

JUDGMENT OF THE COURT (First Chamber)

11 August 1995 ^{*}

In Case C-98/94,

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

Christel Schmidt

and

Rijksdienst voor Pensioenen

on the interpretation of Articles 12(2) and 46 of Regulation (EEC) No 1408/71 of the Council 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), and Articles 12(2) and 46a of that regulation, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7),

^{*} Language of the case: Dutch.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, D. A. O. Edward (Rapporteur)
and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Christel Schmidt, by M. van Loon, of the Antwerp Bar;

— the Belgian Rijksdienst voor Pensioenen, by W. de Meyer, Deputy General
Administrator, acting as Agent;

— the Commission of the European Communities, by M. Patakia and P. van
Nuffel, of the Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1995,

gives the following

Judgment

¹ By judgment of 11 March 1994, lodged at the Court Registry on 22 March 1994, the Arbeidsrechtbank Antwerpen (Labour Court, Antwerp) referred to the Court

for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 12(2) and 46 of Regulation (EEC) No 1408/71 of the Council 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), and Articles 12(2) and 46a of that regulation, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7).

2 That question arose in a dispute between the Belgian Rijksdienst voor Pensioenen (National Pensions Office) and Christel Schmidt concerning the calculation of a retirement pension to which she was entitled as a divorcee.

3 Article 12(2) of Regulation No 1408/71 sets out the following rule against overlapping:

‘The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60(1)(b).’

4 According to Article 46(3) of Regulation No 1408/71, there is unjustified overlapping of benefits if the person concerned receives benefits of the same kind in excess of the highest theoretical amount. Article 46(2)(a) defines the highest theoretical

amount as being the amount to which the person concerned might have been entitled in a Member State if he had spent his entire working life there.

5 Those articles were amended by Regulation No 1248/92, cited above.

6 Article 12(2), as amended, provides as follows:

‘Save as otherwise provided in this regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.’

7 Article 46, as amended, provides that the competent institution must, first, make an independent calculation only under the provisions of the legislation which it administers (Article 46(1)) and, second, carry out a proportional calculation (Article 46(2)), the person concerned being entitled to whichever amount is the highest (Article 46(3)).

8 The new Article 46a(1) defines overlapping of benefits of the same kind as the overlapping ‘of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.’

- 9 Regulation No 1248/92 also introduced a new Article 95a, under which the rights of a person to whom a pension was awarded prior to 1 June 1992 could, on application by the person concerned, be reviewed in the light of the new provisions of Article 46 et seq.
- 10 Under Article 75 et seq. of the Belgian Royal Decree of 21 December 1967 concerning general rules for the scheme of retirement and survivor's pensions for employed persons (*Moniteur Belge* of 16 January 1968), the pension awarded to the divorced spouse, who has not remarried, of an employed person is obtained under the same conditions as if the divorced spouse had herself been in employment during the marriage (Article 76). In calculating that retirement pension, account is taken of earnings in an amount equal to 62.5% of the corresponding annual salary which would be taken into consideration in calculating the pension of the former husband (Article 77).
- 11 Belgian Royal Decree No 50 of 24 October 1967 (*Moniteur Belge* of 27 October 1967) contains the following rule in Article 10a (introduced by Royal Decree No 205 of 29 August 1983, *Moniteur Belge* of 6 September 1983):

‘... when the total of the fractions indicating the level of each of those pensions exceeds the unit, the period of work to be taken into account in calculating the employee's pension is to be reduced by the number of years necessary to reduce that total to the unit ...’
- 12 Under Article 3 of the Belgian Law of 20 July 1990, account is to be taken only of the 40 years conferring entitlement to the most favourable pension.
- 13 Mrs Schmidt was born in Germany on 4 November 1921 and worked in that country from the end of 1937 to the beginning of 1948. She married a Belgian

national on 31 January 1948 and acquired Belgian nationality. She moved to Belgium and, during her marriage, worked on a part-time basis from 1973 to 1979. The couple separated in March 1981. The judgment granting divorce was entered in the records of the Registry Office on 12 February 1991.

