

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 28 October 2004¹

I — Introduction

1. The applicant in the main proceedings, Mrs Salgado Alonso, received a special form of unemployment benefit in Spain in the past. During that period the State employment agency paid contributions into the statutory pension insurance scheme on her behalf. Having reached the age of 65 years, Mrs Salgado Alonso now wishes to receive a statutory retirement pension. A point of dispute in the main proceedings is whether the pension contributions paid while the special unemployment allowance was being drawn should also be taken into account in the calculation of the qualifying period for the statutory retirement pension or whether failure to take them into account constitutes discrimination against migrant workers on grounds of nationality.

2. In this context the Juzgado de lo Social nº 3 de Orense ('the referring court') has referred to the Court of Justice two questions concerning 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 ('Regulation No 1408/71').² These questions have the same content as those submitted in Case C-225/02 (*García Blanco*).³

II — Legal background

A — Community law

3. The background to this case in Community law is formed by Article 39 EC and Regulation No 1408/71.

2 — OJ, English Special Edition 1971(II), p. 416. Articles 90 and 91 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, corrected in OJ 2004 L 200, p. 1) provide for the repeal and replacement of Regulation No 1408/71. For reasons of time, however, Regulation No 1408/71 remains applicable to the present case; the version of Article 1(r) decisive here derives from Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1), all other provisions cited being contained in the version of Regulation No 1408/71 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

3 — See my Opinion of today's date in Case C-225/02, judgment of 20 January 2005, ECR I-523, I-525.

1 — Original language: German.

4. Article 1(r) of Regulation No 1408/71 defines the term 'periods of insurance' as follows:

'periods of contribution or periods of employment or self-employment as defined or recognised as period[s] 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 the said legislation as equivalent to periods of insurance; periods completed under a special scheme for civil servants are also considered as periods of insurance'.

5. Article 3(1) of Regulation No 1408/71 reads as follows:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States 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 the State.'

6. Article 45(1) of Regulation No 1408/71 provides as follows with respect to the taking into consideration of periods of insurance and residence:

'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 [been] completed under its own legislation.'

7. Article 46(2) of Regulation No 1408/71 reads as follows:

'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. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

administers which are taken into account when the risk materialises, if:

- the duration of the said periods does not amount to one year,

- (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.'

and

- taking only these periods into consideration, no right to benefit is acquired by virtue of the provisions of that legislation.

8. With regard to periods of insurance and residence of less than one year, Article 48 of Regulation 1408/71 provides the following:

2. The competent institution of each of the Member States concerned shall take into account the periods referred to in paragraph 1, for the purposes of applying Article 46(2) excepting subparagraph (b).

'1. Notwithstanding Article 46(2), the institution of a Member State shall not be required to award benefits in respect of periods completed under the legislation it

3. If the effect of applying paragraph 1 would be to relieve all the institutions of the Member States concerned of their obligations, benefits shall be awarded exclusively under the legislation of the last of those States whose conditions are satisfied, as if all the periods of insurance and residence completed and taken into account in accor-

dance with Article 45(1) to (4) had been completed under the legislation of that State.’

B — National legislation

9. Article 161(1)(b) of the new version of the Spanish General Law on Social Security (*Texto Refundido de la Ley General de la Seguridad Social*,⁴ ‘TRLGSS’) makes entitlement to a retirement pension dependent on the completion of two qualifying periods:

- a general period of at least fifteen years of contribution;

and

- a specific period of two years of contribution within the fifteen years immediately preceding the date of the operative event.

10. Even before the statutory retirement age, unemployed persons who have reached 52 years of age are granted, pursuant to Article 215(1)(3) TRLGSS, a special form of unemployment benefit (*subsidio por desempleo*, hereinafter ‘special unemployment allowance’). One of the conditions is that those concerned are able to prove that they have contributed to the statutory unemployment insurance scheme for at least six years and also satisfy all the requirements for the granting of a statutory retirement pension, with the exception of the retirement age.

