

JUDGMENT OF THE COURT

26 September 2000 *

In Case C-262/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arbeidshof, Antwerp (Belgium), for a preliminary ruling in the proceedings pending before that court between

Rijksdienst voor Pensioenen

and

Robert Engelbrecht,

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Articles 12(2) and 46a(3)(c) 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), 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,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward (Rapporteur), L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann and H. Ragnemalm, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Rijksdienst voor Pensioenen, by G. Perl, General Administrator,
- Mr Engelbrecht, by H. van Hoogenbemt and B. Vanschoebeke, of the Brussels Bar,
- the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by P.J. Kuijper and B.J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Rijksdienst voor Pensioenen, represented by J.C.A. De Clerck, Adviser, National Pensions Office; Mr Engelbrecht, represented by H. van Hoogenbermt and B. Vanschoebeke; the Belgian Government, represented by J. Devadder; the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and M. Hoskins, Barrister; and the Commission, represented by P.J. Kuijper, at the hearing on 12 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1999,

gives the following

Judgment

- ¹ By judgment of 11 July 1997, received at the Court on 21 July 1997, the Arbeidshof (Higher Labour Court), Antwerp, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Articles 12(2) and 46a(3)(c) 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), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7, 'Regulation No 1408/71, as amended').

- 2 Those questions were raised in proceedings between Mr Engelbrecht and the Rijksdienst voor Pensioenen (National Pensions Office), the Belgian social security agency, concerning his retirement pension.
- 3 The first subparagraph of Article 3(1) of the Belgian Law of 20 July 1990 provides that entitlement to a retirement pension is acquired on a calendar year basis at the rate of a fraction of the relevant gross salary of the person concerned taken into account up to:

‘(a) a maximum of 75% (the household rate) for workers whose spouse:

- has ceased all gainful employment, save as authorised by the King;
- does not receive one of the benefits or allowances referred to in Article 25 of Royal Decree No 50;
- does not receive a retirement or survivor’s pension or equivalent benefit, whether awarded under this Law, Royal Decree No 50, a Belgian scheme for manual workers and employees, miners, seamen or self-employed workers, a Belgian scheme applicable to workers in the public services or the Société Nationale des Chemins de Fer Belges (Belgian National Railway Company) under any other Belgian scheme, a scheme established in a foreign country or a scheme applicable to the staff of an institution governed by public international law.

(b) 60% (the single rate) for other workers.’

4 Article 3(8) states:

'By way of derogation from Article 3(1)(1)(a), the grant to one spouse of one or more retirement or survivor's pensions or equivalent benefit under one or more Belgian schemes, other than those for manual workers and employees, miners, seamen and salaried workers, under a scheme in a foreign country or under a scheme applicable to the staff of an institution governed by public international law, shall not preclude the grant to the other spouse of the retirement pension calculated in accordance with Article 3(1)(1)(a), provided that the total amount of the first spouse's abovementioned pensions and equivalent benefits is less than the difference between the amounts of the other spouse's pensions calculated in accordance with Article 3(1)(1)(a) and 3(1)(1)(b) respectively.

In that case, however, the total amount of the first spouse's abovementioned pensions and equivalent benefits shall be deducted from the other spouse's retirement pension.'

5 In the Netherlands, in accordance with the Algemene Ouderdomswet (the general law on old-age benefits, 'the AOW'), every person resident in that state is compulsorily insured between the ages of 15 and 65, irrespective of nationality and of whether or not he carries on any occupational activity.

6 On reaching the age of 65, a single person of either sex receives a pension equal to 70% of his or her net minimum salary on the basis of the periods of insurance which he or she has completed. On reaching 65, a married person of either sex becomes personally entitled to an old-age pension equivalent to 50% of his or her net minimum salary, on the basis of the periods of insurance which he or she has completed. A married person of 65 whose spouse has not yet reached that age also receives a supplementary pension, the maximum amount of which is 50% of

net minimum salary, on the basis of the periods of insurance completed by the younger spouse. The supplement is also reduced by 2% for each year that the younger spouse is absent and is, consequently, not insured. Until 1 April 1988, the increase was awarded irrespective of the younger spouse's income.

