

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

5 December 2019 (\*)

(References for a preliminary ruling — Social security for migrant workers — Regulation (EC) No 883/2004 — Early retirement pension — Eligibility — Requirement for the pension to be received to be higher than the statutory minimum — Account taken only of pension acquired in the Member State concerned — No account taken of the retirement pension acquired in another Member State — Difference in treatment of workers who have exercised their right to freedom of movement)

In Joined Cases C-398/18 and C-428/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain), made by decisions of 25 May and 13 June 2018, received at the Court, respectively, on 15 June and 28 June 2018, in the proceedings

**Antonio Bocero Torrico** (C-398/18),

**Jörg Paul Konrad Fritz Bode** (C-428/18)

v

**Instituto Nacional de la Seguridad Social,**

**Tesorería General de la Seguridad Social,**

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and F. Biltgen (Rapporteur),  
Judges,

Advocate General: G. Hogan,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2019,

after considering the observations submitted on behalf of

- Mr Bocero Torrico and Mr Bode, by J.A. André Veloso and A. Vázquez Conde, abogados,
- the Instituto Nacional de la Seguridad Social and the Tesorería General de la Seguridad Social, by P. García Perea, R. Dívar Conde and L. Baró Pazos, letradas,
- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the European Commission, by N. Ruiz García, D. Martin and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2019,

gives the following

## **Judgment**

1 These requests for a preliminary ruling concern the interpretation of Article 48 TFEU and of 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 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

2 The requests have been made in two sets of proceedings between, respectively, Antonio Bocero Torrico and Jörg Paul Konrad Fritz Bode, the applicants in the main proceedings, and the Instituto Nacional de la Seguridad Social (National Social Security Agency, Spain) ('the INSS') and the Tesorería General de la Seguridad Social (General Social Security Fund, Spain) concerning the refusal of their applications for early retirement pensions.

## **Legal context**

### ***European Union law***

3 Recital 9 of Regulation No 883/2004 states:

'The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.'

4 In Article 1(x) of that regulation, the term 'early old-age benefit' means a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit.

5 In accordance with Article 3(1)(d) of that regulation, the regulation applies to all legislation concerning branches of social security relating, inter alia, to old-age benefits.

6 Article 4 of that regulation, headed 'Equality of treatment', provides:

'Unless otherwise provided for by this regulation, persons to whom this regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

7 Article 5 of Regulation No 883/2004, headed 'Equal treatment of benefits, income, facts or events', states:

'Unless otherwise provided for by this regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

8 Article 6 of the regulation, headed 'Aggregation of periods', is worded as follows:

'Unless otherwise provided for by this regulation, the competent institution of a Member State whose legislation makes:

– the acquisition, retention, duration or recovery of the right to benefits,

...

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.'

9 In Chapter 5 of Title III of that regulation, which contains provisions concerning old-age and survivors' pensions, Article 52 of that regulation, headed 'Award of benefits', provides, in paragraph 1 thereof:

'The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

(b) by calculating a theoretical amount and subsequently an actual amount (pro-rata benefit), as follows:

(i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

(ii) the competent institution shall then establish the actual amount of the pro-rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.'

10 Also contained in that chapter, Article 58 of that regulation, headed 'Award of a supplement', is worded as follows:

1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this chapter.

2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due

under this chapter and the amount of the minimum benefit.'

### **Spanish law**

11 The Ley General de la Seguridad Social (General Law on Social Security), the consolidated version of which was approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261, 31 October 2015), in the version that applies to the facts in the main proceedings ('the LGSS'), provides, in Article 208(1):

'A person wishing to take early retirement must satisfy the following criteria:

(a) He or she must have reached an age which is not more than 2 years below the age applicable in each case in accordance with Article 205(1)(a), while the reduction coefficients referred to in Article 206 shall not be applicable for these purposes.

(b) He or she must have completed a minimum actual contribution period of 35 years, and any proportion relating to bonuses shall not be taken into consideration ...

(c) After proof has been provided in relation to the general and specific criteria applicable to the type of retirement in question, the amount of the pension to be received must be higher than the amount of the minimum pension which would be due to the person concerned in the light of his family situation on reaching the age of 65. Otherwise, it shall not be possible to take this form of early retirement.'