11. Article 218(2) TRLGSS requires the statutory unemployment benefit agency (*Organismo Gestor del Seguro de Desempleo*) to pay not only the special unemployment allowance to the recipient but also statutory retirement pension contributions into the social security scheme, on behalf of the recipient, for each calendar month in which he has been entitled to the allowance.

12. The effect of the pension contributions paid for the recipients of special unemployment allowance is restricted by the 28th Additional Provision of the TRLGSS⁵ as follows:

⁴ — In the version of Real Decreto Legislativo 1/1994 of 20 June 2004 (*Boletín Oficial del Estado* [BOE] No 154 of 29 June 2004), amended by Law No 50/1998 of 30 December 1998 (BOE of 30 December 1998, entered into force on 1 January 1999).

⁵ — Introduced by the 21st Additional Provision of Law No 50/1998 (cited in footnote 4).

'Retirement contributions paid by the Entidad Gestora (benefit agency) in accordance with Article 218(2) of this law [TRLGSS] shall be taken into account in calculating the basic amount of the retirement pension and the percentage to be applied to it. Such contributions shall in no case have validity and legal effect for the purpose of accrediting the minimum period of contribution required under Article 161(1)(b) of this law, which, in accordance with Article 215(1)(3), must have been completed by the time an application is made for the allowance for persons over 52 years of age.'

III — Facts of the case and procedure

Background

13. In administrative practice, however, the contributions paid into the statutory retirement pension scheme by INEM on behalf of the recipients of special unemployment allowance are taken into account in connection with Article 48(1) of Regulation No 1408/71; this is evident from a joint administrative order issued by INSS and INEM in 1999.⁶

14. Mrs Cristalina Salgado Alonso, who was born on 30 May 1936, applied to the State employment agency (*Instituto Nacional de Empleo*, 'INEM') on 7 August 1992 for special unemployment allowance for workers over 52 years of age. At that time she had paid contributions into the German statutory pension insurance scheme for 74 months (more than six years, from 1964 to 1970), voluntary contributions into the Swiss statutory pension insurance scheme for 26 months (more than two years, between 1971 and 1975) and contributions into the Spanish statutory social insurance scheme for 182 days (about six months, in 1992).

15. Her application for special unemployment allowance was initially rejected on the ground that she had not completed the necessary qualifying period of at least fifteen years. In response to her appeal, however, a Spanish court awarded her this special unemployment benefit on 30 June 1993. The Spanish Government and the defendants essentially ascribe this judgment to the fact that under Spanish case-law at that time

6 — Circular No 3/99 of 16 April 1999 (*Circular conjunta sobre modificación de los criterios de reconocimiento del subsidio por desempleo establecido en el artículo 215(1)(3) del TRLGSS para mayores de 52 años, que afectan a trabajadores emigrantes retornados de la Unión Europea/Espacio Económico Europeo*); the third instruction in this circular reads: 'Las cotizaciones efectuadas por el INEM durante la percepción del subsidio para mayores de 52 años por la contingencia de jubilación ... deberán tenerse en cuenta, a efectos de lo dispuesto en el artículo 48.1 del Reglamento CEE 1408/71 cuando el interesado solicite la pensión contributiva de jubilación española que le corresponda.'

the completion of shorter qualifying periods in other countries, such as the five-year qualifying period in Germany, was recognised as equivalent to the fifteen-year qualifying period prescribed in Spain. This case-law had, however, changed in the meantime, following the judgments of the Court of Justice in the *Martínez Losada* and *Ferreiro Alvite* cases.⁷

While she was granted a retirement pension in Germany and Switzerland, the Spanish social security institution (*Instituto Nacional de Seguridad Social*, 'INSS') refused to grant her a retirement pension, by decision of 21 March 2002. As the ground for this decision, she was informed that she had not completed the necessary qualifying period and that Article 46(2) of Regulation No 1408/71 was not applicable because she had paid pension contributions in Spain for less than one year.

16. While Mrs Salgado Alonso was drawing the special unemployment allowance, INEM paid, on her behalf, contributions into the Spanish statutory pension insurance scheme for a period of 3 219 days (more than eight years and nine months) in accordance with Article 218(2) TRLGSS.