- 7 When the spouse reaches the age of 65, the supplement ceases to be paid. Each of the two spouses acquires a personal right to a separate old-age pension.
- 8 Mr Engelbrecht has been employed in the Netherlands and in Belgium. In the Netherlands he was insured compulsorily for the periods 5 March 1946 to 13 December 1950 and 11 June 1958 to 8 November 1958 and voluntarily for the periods 1 January 1957 to 11 June 1958 and 9 November 1958 to 8 May 1993. In Belgium he was subject, as an employed person, to the Belgium social security scheme from 1958 to 1993.
- 9 Mr Engelbrecht therefore contributed to the Belgian and Netherlands schemes from 1958 to 1993.
- 10 From his 65th birthday, 8 May 1993, he has been paid both Netherlands and Belgian old-age allowances.
- 11 In the Netherlands, by decision of 21 April 1993 the Sociale Verzekeringsbank (the Netherlands Social Insurance Bank, 'the SVB') awarded Mr Engelbrecht an old-age pension for a gross amount corresponding to the full rate for a married person running a household on a permanent basis with a partner under 65. He was also awarded a monthly supplement.

- 12 In Belgium, by decision of 13 July 1993 the Office National des Pensions ('the ONP') awarded Mr Engelbrecht a retirement pension calculated on the basis of a working life of 35 years in Belgium. That pension was awarded at the household rate, since his wife did not work and did not receive any of the benefits referred to in Article 3(1)(1)(a) of the Law of 20 July 1990.
- 13 As from her 65th birthday, namely 16 August 1994, Mrs Engelbrecht received a Netherlands old-age pension. That pension was calculated on the basis of her completed periods of both voluntary and compulsory insurance. As a corollary, the SVB withdrew the supplementary pension which it had hitherto paid to Mr Engelbrecht.
- 14 By decision of 20 October 1994, notified on 4 November 1994, the ONP informed Mr Engelbrecht that, since his wife was receiving, in the Netherlands, a retirement pension or equivalent benefit as referred to in Article 3(1)(1)(a) of the Law of 20 July 1990, the pension which he had been awarded at the household rate would be converted into a pension at the single rate.
- 15 By application lodged with the Arbeidsrechtbank (Labour Court), Turnhout, on 15 November 1994 Mr Engelbrecht appealed against that decision. He maintained that it was contrary to Article 46a(3)(c) of Regulation No 1408/71, as amended, for the Belgian authorities to take into account, when determining whether his Belgian retirement pension should be calculated at the household or single rate, the old-age allowance awarded to his wife under the AOW on the basis of her voluntary insurance.
- 16 By judgment of 10 January 1996 the Arbeidsrechtbank declared the action well founded and declared that Mr Engelbrecht was entitled to a Belgian retirement pension at the household rate. On the one hand, that court considered that it followed from the judgment of the Court of Justice in Case C-98/94 *Schmidt v*

Rijksdienst voor Pensioenen [1995] ECR I-2559 that benefits calculated or provided on the basis of the periods of employment of two different people cannot be treated as benefits of the same kind within the meaning of Article 46a of Regulation No 1408/71, as amended. On the other hand, it considered that strict application of the national legislation in question in the main proceedings was contrary to Community law, more specifically to the EC Treaty and the principle of freedom of movement for workers.

