JUDGMENT OF THE COURT (Fourth Chamber)

22 June 2011 *

In Case C-399/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Nejvyšší správní soud (Czech Republic), made by decision of 23 September 2009, received at the Court on 16 October 2009, in the proceedings

Marie Landtová

v

Česká správa socialního zabezpečení,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, A. Prechal and E. Jarašiūnas, Judges,

* Language of the case: Czech.

Advocate General: P. Cruz Villalón,
Registrar: K. Malaček, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2010,

after considering the observations submitted on behalf of:

— Ms Landtová, by V. Vejvoda, advokát,

— the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

— the Slovak Government, by B. Ricziová, acting as Agent,

— the European Commission, by K. Walkerová and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 12 EC and Articles 3(1), 7(2)(c), 10 and 46 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006 (OJ 2006 L 114, p. 1) ('Regulation No 1408/71'), and point 6 of Annex III(A) to Regulation No 1408/71.

2 The reference has been made in proceedings between Ms Landtová, a national of the Czech Republic who is resident in that Member State, and the Česká správa sociálního zabezpečení (the Czech Social Security Authority: 'the CSSA'), concerning the amount of the partial retirement pension which she was granted by the CSSA.

Legal context

European Union law

3 The eighth recital of the preamble to Regulation No 1408/71 states:

'Whereas employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom.'

4 Article 3(1) of Regulation No 1408/71 provides that '[s]ubject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State'.

5 Article 6 of that regulation states:

'Subject to the provisions of Articles 7, 8 and 46(4), this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively…

…'

6 Article 7(2) of Regulation No 1408/71 provides:

'The provisions of Article 6 notwithstanding, the following shall continue to apply:

…

(c) certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III'.

7 The first paragraph of Article 10(1) of Regulation No 1408/71 provides as follows:

'Save as otherwise provided in this Regulation invalidity, old-age … benefits … acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal … by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

8 Annex III to that regulation, headed 'Provisions of social security conventions remaining applicable notwithstanding Article 6 of the regulation — Provisions of social security conventions which do not apply to all persons to whom the regulation applies', in point 6 of Part A, headed 'Czech Republic – Slovakia', maintains in force, inter alia, Article 20 of the Agreement on Social Security of 29 October 1992 between the Czech Republic and the Slovak Republic ('the Agreement'), one of the measures intended to regulate matters after the dissolution of the Czech and Slovak Federal Republic on 31 December 1992.

The Agreement

9 Article 20(1) of the Agreement provides that 'periods of insurance completed before the date of dissolution of the Czech and Slovak Federal Republic shall be considered to be periods of insurance completed in the contracting State on whose territory the employer of the person concerned had its headquarters either on the day of the dissolution, or on the last day before that date'.

National law

10 Article 89(2) of the Constitution of the Czech Republic (Constitutional Act No 1/1993), provides that 'enforceable decisions of the [Ústavní soud (the Constitutional Court)] are binding on all authorities and persons'.

11 Article 28 of Law No 155/1995 on retirement insurance provides that, 'the insured person has a right to a retirement pension where he has completed the necessary period of insurance and, where he has reached retirement age, where appropriate, if he satisfies other conditions laid down in this Law'.

12 The Ústavní soud held by judgment of 25 January 2005 (III. ÚS 252/04, 'the Ústavní soud judgment') that Article 20(1) of the Agreement must be applied in such a way that 'where a national of the Czech Republic satisfies the statutory conditions for entitlement to a pension the amount of which as set by national law (of the Czech Republic) is greater than that laid down by [the Agreement], it is for [the CSSA] to ensure that the retirement pension is of an amount equivalent to the higher entitlement set by national legislation and to order that the amount of the retirement pension paid by the other contracting party be supplemented, taking account of the retirement pension paid by the other contracting party under [the Agreement] in order to avoid double payment of two retirement pensions of the same kind, granted on the same grounds by two separate [social security institutions]'.

13 In addition to the condition of Czech nationality, the Ústavní soud held that whether a benefit claimant was entitled to rely on the abovementioned method of calculation was dependent on a further, cumulative, condition, namely that the claimant should be resident in the territory of the Czech Republic.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Ms Landtová, a national of the Czech Republic who resides in the territory of that State worked from 1964 until 31 December 1992 in the territory of the Federal Czech and Slovak Republic. After the dissolution of that State, Ms Landtová worked until 31 August 1993 in the territory of the Slovak Republic, and then, from 1 September 1993, in the territory of the Czech Republic.