Application for a statutory retirement pension

17. On reaching the age of 65 in the year 2001, Mrs Salgado Alonso applied to the German, Swiss and Spanish social security authorities for a statutory retirement pen-

18. Mrs Salgado Alonso has now applied to the referring court for legal protection against the rejection of her application for a statutory retirement pension. She has brought an action against INSS and the *Tesorería General de la Seguridad Social* ('TGSS'), arguing in essence that not only her original pension contribution period in Spain of 182 days but also the pension contributions paid by INEM on her behalf while she was in receipt of the special unemployment allowance should be taken into account in her favour; she would then achieve a total of 3 401 days of contribution (more than nine years and three months) in Spain.

19. A point of dispute in the main proceedings is whether the pension contributions paid while the special unemployment allowance was being drawn should also be taken into account in the calculation of the

⁷ — Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869 and Case C-320/95 *Ferreiro Alvite* [1999] ECR I-951.

qualifying period for the statutory retirement pension or whether failure to take them into account constitutes discrimination against migrant workers.

are invalidated by law, with the result that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under Article 45 of the aforementioned EEC Regulation, those qualifying periods would have to be regarded as completed?

Request for a preliminary ruling

20. By order of 24 June 2003 the Juzgado de lo Social n° 3 de Orense stayed its proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

1. Do Article 12 and Articles 39 to 42 of the Treaty establishing the European Community and Article 45 of Council Regulation (EEC) No 1408/71 of 14 June 1971 preclude a national provision under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of completing the various qualifying periods established in the national legislation and of conferring entitlement to the old-age pension, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which
2. Do Article 12 and Articles 39 to 42 of the Treaty establishing the European Community and Article 48(1) of Regulation No 1408/71 preclude national provisions under which retirement contributions which the unemployment benefit agency paid on behalf of a worker during the period in which he received certain unemployment benefits are not to be taken into account for the purposes of determining whether the total duration of insurance periods or periods of residence covered by the legislation of that Member State amounts to one year, when, because of a long period of unemployment, supposedly protected, it is absolutely impossible for that worker to obtain credit for retirement contributions other than those which fall due and are paid during unemployment, so that only workers who have exercised the right to freedom of movement are affected by that provision of national law and are unable to qualify for the national retirement pension, despite the fact that, under

Article 48(1) of the aforementioned EEC Regulation, the national benefit agency could not be relieved of the obligation to award national benefits?’

— INSS and TGSS have made written and oral observations.

Procedure since the referral of the request for a preliminary ruling

IV — Appraisal

21. As the Court of Justice was informed by letter of 29 September 2003 from the defendants in the main proceedings (INSS and TGSS), INSS issued a further decision against Mrs Salgado Alonso on 10 September 2003. This decision, in which her application for a statutory retirement pension was again rejected, replaces the original refusal decision of 21 March 2003. The ground now given for the rejection is that Mrs Salgado Alonso had not completed the qualifying periods prescribed by law in accordance with Article 161(1)(b) TRLGSS; pursuant to the 28th Additional Provision of the TRLGSS, the pension insurance contributions paid while the special unemployment allowance was being drawn could not be taken into account in this context. On the other hand, the rejection is now no longer based on Article 48 of Regulation No 1408/71, i.e. on the fact that Mrs Salgado Alonso had paid contributions for the statutory retirement pension in Spain for less than one year.

22. In the proceedings before the Court of Justice Mrs Salgado Alonso, the Spanish Government, the Commission and — jointly

23. The crux of the problem underlying the main action is that under Spanish law the contributions paid by the State employment agency (INEM) into the pension insurance scheme for the recipients of special unemployment allowance have the effect merely of increasing, not of establishing entitlement. This follows from the 28th Additional Provision of the TRLGSS, which, according to information provided by the defendants and the Spanish Government, was intended in particular to clarify the current legal situation.

