JUDGMENT OF THE COURT
22 November 1995 *

In Case C-443/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Elengtiko Sinedrio (Greece) for a preliminary ruling in the proceedings pending before that court between

Ioannis Vougioukas

and

Idrima Koinonikon Asphalisseon (IKA),

on the interpretation and validity of Article 4(4) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward and G. Hirsch (Presidents of Chambers), F. A. Schockweiler,

* Language of the case: Greek.

J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann (Rapporteur), P. Jann, H. Ragnemalm and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Vougioukas, by M. Bra, of the Brussels Bar, and T. M. Margellos, of the Athens Bar,

— the Idrima Koinonikon Asphalisseon, by T. D. Zigras, of the Athens Bar,

— the Greek Government, by M. Apessos, Assistant Legal Adviser, and F. Dedousi, Legal Agent for the State Legal Service, acting as Agents,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and B. Kloke, Oberregierungsrat at the same Ministry, acting as Agents,

— the French Government, by C. de Salins, Deputy Director in the Directorate for Legal Affairs of the Ministry of Foreign Affairs, and C. Chavance, Secretary of Foreign Affairs in the same Directorate, acting as Agents,

— the Council of the European Union, by A. Sacchettini, Director in its Legal Service, and S. Kyriakopoulou, also of its Legal Service, acting as Agents,

— the Commission of the European Communities, by M. Patakia, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Vougioukas, represented by M. Bra; of the Idrima Koinonikon Asphalisseon, represented by T. D. Zigras; of the Greek Government, represented by M. Apessos; of the German Government, represented by E. Röder and G. Thiele, Assessor at the Federal Ministry for Economic Affairs, acting as Agent; of the French Government, represented by C. Chavance; of the Council, represented by S. Kyriakopoulou; and of the Commission, represented by M. Patakia, at the hearing on 2 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 1 June 1995,

gives the following

Judgment

1 By decision of 28 June 1993, received at the Court Registry on 16 November 1993, the Elengtiko Sinedrio (Court of Auditors) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation and validity of Article 4(4) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 Those questions were raised in proceedings between Mr Vougioukas, a Greek national, and the Idrima Koinonikon Asphalisseon (Social Security Institution; hereinafter 'the IKA'), following the latter's refusal to take into account, for the purpose of Mr Vougioukas's acquisition of old-age pension entitlement, periods between 1964 and 1969 during which he worked in public hospitals in the Federal Republic of Germany.

3 Mr Vougioukas is a staff doctor with the IKA, which is a public legal person. His pension entitlement is accordingly governed by Law No 3163/1955 on pensions for IKA staff and Decree Law No 4277/1962 on pensions for IKA doctors and certain other categories of workers. Under that legislation, the provisions governing the pension entitlement of civil servants apply by analogy, save where otherwise provided, to the pensions of IKA staff doctors.

4 Those rules allow periods of medical practice other than periods of employment with the IKA to be also taken into account for the purpose of acquiring pension entitlement, provided that a special purchase payment, equal to 5% of the ordinary monthly pay received at the time of submitting the application, is made for a period corresponding to the duration of such medical practice.

5 In 1988 Mr Vougioukas applied to the IKA staff pensions directorate for his periods of service between 1964 and 1969 as a doctor in German public hospitals to be recognized as pensionable service. At the time when Mr Vougioukas submitted that application, it was necessary for those periods to be taken into account in order for him to be entitled to a retirement pension.

6 The IKA staff pensions directorate rejected the application on the ground that Mr Vougioukas's service abroad fell outside the categories of service expressly

defined by the provisions applicable to IKA doctors. That decision was upheld by the committee responsible for investigating complaints against acts based on the pension rules.

7 Mr Vougioukas appealed against that decision before the second section of the Elegktiko Synedrio. By judgment No 2101/1991, that section dismissed his appeal on the grounds that the national provisions on the pensions of IKA staff doctors did not provide that service abroad conferred pension rights and also that, pursuant to Article 4(4) of Regulation No 1408/71, that regulation was not applicable to 'special schemes for civil servants and persons treated as such' and therefore did not apply to the special insurance scheme covering IKA staff doctors.

8 Mr Vougioukas brought an appeal on a point of law against that judgment before the Elengtiko Sinedrio in plenary session. In that appeal, he claims *inter alia* that, first, since Article 4(4) of Regulation No 1408/71 is incompatible with Articles 48 and 51 of the EEC Treaty, now the EC Treaty, that regulation is applicable to him, secondly, Article 4(4) of the regulation should be interpreted strictly and therefore disregarded in his case and, thirdly, pursuant to Articles 48 and 51 of the EC Treaty, his periods of service in German hospitals should be treated in the same way as his periods of similar service in Greece.

