

JUDGMENT OF THE COURT (First Chamber)

18 May 1989*

In Case 368/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the German Bundessozialgericht (Federal Social Court) for a preliminary ruling in the proceedings pending before that court between

Lieselotte Hartmann Troiani, 3 N. Sauro, 18020 Vasia (IM), Italy,

and

Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office for the Rhine Area), 71 Königsallee, Düsseldorf 1,

on the question whether a provision such as that contained in paragraph 2, subparagraph 28, of the Arbeiterrentenversicherungs-Neuregelungsgesetz (Law amending the pension-insurance scheme for workers), enabling women to make retroactive pension-insurance contributions, is compatible with Article 9(2) of Council Regulation (EEC) 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 (Official Journal, English Special Edition 1971 (II), p. 416, as codified in Official Journal 1983, L 230, p. 8) and with Article 48 *et seq.* of the EEC Treaty,

THE COURT (First Chamber),

composed of: R. Joliet, President of Chamber, Sir Gordon Slynn and G. C. Rodríguez Iglesias, Judges,

Advocate General: F. G. Jacobs

Registrar: J. A. Pompe, Deputy Registrar

* Language of the case: German.

after considering the observations submitted on behalf of:

Mrs Hartmann Troiani, the plaintiff in the main proceedings, by K. Leingärtner, of the Legal Department of the Deutscher Gewerkschaftsbund (German Federation of Trade Unions),

the Commission of the European Communities, by its Agent, I. Pernice,

having regard to the Report for the Hearing and further to the hearing on 14 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 February 1989,

gives the following

Judgment

- 1 By order of 10 September 1987, which was received at the Court on 7 December 1987, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 9(2) of Council Regulation (EEC) 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 (Official Journal, English Special Edition 1971 (II), p. 416, as codified in Official Journal 1983, L 230, p. 8) and, secondly, of Articles 48 and 51 of the EEC Treaty.

- 2 The questions were raised in the course of proceedings between Mrs Hartmann Troiani, the plaintiff in the main proceedings, and a German social security institution, the Landesversicherungsanstalt Rheinprovinz (hereinafter referred to as 'the social security institution'), the defendant in the main proceedings, concerning the retroactive payment of voluntary pension-insurance contributions.

3 Mrs Hartmann Troiani commenced employment in the Federal Republic of Germany on 1 March 1952. She married in 1963. At that time, she applied for and obtained, in accordance with paragraph 1304 of the German Social Insurance Code, a refund of the pension-insurance contributions which she had paid until the date of her marriage. She continued to work for 11 months in Germany following her marriage and during that period she made compulsory pension-insurance contributions.

4 In 1964 she went to live in Italy, where she took up employment. In 1981 she made application under paragraph 2, subparagraph 28, of the Arbeiterrentenversicherungs-Neuregelungsgesetz (Law amending the pension-insurance scheme for workers, hereinafter referred to as 'the ArVNG'). Under that provision women may voluntarily make retroactive payment of the pension-insurance contributions which had been reimbursed upon their marriage. It is worded as follows:

'Insured women who are engaged in employment or in another activity subject to compulsory pension insurance and whose contributions have been refunded pursuant to paragraph 1304 of the German Social Insurance Code . . . may, on request, . . . retroactively pay contributions going back to 1 January 1924 for the periods in respect of which the contributions were refunded pursuant to the aforesaid provisions, provided that those periods are not already covered by contributions. Entitlement to pay retroactive contributions shall arise only when contributions in respect of an activity or employment subject to compulsory pension insurance have been paid for a period of at least 24 months after the refund of the contributions.'

5 The social security institution rejected the application on the ground that Mrs Hartmann Troiani did not satisfy the two conditions laid down in that provision. In the first place, she had not been engaged, at the time of her application, in an employment or activity subject to compulsory German pension insurance. Secondly, she had not paid contributions in respect of compulsory German pension insurance for the minimum period of 24 months following the refund of contributions at the time of her marriage.

6 Mrs Hartmann Troiani contested that ruling in proceedings before the Sozialgericht (Social Court) Düsseldorf, which upheld the social security institution's decision. She then appealed to the Landessozialgericht (Higher Social Court) for North-Rhine Westphalia which found in her favour.

7 The social security institution brought an appeal on a point of law before the Bundessozialgericht (Federal Social Court) which took the view that the plaintiff in the main proceedings had in fact paid contributions in respect of an employment or activity subject to compulsory German pension insurance during the minimum period of 24 months following the refund of contributions at the time of her marriage. Pursuant to Article 9(2) of Regulation No 1408/71, the periods of employment subject to compulsory pension insurance in Italy ought to be treated as equivalent to periods of employment subject to such insurance in Germany.

8 With regard to the requirement of affiliation, that is to say the requirement that at the time of his application a person must be engaged in an activity or employment which is subject to compulsory German pension insurance, the Bundessozialgericht noted that when she made her application Mrs Hartmann Troiani was employed in Italy. The German court was therefore uncertain whether Article 9(2) of Regulation No 1408/71 might affect her claim and, if it did not, whether Article 48 of the Treaty was to be construed as precluding the requirement of affiliation laid down in paragraph 2, subparagraph 28, of the ArVNG.

9 Article 9 of Regulation No 1408/71 is worded as follows:

‘1. The provisions of the legislation of any Member State which makes admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons.

2. Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.’

10 Since it considered that the dispute raised a problem concerning the interpretation of Community law, the Bundessozialgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 9(2) of Council Regulation (EEC) 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 to be construed as covering cases in which the retroactive payment of voluntary pension-insurance contributions is made conditional on the individual’s being engaged at the time of application in employment subject to compulsory pension insurance under national law?