- 17 The ONP appealed against that judgment before the court making the reference, which first rejected Mr Engelbrecht's argument that his wife's entire pension was awarded on the basis of her voluntary insurance. It considered that only the greater part of that pension — 88% of the total — was provided as a result of 'voluntary insurance or continued optional insurance' within the meaning of Article 46a(3)(c) of Regulation No 1408/71, as amended.
- 18 Next, setting aside the Arbeidsrechtbank's conclusion, the Arbeidshof considered that that provision was applicable only where retirement or old-age benefits were awarded to two separate people. It decided that the voluntary part of Mrs Engelbrecht's pension could not, therefore, be taken into account in the calculation of her husband's Belgian pension.
- 19 Nevertheless, with regard to the part of Mrs Engelbrecht's pension awarded on the basis of periods of compulsory insurance capable of giving rise to the application of Article 3(1) and (8) of the Law of 20 July 1990, that is to say, 12% of the sum awarded, the national court expressed doubt as to the interpretation of the Court's judgment in Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661, and of Articles 5 and 50 of the EC Treaty (now Articles 10 and 41 EC), Article 48 of the Treaty and Articles 49 and 51 of the Treaty (now, after amendment, Articles 40 and 42 EC).

- 20 The Arbeidshof, Antwerp, considering that resolution of the dispute in the main proceedings depended on the precise scope of *Van Munster*, cited above:

‘(1) refers the following questions of interpretation to the Court of Justice for a preliminary ruling on the basis of the aforementioned provisions and any other provisions which that Court may consider to apply in this case:

Is the view that a national court which concludes that an applicable national provision requires a migrant worker’s pension to be reduced (such as Article 3(1) and Article 3(8) of the Belgian Law of 20 July 1990 requiring the amount of the pension received by a migrant worker’s spouse to be deducted from that worker’s household pension, on the ground that the spouse’s pension is a benefit equivalent to a pension) and considers that it is impossible to interpret that national rule in such a way, in the interests of free movement of workers, as to eliminate the unforeseen adverse effects of the lack of coordination between social security schemes or holds that the application of that rule in the case in point constitutes an obstacle to free movement of workers, may not disapply the relevant Belgian legislation, compatible with Community law, in particular Articles 5, 48 and 51 of the Treaty of 25 March 1957 establishing the European Economic Community and, more specifically, the principles of free movement of workers and cooperation in good faith between the competent authorities?

(2) asks the Court of Justice for an interpretation of the scope of its judgment in Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* in the light of those rules of European law:

(a) Does the reasoning set out in paragraphs 21 to 31 of that judgment in respect of Question 2 cover “unforeseen adverse effects of the lack of coordination between social security schemes”?

(b) In the light of paragraphs 32, 33 and 34 of that judgment, is point 2 of the operative part of that judgment to be interpreted as meaning that, where it is impossible to interpret an applicable provision of national law in such a way as to eliminate the adverse effects of its application, in a specific situation, on free movement of workers, the national court must apply that rule in full, or that the national court must disapply that rule of national law?

(3) In the light of point 2 of the operative part of the judgment in *Van Munster v Rijksdienst voor Pensioenen* and the case-law of the Court of Justice, is it compatible with Community law, more particularly Articles 5, 48 and 51 of the Treaty, to take the view that the national court may not disapply express, binding provisions of national law in order to eliminate the adverse effects:

— of the application of the rule of national law to migrant workers who have exercised their right to free movement,

— of the lack of coordination between social security schemes of different Member States?’

21 As a preliminary point, it should be noted that, in the order for reference, the national court explicitly stated that it did not consider it necessary to refer any

question on the interpretation of Article 46a of Regulation 1408/71, as amended, with regard to pensions awarded on the basis of voluntary or continued optional insurance.

- 22 The questions referred by the national court relate, therefore, to the taking into account of a benefit such as the old-age pension granted to Mrs Engelbrecht under the AOW on the basis of compulsory insurance.
- 23 The questions referred may appropriately be examined together.
- 24 The *Van Munster* case, cited above, concerned Article 10(1) of Belgian Royal Decree No 50 of 24 October 1967. Under that provision, a worker is awarded a pension at the household rate where his or her spouse has ceased all gainful employment and does not receive a retirement pension or other equivalent benefit. Where, however, the spouse does receive a pension or equivalent benefit, the worker is entitled to a pension at the single rate only.
- 25 Mr Van Munster had been employed in both the Netherlands and Belgium. Mrs Van Munster, however, had never been employed. As a result of amendment to the Netherlands legislation, it had been decided to award each spouse, on reaching retirement age, a pension of equal amount, provided the person concerned had lived in the Netherlands. Such pension was not, however, subject to the condition that the person concerned should have worked there.