9 Since it was uncertain as to the proper interpretation of Community law, the Elengtiko Sinedrio meeting in plenary session decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In view of the fact that, during the period of their career, the staff doctors of the IKA may, from time to time, be appointed to be in charge of and to direct the clinical services of the IKA, participate in the proceedings of its principal or secondary clinical committees and consequently, in the course of their

duties, be required to take decisions relating to the objectives and functioning of the IKA,

(a) may they on that ground be regarded as "civil servants" within the meaning of Article 4(4) of Regulation No 1408/71, that is to say, do they exercise public authority, and

(b) is it sufficient in order for them to be regarded as "civil servants" that they are afforded the possibility of occupying such positions or must they have actually occupied them, even if only once during their career in the public service?

(2) In so far as their pension situation is governed, irrespective of whether or not they have occupied such positions, by a pension scheme related principally to the pension provisions applicable to civil servants and military personnel, is that sufficient for the scheme in question to be regarded as a "special" scheme of social security benefits for civil servants within the meaning of Article 4(4) of Regulation No 1408/71, as it now applies? Thus, for a scheme of social security benefits to be regarded as "special", is it sufficient that it concerns civil servants or refers to the existing social security scheme for civil servants of a Member State, or does the meaning of "special" perhaps require other elements or arrangements which in any event may not be less favourable than the basic principles contained in the abovementioned regulation and in Article 51 of the EEC Treaty which refers to the 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?

(3) Inasmuch as under Article 4(4) of Regulation No 1408/71 a "special" scheme of benefits for the "civil servants" of a Member State might be regarded as allowing arrangements which do not provide for, or do not permit, the aggregation of periods of employment completed by the civil servant under the leg-

islation of another Member State for the purpose of acquiring and retaining the right to benefit and of calculating the amount thereof, does that provision of the abovementioned regulation run counter to the first paragraph of Article 51 of the EEC Treaty, in view of the fact that Article 48(4) concerning access to employment in the public service, which states that Article 48 "shall not apply to employment in the public service", does not clearly appear to apply to the scheme of social security benefits in such a way as to cause a person subject to a special social security scheme for the civil servants of a Member State to lose the abovementioned right to aggregate, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, earlier periods of employment completed in other Member States, where the national benefits scheme for civil servants does in fact permit such aggregation to the extent to which the aggregated earlier periods of employment were completed abroad in analogous public establishments?'

The Community legislation

10 It should be pointed out at the outset that Article 48 of the EC Treaty lays down the principle of freedom of movement for workers. Under Article 48(2), such freedom entails *inter alia* the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

11 Article 48(4) states that the provisions of Article 48 do not apply to employment in the public service.

12 Article 51 provides that:

'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;

...'

13 On the basis of that article, the Council adopted Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, which coordinates the relevant legislation in the various Member States in order to ensure that workers who exercise the right to freedom of movement suffer no disadvantage by comparison with those who pursue their occupation in a single Member State.

14 Article 4(4) of Regulation No 1408/71 excludes from the scope of the regulation special schemes for civil servants and persons treated as such.

15 As regards old-age pensions in particular, Article 45 provides that, for the acquisition, retention or recovery of the right to benefits, periods completed under the legislation of other Member States are to be taken into account, while Article 46 provides that, with respect to the payment of benefits, the competent institution is to establish the actual amount of the benefit in the ratio which the length of the periods of insurance completed under the legislation administered by it bears to the total length of the periods of insurance completed under the legislations of all the Member States concerned.

Question 1

16 By its first question, the national court essentially asks whether Article 4(4) of Regulation No 1408/71 refers only to civil servants covered by the derogation provided for in Article 48(4) of the Treaty, as interpreted by the Court, and, if so, whether doctors such as those who work for the IKA should be regarded as such civil servants.

17 Mr Vougioukas claims in that connection that Article 4(4) of Regulation No 1408/71 should be interpreted consistently with Article 48(4) of the Treaty and therefore must only be applied to civil servants covered by that derogation from the principle of freedom of movement for workers.

18 That view cannot be accepted.

19 It should be observed in that regard that the subject-matter of the two provisions is different. Article 48(4) of the Treaty provides only that Member States may exclude nationals of other Member States from access to certain posts in the public service (see Joined Cases 389/87 and 390/87 *Echternach and Moritz* v *Minister for Education and Science* [1989] ECR 723, paragraph 14), whereas Article 4(4) of Regulation No 1408/71 excludes, in general terms, special schemes for civil servants and persons treated as such from the coordination of social security schemes under that regulation.

