JUDGMENT OF THE COURT (Fifth Chamber)

3 March 2011 *

In Case C-440/09,

REFERENCE for a preliminary ruling under Article 234 EC by the Sąd Najwyższy (Poland), made by decision of 18 August 2009, received at the Court on 11 November 2009, in the proceedings

Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu

v

Stanisława Tomaszewska,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel (Rapporteur), President of the Chamber, A. Borg Barthet and E. Levits, Judges,

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

* Language of the case: Polish.

having regard to the written procedure and further to the hearing on 17 November 2010,

after considering the observations submitted on behalf of:

— Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu, by D. Karwala-Szot and B. Rębilas, acting as Agents,

— the Polish Government, by J. Faldyga and A. Siwek, acting as Agents,

— the European Commission, by V. Kreuschitz and M. Owsiany-Hornung, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 45 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), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71').

2 The reference has been made in the context of proceedings between Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu (Social Security Institution – Nowy Sącz Branch) ('the Zakład Ubezpieczeń Społecznych') and Ms Tomaszewska concerning the account to be taken of the period of contribution which she completed in another Member State and the detailed rules for determining the minimum period required under Polish law for acquisition of entitlement to a retirement pension.

Legal context

European Union legislation

3 Under Article 1(r) of Regulation No 1408/71, the expression 'periods of insurance' means periods of contribution or periods of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were

completed or considered as completed, and all periods treated as such, where they are regarded by that legislation as equivalent to periods of insurance.

4 Article 45 of Regulation No 1408/71, entitled 'Consideration of periods of insurance or of residence completed under the legislations to which an employed person or self-employed person was subject for the acquisition, retention or recovery of the right to benefits', provides in paragraph 1 as follows:

'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 paragraphs 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 [been] completed under its own legislation.'

National legislation

5 In Poland, retirement and other pensions are governed by the ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law on retirement and other pensions provided by the Social Security Fund) of 17 December 1998, in its consolidated version (*Dziennik Ustaw* 2004, No 39, item 353) ('the Law on retirement pensions').

6 Article 5 of the Law on retirement pensions provides:

‘1. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, the following periods shall be taken into account, subject to paragraphs 2 to 5:

(1) contribution periods as referred to in Article 6;

(2) non-contribution periods as referred to in Article 7.

2. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, non-contribution periods shall be taken into account up to a maximum of one third of the proven contribution periods.

...’

7 Article 10(1) of that Law provides:

‘In establishing entitlement to a retirement pension and in calculating the amount thereof, the following periods shall also be included and treated as contribution periods, subject to Article 56:

...

(3) periods of employment on agricultural holdings after the age of 16, falling before 1 January 1983, where the contribution and non-contribution periods established pursuant to Articles 5 to 7 are shorter than the period required for the award of a retirement pension, to the extent necessary to supplement this period.'

8 Article 29(1)(1) of the Law on retirement pensions is worded as follows:

'Insured persons who were born before 1 January 1949 and who have not attained the retirement age laid down in Article 27(1) may retire:

(1) in the case of a woman – after attaining the age of 55 – where she has a contribution and non-contribution period amounting to at least 30 years or has a contribution and non-contribution period amounting to at least 20 years and has been declared to be totally incapable of working.'

9 Under Article 46 of that Law:

'1. Insured persons born after 31 December 1948 and before 1 January 1969 shall also be entitled to a retirement pension, subject to the conditions laid down in Articles 29, 32, 33 and 39, in so far as they satisfy the following cumulative conditions:

(1) they have not become affiliated to an open pension fund or applied to transfer funds accumulated in an account in an open pension fund, via the Social Security Institution, to the State budget;

(2) they satisfy the conditions for obtaining a retirement pension laid down in these provisions up to 31 December 2008.'

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

10 Ms Tomaszewska, who was born on 1 March 1952, applied for an early retirement pension when she reached the age of 55.

11 She had not become affiliated to the open retirement fund and had completed, in Poland, contribution periods of 181 months, non-contribution periods of 77 months and 11 days and periods of employment on her parents' agricultural holding of 56 months and 25 days. She had also completed, in the former Republic of Czechoslovakia, contribution periods totalling 49 months.

