurance institutions in other Member States shall be aggregated without questioning their quality, which means that the Polish insurance institution cannot be obliged to take into account more national periods of insurance (as a result of the addition of foreign periods of insurance) than required by national law.

Brief statement of and reasons for the reference

9 In the view of the Sąd Najwyższy (Supreme Court), Article 52(1)(b) of Regulation 883/2004 can be interpreted in three ways, which are reflected in the question referred for a preliminary ruling.

10 The first of these interpretation options is based on the *Tomaszewska* judgment. It follows from that judgment that Article 45(1) of Regulation 1408/71 must be interpreted as meaning that 'in the determination of the minimum insurance period required by national law for the purpose of the acquisition by a migrant worker of entitlement to a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States'. The Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw) also used this reasoning to determine the amounts referred to in Article 52(1)(b) of Regulation 883/2004.

11 The Sąd Najwyższy (Supreme Court, Poland) notes that pursuant to Article 52(1)(b) of Regulation 883/2004 the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance which have been completed under the legislations of the other Member States had been completed under the legislation applied by the competent institution on the date of the award of the benefit. According to the Sąd Najwyższy (Supreme Court), this provision of Regulation 883/2004 reproduces the solution adopted in Article 45(1) of Regulation 1408/71 (now Article 6 of Regulation 883/2004). This in turn means that it can be interpreted in accordance with the views expressed in the *Tomaszewska* judgment.

12 Article 52(1)(b) of Regulation 883/2004 clearly indicates that in calculating the theoretical amount of the benefit, a legal fiction must be adopted according to which all periods of insurance completed in other Member States are to be treated as if they had been completed in Poland. As Polish law uses a solution whereby contribution periods are counted first, and only then the limit of one third of non-contribution periods is set, the acceptance of that legal fiction and the application of the reasoning adopted in the *Tomaszewska* judgment leads to the conclusion that Polish and Dutch contribution periods should be aggregated, and only then should one third of the contribution periods be calculated as the upper limit of Polish non-contribution periods. As a result, the theoretical amount of the benefit increases because the total insurance period taken into account in its calculation is longer.

13 In the present case, this would mean extending the total insurance period from 407 months to 445 months (104 months of contribution periods + 72 months of non-contribution periods applying the one third limit calculated on aggregated

national and Dutch contribution periods amounting to 373 months + 269 Dutch contribution periods).

14 If this reasoning were applied to the present case, the number of Polish non-contribution periods which may be taken into account would increase. As a result, the 'duration of the periods' completed in Poland would also increase in relation to the total duration of the periods completed under Polish and Dutch legislation (Article 52(1)(b)(ii) of Regulation 883/2004) from 138 months (104 months of contribution periods + 34 months of non-contribution periods) to 176 months (104 months of contribution periods + 72 months of non-contribution periods). As a consequence, the share of the benefit paid by the Polish institution (as part of the pro rata benefit) would also increase from 33.9% to 39.5% (instead of 138:407 months, it would be 176:445 months). As a result, the insured person would receive a higher benefit from the competent Polish institution.

15 This interpretation of Article 52(1)(b) of Regulation 883/2004 requires the assumption to be made that the *Tomaszewska* judgment applies not only to acquiring the entitlement to a benefit but also to calculating its amount. This assumption is supported by the fact that it preserves consistency between the rules for determining the period of pension contributions required to acquire the entitlement to a benefit and the rules for determining the insurance period for the purposes of calculating the amount of that benefit.

16 As it has already been accepted in the Court's case-law that the phrase 'as though they were periods completed under the legislation which it applies' in Article 45 of Regulation 1408/71 (now Article 6 of Regulation 883/2004) should be interpreted as meaning that the Polish pension authority should take into account Polish non-contribution periods in the maximum amount of one third of Polish and foreign contribution periods, then the analogous wording of Article 52(1)(b) of Regulation 883/2004 ('if all the periods of insurance … had been completed under the legislation …') should be interpreted in the same way, because in both cases a legal fiction is adopted according to which periods of insurance in other Member States are treated as though they were periods of insurance completed in Poland.

17 This interpretation of Article 52 of Regulation 883/2004 appears to be indicated by the Court in paragraph 42 of its judgment of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16 (EU:C:2017:946). According to that judgment, it follows from the equivalent provision in Regulation 1408/71 that the competent institution is to calculate the theoretical amount of the benefit to which the person concerned is entitled 'as if all the periods of work which that person completed in various Member States had been completed in the Member State of the competent institution'. In other judgments, the Court uses the phrase 'as if the insured person had worked exclusively in the Member State concerned' (judgments of 21 July 2005, *Koschitzki*, C-30/04, EU:C:2005:492, paragraph 27; of 21 February 2013, *Concepción Salgado González*, C-282/11, EU:C:2013:86, paragraph 41; and of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 10).

18 The Court also accepts that the principle of national treatment does not mean that periods which have been recognised as periods of insurance in another Member State (for instance, periods of military service, judgment of 15 December 1993, *Fabrizii and Others v Office national des pensions*, C-113/92, EU:C:1993:930, paragraph 25) are excluded from the insurance period even if those periods are not recognised in the Member State of the competent institution. This position could indicate — a contrario — that more Polish non-contribution periods should be recognised than those resulting from national law.

