

JUDGMENT OF THE COURT (Third Chamber)  
3 February 1993<sup>\*</sup>

In Case C-275/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

**Alfredo Iacobelli**

and

**Institut National d'Assurance Maladie-Invalidité (INAMI) and**

**Union Nationale des Fédérations Mutualistes Neutres,**

on the interpretation of the second subparagraph of Article 46(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, and of Article 36(4) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Third Chamber),

composed of: M. Zuleeg, President of Chamber, J. C. Moitinho de Almeida and F. Grévisse, Judges,

<sup>\*</sup> Language of the case: French.

Advocate General: F. G. Jacobs,  
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Iacobelli, the plaintiff in the main proceedings, by D. Rossini, trade union representative;
  
- INAMI, the defendant in the main proceedings, by Jean-Jacques Masquelin, of the Brussels Bar;
  
- the Greek Government, by Vasileios Kontolaimos, Assistant Legal Adviser, and Ioannis Chalkias, Legal Attorney, members of the State Legal Council, acting as Agents;
  
- the Italian Republic, by Luigi Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, *Avvocato dello Stato*;
  
- the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the defendant, the Greek Government and the Commission, represented by D. Gouloussis, of its Legal Service, at the hearing on 2 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1992,

gives the following

### Judgment

1 By order of 15 October 1991, received at the Court Registry on 23 October 1991, the Tribunal du Travail (Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of the second subparagraph of Article 46(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, and of Article 36(4) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 The question arose in proceedings between Mr Iacobelli, an Italian national, and the Belgian Institut National d'Assurance Maladie-Invalidité (National Sicknes and Invalidity Insurance Institution, 'INAMI') and the Union Nationale des Fédérations Mutualistes Neutres (National Union of Neutral Mutual Federations).

3 It is apparent from the file that Mr Iacobelli worked in Italy between 1936 and 1964 and in Belgium from 13 August 1964 onwards. Following an accident at work on 9 December 1977, he claimed an invalidity pension from the INAMI, which examined the claim in accordance with Article 36 of Regulation No 574/72. He became an invalid on 9 December 1978 and was awarded invalidity benefits under Belgian law alone as from 1 August 1980.

4 Pursuant to Article 40(1) of Regulation No 1408/71, the INAMI contacted the Italian Istituto Nazionale della Previdenza Sociale (National Social Welfare

Institution, 'INPS') on 20 March 1979 with a view to the payment of the invalidity pension under Italian legislation. On 26 May 1981 the INPS informed the INAMI that Mr Iacobelli was entitled to an Italian invalidity pension, calculated pro rata, with effect from 1 January 1979 under Article 46(2)(b) of Regulation No 1408/71. On 24 February 1982 the INPS notified the INAMI of its decision to grant Mr Iacobelli an old-age pension in lieu of the invalidity pension previously awarded but not paid, with effect from 1 December 1980, the date on which he reached the age of 60, the statutory retirement age for men in Italy.

- 5 In a subsequent letter to the INAMI, the INPS stated that no invalidity benefit would be paid by Italy as the person concerned had expressly waived such a pension in a declaration of 6 December 1982. It appears from the file that this was done because the Italian legislation at that time did not provide for the possibility of converting an invalidity pension into an old-age pension which, in the present case, was higher than the invalidity pension to which Mr Iacobelli would have been entitled.
  
- 6 In view of this situation, the INAMI discontinued the benefits to Mr Iacobelli as from October 1983. On 3 August 1985 he brought an action against that decision before the Tribunal du Travail, Brussels, which stayed the proceedings and asked the Court for a preliminary ruling on the following question:

'Whether Article 36(4) of Regulation (EEC) No 574/72 and the second subparagraph of Article 46(1) *in fine* of Regulation (EEC) No 1408/71 which Regulation No 574/72 implements prevent an institution of a Member State to which an institution of another Member State has referred a claim for invalidity pension on the basis of Article 40 of Regulation (EEC) No 1408/71 from awarding a migrant worker an old-age pension instead of an invalidity pension where it appears that the old-age pension to which there is entitlement by virtue of the national legislation alone is more beneficial than the invalidity pension calculated in accordance with the aggregation and apportionment system, that is to say, the defendant's interpretation of Articles 241(1) of the Royal Decree of 4 November 1963, adopted pursuant to the Law of 9 August 1963 introducing and organizing a system of compulsory sickness and invalidity insurance, and the new first subparagraph of Article 76 quater (2) of that law.'