12 By a decision of 2 August 2007, the Zakład Ubezpieczeń Społecznych rejected Ms Tomaszewska's application for a retirement pension on the ground that she had failed to furnish proof that she had completed the mandatory minimum 30-year insurance period prescribed in Article 29(1)(1) of the Law on retirement pensions. Since, under Article 5(2) of that Law, the non-contribution periods may not exceed one third of the contribution periods completed in Poland, the Zakład Ubezpieczeń Społecznych credited her with only 181 months in respect of contribution periods and 60 months and 10 days in respect of non-contribution periods. As Ms Tomaszewska also did not hold a certificate attesting to her total incapacity for work, the Zakład Ubezpieczeń

Społecznych found that she did not satisfy the conditions laid down for early retirement for women.

13 Ms Tomaszewska brought an action against that decision before the Sąd Okręgowy w Nowym Sączu (Regional Court, Nowy Sącz). By judgment of 7 December 2007, that court partially upheld Ms Tomaszewska's claim, holding that she was entitled to a proportional retirement pension as from 14 May 2007.

14 By judgment of 5 August 2008, the Sąd Apelacyjny w Krakowie (Court of Appeal, Cracow) dismissed the appeal brought by the Zakład Ubezpieczeń Społecznych and upheld the decision delivered at first instance.

15 According to the Sąd Apelacyjny w Krakowie, the aggregation of the insurance periods completed in and outside Poland allows for full account to be taken of the contribution periods completed in Poland and outside Poland, in accordance with the principle of equal treatment of migrant workers. The fact of not allowing the non-contribution periods to exceed one third of the contribution periods completed in Poland gives rise to a situation in which non-contribution periods are taken into account in a less favourable manner in the case of migrant workers than in the case of individuals who can furnish proof of relatively lengthy contribution periods in Poland.

16 The Zakład Ubezpieczeń Społecznych lodged an appeal in cassation, arguing that there had been a misinterpretation of Article 45(1) of Regulation No 1408/71, Article 15(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972(I), p. 159), as updated and amended by Regulation No 118/97 ('Regulation No 574/72'),

and also of Article 5(2) of the Law on retirement pensions, claiming that the Sąd Apelacyjny w Krakowie had erred in holding that the non-contribution periods completed in Poland must be taken into account up to a maximum of one third of proven Polish and foreign contribution periods.

17 The Zakład Ubezpieczeń Społecznych takes the view that the order laid down in Article 45(1) of Regulation No 1408/71 should be followed for the purpose of taking account of the different insurance periods. In order to determine whether the insurance period completed in a Member State is sufficient to confer entitlement to a retirement pension, the competent institution of that Member State must first apply only the legislation of that Member State and determine whether the insurance period completed there is capable of conferring entitlement to a retirement pension paid by that institution. If the insurance periods thus determined are insufficient, insurance periods completed in other Member States may then be taken into account.

18 That approach, it argues, is supported by the wording of Article 15 of Regulation No 574/72. It also allows aggregation of all insurance periods completed abroad – both contribution periods and non-contribution periods – since any limitation on the account to be taken of certain contribution periods does not apply to periods completed abroad, which has, inter alia, a significant bearing on a situation in which such periods were completed under the legislation of a Member State which does take them into account for the purpose of confirming the entitlement to benefits.

19 By contrast, according to the Sąd Apelacyjny w Krakowie, each Member State is required, in order to determine entitlement to social security benefits in accordance with Article 45(1) of Regulation No 1408/71 to treat periods of insurance completed under the legislation of any other Member State of the European Union as equivalent to periods of insurance completed within its own territory.