20 The objectives of the two provisions are also different. Article 48(4) of the Treaty takes account of the legitimate interest which Member States have in reserving to their own nationals a range of posts connected with the exercise of powers conferred by public law and with the protection of general interests (see

Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 19), whereas Article 4(4) of Regulation No 1408/71 is intended to take account of the special features of schemes for civil servants in the Member States.

21 It should therefore be stated in reply to the first question that the term 'civil servants' in Article 4(4) of Regulation No 1408/71 does not refer only to civil servants covered by the derogation provided for in Article 48(4) of the Treaty, as interpreted by the Court, but to all civil servants employed by a public authority and persons treated as such.

22 In view of the reply given to the first part of the question, there is no need to consider whether, in the present case, the derogation provided for in Article 48(4) of the Treaty applies to doctors such as those employed by the IKA.

Question 2

23 By its second question, the national court asks the Court to interpret the expression 'special schemes for civil servants' in Article 4(4) of Regulation No 1408/71.

24 Mr Vougioukas submits that the term should be interpreted strictly. The fact that a social security scheme applies exclusively to civil servants and persons treated as such is not sufficient for it to be regarded as 'special' within the meaning of Regulation No 1408/71. That should also depend on other, objective, criteria such as the impossibility or difficulty — given the specific nature of such a scheme — of making it subject to the rules in Regulation No 1408/71.

25 That interpretation cannot be adopted.

26 As the Advocate General pointed out at point 15 of his Opinion, by adopting Article 4(4) of Regulation No 1408/71, the Community legislature intended to exempt social security schemes established by Member States for all or some of the staff of their public authorities from the coordination of the general schemes applicable to other workers.

27 It should therefore be stated in reply to the second question that, in order to be regarded as 'special' within the meaning of Article 4(4) of Regulation No 1408/71, it is sufficient — without there being any need to take other factors into consideration — that the social security scheme in question is different from the general social security scheme applicable to employed persons in the Member State concerned and that all, or certain categories of, civil servants are directly subject to it, or that it refers to a social security scheme for civil servants already in force in that Member State.

Question 3

28 By its third question, the national court asks essentially whether Article 4(4) of Regulation No 1408/71, in so far as it excludes special schemes for civil servants from the scope of the regulation, must be regarded as contrary to Articles 48 and 51 of the Treaty, in so far as it entails refusal to take into account, for the acquisition of the right to a pension, periods of work by a person subject to a special scheme for civil servants or persons treated as such, such as an IKA staff doctor, in public hospitals in another Member State, where the relevant national legislation allows such periods to be taken into account if they have been completed in comparable establishments within that State.

29 According to Mr Vougioukas, Article 4(4) of Regulation No 1408/71 is contrary to Articles 48 and 51 of the Treaty, since its scope is wider than that of Article 48(4). Any other interpretation would be tantamount to accepting that the Council has the power to limit the exercise of freedom of movement to certain categories of workers.

30 It should be observed that, in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council is required, under Article 51 thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. In principle, the Council carried out that duty by introducing Regulation No 1408/71 (see Case 368/87 *Hartmann Troiani* v *Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333, paragraph 20).

31 The Community legislature, however, has not yet adopted the measures necessary to extend the material scope of Regulation No 1408/71 to special schemes for civil servants and persons treated as such, with the result that Article 4(4) of the regulation leaves a considerable lacuna in the Community coordination of social security schemes.

32 As the Advocate General pointed out at point 21 of his Opinion, the exclusion of special schemes for civil servants or persons treated as such from the material scope of the regulation may have been justified at the time when Regulation No 1408/71 was adopted by the existence of profound differences between the national schemes, giving rise to difficulties which the Community legislature may have regarded as insurmountable when seeking to coordinate those schemes.

33 Nevertheless, in the light of the task entrusted to the Council by Article 51 of the Treaty, the existence of such technical difficulties cannot justify indefinitely the

lack of any coordination of special schemes for civil servants and persons treated as such, particularly since, in December 1991, the Commission submitted to the Council a proposal for a regulation amending Regulation No 1408/71, designed *inter alia* to bring such schemes within its material scope (OJ 1992 C 46, p. 1).

34 In any event, it must be concluded that, by not introducing any measure for coordination in that sector following the expiry of the transitional period provided for with regard to freedom of movement for workers, the Council has not fully discharged its obligation under Article 51 of the Treaty.