12 Article 14(3) of Real Decreto 1170/2015, sobre revalorización de pensiones del sistema de seguridad social y de otras prestaciones sociales públicas para el ejercicio 2016 (Royal Decree 1170/2015 on adjustment of pensions covered by the social security system and other State social benefits for the year 2016) of 29 December 2015 (BOE No 312, 30 December 2015) provides:

'If, after having applied the provisions of the previous paragraph, the sum of the amounts of the pensions recognised under a bilateral or multilateral social security convention, pursuant to both Spanish and foreign legislation, is lower than the minimum amount of the pension concerned in force in Spain, the beneficiary, as long as he or she resides on national territory and satisfies the criteria laid down in that connection by the general provisions, shall be guaranteed the difference between the total of the Spanish and foreign pensions awarded and the minimum amount referred to.

Pensions awarded under the [European Union] regulations on social security shall be subject to Article 50 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)] and to Article 58 of [Regulation No 883/2004].

...'

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

13 Mr Bocero Torrico, who was born on 15 December 1953, applied to the INSS on 16 December 2016 for an early retirement pension. On the date of that application, he was able to prove contribution periods of 9 947 days in Spain and 6 690 days in Germany. The actual amount of the retirement pension payable to him in Germany is EUR 507.35, while the early retirement pension that he could claim in Spain stands at EUR 530.15.

14 Mr Bode, who was born on 4 June 1952, applied to the INSS on 31 May 2015 for an early retirement pension. On the date of that application, he was able to prove contribution periods of 2 282 days in Spain and 14 443 days in Germany. In Germany, the actual amount of the retirement pension awarded is EUR 1 185.22. According to Mr Bode, the early retirement pension that he could claim in Spain stands at EUR 206.60. According to the calculations made by the INSS, the amount of that early retirement pension stands at EUR 99.52.

15 The pensions sought were refused on the ground that the amount payable was below the minimum monthly pension corresponding to the family situation of the applicants in the main proceedings on their 65th birthday, set at EUR 784.90 in the case of Mr Bocero Torrico and EUR 782.90 in the case of Mr Bode. Following complaints by the parties concerned, the INSS confirmed those refusals.

16 The action brought by Mr Bocero Torrico against the INSS and the General Social Security Fund before the Juzgado de lo Social No 2 de Ourense (Labour Court No 2, Ourense, Spain) and that brought by Mr Bode against those bodies before the Juzgado de lo Social No 2 of A Coruña (Labour Court No 2, A Coruña, Spain) were dismissed. Those courts considered that the amount of the 'pension to be received', within the meaning of Article 208(1)(c) of the LGSS, which must be higher than the minimum pension which would be due to the person concerned when he or she reaches the age of 65 in order to be eligible for an early retirement pension, is the amount of the actual pension payable by the Kingdom of Spain. They relied on the purpose of the Spanish legislation, which is to avoid supplementing, up to the statutory minimum, retirement pensions for persons who have not yet reached the statutory retirement age, thus keeping them in the employment market.

17 The applicants in the main proceedings appealed against those judgments before the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain). That court observes that, under Article 14(3) of Royal Decree 1170/2015, Spanish legislation permits a pension supplement to be granted only in respect of the difference between the sum of the benefits due in accordance with EU law and the minimum pension in Spain. As a result, the pensions actually received by Mr Bocero Torrico and Mr Bode in both Spain and Germany should be taken into account, such that neither of them may claim a pension supplement. Accordingly, they would not be a burden on the Spanish social security system.

18 The referring court is uncertain whether the way in which the expression 'pension to be received' in Article 208(1)(c) of the LGSS is interpreted by the INSS for the purposes of determining whether a worker is eligible for an early retirement pension, that is to say, by taking into account only the actual pension payable by the Kingdom of Spain, amounts to discrimination contrary to EU law. That court notes that a worker who is entitled to a pension payable by at least two Member States may be ineligible for such an early retirement pension, while a worker who is entitled to a pension of the same amount, but which is payable only by the Kingdom of Spain, would be eligible for that pension.

19 Under those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia) decided to stay the proceedings and to refer the following question, which is formulated in identical terms in Cases C?398/18 and C?428/18, to the Court of Justice for a

preliminary ruling:

‘Must Article 48 TFEU be interpreted as meaning that it precludes national legislation which requires as a condition for access to an early retirement pension that the amount of the pension to be received must be higher than the minimum pension which would be due to the person concerned under that same national legislation, the term “pension to be received” being interpreted as the actual pension from the competent Member State alone (in this case, the Kingdom of Spain), without also taking into account the actual pension which that person may receive through another benefit of the same kind from one or more other Member States?’

20 By decision of the President of the Court of 25 July 2018, Cases C-398/18 and C-428/18 were joined for the purposes of the written and oral procedure and the judgment.

