JUDGMENT OF THE COURT
OF 20 NOVEMBER 1975 [1]

Camilla Borella
v Landesversicherungsanstalt Schwaben
(preliminary ruling requested by the Sozialgericht Augsburg)

Case 49/75

Summary

Social security for migrant workers — Old-age and death insurance — Insurance period of less than one year — Benefits — Right acquired by virtue of the legislation of the Member State in question — Article 48 of Regulation No 1408/71 — Inapplicability

Article 48 of Regulation No 1408/71 is not applicable where the right to benefits of a migrant worker or his survivors already arises solely from the provisions of the legislation of the Member State in question.

In Case 49/75

Reference to the Court under Article 177 of the EEC Treaty by the Sozialgericht Augsburg (5th Senate) for a preliminary ruling in the action pending before that court between

CAMILLA BORELLA (née Locatelli), of Pizzighettone (Cremona),

and

LANDESVERSICHERUNGSANSTALT SCHWABEN, Augsburg,

on the interpretation of Article 48 (1) of Regulation No 1408/71 of the Council relating to social security

1 — Language of the Case: German.

THE COURT

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

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the 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

On 23 October 1973 the plaintiff in the main action, Mrs Borella (née Locatelli), widow, an Italian national resident in Italy, sought from the defendant in the main action, the Landesversicherungsanstalt Schwaben, a survivor's pension under the German pension insurance scheme for workers.

Her husband, who died on 20 September 1973, had worked in Germany between 24 March 1941 and 3 January 1942 and had paid nine monthly contributions to the old-age insurance scheme. By a decision of 9 April 1965, a pension for occupational incapacity was granted to him by the competent institution on the basis of that insurance period, with effect from 1 April 1964. By a decision of 21 September 1972 this pension was converted into an invalidity pension as from 1 July 1972.

By a decision of 10 September 1974, the defendant in the main action rejected the application submitted by the plaintiff in the main action on the ground that the insurance periods completed under German legislation did not amount to the twelve months required under Article 48 (1) of Regulation No 1408/71.

An action was brought against this decision of rejection before the Sozialgericht Augsburg which, by an order of 28 May 1975, stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 48 (1) of Regulation No 1408/71 of the Council of 14 June 1971, on the application of social security schemes to employed persons and their families moving within the Community OJ L 149), to be interpreted in such a way that the relevant institution of a Member State is under an obligation to pay benefits to the survivors of an insured person, who are resident in another Member State and who posses the nationality of that State, if the insurance periods completed under the legislation of this Member State amount

to less than one year, but benefits were due to the deceased insured person arising out of these insurance periods until his death after the coming into force of Regulation No 1408/71?'

The Sozialgericht notes the consistent case-law of the Court to the effect that the Court has no jurisdiction to interpret a provision of domestic law with regard to the provisions of Community law, but may nevertheless provide a national court with the criteria necessary for the interpretation of Community law which might be useful to it in evaluating the effects of that provision.

Article 48 (1) of Regulation No 1408/71 provides that '... if the total length of the insurance periods completed under the legislation of a Member State does not amount to one year, and if under that legislation no right to benefit is acquired by virtue only of those periods the institution of that State shall not be bound to award benefits in respect of such periods'.

The court making the order for reference states that such an exception exists under the provisions of Paragraph 1263 (2) of the Reichsversicherungsordnung (RVO) (the State insurance scheme), which provides that a survivor's pension is awarded when, at the time of his death, the deceased 'was entitled' to an insurance pension.

In the opinion of the Sozialgericht, it is for the legal existence of that entitlement sufficient that a decision was taken even if it was erroneous. In this connexion, under Article 28 (2) of Regulation No 4 which was valid before the entry into force of Regulation No 1408/71, the relevant insurance period has to amount to only six months in all. A case such as the present one, involving a new contingency is not governed by the transitional provisions of Regulation No 574/72 of the Council of 21 March 1972, fixing the procedure for implementing Regulation No 1408/71 (OJ L 74), Article 118 (2) of which only provides for automatic reassessment in respect of the same contingency.

The order making the reference was received at the Court Registry on 5 June 1975.

Having heard the report of the Judge Rapporteur and the views of the Advocate-General, the Court decided that there was no need to undertake a preparatory inquiry.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

The *plaintiff in the main action* believes that she can show a right to her survivor's pension under the German pensions insurance scheme.

Whilst the insurance periods completed in Germany may be taken into consideration for the calculation of the pension paid in Italy, it must not be forgotten that the pension to be paid on the basis of the insurance periods completed under the German pensions insurance scheme differs depending on whether it is paid under the German or the Italian pensions insurance schemes. It is sufficient to recall in this respect that in the Federal Republic of Germany pensions are reviewed annually and that pensions paid in different Member States have different purchasing powers.

Therefore, to take this right into consideration in calculating the pension to be paid in Italy would subject the plaintiff in the main action to financial loss which could not be justified by the objective of Article 48 of Regulation No 1408/71, that of simplifying administrative formalities. This objective did not prevent the payment of the pension granted to the insured after 1 October 1972.