(2) If not, does a national provision such as that described in Question 1 contravene Article 48 *et seq.* of the EEC Treaty or any other provisions of Community law?’

11 Reference is made to the Report for the Hearing for a more detailed account of the facts and legislation relative to the main proceedings and of the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 It should be noted at the outset that national legislation making the right voluntarily to make retroactive payments of pension-insurance contributions subject to certain conditions falls within the concept of continued insurance within the meaning of Article 9 of Regulation No 1408/71. As the Court ruled in its judgment of 16 March 1977 in Case 93/76 *Liégeois v Office national des pensions pour travailleurs salariés* [1977] ECR 543, that provision covers ‘every type of insurance incorporating a voluntary element and it matters little whether there is any continuance of existing insurance or not’.

The first question

- 13 The national court's first question is in substance designed to ascertain whether Article 9 of Regulation No 1408/71 must be construed as meaning that the requirement of affiliation to a compulsory insurance scheme in a Member State, which according to the legislation of that State must be fulfilled at the time of the submission of an application to make retroactive payment of voluntary pension-insurance contributions, may be considered to be satisfied if the person making the application is, at that date, affiliated to a compulsory insurance scheme in another Member State.
- 14 Under Article 9(1) of Regulation No 1408/71, residence requirements to which admission to a voluntary insurance scheme is made subject by national legislation are inapplicable to employed or self-employed persons. However, an affiliation requirement such as that laid down in paragraph 2, subparagraph 28, of the ArVNG is not equivalent to a residence requirement. In fact, a residence requirement may be satisfied even though the person concerned is not subject to a social security scheme because of his engagement in an activity or employment in the State in which he resides. Conversely, as the case of frontier-zone workers shows, the requirement of affiliation to the national social security scheme may be satisfied without the applicant's residing in national territory. Consequently, Article 9(1) does not preclude the application of an affiliation requirement such as that laid down in paragraph 2, subparagraph 28, of the ArVNG.
- 15 As regards Article 9(2) of Regulation No 1408/71, the object of that provision is to guarantee that periods of insurance completed in different Member States are treated as equivalent so that the persons concerned can satisfy the condition of a minimum length of insurance periods where national legislation makes admission to a voluntary or optional insurance scheme subject to such a condition.
- 16 On the other hand, it is clear from the wording of Article 9(2) that it does not govern the other conditions to which the legislation of any Member State may make subject the acquisition of a right, such as the right to contribute to a national scheme of voluntary or optional continued insurance.

17 Consequently, the answer to the national court must be that Article 9 of Regulation No 1408/71 must be construed as meaning that the requirement of affiliation to a compulsory insurance scheme in a Member State, which according to the legislation of that State must be fulfilled at the time of the submission of an application to make retroactive payment of voluntary pension-insurance contributions, cannot be considered to be satisfied if the person making the application is at that date affiliated to a compulsory insurance scheme in another Member State.

The second question

18 The second question is in substance designed to ascertain whether Articles 48 and 51 of the Treaty must be construed as precluding a Member State's legislation from laying down an affiliation requirement, such as that laid down in paragraph 2, subparagraph 28, of the ArVNG, for the nationals of that State.

19 Article 48 of the Treaty lays down the principle of freedom of movement for workers. This freedom entails the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment. It entails the right, subject to certain limitations, to accept offers of employment actually made, to move freely within the territory of Member States for that purpose, to stay in a Member State for the purpose of employment and, lastly, subject to certain conditions, to remain in the territory of a Member State after having been employed in that State.

20 In order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council was required, under Article 51 of the Treaty, to set up a system designed to help workers overcome obstacles arising from national laws which they might encounter in the field of social security. The Council carried out that duty by introducing Regulation No 1408/71.

21 It is true, as the Court ruled in its judgment of 25 February 1986 in Case 284/84 *Spruyt v Sociale Verzekeringsbank* [1986] ECR 685, paragraph 19, that the aim of Articles 48 and 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of an

individual Member State. However, as the Court held in its judgments of 24 April 1980 in Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, paragraph 12 and of 24 September 1987 in Case 43/86 *Sociale Verzekeringsbank v de Rijke* [1987] ECR 3611, paragraph 12, it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, provided always that in this connection there is no discrimination between nationals of the host State and nationals of other Member States. The documents before the Court make it clear that the provisions of national legislation which gave rise to the main proceedings do not operate any discrimination on the basis of nationality.

- 22 Consequently, the answer to be given to the national court must be that Articles 48 and 51 of the Treaty must be construed as not precluding a Member State's legislation from laying down an affiliation requirement, such as that laid down in paragraph 2, subparagraph 28, of the ArVNG, for the nationals of that State.

Costs

- 23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings brought before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions submitted to it by the Bundessozialgericht, by order of 10 September 1987, hereby rules:

- (1) Article 9 of Regulation No 1408/71 must be construed as meaning that the requirement of affiliation to a compulsory insurance scheme in a Member State, which according to the legislation of that State must be fulfilled at the time of

the submission of an application to make retroactive payment of voluntary pension-insurance contributions, cannot be considered to be satisfied if the person making the application is at that date affiliated to a compulsory insurance scheme in another Member State.

- (2) Articles 48 and 51 of the Treaty must be construed as not precluding a Member State's legislation from laying down an affiliation requirement, such as that laid down in paragraph 2, subparagraph 28, of the ArVNG, for the nationals of that State.

Joliet

Slynn

Rodríguez Iglesias

Delivered in open court in Luxembourg on 18 May 1989.

J.-G. Giraud

Registrar

R. Joliet

President of the First Chamber