



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 February 2013*

(Article 48 TFEU — Social security for migrant workers — Regulation (EEC) No 1408/71 and (EC) No 883/2004 — Old-age and survivor's insurance — Special provisions for the application of national legislation relating to old-age pensions — Calculation of benefits)

In Case C-282/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (Spain), made by decision of 9 May 2011, received at the Court on 6 June 2011, in the proceedings

Concepción Salgado González,

v

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Ilešič, E. Levits, J.-J. Kasel and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 May 2012,

after considering the observations submitted on behalf of:

- the Instituto Nacional de la Seguridad Social (INSS) and the Tesorería General de la Seguridad Social (TGSS), by A.R. Trillo García and P. García Perea, abogados,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the European Commission, by S. Pardo Quintillán and V. Kreuzschatz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2012,

gives the following

* Language of the case: Spanish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation 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 in the version 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 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43), ('Regulation No 883/2004').
- 2 The request has been made in proceedings between Ms Salgado González and the Instituto Nacional de la Seguridad Social (the 'INSS') and the Tesorería General de la Seguridad Social (TGSS) in relation to the amount of the old-age pension of the applicant in the main proceedings.

Legal context

EU law

- 3 Article 3(1) of Regulation No 1408/71 provides:

'Subject 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 that State.'

- 4 Under Article 45(1) of that regulation:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had completed under its own legislation.'

- 5 Article 46(2) of Regulation No 1408/71 provides:

'Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and[/]or Article 40(3), the following rules shall apply:

- (a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. ...
- (b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the

materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.’

6 Article 47(1) of Regulation No 1408/71 provides:

‘For the calculation of the theoretical and pro rata amounts referred to in Article 46(2), the following rules shall apply:

...

(g) where, under the legislation of a Member State, benefits are calculated on the basis of average contributions, the competent institution shall determine that average by reference only to those periods of insurance completed under the legislation of the said State.’

7 In accordance with Article 89 of the regulation, ‘[s]pecial procedures for implementing the legislations of certain Member States are set out in Annex VI’.

8 Point 4 of Heading H, paragraph 4 (Kingdom of Spain), of Annex VI to Regulation No 1408/71 provides:

‘(a) Under Article 47 of the Regulation, the calculation of the theoretical Spanish benefit shall be carried out on the basis of the actual contributions of the insured person during the years immediately preceding payment of the last contribution to the Spanish social security.

(b) the amount of the pension obtained shall be increased by the amount of the increases and revalorisations calculated for each subsequent year, for pensions of the same nature.’

9 Article 90 of Regulation No 883/2004 provides that Regulation No 1408/71 is in substance repealed from the date of application of Regulation No 883/2004.

10 Article 87(5) of Regulation No 883/2004 contains the following transitional provision:

‘The rights of a person to whom a pension was provided prior to the date of application of this Regulation in a Member State may, at the request of the person concerned, be reviewed, taking into account this Regulation.’

11 Under Article 91 of that regulation, the latter is to apply from the date of entry into force of the Implementing Regulation.

12 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), in accordance with its Article 97, entered into force on 1 May 2010.

Spanish law

13 In accordance with Article 161(1)(b) of the General Law on Social Security (Ley General de la Seguridad Social), as amended and approved by Royal Legislative Decree No 1/1994 of 20 June 1994, in the version applicable to the case in the main proceedings (the ‘LGSS’), entitlement to a retirement pension requires, inter alia, a minimum contribution period of 15 years.

14 Under Article 162(1) of the LGSS:

‘The basic amount of the retirement pension, under the contributory scheme, will be the quotient given by dividing by 210 the bases of contribution of the interested party during the 180 months immediately before the month preceding the operative event.’

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

15 Ms Salgado González paid contributions in Spain to the Special Scheme for Self-Employed Persons (*Régimen Especial de Trabajadores Autónomos*) from 1 February 1989 to 31 March 1999, i.e. a total of 3 711 days, and in Portugal from 1 March 2000 to 31 December 2005, i.e. a total of 2 100 days,.

16 Ms Salgado González applied for a retirement pension in Spain. On 9 November 2006, this retirement pension was granted to her by the INSS, from 1 January 2006.

17 Initially, the INSS fixed the ‘basic amount’ of that benefit at EUR 341.65 per month, pursuant to Article 162(1) of the LGSS.

18 That amount was obtained by adding the contribution bases paid in Spain from 1 January 1991 to 31 December 2005 and by dividing the amount by 210, that divisor corresponding – as appears from the documents before the Court – to the total amount of ordinary contributions (12 a year) and extraordinary contributions (two a year) paid during a period of 180 months, which is 15 years.