15 On 20 June 2006 the CSSA awarded to Ms Landtová a partial retirement pension ('the old age benefit'), to date from 31 March 2006.

16 The CSSA set the amount of the old age benefit in accordance with Article 20 of the Agreement and concluded that the value of the period of insurance completed by Ms Landtová up to 31 December 1992 had to be determined under the rules of the Slovak social security scheme since the headquarters of her employer were in the territory of the Slovak Republic.

17 On 14 August 2006 Ms Landtová challenged the amount of the old age benefit awarded to her by bringing an action before the Městský soud v Praze (Prague City Court), taking the view that the CSSA had failed to take into account all the periods of insurance completed by her.

18 On 23 May 2007 the Městský soud v Praze annulled the CSSA's decision in accordance with the Ústavní soud judgment, which held that where a national of the Czech Republic satisfies the statutory conditions for entitlement to an old age benefit and under national law is entitled to a benefit greater than that calculated in accordance with the Agreement, the CSSA is bound to award a benefit which is equivalent to the

higher entitlement. Consequently, the Městský soud v Praze came to the conclusion that the old age benefit paid to Ms Landtová by the CSSA should be adjusted to bring it up to the amount which the applicant in the main proceedings could have expected if she had completed the entire period of insurance before 31 December 1992 under the Czech Republic social security scheme.

19 The CSSA brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court).

20 On 16 January 2008 the Nejvyšší správní soud set aside the judgment of the Městský soud v Praze and referred the case back to it for further consideration. The Nejvyšší správní soud questioned whether the Ústavní soud judgment and the preferential treatment thereby granted to nationals of the Czech Republic were compatible with the principle of equality of treatment laid down in Article 3(1) of Regulation No 1408/71.

21 The Městský soud v Praze adhered to its position and held, on the basis of the Ústavní soud judgment, that the CSSA was required to adjust the amount of old age benefit awarded to the applicant in the main proceedings to bring it up to the amount she would have been entitled to receive if she had been insured throughout under the Czech social security scheme.

22 The CSSA brought a further appeal on a point of law before the Nejvyšší správní soud, claiming that the obligation to adjust old age benefits solely for individuals of Czech nationality residing in the territory of the Czech Republic, where the value of the period of insurance completed by such persons when the Czech and Slovak Federal Republic was in existence was determined in accordance with Article 20 of the Agreement, is contrary to the principle of equality of treatment laid down in Article 3 of Regulation No 1408/71. Further, such an obligation also involves taking

into consideration Slovak periods of insurance in order to raise the amount of Czech old age benefit, whereas Article 12 of Regulation No 1408/71 provides that the same period of insurance cannot be taken into account twice.

23 According to the Nejvyšší správní soud, the Ústavní soud judgment requires the CSSA to take into consideration periods of insurance completed by the benefit claimant under the social security scheme of the Czech and Slovak Federal Republic, notwithstanding the fact that, under Article 20 of the Agreement, the Slovak social security authority is the competent institution. To proceed in that way might not only entail changing the test used to determine which State is competent for the purpose of taking into account the periods of insurance concerned, but might also lead to one and the same period of insurance being taken into account twice.

24 Although the referring court does not dispute the fact that Ms Landtová satisfies all the preconditions for adjusting the amount of the old age benefit, it nevertheless regards the requirement of Czech nationality as contrary to Article 12 EC and Article 3 of Regulation No 1408/71, since, by its very nature, it places at a disadvantage the nationals of other Member States if they satisfy the other conditions for entitlement to the benefit concerned. The question also arises whether the residence requirement is compatible with Article 10(1) of Regulation No 1408/71.

25 In those circumstances, the Nejvyšší správní soud decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 … read in conjunction with Article 7(2)(c) [thereof], according to which the criterion for determining the successor state competent to determine the value of periods of insurance completed by employed persons before 31 December 1992 under the

social security scheme of the Czech and Slovak Federal Republic is to remain applicable, be interpreted as precluding the application of a rule of national law which provides that the Czech social security institution is to take into account, with regard to entitlement to a benefit and setting the amount thereof, the entire period of insurance completed in the territory of the Czech and Slovak Federal Republic before 31 December 1992, even though, according to the abovementioned criterion, it is the social security institution of the Slovak Republic which is competent to determine the value of that period of insurance?