7 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 By its question, the national court seeks in essence to ascertain whether the second subparagraph of Article 46(1) of Regulation No 1408/71 and Article 36(4) of Regulation No 574/72 prevent an institution of a Member State to which an institution of another Member State has referred a claim for invalidity pension on the basis of Article 40 of Regulation No 1408/71 from granting a worker an old-age pension instead of an invalidity pension which the person in question has waived in order to obtain the old-age pension which is more favourable and, if so, whether the loss of the invalidity benefit payable by the institution of the latter Member State under the domestic law of that State is compatible with Community law.

9 The INAMI submits that, under Article 44(2) of Regulation No 1408/71, applicable to invalidity benefits under Article 40(1) of that regulation, and Article 36(4) of Regulation No 574/72, when a claim for the award of a benefit is lodged, such award must be made having regard to all the legal systems to which the employed or self-employed worker has been subject and that this rule allows of exceptions only as regards old-age benefits acquired under the legislation of one or more Member States. In the present case, which concerns an invalidity pension, a waiver is not therefore possible.

10 Under Article 40(1) of Regulation No 1408/71, which is in the chapter on invalidity, the provisions of Chapter 3 concerning old-age and death (pensions) apply by analogy where an employed or self-employed person has been successively or alternately subject to the legislation of two or more Member States, of which at least one does not make the amount of invalidity benefits depend on the duration of periods of insurance. That is the situation of Mr Iacobelli.

- 11 Pursuant to Article 44(2) of that regulation, which is therefore applicable by analogy to invalidity:

‘Subject to the provisions of Article 49, when a claim for the award of a benefit is lodged, such award must be made having regard to all the legislations to which the employed or self-employed person has been subject. Exception shall be made to this rule if the person concerned expressly asks for postponement of the award of old-age benefits to which he would be entitled under the legislation of one or more Member States.’

- 12 Article 36(4) of Regulation No 574/72, in the chapter on invalidity, old-age and death (pensions), lays down that:

‘A claim for benefits sent to the institution of one Member State shall automatically involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies except where, under Article 44(2) of the Regulation, the claimant asks for postponement of any old-age benefits to which he would be entitled under the legislation of one or more Member States’.

- 13 Without it being necessary to establish whether the rule in Article 44(2) *in fine* is applicable to invalidity, it must be observed that the abovementioned provisions are of a procedural nature and entail no changes in the conditions to which Member States make the grant of invalidity benefits subject. It is for the legislation of each Member State to determine whether the person concerned may waive an invalidity pension in order subsequently to receive an old-age pension which is more advantageous to him.

14 Accordingly, as the Advocate General has observed (in paragraph 23 of his Opinion), where national legislation requires a claimant to make a choice between two alternative benefits, the benefit to be taken into account, pursuant to the first sentence of Article 44(2) of Regulation No 1408/71, and for the purposes of the calculations to be performed under Article 46 of that regulation, is simply the benefit which the claimant elects to receive.

15 This interpretation is all the more compelling in that the argument put forward by the INAMI would have the consequence of depriving the person concerned of a right acquired under national legislation alone and this, according to the case-law of the Court, would be incompatible with Article 51 of the Treaty (see, *inter alia*, Case 24/75 *Petroni v ONPTS* [1975] ECR 1149, paragraph 21).

16 The reply to the national court must therefore be that the second subparagraph of Article 46(1) of Regulation No 1408/71 and Article 36(4) of Regulation No 574/72, as amended, do not prevent an institution of a Member State to which an institution of another Member State has referred a claim for invalidity pension based on Article 40 of Regulation No 1408/71 from awarding a worker an old-age pension instead of an invalidity pension which he has waived in order to obtain an old-age pension which is more advantageous to him.

## Costs

17 The costs incurred by the Italian and Greek Governments and 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Tribunal du Travail, Brussels, by order of 15 October 1991, hereby rules:

The second subparagraph of Article 46(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 and Article 36(4) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Council Regulation (EEC) No 1408/71, as amended and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983, do not prevent an institution of a Member State to which an institution of another Member State has referred a claim for invalidity pension based on Article 40 of Regulation No 1408/71 from awarding a worker an old-age pension instead of an invalidity pension which he has waived in order to obtain an old-age pension which is more advantageous to him.

Zuleeg

Moitinho de Almeida

Grévisse

Delivered in open court in Luxembourg on 3 February 1993.

J.-G. Giraud

M. Zuleeg

Registrar

President of the Third Chamber