19 That basic amount was the subject of an initial adjustment, which was a reduction to 53%, to take account of Ms Salgado González’s years of contribution. Following that initial adjustment, the basic amount was EUR 181.07.

20 That amount was then further adjusted in order to establish that portion of the retirement pension for which the Kingdom of Spain was responsible. To those ends, the INSS took into account the proportion of contributions paid in Spain by Ms Salgado González in relation to the total amount of her paid contributions. The portion for which that Member State was responsible was set at 63.86% of the adjusted basic amount, which came to EUR 115.63. That amount, reassessed and including supplements, was finally set at EUR 371.36.

21 On 8 January 2007, Ms Salgado González, who submits that the contributions she paid in Portugal must also be taken into account when calculating her retirement benefits, has applied for that monthly amount to be reviewed and set at EUR 864.14.

22 The INSS dismissed that application and later fixed that amount at EUR 336.86 a month.

23 That amount was obtained, pursuant to Article 162(1) of the LGSS, by adding the Spanish contribution bases paid between 1 April 1984 and 31 March 1999, namely, the 15 years preceding payment of the last contribution by Ms Salgado González in Spain, and by dividing them by 210. The applicant in the main proceedings having, however, started to pay contributions to Spanish social security only on 1 February 1989, those contributions paid between 1 April 1984 and 31 January 1989 were calculated as zero.

24 The INSS made the adjustments described at paragraphs 19 and 20 of the present judgment to that basic amount in order to arrive at the actual amount of the benefit.

25 Having unsuccessfully brought a preliminary administrative action, Ms Salgado González brought an action before the Juzgado de lo Social (Social Court) No 3, Ourense, which was also dismissed.

- 26 The referring court, to which an appeal has been made, specifies that, in calculating the basic amount of the retirement pension to be granted to the applicant in the main proceedings, the INSS proceeded to apply Heading H, paragraph 4 (Spain), of Annex VI to Regulation No 1408/71 in combination with Article 162(1) of the LGSS.
- 27 The referring court states that it has no doubt as to the impossibility of including the contributions paid in Portugal by Ms Salgado González in the calculation of the basic amount of her Spanish retirement pension. Nonetheless, it submits that the method used by the INSS to calculate that amount is not compatible with the requirements of the freedom of movement of workers applied to social security benefits referred to at Article 48 TFEU nor with equal treatment between migrant and non-migrant workers under Article 3 of Regulation No 1408/71.
- 28 In particular, firstly, the use of 210 as a divisor in relation to Community migrant workers, even when fewer than 15 years of contributions were made in Spain, puts migrant workers on an unequal footing with non-migrant workers paying contributions in Spain. Indeed, for the same level of contributions as a non-migrant worker paying contributions in Spain, the Community migrant worker, whose contributions have been divided between Spain and another Member State, will have a basic amount reduced in proportion to the lesser amount of contributions paid in Spain. Such an outcome is contrary to the Community objective, set out at Article 48 TFEU, which is to avoid migrant workers from suffering a reduction in the amount of the benefit they would have received if they were not migrants (see judgment in Case C-406/93 *Reichling* [1994] ECR I-4061, paragraph 26, and Case C-251/94 *Lafuente Nieto* [1996] ECR I-4187, paragraph 38).
- 29 Secondly, the referring court sets out that, the more a worker pays in contributions in a Member State other than the Kingdom of Spain, the less time he has during his professional life to pay contributions in Spain – which are the only ones that can be taken into account under Heading H, paragraph 4, of Annex VI to Regulation No 1408/71 – during the 15 year period set out at Article 162(1) of the LGSS. Those circumstances differentiate the situation of a migrant worker paying contributions in Spain and a non-migrant worker also paying contributions in Spain, inasmuch as the latter has the entirety of his professional life available to him to cover those 15 years of contributions.
- 30 The Tribunal Superior de Justicia de Galicia therefore decided to stay the proceedings and to refer the following questions to the Court:

(1) Is it in accordance with the Community objectives set out in [Article 48 TFEU and in Article 3 of Regulation No 1408/71], and with the wording of [Heading H, paragraph 4, of Annex VI to Regulation No 1408/71], to interpret that annex ... to the effect that, for the calculation of the theoretical Spanish benefit carried out on the basis of the actual contributions of the insured person, during the years immediately preceding payment of the last contribution to the Spanish social security, the sum thus obtained is divided by 210, that divisor being established by the calculation of the basis for determination of the retirement pension in accordance with Article 162(1) of the LGSS?