2. If the first question is answered in the negative, must Article 12 EC in conjunction with Articles 3(1), 10 and 46 of Regulation (EC) No 1408/71 … be interpreted as meaning that the period of insurance completed under the social security scheme of the Czech and Slovak Federal Republic before 31 December 1992, which has already been taken into account once to the same extent for benefit purposes under the social security scheme of the Slovak Republic, cannot, pursuant to the abovementioned national rule, be taken into account in its entirety only in respect of nationals of the Czech Republic resident in the territory of the Czech Republic for the purposes of entitlement to old age benefit and setting the amount thereof ?'

Admissibility of the reference for a preliminary ruling

26 The Slovak Republic expresses doubts as to whether the questions referred are admissible and submits that the interpretation of the principle of non-discrimination requested by the referring court has no relevance to the outcome of the dispute in the main proceedings and has no relation to the actual facts of the main action or to

its purpose, since Ms Landtová satisfies all the preconditions for the payment of the supplement to old age benefit in the Czech Republic, as laid down by the Ústavní soud judgment, and is not the victim of any discrimination.

27 According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47).

28 Consequently, where the questions referred concern the interpretation of European Union law ('EU law'), the Court is, in principle, bound to give a ruling (see, to that effect, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 24). That is not the case, where, inter alia, the problem referred to the Court is purely hypothetical or where the interpretation or consideration of the validity of a rule of EU law which is sought by the national court has no relation to the actual facts of the main action or to its purpose (see, to that effect, Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke* [2010] ECR I-11063, paragraph 40).

29 However, as stated by the Advocate General in point 30 of his Opinion, that is not so in the present case. Although Ms Landtovà benefits from the ruling deriving from the Ústavní soud judgment, that judgment has been challenged both by the CSSA and by the referring court.

30 The Court therefore finds that the reference for a preliminary ruling is admissible.

The questions referred for a preliminary ruling

The first question

31 By the first question referred, the referring court seeks in essence to ascertain whether the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, preclude a national rule, such as that at issue in the main proceedings, which provides for the payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

32 It must be borne in mind that the effect of the abovementioned provisions of Regulation No 1408/71 is to preserve Article 20 of the Agreement, which establishes that the criterion for the identification of the applicable scheme and the authority with competence to grant social security benefits is the country in which the employer was resident at the time of the dissolution of the Czech and Slovak Federal Republic.

33 It is evident from the order for reference that the first question referred arises from concerns linked to the risk that applying the Ústavní soud judgment may lead to one and the same period of insurance being taken into account twice and may change the criterion established in Article 20 of the Agreement.

34 As is apparent from the documents before the Court, the opinion of the Ústavní soud is that Article 20 of the Agreement must be interpreted as meaning that the CSSA is obliged, where a Czech national satisfies the statutory conditions for entitlement to

a pension and the amount of that pension as set under Czech law is higher than that provided for in the Agreement, to ensure that the amount of the retirement pension actually awarded to that person is of an amount equivalent to the higher entitlement set by national legislation and, consequently, to supplement where necessary, the amount of the retirement pension paid by the other contracting party. The CSSA is also obliged to take into account the retirement pension paid by the other contracting party under the Agreement in order to avoid double payment of two retirement pensions of the same kind, granted on the same grounds by two separate social security institutions.

35 It is clear from the case-law of the Ústavní soud that the rule on the allocation of competence, as between the Czech and Slovak social security institutions for the purpose of taking into account periods of insurance completed before the date of the dissolution of the Czech and Slovak Federal Republic, a rule introduced by Article 20 of the Agreement, is neither called into question nor affected, since the objective of the case-law of the Ústavní soud is simply to increase the amount of the Czech old age benefit awarded under the Agreement in order to bring it to the level which would have been awarded under national law alone.

36 As stated by the Advocate General in point 37 of his Opinion, the supplementary benefit at issue in the main proceedings does not affect either the scheme applicable or the competence of the authorities designated in the Agreement, but merely makes it possible, pursuant to that Agreement, to apply for supplementary benefit, over and above the general benefit, from another social security authority.