24. As the defendants and the Spanish Government have emphasised in the proceedings before the Court of Justice, recipients of special unemployment allowance must in any case, under Article 215(1)(3) TRLGSS, already satisfy all the conditions for the granting of a statutory retirement pension, with the exception of the retirement age. In particular, they must be able to demonstrate that they have completed the qualifying periods required by Article 161(1)

(b) TRLGSS. Thus the purpose of INEM's payment of *further* pension contributions *while* the special unemployment allowance is being drawn is not to *establish* entitlement to a pension — the conditions for this must in any case be satisfied by those concerned — but rather continuously to *increase* that entitlement.⁸ In this way, those concerned are to be enabled, despite unemployment due to their age, to increase their pension claims so that they do not remain 'frozen' at the level which they had reached when they became unemployed.

1. Article 45 of Regulation No 1408/71

26. In accordance with the legislative task defined in Article 42(a) EC, Article 45 of Regulation No 1408/71 requires the pension insurance institutions to take account, when calculating periods of insurance and residence, of periods which the claimant has completed in other Member States. The ultimate aim in this is to prevent migrant workers from losing entitlements or advantages in the field of social security because they have worked in more than one Member State, since any threat of the loss of entitlements or advantages may discourage workers from exercising their right to freedom of movement.⁹

A — The first question

25. With its first question the referring court essentially seeks to establish whether Article 45 of Regulation No 1408/71 and Articles 12 and 39 EC preclude a national provision such as the 28th Additional Provision of the TRLGSS, which prescribes that certain pension contribution periods may have the effect merely of increasing, not of establishing entitlement.

27. As is evident *inter alia* from the fourth recital of Regulation No 1408/71, however, this rule does not lead to any *harmonisation* of the Member States' social security legislation, but merely brings about *coordination* which takes account of the special characteristics of national social security legislation.¹⁰ This affects the present case and others like it in two ways in particular:

8 — At the hearing, however, Mrs Salgado Alonso's representative expressed doubts about the pension entitlement having actually been increased, given the small amount of the contributions paid by INEM.

9 — See, for example, Case 232/82 *Baccini* [1983] ECR 583, paragraph 17, Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22, and Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 41.

10 — See also Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 50.

28. Firstly, Regulation No 1408/71 does not specify *whether* a pension entitlement may be made conditional on *qualifying periods* or *how long* the periods may be. The Member States continue to be competent for establishing the conditions for the granting of social security benefits and, where necessary, making them stricter, provided that the conditions established do not give rise to overt or disguised discrimination against Community workers.¹¹

29. The Spanish legislature is thus free to provide for a general qualifying period for a statutory retirement pension of at least fifteen years of contribution and a special qualifying period of two years of contribution within the fifteen years immediately preceding the operative event (Article 161(1)(b) TRLGSS). Regulation No 1408/71 merely stipulates that parts of this qualifying period completed under the legislation of other Member States must be taken into account as if they were periods completed under Spanish legislation (see, in particular, the second sentence of Article 45(1) of that regulation).¹²

11 — *Ferreiro Alvite*, paragraphs 22 to 24, and *Martínez Losada*, paragraph 43, both cited in footnote 7; see also Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27.

12 — This is also reflected in *Ferreiro Alvite* (cited in footnote 7, paragraph 26), which refers to the same qualifying periods as those at issue in the present case, merely considering them from a different angle (entitlement to special unemployment allowance rather than — as in this case — entitlement to a statutory retirement pension).

30. In the present case there is nothing to suggest that periods of insurance or residence completed in other Member States are not taken into account. If Mrs Salgado Alonso has not completed the qualifying period required by Article 161(1)(b) TRLGSS even with account taken of the pension insurance periods completed in Germany and Switzerland, a third country — and this was confirmed by her representative at the hearing before the Court of Justice — the rejection of her application for a statutory retirement pension cannot to this extent be inconsistent with Article 45 of Regulation No 1408/71.

