

JUDGMENT OF THE COURT  
10 NOVEMBER 1971<sup>1</sup>

**August Keller**  
**v Caisse Régionale d'Assurance Vieillesse**  
**des Travailleurs Salariés de Strasbourg**  
**(Reference for a preliminary ruling**  
**by the Commission de Première Instance du Contentieux**  
**de la Sécurité Sociale et de la Mutualité Sociale Agricole**  
**du Bas-Rhin)**

**'Old-Age Pension'**

**Case 27/71**

**S u m m a r y**

*Social security for migrant workers — Old-age pensions — Right acquired by virtue of insurance periods completed under the legislation of a single Member State — Reduction by means of aggregation and pro rata calculation — Prohibited except in the case of overlapping of benefits for the same period*

*(Regulation No 3 of the Council, Articles 27 and 28)*

When in one Member State the right to an old-age pension arises by reason of insurance periods completed solely under the legislation of that State without its being necessary to refer to periods completed under the legislation of other Member States, the competent institution of the first State is not empowered to apply Articles 27 and 28 of

Regulation No 3 in order to reduce the benefit which it is obliged to pay by virtue of its own legislation, at least in so far as that benefit does not relate to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State.

**In Case 27/71**

Reference to the Court under Article 177 of the EEC Treaty by the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole du Bas-Rhin sitting in Strasbourg, for a preliminary ruling in the action pending before that court between

**AUGUST KELLER, residing in Gundelfingen (Federal Republic of Germany),**

**and**

**CAISSE RÉGIONALE D'ASSURANCE VIEILLESSE DES TRAVAILLEURS SALARIÉS DE STRASBOURG,**

<sup>1</sup> — Language of the Case: French.

on the interpretation of Articles 27 and 28 of Regulation No 3 of the Council concerning social security for migrant workers,

## THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Monaco and P. Pescatore (Rapporteur), Judges,

Advocate-General: A. Dutheillet de Lamothe  
Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Issues of fact and of law

#### I — Facts and procedure

August Keller, a German national born on 9 January 1905 and residing in Gundelfingen (Federal Republic of Germany), successively completed 101 quarterly insurance periods in Germany and 84 quarterly insurance periods in France.

On 12 February 1969 he submitted to the 'Bundesversicherungsanstalt für Angestellte' (Federal Railways Insurance Institution for Employees) in Berlin a claim for the award of his entitlement under French old-age insurance.

On 10 January 1970 he was informed of a decision of the Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg, dated 15 November 1969, whereby he was granted the benefit of an old-age pension calculated in accordance with the French Code de la Sécurité Sociale and Articles 27 and 28 of Regulation No 3 concerning social security for migrant workers.

On 3 February 1970 Mr Keller applied to the Commission de Procédure Gracieuse et de Remise des Dettes of the Caisse Régionale d'Assurance Vieillesse

des Travailleurs Salariés in Strasbourg contesting the application of Regulation No 3 to his case and requesting the award of his entitlement on the sole basis of payments made by him in France.

The said Commission rejected his application by decision delivered on 11 May 1970 and notified to Mr Keller on 4 June 1970.

Mr Keller instituted proceedings against this decision on 3 July 1970 before the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole du Bas-Rhin in Strasbourg.

After hearing argument on 31 March 1971, the said Commission decided on 28 April 1971 to request the Court of Justice, in accordance with Article 177 of the EEC Treaty,

'to give a preliminary ruling on the interpretation of the legal provisions relied on by the parties and, more particularly, to state whether, notwithstanding the rules in force (Articles 27 and 28 of Regulation No 3 and Article 51 of the Treaty of Rome), migrant workers must occupy

a privileged position as compared with nationals of the State in which they are working'.

This decision was lodged at the Court Registry on 8 June 1971.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 13 July 1971 by the plaintiff in the main action, on 21 July 1971 by the Commission of the European Communities and on 2 August 1971 by the defendant in the main action.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

The Commission presented its oral observations at the hearing on 6 October 1971.

The Advocate-General delivered his opinion on 13 October 1971.

In the procedure before the Court, the plaintiff in the main action himself submitted observations, the defendant in the main action was represented by its Assistant Director, Paul Kuntz, and the Commission by its Legal Adviser, Italo Telchini.

## II—Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows:

*August Keller, the plaintiff in the main action*, observes that by aggregating the insurance periods completed by him in France and in Germany the Caisse Régionale d'Assurance Vieillesse de Strasbourg is reducing his French pension in direct proportion to the number of insurance years completed by him in Germany. Since he has acquired in its entirety the right to the French pension, calculation of the latter should be effected in accordance with the formula 84/120 and not in accordance with the

formula 84/185; in this case it is inappropriate to aggregate the French and German periods.