37 As submitted by the European Commission, the Ústavní soud simply establishes that it is necessary to bring the amount of the Czech old age benefit granted under Article 20 of the Agreement into line with the amount which an insured person could have obtained if the amount of that benefit had been calculated in accordance solely with the rules of domestic law, where the latter amount is higher than that obtained under the provisions of the Agreement.

38 Accordingly, what is at issue is not the award of a parallel Czech old age benefit, nor one and the same period of insurance being taken into account twice, but merely the elimination of an objectively established difference between benefits from different sources.

39 It is clear that such an approach avoids 'the overlapping of national legislations applicable', in accordance with the objective set out in the eighth recital of the preamble to Regulation No 1408/71, and does not run counter to the criterion for the allocation of competence established in Article 20 of the Agreement, which is maintained under Article 7(2)(c) of Regulation No 1408/71, read in conjunction with point 6 of Annex III(A) to that regulation.

40 In the light of the foregoing, the answer to the first question referred is that the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

The second question

Whether there is discrimination

41 By the second question referred, the referring court seeks, in essence, to ascertain whether the Ústavní soud judgment, which allows payment of a supplement to old age benefit solely to individuals of Czech nationality residing in the territory of the

Czech Republic, constitutes discrimination which is prohibited under Article 12 EC and the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71.

42 It must be borne in mind that the object of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 39 EC, equality of treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the Member States (Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 22).

43 The documents before the Court show incontrovertibly that the Ústavní soud judgment discriminates, on the ground of nationality, between Czech nationals and the nationals of other Member States.

44 As regards the requirement of residence in the territory of the Czech Republic, it must be recalled that the principle of equality of treatment, as referred to in Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (*Celozzi*, paragraph 23).

45 Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter (see *Celozzi*, paragraph 24).

46 That applies to a condition of residence, such as that at issue in the main proceedings, which essentially affects migrant workers who reside in the territory of Member States other than their State of origin.

47 No evidence capable of justifying such discrimination has been adduced before the Court.

48 Further, it must be recalled that Article 10(1) of Regulation No 1408/71 establishes the principle that residence clauses are to be waived by protecting the persons concerned from any negative effect which might be caused by the transfer of their residence from one Member State to another.

49 It follows from the foregoing that the Ústavní soud judgment involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement.

The consequences of the finding of discrimination

50 It having been established that the rule deriving from the Ústavní soud judgment is discriminatory, the Court must determine the practical consequences which ensue, both for persons placed at a disadvantage by the application of that rule and those who, like Ms Landtová, have benefited from it.

51 As regards the consequences of failure to observe the principle of equal treatment in a situation such as that in the main proceedings, it must be recalled that, where discrimination contrary to EU law has been established, as long as measures reinstating

equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (see Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 57 and the case-law cited).

52 As regards the implications, for persons, such as Ms Landtová, belonging to the category of those who have benefited from the rule deriving from the Ústavní soud judgment, of the finding that that judgment is discriminatory, while, as Czech law currently stands, the competent authority for the purpose of granting the pension cannot lawfully refuse to extend entitlement to the supplement to those who are placed at a disadvantage, nothing precludes that authority from maintaining that right for the category of persons who already benefit from it under the national rule.

53 EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured (see Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 33). However, before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, such as that at issue in the main proceedings, should be deprived of it.

54 In the light of the foregoing, the answer to the second question referred is that the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71 preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not necessarily follow, under EU law, that an individual who satisfies those two requirements should be deprived of such a payment.

Costs

55 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The provisions of point 6 of Annex III(A) to Council Regulation (EC) 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 (EC) No 118/97 of 2 December 1996 and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to Article 20 of the bilateral agreement between the Czech Republic and the Slovak Republic signed on 29 October 1992 as a measure to regulate matters after the dissolution of the Czech and Slovak Federal Republic, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.**

2. **The combined provisions of Article 3(1) and Article 10 of Regulation No 1408/71, as amended by Regulation No 629/2006, preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the**

territory of the Czech Republic, but it does not necessarily follow, under European Union law, that an individual who satisfies those two requirements should be deprived of such a payment.

[Signatures]