### **Consideration of the question referred**

21 As a preliminary point, it must be noted that while the question referred for a preliminary ruling relates expressly to Article 48 TFEU, the referring court also mentioned, in the grounds of its order for reference, the provisions of Regulation No 883/2004.

22 In that regard, it should be observed that early retirement pensions, such as those at issue in the main proceedings, fall within the scope of that regulation. Pursuant to Article 3(1)(d) thereof, that regulation applies to legislation concerning old-age benefits. Moreover, the term ‘early old-age benefit’ is defined in Article 1(x) of that regulation.

23 Under those circumstances, the referring court’s question must be examined in the light of Regulation No 883/2004 (see, by analogy, judgments of 18 January 2007, *Celozzi*, C-332/05, EU:C:2007:35, paragraph 14, and of 18 December 2014, *Larcher*, C-523/13, EU:C:2014:2458, paragraph 29).

24 Therefore, by its question, the referring court must be regarded as asking, in essence, whether the provisions of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, the term ‘pension to be received’ being interpreted as referring only to the pension payable by that Member State, and not including any pension which that worker may receive through equivalent benefits payable by one or more other Member States.

25 As regards the provision of Spanish law at issue in the main proceedings, namely Article 208(1)(c) of the LGSS, the fact that that provision makes eligibility for an early retirement pension conditional on the amount of the pension to be received being higher than the minimum pension that would be due to the person concerned upon reaching the statutory retirement age is not called into question, as such, in the cases in the main proceedings.

26 In that regard, it must be pointed out that no provision in Title I of Regulation No 883/2004, containing the general provisions of that regulation, or in Title III, Chapter 5 of that regulation, containing the applicable special provisions, inter alia, old-age pensions, precludes such a rule.

27 In particular, it does not follow from Article 58 of that regulation, which stipulates that the recipient of old-age benefits may not be provided with a benefit which is less than the minimum benefit fixed by the legislation of the Member State of residence and that the competent institution of that State must, if necessary, pay him or her a supplement equal to the difference between the total of the benefits due and the amount of the minimum benefit, that a Member State is required

to grant an early retirement pension to a claimant where the amount of that pension payable to that person is below the minimum pension that would be due upon reaching the statutory retirement age.

28 However, the applicants in the main proceedings dispute the interpretation given by the competent institutions and the Spanish courts, for the purpose of determining eligibility for an early retirement pension, to the concept of 'pension to be received' as referring only to the pension payable by the Kingdom of Spain, and not including pensions from other Member States that might be due to the person concerned.

29 As regards, in the first place, the provisions of Regulation No 883/2004 which apply to such circumstances, the Court notes that Article 5 of that regulation lays down the principle of equal treatment. It follows from recital 9 of that regulation that the EU legislature sought to include in the regulation the principle, deriving from case-law, of equal treatment of benefits, income and facts, in order that that principle might be developed in keeping with the substance and spirit of the Court's rulings (judgment of 21 January 2016, *Vorarlberger Gebietskrankenkasse and Knauer*, C-453/14, EU:C:2016:37, paragraph 31).

30 In that regard, Article 5(a) of Regulation No 883/2004 provides that, where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State.

31 As the Advocate General stated in point 45 of his Opinion, that provision must be regarded as being applicable in situations such as those at issue in the main proceedings. The 'receipt of social security benefits', within the meaning of that provision, must be regarded as referring to the pension to which the applicants in the main proceedings are entitled. Under Article 208(1)(c) of the LGSS, entitlement to that pension has, if the amount payable exceeds the minimum pension due upon reaching the statutory retirement age, the legal effect of rendering the applicants eligible for an early retirement pension.

32 On the other hand, contrary to what the applicants in the main proceedings submit in their written observations, the factual situations in the main proceedings do not fall within the scope of Article 6 of Regulation No 883/2004. That article, headed 'Aggregation of periods', provides, for the purposes of determining whether any entitlement to social security benefits has been acquired, that the Member State is to take account of periods of insurance, employment, self-employment or residence completed under the legislation of other Member States, whereas, in the present case, the issue is whether the amount of the pensions due to the applicants in another Member State should be taken into account for the purposes of determining eligibility for an early retirement pension.