- 14 With effect from her sixtieth birthday, that is to say, from 1 December 1981, Mrs Schmidt received a pension as a single person based on the period of employment which she had completed in Belgium (1973 to 1979). She renounced this pension on 15 April 1988.
- 15 From the age of 65, that is to say, from 1 December 1986, she has, by virtue of the *Angestelltenversicherungsgesetz* (German Law on Insurance for Employed Persons), been in receipt of a German pension based on the period of employment which she completed in Germany prior to her marriage (1936 to 1948).
- 16 Since 1 June 1988, the date on which her husband, from whom she was *de facto* separated, retired, she has also received a Belgian pension as a *de facto* separated spouse.
- 17 After her divorce had been officially registered on 12 February 1991, the *Rijksdienst voor Pensioenen* recalculated her pension entitlement and, by decision of 10 July 1991, granted her an annual Belgian pension from 1 March 1991 as a divorcee under Article 75 et seq. of the Royal Decree of 21 December 1967.
- 18 That pension was calculated on the basis of her former husband's recognized period of employment of 33 years (1948 to 1980). Four years (1948 to 1951) were not taken into account for this calculation on the ground that they exceeded the unit fixed at 40 years. By adding together her former husband's recognized period of employment and her own period of employment (18 years), the *Rijksdienst*

voor Pensioenen arrived at a total of 51 years, seven of which had been reckoned twice. Since the 40/40 unit had been exceeded by four years, Article 10a of Royal Decree No 50 was applied.

- 19 Mrs Schmidt brought an action before the Arbeidsrechtbank Antwerpen against the decision of the Rijksdienst voor Pensioenen. In her action, she contests the application of Article 10a of Royal Decree No 50. A rule against overlapping, she argues, can apply only if it results in the grant of a pension more favourable than that calculated pursuant to Article 46. Since she takes the view that the German pension and the Belgian pension to which she is entitled as a divorcee constitute benefits of the same kind within the meaning of Regulation No 1408/71, she requests that her pension be calculated in accordance with Article 46 in such a way that a comparison can be made between the national pension calculated pursuant to Article 10a of Royal Decree No 50 and the pension calculated in accordance with Article 46 of the regulation. Were this to be done, the application of the Belgian rule against overlapping could not have the effect of reducing the pension due under Belgian legislation to such an extent that the beneficiary receives a total amount smaller than the maximum theoretical amount.
- 20 For its part, the Rijksdienst voor Pensioenen takes the view that since the benefits in question are not of the same kind, the rule contained in Article 46 of Regulation No 1408/71 does not apply. It argues that Article 12(2) of that regulation should be applied; that provision, it contends, does not preclude the application of national rules against overlapping.
- 21 As it was uncertain whether the pension received by Mrs Schmidt as a divorcee and that obtained in a personal capacity were to be treated as benefits of the same kind, the Arbeidsrechtbank Antwerpen decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Are (i) a German retirement pension obtained under the *Angestelltenversicherungsgesetz* (German Law on Insurance for Employed Persons) on the basis

of periods of insurance which the beneficiary personally completed in Germany, and (ii) a Belgian retirement pension as a divorcee granted under the Belgian pensions legislation, in particular Articles 75 and 76 of Royal Decree No 50 (of 21 December 1967), on the basis of periods of insurance completed by the former spouse and obtained subject to the same conditions as if the divorcee had personally been in paid employment during his/her marriage to the former spouse, benefits of the same kind within the meaning of Article 12(2) of Regulation (EEC) No 1408/71 so that Articles 46 and 46a of Regulation No 1408/71 and Article 7 of Regulation (EEC) No 574/72 apply?’