35 The foregoing does not, however, affect the validity of Article 4(4) of Regulation No 1408/71 since, having regard to its wide discretion regarding the choice of the most appropriate measures for attaining the objective of Article 51 of the Treaty, the Council remains at liberty, for the purpose of coordinating special schemes for civil servants and persons treated as such, to depart, in some respects at least, from the mechanisms currently provided for in Regulation No 1408/71.

36 That said, the validity as circumscribed above of Article 4(4) does not entail that a request for aggregation is to be refused when it may be satisfied, in direct application of Articles 48 to 51 of the Treaty, without recourse to the coordination rules adopted by the Council.

37 Mr Vougioukas and the Commission submit in that connection that, under Articles 48 and 51 of the Treaty, periods worked in German public hospitals must be treated in the same way as comparable periods completed in Greece. The fact that only periods of service in Greek public hospitals are recognized as pensionable,

but not those completed in comparable establishments in other Member States, constitutes a serious obstacle to the freedom of movement for persons.

38 It should be observed that the fact that the appellant in the main proceedings is a Greek national has no bearing on the application of the principle of freedom of movement for workers laid down by Article 48 of the Treaty. Any Community national, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and has been employed in another Member State falls within the scope of that provision (see Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari* [1994] ECR I-505, paragraph 9).

39 According to settled case-law, the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community and preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State (see Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877, paragraph 13). The objective of Articles 48 to 51 of the Treaty would not be attained if, as a result of exercising their right to freedom of movement, workers were to lose social security advantages granted to them by the legislation of a Member State: that might dissuade Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see Case C-12/93 *Drake* v *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1994] ECR I-4337, paragraph 22).

40 A worker is subject to precisely such dissuasion if national legislation provides that only periods completed in national public hospitals may be recognized as pension-

able whereas comparable periods completed in public hospitals in other Member States may not be recognized as such.

41 The effect of such legislation is to establish different treatment for workers who have not exercised their right to freedom of movement by comparison with migrant workers which places the latter at a disadvantage, since the problem of recognition of periods completed in other Member States of the Community confronts only workers who have exercised their right to freedom of movement.

42 Since the documents in this case disclose no factor affording objective justification for that difference in treatment between migrant workers and workers who have not exercised their right to freedom of movement, the difference must be regarded as discriminatory and it is therefore contrary to the fundamental rules of the Treaty seeking to ensure freedom of movement for workers.

43 That is *a fortiori* the case because the application of national rules such as those at issue causes the principle of aggregation laid down in Article 51 of the Treaty to be disregarded in a situation where the refusal to aggregate the relevant periods is based on the fact that those periods were completed in another Member State and not in the Member State in question, and where that limitation of the right of migrant workers to aggregation is not justified by any of the factors raised before the Court in the present proceedings.

44 Accordingly, the reply to be given to the national court should be that Articles 48 and 51 of the Treaty must be interpreted as precluding refusal to take into account, for the acquisition of the right to a pension, periods of employment completed by a person subject to a special scheme for civil servants or persons treated as such, such as an IKA staff doctor, in public hospitals in another Member State,

where the relevant national legislation allows such periods to be taken into account if they have been completed in comparable establishments within that State.

Costs

45 The costs incurred by the Greek, German and French Governments, the Council of the European Union and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Elengtiko Sinedrio by decision of 28 June 1993, hereby rules:

1. The term 'civil servants' in Article 4(4) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, does not refer only to civil servants covered by the derogation provided for in Article 48(4) of the Treaty, as interpreted by the Court, but to all civil servants employed by a public authority and persons treated as such.

2. **In order to be regarded as 'special' within the meaning of Article 4(4) of Regulation No 1408/71, it is sufficient — without there being any need to take other factors into consideration — that the social security scheme in question is different from the general social security scheme applicable to employed persons in the Member State concerned and that all, or certain categories of, civil servants are directly subject to it, or that it refers to a social security scheme for civil servants already in force in that Member State.**

3. **Articles 48 and 51 of the EC Treaty must be interpreted as precluding refusal to take into account, for the acquisition of the right to a pension, periods of employment completed by a person subject to a special scheme for civil servants or persons treated as such, such as an IKA staff doctor, in public hospitals in another Member State, where the relevant national legislation allows such periods to be taken into account if they have been completed in comparable establishments within that State.**

Rodríguez Iglesias Kakouris Edward

Hirsch Schockweiler Moitinho de Almeida

Kapteyn Gulmann Jann

Ragnemalm Sevón

Delivered in open court in Luxembourg on 22 November 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President