The *Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg*, the defendant in the main action, points out that the fraction of the French pension payable to Mr Keller was awarded:

- first, in accordance with the Order of 19 October 1945, which takes account of the average annual earnings over the previous 10 years of affiliation, of the percentage corresponding to the age reached at the date when the pension becomes payable and of the duration of insurance in France;
- secondly, in accordance with Regulations Nos 3 and 4 concerning social security for migrant workers, which provide for the aggregation of insurance periods completed in two or more States of the Community, the determination of the amount for accounting purposes of the benefit to which the person concerned would be entitled if all his insurance periods had been completed exclusively under French legislation and the calculation of the French portion *pro rata* with the periods completed in France as compared with the total duration of insurance periods completed under the legislative systems of all the Member States concerned.

In pursuance of those provisions, account was taken of the following factors:

- basic annual wage (average annual wage corresponding to the contributions paid during the last 10 years of insurance completed before the age of 60 or before the age taken as the basis for the award, if this method of calculation is more advantageous): FF 14 755.91;
- percentage (for insured persons who have contributed for at least 30 years the pension is equal to 20% of the basic annual wage; where the insured person requests the award of his pension after the age of 60 this pension

is increased by 4% of the basic annual wage for each year after that age):  $20 + (4 \times 4) = 36\%$ ;

- the formula for calculating the old-age pension acquired over 30 years is as follows:

$$\frac{14\,755.91 \times 36}{100} = \text{FF } 5\,312.12;$$

- since the person concerned has completed 101 quarterly insurance periods in Germany, in addition to 84 quarterly insurance periods in France, he is entitled, under Article 27 (1) of Regulation No 3, to aggregation of the insurance periods completed in the two States ( $101 + 84 = 185$  quarterly periods);

- under Article 28 (1) (b) of Regulation No 3 the amount payable by the French social security institution *pro rata* with the duration of insurance periods completed under French legislation as compared with the total duration of periods completed under French and German legislation is therefore, as from 1 September 1969:

$$\frac{5\,312.12 \times 84}{185} = \text{FF } 2\,411.98.$$

Mr Keller wishes this reduction (84/185) to be limited to 50/120, in view of the fact that, in calculating old-age pensions, French legislation provides only for a maximum of 30 years (120 quarterly periods).

This solution, which is more favourable to the plaintiff in the main action than that adopted by the Caisse, is unacceptable since it does not take account of Regulations Nos 3 and 4.

Article 51 of the EEC Treaty provides for aggregation of all periods taken into account under the different national legislative systems for the purpose both of acquiring and retaining the right to benefit and of calculating the amount of benefit. There is no reason to suppose that this rule enables aggregation to be foregone where it is not in the insured's interest or that it is intended to ensure that migrant workers are treated more

favourably than nationals of the countries in which they are working. All international agreements give foreigners the same rights as nationals but they cannot put the former in a privileged position.

It also emerges from Articles 27 and 28 of Regulation No 3—adopted in pursuance of Article 51 of the Treaty—that aggregation of insurance periods completed in two or more Member States is obligatory and admits of no derogation. Despite what the Court has declared in its judgment of 5 July 1967 (Case 1/67, *Stanislas Ciechelski v Caisse Régionale de Sécurité Sociale du Centre d'Orléans*; reference for a preliminary ruling by the Chambre Sociale of the Cour d'Appel, Orléans; [1967] ECR 181), *pro rata* calculation cannot be excluded even where the insured person's right to benefit is acquired in pursuance of the legislation of a single Member State and there is no need to take account of periods completed in another State. Subparagraphs (f) and (g) of paragraph (1) and paragraph (3) of Article 28 of Regulation No 3 would be devoid of purpose if the award of the various benefits without aggregation were possible.

In this case, with regard to the possible limitation to 120 (instead of 185) for the purpose of the *pro rata* calculation, it must be observed that no legal text provides for this limitation, that it would lead, in certain cases, to the non-application of obligatory EEC regulations and that, in other cases, it would favour foreign nationals as compared with French nationals affiliated in France to two social security schemes.

The *Commission of the European Communities* maintains that Mr Keller would enjoy a larger old-age pension in France if it had been calculated exclusively under the French legislation, that is, if account were not taken of the principle of aggregation and *pro rata* calculation written into Articles 27 and 28 of Regulation No 3. Mr Keller acquired a right to an independent old-age pen-

sion in France on the sole basis of the French insurance periods since he has amply fulfilled the minimum period of 15 years, that is, 60 quarterly periods, of contributions. The case is therefore identical with that settled by the Court of Justice in its judgment in *Ciechelski* of 5 July 1967; that decision has been clarified and supplemented by a number of judgments of the Court. The principles flowing from those cases were recently adopted by the French Cour de Cassation and by the Cour d'Appel, Paris.