22 It should be borne in mind, as a preliminary point, that in proceedings brought under Article 177 of the Treaty the Court has no jurisdiction to apply the rules of Community law to a specific case or, consequently, to classify provisions of national law with respect to such a rule. It may, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful to it in assessing the effects of such provisions of national law (see, in particular, the judgment in Case 37/86 *Van Gastel, née Coenen v Rijksdienst voor Werknemerspensioenen and Rijkskas voor Rust-en Overlevingspensioenen* [1987] ECR 3589, paragraph 8).

23 By its question, the national court is essentially asking whether a retirement pension granted under the legislation of one Member State, on the basis of periods of insurance personally completed in that State by the person concerned, and a retirement pension obtained under the legislation of another Member State by that person as a divorcee, on the basis of periods of insurance completed by that person's former spouse, are benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 and Articles 12(2) and 46a of Regulation No 1408/71, as amended.

24 The Court has consistently held that social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical (see the

judgment in Case 197/85 *ONPTS v Stefanutti* [1987] ECR 3855, paragraph 12). On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits (judgment in *Van Gastel*, cited above, paragraph 10).

- 25 So far as concerns the purpose and object of the benefits in question, it is not disputed that the aim of the Belgian retirement pension granted to a divorcee who has not remarried is to ensure that that person should have adequate means of subsistence in view of the fact that he or she no longer has access to the income of his or her former spouse. The basis for calculating and the conditions for granting that pension have been determined in such a way as to compensate for the loss of income suffered by the person concerned by reason of that separation. That right is forfeited in the event of remarriage. As for the personal retirement pension obtained in Germany, it is intended to ensure that a worker has an adequate income from the date on which he or she personally retires.
- 26 It follows that the benefits at issue in the main proceedings do not have the same purpose and object.
- 27 Second, Article 46a(1) of Regulation No 1408/71, as amended, has added a criterion which was already implicit in the case-law cited above in defining the overlapping of benefits of the same kind as meaning overlapping of benefits in respect of invalidity, old age and survivors 'calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.'
- 28 As the Commission has correctly pointed out, benefits that are calculated or provided on the basis of the periods of employment of two different persons cannot be treated as benefits of the same kind within the meaning of Article 46a of the regulation.

- 29 It is common ground in the present case that, in calculating the Belgian pension to which a divorcee is entitled, account is taken of the period of employment and remuneration of the former spouse. The retirement pension obtained in Germany, by contrast, is calculated on the basis of the periods of insurance personally completed by the individual concerned, by taking account both of the number of years during which she actually worked and of the remuneration which she received during that period.
- 30 It follows that benefits such as those at issue in the main proceedings are calculated or provided on the basis of the periods of employment of two different persons.
- 31 This conclusion cannot be invalidated by the fact that Belgian legislation notionally equates the pension granted to a divorcee with a retirement pension of an employed person by treating the years of marriage as years of insurance. According to the case-law cited above, the benefits in question must be considered independently of the characteristics peculiar to different national legal systems.
- 32 In those circumstances, the answer to the question submitted must be that a retirement pension granted under the legislation of one Member State, on the basis of periods of insurance personally completed in that State by the person concerned, and a retirement pension obtained under the legislation of another Member State by that person as a divorcee, on the basis of periods of insurance completed by that person's former spouse, are not benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 and Articles 12(2) and 46a of Regulation No 1408/71, as amended.

Costs

- 33 The costs incurred by the Commission of the European Communities, which has 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 (First Chamber),

in answer to the question referred to it by the Arbeidsrechtbank Antwerpen by judgment of 11 March 1994, hereby rules:

A retirement pension granted under the legislation of one Member State, on the basis of periods of insurance personally completed in that State by the person concerned, and a retirement pension obtained under the legislation of another Member State by that person as a divorcee, on the basis of periods of insurance completed by that person's former spouse, are not benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 of the Council 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, and Articles 12(2) and 46a of Regulation No 1408/71, as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992.

Jann

Edward

Sevón

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass

P. Jann

Registrar

President of the First Chamber