- 26 When Mrs Van Munster reached the age of 65, the SVB accordingly awarded her an old-age pension of her own. In consequence, the supplementary pension which Mr Van Munster had received until then was withdrawn.
- 27 The grant of that pension to Mrs Van Munster had therefore left the couple's total income unchanged. None the less, the amount of the pension awarded under the Belgian scheme was reduced to the single rate.
- 28 The first question referred by the national court was whether the Belgian legislation was compatible with Community law. The Court ruled that that legislation could not be regarded as constituting, in itself, a barrier to freedom of movement, given that it applied without distinction both to Belgian nationals and to nationals of other Member States (*Van Munster*, cited above, paragraph 19).
- 29 The second question concerned the actual application of that legislation to a situation such as that of Mr and Mrs Van Munster. The Court ruled that when, for the purpose of applying a provision of its domestic law, a national court has to characterise a social security benefit awarded under the statutory scheme of another Member State, it should interpret its own legislation in the light of the aims of Articles 48 to 51 of the Treaty and, as far as is at all possible, prevent its interpretation from being such as to discourage a migrant worker from actually exercising his right to freedom of movement.
- 30 So far as the present case is concerned, some of the facts are almost identical to those in *Van Munster*, cited above, inasmuch as the amount of the pension

previously awarded to Mr Engelbrecht under the Netherlands scheme is henceforth to be divided equally between Mr and Mrs Engelbrecht, but the couple's income has not been increased by this new award. The benefit awarded to Mr Engelbrecht under the Belgian scheme has, however, been reduced.

- 31 Furthermore, it is common ground that the problems encountered by Mr Engelbrecht are caused by the fundamental differences between the two schemes in issue in the main proceedings. The Belgian scheme provides for a higher-rate pension for workers whose spouses receive no retirement pension or equivalent benefit, whereas the Netherlands scheme, in the same circumstances, awards each spouse, on reaching retirement age, a non-renounceable pension of an equal amount, without however implying any increase at all in the couple's total income.
- 32 This case is distinguishable from *Van Munster*, cited above, in that it does not concern the same provision of national law. Unlike Article 10 of Royal Decree No 50 of 24 October 1967, which was in issue in *Van Munster*, Article 3(8) of the Law of 20 July 1990 provides, by way of derogation from Article 3(1), that the other spouse's entitlement to a pension under certain Belgian and foreign schemes does not preclude the grant of a pension calculated at the household rate, provided that the amount of the pension received by the other spouse is not greater than the difference between the amount of the retirement pension in question calculated at the household rate and the amount of that pension at the single rate. However, the amount of the pension at the household rate is reduced by the amount of the pension received by the other spouse.
- 33 It is clear from the documents before the Court that, with regard to Mrs Engelbrecht's pension awarded on the basis of periods of compulsory insurance, that is to say 12% of the total allocated, Article 3(8) of the Law of 20 July 1990 must be applied. Application of that deduction clause would entail a reduction in

Mr Engelbrecht's pension, calculated at the household rate, by the amount of the pension received by his wife under the Netherlands legislation.

34 Consequently, the question raised in this instance, unlike *Van Munster*, is whether, when applying a provision of law:

- which fixes the amount of the retirement pension awarded to a married worker,
- which provides for that pension to be reduced by the amount of the pension awarded to his spouse under the scheme of another Member State, but
- which provides for the application of a derogating clause in respect of overlapping where the pension paid elsewhere is less than a certain amount,

the competent authorities may, without failing to comply with the requirements of Community law, reduce the amount of the old-age pension awarded to a migrant worker to take account of a pension awarded to his spouse under the scheme of another Member State when the grant of that latter pension involves no increase in the couple's total income.