In those circumstances it must be ruled, as the Court has already decided, that when in one Member State the right to benefit arises without its being neces-

sary to refer to periods completed under the legislation of other Member States, the competent institution of the first State is not empowered to apply Articles 27 and 28 of Regulation No 3 in order to reduce the benefit which it is obliged to pay by virtue of its own legislation, at least in so far as that benefit does not relate to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State.

Within those limits it is possible that in certain respects the situation of migrant workers may be more favourable than it would be through the application of internal law alone.

### Grounds of judgment

- <sup>1</sup> By decision of 28 April 1971, received at the Court on 8 June 1971, the Commission de Première Instance du Contentieux de la Sécurité Sociale du Bas-Rhin submitted, under Article 177 of the EEC Treaty, a question relating to the interpretation of Articles 27 and 28 of Regulation No 3 of the Council concerning social security for migrant workers and of Article 51 of the EEC Treaty, in connexion with the method of determining old-age pensions.
- <sup>2</sup> It appears from the file that the plaintiff in the main action has been affiliated successively to German and French social insurance schemes, having completed 185 quarterly periods in this manner, 101 in Germany and 84 in France.
- <sup>3</sup> It is clear from these facts that on the basis of the payments effected in France alone he could have claimed a 'proportional' old-age pension as defined in Article L 335 of the French Code de la Sécurité Sociale.
- <sup>4</sup> Despite this the Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg granted him a right to an old-age pension calculated under Article L 331 of that Code, pursuant to the provisions of Articles 27 and 28 of Regulation No 3 on the aggregation and *pro rata* calculation of insurance periods.
- <sup>5</sup> The applicant submitted a complaint against this decision to the Commission de Procédure Gracieuse, disputing the application of Regulation No 3 to his

case and requesting that his rights be quantified by reference solely to payments made by him in France.

- 6 This complaint was rejected, whereupon he brought an action before the Commission de Première Instance du Contentieux de la Sécurité Sociale in which he confined his objection to the methods of calculation applied by the Caisse Régionale for the *pro rata* calculation of his pension under Article 28 of Regulation No 3.
- 7 It appears from these facts that the question of interpretation raised by the Commission de Première Instance concerns the applicability of Articles 27 and 28 of Regulation No 3 to the case of a worker who is entitled to an old-age pension under the legislation of a Member State on the sole basis of insurance periods completed under the legislation of that State.
- 8 In particular, the Commission de Première Instance wishes to know whether 'migrant workers must occupy a privileged position as compared with nationals of the State in which they are working', because they do not come under the rule regarding aggregation and its corollary, that on *pro rata* calculation.
- 9 Article 51 of the Treaty and Article 27 of Regulation No 3 deal essentially with the case in which the laws of one Member State do not by themselves allow the person concerned the right to benefits by reason of the insufficient number of periods completed under its laws.
- 10 To remedy this situation they provide, in respect of a worker who has been successively or alternately subject to the laws of two or more Member States, for aggregation of the insurance periods completed under the laws of each of such States.
- 11 The provisions of Articles 27 and 28 of Regulation No 3 are accordingly applicable only in clearly defined cases and are irrelevant with regard to a State in which the effect which Article 51 seeks to produce is attained under national legislation alone.
- 12 The aggregation and *pro rata* calculation provided for by the said provisions cannot therefore be carried out if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws, always provided that this method cannot lead to a duplication of benefits for one and the same period.

- <sup>13</sup> If this procedure were to lead in certain cases to migrant workers being placed at an advantage in comparison with nationals of the State in which they work, this consequence would follow not from the interpretation of Community law but from the system at present in force, which, in the absence of a common social security scheme, depends on a simple coordination of national legislative systems which have not been harmonized.

### Costs

- <sup>14</sup> The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.
- <sup>15</sup> As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole du Bas-Rhin, costs are a matter for that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the Commission of the European Communities;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 51 and 177;

Having regard to Regulation No 3 of the Council concerning social security for migrant workers, especially Articles 27 and 28;

Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities.

### THE COURT

in answer to the question referred to it by the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole du Bas-Rhin by decision of 28 April 1971, hereby rules:

**When in one Member State the right to an old-age pension arises by reason of insurance periods completed solely under the legislation of that State without its being necessary to refer to periods completed under the legislation of other Member States, the competent institution**

of the first State is not empowered to apply Articles 27 and 28 of Regulation No 3 in order to reduce the benefit which it is obliged to pay by virtue of its own legislation, at least in so far as that benefit does not relate to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State.

Lecourt	Mertens de Wilmars	Kutscher	
Donner	Trabucchi	Monaco	Pescatore

Delivered in open court in Luxembourg on 10 November 1971.

A. Van Houtte  
Registrar

R. Lecourt  
President

OPINION OF MR ADVOCATE-GENERAL  
MR DUTHEILLET DE LAMOTHE

(See Case 26/71, p. 878)