The prevailing principle here is that of the protection of the legitimate

expectation of the individual, which has the status of a fundamental right to be respected at the Community level and which implies that payment of the pension granted for some years to the husband of the plaintiff in the main action should continue.

In the opinion of the *defendant in the main action,* the materialization of a new contingency (in this case the death of the insured on 20 September 1972) after the entry into force of Regulation No 1408/71 on 17 September 1972 invalidates the claim to vested rights. Therefore Article 48 (1) should be applied (as is clear from the combined provisions of Articles 94 (1) and 99 of that regulation) and not Article 28 (2) of Regulation No 4 even though an insurance pension had been paid to the deceased in pursuant of the latter provision.

Nor can the grant of German benefits be founded on the principle of the protection of legitimate expectation. It is true that the transitional provisions of Article 118 of Regulation No 574/72 show that this principle is not unknown to Community law, but in this respect they presuppose that the contingency materializes prior to the entry into force of Regulation No 1408/71. The latter regulation does not conflict with this principle but is merely intended to avoid the granting of derisory benefits. Therefore it is for the Italian institution to take responsibility for the period in question and to take it into consideration in applying Article 46 (2) (a) of the said regulation.

Furthermore, it is not possible to deduce a right to a pension from the second condition mentioned in Article 48 (1), which implies that in German law an insurance period of nine months is sufficient basis for the acquisition of the right to a pension. However, in Germany the time limit for failure to act in matters relating to invalidity and old-age and invalidity insurance is sixty months.

In no way can the rule established by Paragraph 1263 (2) of the Reichsversicherungsordnung give rise to the right to a pension; it can only be related to a right to a German pension under domestic law. However, a right under domestic law to a survivor's pension within the meaning of the said paragraph cannot be deduced from the insurance pension paid to the deceased, to which he had a right only through the aggregation of periods completed in other Member States by virtue of Article 27 (1) of Regulation No 3. An insurance pension governed exclusively by German law could not have been paid in the present case since the right to the pension existed under supra-national law. The German legislation could not grant a pension to the person entitled thereto or to his survivors due on the basis of EEC regulations.

The *Commission* is of the opinion that Article 48 (1) of Regulation No 1408/71 is not applicable. This follows from the fact that Paragraph 1263 (2) of the Reichsversicherungsordnung a survivor's pension should be granted if, at the time of his death, the deceased has acquired the right to an insurance pension. This right was not affected by the entry into force of Regulation No 1408/71, as is clear from Article 94 (5) and from the seventh recital in the preamble to that regulation.

Article 48 (1) is also inapplicable since it merely lays down an exception to the principle imposed upon the institutions by Article 45 (1) of the same regulation, that insurance or residence periods completed abroad shall be taken into consideration; the right acquired in this case had been acquired independently of the completion of such periods.

The Commission therefore believes that the question referred may be answered as follows:

'Article 48 (1) of Regulation No 1408/71 of the Council of 14 June 1971 is not

applicable to benefits payable under the legislation of one Member State unless the acquisition of the right to benefits in accordance with Article 45 of that Regulation is subject to account being taken of insurance or residence periods completed under the legislation of another Member State.'

The *Government of the Republic of Italy* states, first, that it is possible to resolve the case in a manner favourable to the plaintiff in the main action on the basis of national law, independently of the rules on coordination and harmonization laid down by the Community legal order.

On various occasions the Court has emphasized that the rules for coordinating the various systems are not applicable where the right to certain benefits is acquired on the basis of a single national legislation and that they cannot be invoked in order to reduce the benefits which a social security institution is bound to pay by virtue of its own national legislation.

Moreover, the very objectives of the Community regulations would be jeopardized if their application led to loss of benefit on the rights acquired in one Member State by virtue of the legislation in force in that State.

It follows from this that Article 48 (1) cannot be applied in the present case, since the pension in question was granted under German legislation 'by virtue' of the contributions paid in Germany and since the survivor's pension is payable to the plaintiff in the main action under the same legislation.

Any discrimination which can be conceived of in this case is prohibited by the provisions of Article 7 of the Treaty and of Articles 2 (2), 3 (1), 10 (1), 28 (1) and (2), and 28 (a) of Regulation No 1408/71.

The survivor's pension cannot be refused on the basis of the provisions of Article 48 (1) since a pension had previously been paid to the husband of the plaintiff in the main action 'by virtue' of social insurance contributions paid during a period of less than one year.

Article 48 (2) is not applicable to this case because it is only relevant to the case where insurance periods completed in a Member State of a total duration of less than one year do not give rise to a right to social security benefits.

In addition, this case is not concerned with a right to social security benefits which have to be paid on the basis of certain insurance periods but with a survivor's pension, and therefore with a right which in principle and according to the German legislation arises exclusively from the pension already granted to the deceased and which exists solely because of that prior grant.