(2) If the first question should be answered in the negative:

Is it in accordance with the Community objectives set out in [Article 48 TFEU and Article 3 of Regulation No 1408/71], and [Heading H, paragraph 4, of Annex VI to that regulation], to interpret the said annex to the effect that, for the calculation of the theoretical Spanish benefit carried out on the basis of the actual contributions of the insured person, during the years immediately preceding payment of the last contribution to the Spanish social security, the sum thus obtained is divided by the number of years of contribution in Spain?

- (3) In the event of a negative response to the second question and whatever the answer to the first question:

Is [paragraph 2(a) (Spain), of Annex XI] to Regulation (EC) No 883/2004 ... applicable by analogy, in the case described in these proceedings, with the aim of satisfying the Community objectives set out in [Article 48 TFEU and Article 3 of Regulation No 1408/71], and, as a result, is it possible to cover the contribution period in Portugal with the basis of contributions in Spain closest in time to that period, taking into account the evolution of consumer prices?]

- (4) If the first, second and third questions are all answered in the negative:

What, if none of the previously mentioned interpretations were held to be wholly or partly correct, would be the interpretation of [Heading H, paragraph 4, of Annex VI to Regulation No 1408/71] that, being useful for the resolution of the dispute described in these proceedings, is most in accordance with the Community objectives set out in [Article 48 TFEU and Article 3 of Regulation No 1408/71] and with Heading H, paragraph 4, of Annex VI]?’

The questions referred

- 31 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 48 TFEU, Article 3 of Regulation No 1408/71 and Heading H, paragraph 4, of Annex VI, to that regulation, or paragraph 2(a) (Spain), of Annex XI to Regulation No 883/2004 preclude legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the theoretical amount of the retirement pension of the self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over the fixed reference period of 15 years preceding the payment of his last contribution in that Member State, divided by 210, when it is impossible for either the duration of that period or the divisor used to be adapted so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.
- 32 Firstly, it should be noted that, in accordance with Article 91 of Regulation No 883/2004, read in combination with Article 97 of Regulation No 987/2009, Regulation No 883/2004 is applicable only from 1 May 2010.
- 33 However, as appears from paragraph 16 of the present judgment, the INSS, on 9 November 2006, granted Ms Salgado González a retirement pension with effect from 1 January 2006. In addition, as also noted by the Advocate General at point 30 of his opinion, no evidence has been submitted to the Court which shows that Ms Salgado González availed herself of the opportunity left open by Article 87(5) of that regulation relating to the reassessment of her rights.
- 34 It follows that Regulation No 883/2004 is not applicable *ratione temporis* to the case in the main proceedings.
- 35 In order to answer the questions raised by the national court, it must be pointed out that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist; its sole objective is to ensure the coordination of those schemes. Thus, according to settled case-law, Member States retain the power to organise their social security schemes (see judgment in Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 43, and Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 75).
- 36 Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, in particular, the conditions for entitlement to benefits (see *Stewart*, paragraph 76 and case-law cited).

- 37 In exercising those powers, Member States must nonetheless comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States (see *Stewart*, paragraph 77 and case-law cited).
- 38 In that regard, it should be noted that, under Article 45 of Regulation No 1408/71, where the legislation of a Member State makes the acquisition of the right to benefits provided for by that provision subject to the completion of periods of insurance, as in the case of a retirement pension, the competent institution of that Member State is to take account, where necessary, of the periods of insurance completed under the legislation of any other Member State. For that purpose, it is to take account of those periods as if they had been completed under its own legislation.
- 39 In the case in the main proceedings, it is common ground that the INSS, in order to ascertain whether Ms Salgado González paid contributions during the minimum period of 15 years required under Article 161(1)(b) of the LGSS, took account both of the periods completed in Spain and those completed in Portugal, in accordance with Article 45 of Regulation No 1408/71.
- 40 In contrast, the referring court raises the question whether EU law precludes the methods for calculating the theoretical amount of the benefits concerned which are used by the INSS.
- 41 In that regard, it should be noted that under Article 46(2)(a) of Regulation No 1408/71, the theoretical amount of that benefit must be calculated as if the insured person had worked exclusively in the Member State concerned (Case C-30/04 *Koschitzki* [2005] ECR I-7389, paragraph 27).
- 42 In addition, Article 47 of Regulation No 1408/71 lays down additional provisions for the calculation of benefits. In particular, in subparagraph (1)(g), it provides that where, under the legislation of a Member State, benefits are calculated on the basis of average contributions, the competent institution is to determine that average by reference only to those periods of insurance completed under the legislation of that State. In addition, Heading H of Annex VI to Regulation No 1408/71, which sets out the specific rules for the application of the Spanish legislation, states at subparagraph (4)(a) that under Article 47 of that regulation, the calculation of the theoretical Spanish benefit is to be carried out on the basis of the insured person's actual contributions during the years immediately preceding payment of the last contribution to Spanish social security.
- 43 As appears from settled case-law, Articles 46(2) and 47(1) of Regulation No 1408/71 must be interpreted in the light of the objective laid down by Article 48 TFEU, which implies in particular that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement (*Reichling*, paragraphs 21 and 22, and *Lafuente Nieto*, paragraph 33).
- 44 However, in the context of the award of the benefit at issue in the main proceedings, the INSS calculated the theoretical amount of Ms Salgado González's retirement pension in accordance with the rule set out under Article 162(1) of the LGSS, pursuant to which that amount must be calculated on the basis of an average contribution.
- 45 Admittedly, for the purpose of recognising the right to a benefit, it took account of the Portuguese contributions as if they had been periods completed for the purposes of the Spanish legislation, in accordance with Article 45 of Regulation No 1408/71.
- 46 Nonetheless, the implication of Article 47(1)(g) of Regulation No 1408/71 is that the calculation of the average contribution basis relies on the amount of the contributions paid under the legislation concerned alone (see, by analogy, *Lafuente Nieto*, paragraph 39).