33 Similarly, Article 52(1)(b) of Regulation No 883/2004, also relied on by the applicants in the main proceedings, does not apply for the purposes of answering the question submitted by the referring court. That provision also relates to the aggregation of periods of insurance or residence completed under the legislation of all of the Member States concerned. Furthermore, it does not concern the acquisition of entitlement to a retirement pension, but the calculation of the amount of benefits due (see, to that effect, regarding the corresponding provisions in Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation 1992/2006, judgment of 3 March 2011, *Tomaszewska*, C-440/09, EU:C:2011:114, paragraph 22 and the case-law cited).

34 In the second place, the Court must examine whether a provision of national law such as

Article 208(1)(c) of the LGSS, as interpreted by the competent institutions and the national courts, is consistent with Article 5(a) of Regulation No 883/2004.

35 In accordance with the latter provision, in applying a national legal rule such as Article 208(1)(c) of the LGSS, the competent authorities of the Member State concerned must take into account not only the receipt of social security benefits acquired by the person concerned under the legislation of that State, but also the receipt of equivalent benefits acquired in any other Member State.

36 As regards old-age pensions, the Court has previously interpreted the concept of 'equivalent benefits' in Article 5(a) as referring to two old-age benefits that are comparable in the light of the aim pursued by those benefits and the legislation which established them (see, to that effect, judgment of 21 January 2016, *Vorarlberger Gebietskrankenkasse and Knauer*, C-453/14, EU:C:2016:37, paragraphs 33 and 34).

37 It would appear to follow from the documents available to the Court that the retirement pensions to which the applicants in the main proceedings are entitled in Germany are equivalent, in that sense, to the early retirement pensions which they could claim in Spain, which is, nonetheless, a matter for the referring court to verify.

38 It follows that Article 5(a) of Regulation No 883/2004 precludes an interpretation of the concept of 'pension to be received', as contained in Article 208(1)(c) of the LGSS, as referring only to the pension payable by the Kingdom of Spain, and not including the pension due to the applicants in the main proceedings in Germany.

39 That conclusion is supported by an examination of the situations at issue in the main proceedings in the light of the principle of equal treatment, the equal treatment of benefits, income, facts or events covered in Article 5 of that regulation being a specific expression of that principle (see, to that effect, judgment of 21 February 2008, *Klöppel*, C-507/06, EU:C:2008:110, paragraph 22).

40 In that regard, it must be noted that the principle of equal treatment, as laid down in Article 4 of Regulation No 883/2004, 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 (see, by analogy, judgment of 22 June 2011, *Landtová*, C-399/09, EU:C:2011:415, paragraph 44 and the case-law cited).

41 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 (judgment of 22 June 2011, *Landtová*, C-399/09, EU:C:2011:415, paragraph 45 and the case-law cited).

42 The refusal by the competent authorities of one Member State to take into account, for the purposes of determining eligibility for an early retirement pension, the pension benefits to which a worker who has exercised his right to free movement is entitled in another Member State is likely to put that worker in a less favourable position than that of a worker who has completed his entire career in the first Member State.

43 National legislation such as that at issue in the main proceedings may nonetheless be justified, in so far as it pursues a public interest objective, on the condition that it is appropriate for



the purpose of ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain it (see, to that effect, in particular, judgment of 18 December 2014, *Larcher*, C?523/13, EU:C:2014:2458, paragraph 38).

44 In that regard, the INSS and the Spanish Government submitted, at the hearing, that the application, for the purposes of eligibility for an early retirement pension, of the requirement that the person concerned has attained the minimum amount of pension which would be due to him or her upon reaching the statutory retirement age is intended to reduce recourse to early retirement. Moreover, by precluding eligibility for an early retirement pension in cases where the amount of the pension that could be claimed by the person concerned would render him or her eligible for a pension supplement, that requirement avoids placing additional burdens on the Spanish social security system.

45 However, as the Advocate General noted in point 49 of his Opinion, even if such considerations were to constitute general interest objectives within the meaning of the case-law cited in paragraph 43 above, the arguments put forward by the INSS and the Spanish Government are not such as to justify discriminatory application of such a requirement to the detriment of workers who have exercised their right to freedom of movement.

46 Having regard to the foregoing considerations, the answer to the question referred is that Article 5(a) of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, where the term 'pension to be received' is interpreted as referring only to the pension from that Member State, and not including the pension which that worker may receive through equivalent benefits payable by one or more other Member States.

### **Costs**

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

**Article 5(a) of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems must be interpreted as precluding legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, where the term 'pension to be received' is interpreted as referring only to the pension from that Member State, and not including the pension which that worker may receive through equivalent benefits payable by one or more other Member States.**

[Signatures]

\* Language of the case: Spanish.