20 Having established that the position of the Sąd Apelacyjny w Krakowie was nevertheless supported by the wording of the first sentence of Article 46(2)(a) of Regulation No 1408/71 concerning the calculation of the theoretical amount of the benefit, the referring court found that the issue in dispute came down to the question of whether or not non-contribution periods can amount to a maximum of one third of the duration of proven contribution periods completed in Poland or to a maximum of one third of all insurance periods completed in the course of the insured person's professional career, including those completed in other Member States.

21 It was in those circumstances that the Sąd Najwyższy decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 45(1) of [Regulation No 1408/71], in conjunction with Article 15(1)(a) of [Regulation No 574/72], to be interpreted as meaning that the competent institution of a Member State is required – on establishing that a worker has failed to satisfy the condition of having completed in that Member State a period of insurance which is sufficient under the law of that State for acquisition of entitlement to a retirement pension – to take account of a period of insurance completed in another Member State in such a way that it must recalculate the period of insurance on which acquisition of entitlement depends by applying the rules arising from national law and treating the period completed in the other Member State as a period completed in its own State, or must it add the period completed in the other Member State to the national period calculated previously on the basis of the rules in question?'

The question referred for a preliminary ruling

22 It should be noted, as a preliminary point, that the dispute between the Zakład Ubezpieczeń Społecznych and Ms Tomaszewska concerns the acquisition of entitlement to a retirement pension, a question which comes within the scope of

Article 45(1) of Regulation No 1408/71, whereas the rules concerning the calculation of the amount of the benefits are laid down in Article 46 et seq. of that regulation (see, to that effect, Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 13, and Case C-251/94 *Lafuente Nieto* [1996] ECR I-4187, paragraph 49).

23 By its question, the national court asks, essentially, whether Article 45(1) of Regulation No 1408/71 is to be interpreted as meaning that, in the determination of the minimum insurance period required under national law for the acquisition of entitlement to a retirement pension by a migrant worker, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for under that Member State's legislation, only the contribution periods completed in that Member State or all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

24 According to settled case-law, the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between European Union workers (Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27; Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869, paragraph 43; and Case C-306/03 *Salgado Alonso* [2005] ECR I-705, paragraph 27).

25 The system put in place by Regulation No 1408/71 is merely a system of coordination, concerning, inter alia, the determination of the legislation applicable to employed and self-employed persons who make use, under various circumstances, of their right to freedom of movement (Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 20; Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 20; and Case C-103/06 *Derouin* [2008] ECR I-1853, paragraph 20).

26 It is inherent in such a system that the conditions governing the constitution of periods of employment or insurance will differ depending on the Member State in which the person concerned has worked. Those conditions are, in accordance with Article 1(r) of Regulation No 1408/71, defined exclusively by the legislation of the Member State under which the periods in question were completed.

27 In laying down those conditions, however, the Member States are required to comply with European Union law, in particular with the objective pursued by Regulation No 1408/71 and the principles on which it is based.

28 In that regard, it must be borne in mind that the objective of Regulation No 1408/71, as stated in the second and fourth recitals in its preamble, is to ensure free movement of employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation. To that end, as is clear from the fifth, sixth and tenth recitals in its preamble, that regulation upholds the principle of equality of treatment of workers under the various measures of national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right of free movement (*Piatkowski*, paragraph 19; *Nikula*, paragraph 20; and *Derouin*, paragraph 20).

29 As regards old-age insurance in particular, Article 45(1) of Regulation No 1408/71 requires the competent institution of the Member State the legislation of which makes the acquisition of entitlement to benefits subject to the completion of a minimum insurance period to take account, where necessary in order for the worker concerned to acquire entitlement to a benefit, of periods of insurance completed under the

legislation of any other Member State as if those periods had been completed under the legislation which that competent institution applies.

30 Thus, Article 45 of Regulation No 1408/71 implements the principle of aggregation of insurance, residence or employment periods as laid down in Article 42(a) EC. This is one of the basic principles governing European Union coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the EC Treaty, to freedom of movement does not have the effect of depriving workers of social security advantages to which they would have been entitled if they had spent their entire working life in only one Member State. Such a consequence might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (Case C-481/93 *Moscato* [1995] ECR I-3525, paragraph 28, and *Salgado Alonso*, paragraph 29).