- 47 It appears in that regard that, when calculating the theoretical amount of the benefit at issue in the main proceedings, the INSS did not calculate Ms Salgado González's average contribution by reference only to the insurance periods in Spain during the years immediately preceding the payment of the last contribution to Spanish social security, as required by Article 47(1)(g) of Regulation No 1408/71 and Heading H, paragraph 4(a), of Annex VI thereto.
- 48 In fact, Ms Salgado González contributed to the Spanish social security system from 1 February 1989 to 31 March 1999, for a total of 3 711 days, i.e. approximately 10 years and 2 months, whereas the INSS adds a credited period running from 1 April 1984 to 30 January 1989 in order to fulfil the requirement of contributions spanning a period of 15 years preceding Ms Salgado González's last Spanish contribution. This calculation allowed the INSS to obtain a numerator to which to apply the divisor of 210 set out under Article 162(1) of the LGSS, and thus ascertain the average contribution basis required to calculate the basic amount of the retirement pension.
- 49 Nonetheless, as Ms Salgado González did not pay contributions between 1 April 1984 and 31 March 1989, the INSS in its calculation took account of insurance periods which were not completed in Spain. Those periods having necessarily been calculated as zero, taking them into account had the effect of reducing Ms Salgado González's average contribution basis.
- 50 However, it must be stated that no such reduction would have been made if Ms Salgado González had paid contributions only in Spain, without exercising her right to freedom of movement. In other words, contrary to the requirements set out in Article 46(2)(a) of Regulation No 1408/71, as they are set out at paragraph 41 of the present judgment, the theoretical amount of Ms Salgado González's retirement pension was not calculated as if she had carried out the entirety of her professional life exclusively in Spain.
- 51 The situation would be different if, as noted by the Advocate General at point 44 of his Opinion, the national legislation set out adjustment mechanisms for the method of calculation of the theoretical amount of the retirement pension in order to take into account the exercise by the worker concerned of his right to freedom of movement. In the present case, having regard to the rules set out under Article 162(2) of the LGSS, the divisor could be adjusted to reflect the number of contributions for ordinary and extraordinary pay which the insured has actually paid.
- 52 In the light of all of the foregoing, the answer to the questions referred is that Article 48 TFEU, Articles 3, 46(2)(a) and 47(1)(a) of Regulation No 1408/71 and Heading H, paragraph 4, of Annex VI to that regulation must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the theoretical amount of the retirement pension of a self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over a fixed reference period preceding the payment of his last contribution in that Member State, to which a fixed divisor is applied, when it is impossible for either the duration of that period or the divisor to be adapted so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.

Costs

- 53 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 (First Chamber) hereby rules:

Article 48 TFEU, Articles 3, 46(2)(a) and 47(1)(a) 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, in the version 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, and Heading H, paragraph 4, of Annex VI to that regulation, must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the theoretical amount of the retirement pension of a self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over a fixed reference period preceding the payment of his last contribution in that Member State, to which a fixed divisor is applied, when it is impossible for either the duration of that period or the divisor to be adapted so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.

[Signatures]