No contrary argument can be drawn from Article 118 of Regulation No 574/72, the latter part of which excludes the possibility of a downward reassessment. It seems very doubtful that the death may serve to determine what the abovementioned provision defines as 'the date of materialization of the contingency'. It is not permissible to discriminate between survivors in the same circumstances according to whether the death of the person under whom they claim occurred before or after the entry into force of Regulation No 1408/71.

The Italian Government therefore suggests that the Court should rule as follows:

'The minimum periods laid down by the Community regulations regarding the criteria determining the grant of social security benefits in arrangements between national schemes may not be relied upon to refuse or reduce benefits already payable to persons entitled on the basis of the legislation of a single Member State;'

or alternatively, reply to the question referred in the affirmative.

The oral observations of the plaintiff in the main action, represented by Helga Niesel, Advocate at the Munich Bar, and the Commission, represented by its Legal Adviser, Norbert Koch, acting as Agent, were made at the hearing on 22 October 1975.

The Advocate-General delivered his opinion on 11 November 1975.

Law

1 By order dated 28 May 1975 received at the Court on the following 5 June, the Sozialgericht Augsburg has referred to the Court under Article 177 of the EEC Treaty a question on the interpretation of Article 48 (1) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ English Special Edition 1971 (II) p. 416).

2 The said article provides that 'Notwithstanding the provisions of Article 46 (2), if the total length of the insurance periods completed under the legislation of a Member State does not amount to one year, and if under that legislation no right to benefits is acquired by virtue only of those periods the institution of that state shall not be bound to award benefits in respect of such periods'.

3 The question asks whether this provision must be understood as meaning that the relevant institution of a Member State is under an obligation to pay benefits to the survivors of an insured person who are resident in another Member State and who possess the nationality of that State, if the insurance periods completed under the legislation of this Member State amount to less than one year, but benefits were due to the deceased insured person arising out of these insurance periods until his death after the coming into force of Regulation No 1408/71.

This question was raised in the context of proceedings that related to an application for a survivor's pension under the German pensions insurance scheme for workers made to the Landesversicherungsanstalt Schwaben by an Italian national, the plaintiff in the main action, in view of the fact that her husband, who died in September 1973, had worked in Germany from 24 March 1941 to 3 January 1942 where he had paid nine monthly contributions to the old-age insurance scheme.

The defendant in the main action rejected the application on the ground that the insurance periods completed under the German legislation amounted to less than the twelve months provided for under Article 48 (1) aforementioned.

4 It can be seen from the file that on the basis of these periods of insurance, the competent institution had granted the spouse of the plaintiff in the main action a pension for occupational invalidity by a decision of 9 April 1965, which was subsequently converted into a disablement pension as from 1 July 1972.

The Sozialgericht states that Paragraph 1263 (2) of the Reichsversicherungsordnung provides for a survivor's pension where, at the time of his death, the deceased 'was entitled' to an insurance pension.

5 Under the actual terms of Article 48 (1) the latter only applies where two conditions are fulfilled, that is, first, that 'the total length of insurance periods ... does not amount to one year' and, secondly, that under the legislation of that Member State 'no right to benefits is acquired by virtue only of those periods'.

It follows that this article cannot be applied where the right to benefits of a migrant worker or his survivors already arises solely from the provisions of the legislation of the Member State in question.

Costs

6 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable and since, in so far as the parties to the main action are concerned, the proceedings are a step in the action pending before the national court, it is for the latter court to decide the question of costs.

On those grounds,

THE COURT

in reply to the question referred to it by the Sozialgericht Augsburg by its order of 28 May 1975, hereby rules:

Since Article 48 (1) only applies where two conditions are fulfilled, that is, first, that 'the total length of the insurance

periods ... does not amount to one year' and, secondly, that under the legislation of that Member State 'no right to benefits is acquired by virtue only of those periods' it follows that this article cannot be applied where the right to benefits of a migrant worker or his survivors already arises solely from the provisions of the legislation of the Member State in question.

Lecourt Kutscher Donner

Mertens de Wilmars Pescatore Sørensen O'Keeffe

Delivered in open court in Luxembourg on 20 November 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1975 [1]

Mr President,
Members of the Court,

In proceedings pending before the Sozialgericht Augsburg which have resulted in the question referred for a preliminary ruling with which I shall deal today, we are concerned with a claim for the grant of a survivor's pension under the German pensions insurance scheme for workers. The claim is made by Mrs Borella, an Italian citizen residing in Italy.

Apart from 119 months completed under the Italian legislation which can be taken into account for insurance purposes, Mrs Borella's husband also had 10 months which can be taken into account for insurance purposes under the German insurance laws. During the period from 24 March 1941 to 3 January 1942 he had in fact paid contributions to the German pensions insurance scheme in respect of 9 months; one month was counted as an equivalent period (Ausfallzeit) under German law. In these circumstances, on the basis of a decision of 9 April 1965 Mr Borella received a pension for occupational invalidity as from 1 April 1964 and on the basis of a decision of 21 September 1972 he received a disablement pension as from 1 July 1972.

On 20 September 1973 Mr Borella died. On 23 October 1973 Mrs Borella applied for the grant of a widow's pension. This

1 — Translated from the German.