19 This interpretation of Article 52 of Regulation 883/2004 could also be supported by the general principle followed by the Court in interpreting the provisions of that regulation, according to which its provisions must be interpreted in the light of the objective laid down in Article 45 TFEU (ex Article 39 [48] TEC). This objective implies that 'migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement' (judgment of 21 February 2013, *Concepción Salgado González*, C-282/11, EU:C:2013:86, paragraph 43, and the case-law cited therein), which in turn means that the application of coordination rules must not result in a deterioration of the migrant's situation (judgments of 17 December 1998, *Aristóteles Grajera Rodriguez*, C-153/97, EU:C:1998:615, paragraph 17; of 9 October 1997, *Antonio Naranjo Arjona*, C-31/96, C-32/96 and C-33/96, ECLI:EU:C:1997:475, paragraph 22; and of 9 August 1994, *Reichling v INAMI*, C-406/93, EU:C:1994:320, paragraphs 21 to 24).

20 Further, the Supreme Court notes that the Court has already held that the purpose of Article 46 of Regulation 1408/71 is 'to give a worker the maximum theoretical amount which he could claim if all periods of insurance had been completed in the State concerned' (judgment of 21 July 2005, *Koschitzki*, C-30/04, EU:C:2005:492, paragraph 28). In order to achieve this objective, it is necessary to take into account non-contribution periods in relation to the sum total of contribution periods completed under the social security legislation of the competent institution as well as in other Member States (judgment of 18 February 1992, *Antonietta Di Prinzio*, C-5/91, EU:C:1992:76, paragraph 56).

21 The second interpretation option is based on the assumption that the *Tomaszewska* judgment affects the interpretation of Article 52 of Regulation 883/2004 only partially. Namely, the reasoning adopted by the Court in that judgment only applies to the determination of the theoretical amount [Article 52(1)(b)(i) of Regulation 883/2004], since that provision expressly provides that the theoretical amount is to be calculated on the basis of the legal fiction that the insured person has completed all recognised periods of insurance in Poland. However, this reasoning does not apply to the calculation of the actual amount. This option requires, however, that Article 52(1)(b) of Regulation 883/2004 is interpreted as meaning that the proportions between the amounts paid by the competent institutions of two Member States must be determined by separately counting the periods of insurance in each of the Member States (under the rules in force in

those Member States) in which the insured person was covered by social security, and by applying different rules to the theoretical and actual amounts.

22 This interpretation of Article 52(1)(b) of Regulation 883/2004 could be supported by the fact that the provision refers to taking into account only the periods of insurance completed under the national legislation of the competent institution (in the present case: Polish legislation). These periods are then compared to the total duration of the insurance periods completed under the legislations of all the Member States to which the insured person was subject during his professional career.

23 This interpretation might appear controversial, since it introduces different rules for determining the insurance period for the purposes of calculating the theoretical amount of the benefit and for the purposes of calculating the actual amount of the benefit to be paid. When calculating the theoretical amount of the benefit, national and foreign contribution periods will be aggregated in order to determine the ceiling of national non-contribution periods which may be taken into account. On the other hand, when calculating the actual amount of the benefit, the total insurance period will only comprise the periods of insurance completed under the legislation of each Member State, and these periods will be calculated separately. In the present case, for the purposes of calculating the theoretical amount, the insurance period would be 445 months, whereas for the purposes of calculating the actual amount it would be only 407 months. The theoretical amount of the benefit and the actual amount of the benefit paid by the Polish pension authority would increase, but the share of the Polish social security system in funding the retirement pension benefit due to the insured person would not increase, since instead of 39.5% under the first option, it would only amount to 33.9%.

24 This interpretation of Article 52(1)(b) of Regulation 883/2004 could be supported by the view expressed in the judgment of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 12, in which it is stated that certain periods of insurance are taken into account in the calculation of the theoretical benefit but not in the calculation of the actual benefit (see also the judgment of 3 October 2002, *Ángel Barreira Pérez*, C-347/00, EU:C:2002:560, paragraph 32).

25 Finally, the third interpretation option assumes that the *Tomaszewska* judgment only applies to the acquisition of the entitlement to a pension but not to the calculation of its amount. In this case, periods of insurance in another Member State are not taken into account at all when calculating the limit (one third of contribution periods) of non-contribution periods which may be taken into account in the calculation of the benefit.

26 This concept, which is advocated by the pension authority, may be supported by the distinction made by the Court between the rules for the acquisition of pension entitlement and those for calculating its amount (judgment of 12 September 1996, *Lafuente Nieto v Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, C-251/94, EU:C:1996:319, paragraph 49) and also by

point 2 of Decision H6. However, both the above judgment and the decision were issued before the *Tomaszewska* judgment.

27 The argument in favour of the third interpretation option may be that Article 6 of Regulation 883/2004 (corresponding to Article 45(1) of Regulation 1408/71) states that periods of insurance in another Member State shall be taken into account 'to the extent necessary'. Since the principle is that these periods should be taken into account by the competent institution of a Member State only 'to the extent necessary', it could be assumed that the *Tomaszewska* judgment only applies in so far as the insured person is not entitled to a benefit on the basis of separately calculated contribution and non-contribution periods from each Member State in which he was insured. In the present case, however, the insured person acquired the entitlement to a pension without the need to apply the insurance period calculation method used in the *Tomaszewska* judgment, and thus it was not necessary to take into account the insurance period in another Member State for the purposes of reaching the period necessary to acquire the entitlement to the benefit. In this case, Article 52(1)(b) of Regulation 883/2004 may be interpreted as meaning that, where it is not necessary to take into account the insurance period from another Member State in order to acquire the entitlement to a pension, that insurance period is not taken into account when determining the duration of the national insurance period (as the sum of national contribution periods and national non-contribution periods up to a maximum of one third of aggregated national and foreign contribution periods).