- 35 The Court has consistently held that Community law does not detract from the powers of the Member States to organise their social security systems (Case 238/82 *Duphar and Others v Netherlands State* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395, paragraph 27).
- 36 Accordingly, in the absence of Community harmonisation in this field, the conditions governing the right or obligation to become a member of a social security scheme are a matter to be determined by the legislation of each Member State (Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12, and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15), as are the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira v Bundesanstalt für Arbeit* [1997] ECR I-511, paragraph 36).
- 37 While it is true that Article 51 of the Treaty leaves in being differences between the Member States' social security systems and hence in the rights of persons working in the Member States, it is not, however, in dispute that the aim of Articles 48 to 51 of the Treaty would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State (*Van Munster*, paragraph 27).
- 38 The Court has also consistently held that the duty imposed on Member States by Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of Community law is incumbent on all the authorities in the Member States, including, for matters within their jurisdiction, the courts.
- 39 In this regard, when applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of

Community law (*Van Munster*, paragraph 34, and, to the same effect, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

- 40 Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure application of which would, in the circumstances of the case, lead to a result contrary to Community law (see, to similar effect, Case 249/85 *Albako v BALM* [1987] ECR 2345, paragraph 13 et seq.)
- 41 In this context, the exercise of the right to free movement within the Community is impeded if a social advantage is lost or reduced simply because a benefit of the same kind awarded to a worker's spouse under the legislation of another Member State is taken into account when, on the one hand, the grant of that latter benefit has not led to any increase in the couple's total income and, on the other, there has been a concomitant reduction of the same amount in the personal pension received by the worker under the legislation of that same State.
- 42 Such a result might well discourage Community workers from exercising their right to free movement and would therefore constitute a barrier to that freedom enshrined in Article 48 of the Treaty.
- 43 Moreover, it is plain from the documents before the Court that the national rules against overlapping in issue in the main proceedings were specifically devised to deal with the increase in the couple's total income resulting from the receipt of a retirement or survivor's pension by the spouse of the insured person concerned. That being so, the competent authorities must necessarily know exactly how much both the worker and his spouse receive by way of benefits.

44 In those circumstances, it is contrary to Article 48 of the Treaty for the competent authorities to content themselves with merely reducing the worker's pension without ascertaining whether the pension granted to the spouse actually increases the couple's total income.

45 The answer to be given to the questions referred for a preliminary ruling must therefore be that, where the competent authorities of a Member State apply a provision of law:

- which fixes the amount of the retirement pension awarded to a married worker,
- which provides for that pension to be reduced, by the amount of the pension awarded to his spouse under the scheme of another Member State, but
- which provides for the application of a derogating clause in respect of overlapping where the pension paid elsewhere is less than a certain amount,

it is contrary to Article 48 of the Treaty for those authorities to reduce the amount of the pension awarded to a migrant worker by the amount of a pension awarded to his spouse under the scheme of another Member State, when the grant of that latter pension does not involve any increase in the couple's total income.

Costs

- 46 The costs incurred by the Belgian, Netherlands and United Kingdom Governments and by 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 proceedings 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 Arbeidshof, Antwerp, by judgment of 11 July 1997, hereby rules:

Where the competent authorities of a Member State apply a provision of law

— which fixes the amount of the retirement pension awarded to a married worker,

- which provides for that pension to be reduced, by the amount of a pension awarded to his spouse under the scheme of another Member State, but
- which provides for the application of a derogating clause in respect of overlapping where the pension paid elsewhere is less than a certain amount,

it is contrary to Article 48 of the EC Treaty (now, after amendment, Article 39 EC) for those authorities to reduce the amount of the pension awarded to a migrant worker by the amount of a pension awarded to his spouse under the scheme of another Member State, when the grant of that latter pension does not involve any increase in the couple's total income.

Rodríguez Iglesias

Edward

Sevón

Schintgen

Kapteyn

Gulmann

Puissochet

Jann

Ragnemalm

Delivered in open court in Luxembourg on 26 September 2000.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President