31 Consequently, a Member State is entitled to impose a minimum contribution period for the acquisition of entitlement to a pension provided for by national legislation and to define the nature and limits of insurance periods which may be taken into account for that purpose, on condition that, in accordance with Article 45 of Regulation No 1408/71, periods completed under the legislation of any other Member State are also taken into consideration under the same conditions as if they had been completed under national legislation (see, to that effect, *Salgado Alonso*, paragraph 31).

32 In the present case, it is apparent from the case-file submitted to the Court that contribution periods completed in another Member State are recognised by the Zakład Ubezpieczeń Społecznych for the purpose of determining the period required for the acquisition of entitlement to a retirement pension and are added to the total of all the contribution periods completed in Poland. However, those same contribution periods completed in another Member State are not taken into consideration for the

purpose of determining the one-third maximum limit for non-contribution periods in relation to contribution periods.

33 It is, however, not disputed that a worker such as the one in question in the main proceedings, who has completed contribution periods in Poland and in another Member State, is thereby placed in a less favourable position than a worker who has completed all of his contribution periods in Poland.

34 As shown by the calculation made by the Zakład Ubezpieczeń Społecznych, Ms Tomaszewska can rely on a non-contribution period of only 60 months, giving a total contribution period of 346 months, which is insufficient for her to acquire entitlement to a pension. By contrast, if Ms Tomaszewska had completed all of her contribution periods in Poland, instead of exercising her right of free movement and completing contribution periods in another Member State, she would have been able to rely on a non-contribution period of 76 months and would thus have had a total of 362 months of contribution, corresponding to the minimum period of 30 years required to qualify for a pension.

35 In those circumstances, an application of national law, such as that effected by the Zakład Ubezpieczeń Społecznych in the main proceedings, which, for the purposes of determining the one-third maximum limit for non-contribution periods in relation to contribution periods, has the effect that European Union workers who have exercised their right of free movement are treated less favourably than those who have not exercised that right, is liable to impede the free movement of workers and

undermines the application of the aggregation rules laid down in Article 45 of Regulation No 1408/71.

36 It follows from the case-law referred to in paragraph 31 of this judgment that, although Polish law may impose a minimum contribution period for the purpose of acquisition of entitlement to a retirement pension and for determining the nature of and limits on contribution periods which may be taken into account, it may do so solely on condition that contribution periods completed in another Member State are taken into consideration under the same conditions as those completed in Poland, as required by Article 45 of Regulation No 1408/71.

37 Consequently, the contribution periods completed by Ms Tomaszewska in any other Member State must be treated in the same way as the contribution periods completed in Poland and must, therefore, be included in the calculation for determining the one-third limit which non-contribution periods may not exceed in relation to contribution periods.

38 As regards the argument put forward by the Polish Government, to the effect that the non-inclusion of contribution periods completed in other Member States for the purpose of determining the one-third limit which non-contribution periods may not exceed in relation to contribution periods is justified on grounds of administrative difficulties and other practical problems, suffice it to note that Article 39(3) EC allows for limitations on the exercise of the right of free movement of workers only in so far as such limitations can be justified on grounds of public policy, public security or public health.. Accordingly, apart from those cases expressly referred to in the Treaty, no impediments to the free movement of workers may be justified (see, to that effect,

Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 24, and Case C-400/02 *Merida* [2004] ECR I-8471, paragraph 30).

39 In the light of the foregoing, the answer to the question referred is that Article 45(1) of Regulation No 1408/71 must be interpreted as meaning that, in the determination of the minimum insurance period required by national law for the purpose of the acquisition by a migrant worker of entitlement to a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

Costs

40 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 (Fifth Chamber) hereby rules:

Article 45(1) 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, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, must be interpreted as meaning that, in the determination of the minimum insurance period required by national law for the purpose of the acquisition by a migrant worker of entitlement to a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

[Signatures]