

SUMMARY

ECJ 16 May 2013, case C-589/10 (Janina Wencel - v - Zakład Ubezpieczeń Społecznych w Białymstoku), Free movement, Social insurance

Facts

Mrs Wencel is a Polish national. She has been registered as a Polish resident ever since 1954. Her husband, whom she married in 1975, lived and worked in Germany. Mrs Wencel frequently went to Germany to see him and he spent all his holidays in Poland. Mrs Wencel obtained a German residence certificate that described her as being permanently resident there.

In 1990, by virtue of her having completed insurance periods in Poland, Mrs Wencel acquired the right to a Polish retirement pension. Following the death of her husband in 2008, she was granted a German survivor's pension on the basis of her residence in Germany.

In 2009, the Polish social insurance authority ZUS withdrew Mrs Wencel's retirement pension and demanded repayment of the pension payments she had received in the previous three years. She challenged this decision.

National proceedings

The court of first instance ruled against Mrs Wencel. She appealed. The Court of Appeal accepted that, from 1975 to 2008, Mrs Wencel had spent half her time in Poland and half in Germany and that she genuinely considered that she had simultaneously had two places of residence of equal status for the purposes of Article 1(h) of Regulation 1408/71. Given this finding, the court held that the ZUS' decision appeared to be at odds with the principle of free movement within the EU. Moreover, according to the Court of Appeal, a 1975 convention between Poland and Germany, that would have stood in the way of simultaneous collection of

Polish retirement benefits and German survivor's benefits, was superseded by Regulation 1408/71.

The Court of Appeal referred three questions to the ECJ. The ECJ reformulated the questions as asking, in essence, whether EU law must be interpreted as allowing a social security institution to withdraw, retroactively, the pension right of an insured person who, for many years, has had two habitual residences simultaneously in two different Member States, on the ground that the insured person receives a survivor's pension in another Member State in the territory in which he has also been resident.

ECJ's findings

1. First, it is necessary to determine whether a person may legitimately, for the purposes of the application of Regulation 1408/71, claim to have two habitual residences simultaneously. In previous cases, the ECJ has held that the provisions of Regulation 1408/71 are not only intended to prevent persons from being left without social security cover because there is no legislation which applies to them, but also to prevent more than one national social security system from applying. This aim finds expression in particular in Article 13(1), which provides that "persons to whom this Regulation applies shall be subject to the legislation of a single Member State only" and in Article 13(2)(f), which provides that "a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him [...] shall be subject to the legislation of the Member State in whose territory he resides [...]". Since the Regulation uses residence as the connecting factor for determining the applicable legislation, it cannot be accepted, without depriving said provisions of all practical effectiveness, that a person may simultaneously have habitual residences in more than one Member State (§ 43-51).

2. It is for the member state to determine, in the light of all the relevant evidence before it, the Member State of habitual residence. In that regard, it should be noted (i) that Mrs Wencel worked in Poland as a child minder for her daughter-in-law; (ii) that she was granted a retirement pension on the basis of the contributions made by her for that purpose in Poland and (iii) that following the death of her husband, her centre of interests were located solely in Poland (§ 52-55).

3. Was ZUS entitled to withdraw Mrs Wencel's Polish retirement pension retroactively? Article 12(1) of Regulation 1408/71 provides that the regulation can neither confer nor maintain, in principle, the right to several benefits of the same kind for one and the same period of insurance. In this case, the two benefits in question cannot be considered to be "benefits of the same kind", Mrs Wencel's Polish retirement pension having been calculated on the basis of

her employment in Poland and her German survivor's pension being paid to her on account of her late husband's employment in Germany (§ 56-58).

4. Article 12(2) of Regulation 1408/71 provides that national rules on the reduction, suspension and withdrawal of benefits in the case of overlapping with other social security benefits may be invoked even where such benefits were acquired under the legislation of another Member State. It follows that, although Mrs Wencel's Polish old-age pension cannot be withdrawn on the ground that she receives a German survivor's benefit, that pension may be reduced, up to the limit of the German benefits, on the basis of any Polish rule precluding the cumulation of benefits. It is for the referring court to ascertain whether such a rule exists in the present case (§ 59-62).

5. However, even if such a rule exists, and even if it is not precluded by Regulation 1408/71, it may still be precluded by the TFEU. The finding that a national measure may be consistent with secondary EU law, such as Regulation 1408/71, does not necessarily have the effect of removing that measure from the scope of the TFEU's provisions (§ 63-65).

6. It is clear that Mrs Wencel's situation falls within the scope of Article 45 TFEU on freedom of movement. It precludes national measures which, even though applicable without discrimination on grounds of nationality, are capable of hindering or rendering less attractive the exercise by Member State nationals of their fundamental freedoms, unless they pursue a legitimate objective in the public interest; are appropriate for the purpose of ensuring the attainment of that objective, and do not go beyond what is necessary to obtain the objective pursued. Accordingly, it is for the national court to assess the compatibility of the Polish legislation at issue with the requirements of EU law by determining whether that legislation does not in fact lead, in respect of Mrs Wencel, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element and, if such a disadvantage is established, whether the national rule in question is justified by objective considerations and is proportionate to the legitimate objective pursued by national law (§ 66-72).

Ruling

Article 10 of Regulation (EEC) No 1408/71 [...] must be interpreted as meaning that, for the purposes of the application of the regulation, a person cannot have simultaneously two habitual residences in two different Member States.

Under the provisions of Regulation No 1408/71, in particular Articles 12(2) and 46a, the competent institution of a Member State cannot, in circumstances such as those in the main proceedings, legitimately withdraw, retroactively, the entitlement to a retirement pension of the person concerned and require that person to repay any pension to which it is alleged he

was not entitled on the ground that he receives a survivor's pension in another Member State in whose territory he has also been resident. However, the amount of the retirement pension paid in the first Member State may be reduced, up to the limit of the amount of the benefits received in the other Member State, by virtue of the application of any national rule precluding the cumulation of benefits.

Article 45 TFEU must be interpreted as not precluding, in circumstances such as those in the main proceedings, a decision requiring the amount of the retirement pension paid in the first Member State to be reduced, up to the limit of the benefits received in the other Member State, by virtue of the application of any rule precluding the cumulation of benefits, provided that decision does not lead, in respect of the recipient of those benefits, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element and, where such a disadvantage is established, provided that it is justified by objective considerations and is proportionate to the legitimate objective pursued by national law, which it falls to the national court to verify.

Creator: European Court of Justice (ECJ)

Verdict at: 2013-05-16

Case number: C-589/10