31. Secondly, Regulation No 1408/71 does not stipulate — even in the legal definition given in Article 1(r) — *what periods* specifically represent periods of insurance. This too is determined solely by the legislation of the Member State in which benefits are applied for; a Member State is therefore entitled to make the granting of a benefit conditional on the completion by those concerned of periods classed as ‘periods of insurance’ under its own legislation.¹³ The regulation governs only the aggregation of the insurance periods completed in different Member States, not the conditions under

13 — *Martínez Losada* (cited in footnote 7, paragraphs 34 and 35) and Case 388/87 *Warmerdam-Steggerda* [1989] ECR 1203, paragraphs 10, 17 and 19.

which those insurance periods are constituted.¹⁴

32. The Spanish legislature is thus free to attribute to contributions made in certain periods the effect of both establishing and increasing entitlement, while attributing to other periods the effect merely of increasing, not establishing entitlement (the latter is brought about, for example, by the 28th Additional Provision of the TRLGSS). Article 45 of Regulation No 1408/71 merely requires that it be ensured that periods completed in other countries are taken into account in the same way as periods completed under Spanish law.

34. The fact that, moreover, a Spanish court had previously awarded Mrs Salgado Alonso the special unemployment allowance even though she had not — as far as can be seen — completed the qualifying periods required by national law, i.e. Article 215(1)(3) TRLGSS in conjunction with Article 161(1)(b) TRLGSS,¹⁵ is solely a matter for national law. It must also be established under national law whether and in what form the referring court is now bound by that earlier national court ruling if the same qualifying periods (Article 161(1)(b) TRLGSS) now become relevant in its case, though this time in connection with the granting of a statutory retirement pension, for which an application has been made.

2. Article 39 EC

33. In this respect, however, there is again no indication in the present case that periods of insurance or residence completed in other Member States are not taken into account. On the contrary, the parties to the main proceedings disagree over the consideration of *Spanish*, not of foreign contribution periods. If the competent institution refuses to recognise periods completed under the legislation which it itself must apply, i.e. under its own system, the problem does not lie with Article 45 of Regulation No 1408/71.

35. In its request for a preliminary ruling the referring court assumes, in agreement with the view held by Mrs Salgado Alonso, that only workers who have exercised their right to freedom of movement are affected by a rule such as the 28th Additional Provision of the TRLGSS. This being the case, it also asks

¹⁴ — See also *Drake* (cited in footnote 11, paragraph 26).

¹⁵ — As already mentioned, this was also confirmed by Mrs Salgado Alonso's representative at the hearing before the Court of Justice.

in its first question for information on the interpretation of Article 39 EC.

able situations or the application of the same rule to different situations.¹⁸

36. The fact that Mrs Salgado Alonso, a Spanish national, is engaged in a legal dispute with Spanish agencies does not preclude the application of Article 39 EC, since any Community citizen who has exercised his right to freedom of movement as a worker and has been employed in another Member State falls, irrespective of his place of residence and his nationality, within the scope of Article 39 EC.¹⁶ This is true of Mrs Salgado Alonso, who was employed in Germany.

37. According to settled case-law,¹⁷ Article 39 EC prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.

38. However, discrimination presupposes the application of different rules to compar-

39. According to the available information, the statutory qualifying periods (Article 161 (1)(b) TRLGSS) apply to all workers *without distinction* and thus both to workers who have spent their whole working life in Spain and to those who have occasionally been employed in other Member States as migrant workers. Similarly applicable *without distinction* is the preclusion of the entitlement-establishing effect of contribution periods which have been completed while the special unemployment allowance has been drawn (28th Additional Provision of the TRLGSS); consequently, the pension contributions paid by INEM while the special unemployment allowance was granted may not be taken into account for calculating qualifying periods in the case of either migrant workers or workers who have remained in Spain.

40. With respect to the qualifying periods required by Article 161(1)(b) TRLGSS and the implications of the 28th Additional

16 — See, for example, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 27, Case C-209/01 *Schilling* [2003] ECR I-13389, paragraph 23, and, earlier, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 to 17.

17 — See, for example, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11, Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17, and Case C-400/02 *Merida* [2004] ECR I-8471, paragraph 21.

18 — See no more than Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, Case C-342/93 *Gillespie* [1996] ECR I-475, paragraph 16, and *Merida*, cited in footnote 17, paragraph 22.

Provision of the TRLGSS migrant workers are also in a situation comparable to that of workers who have remained in Spain, since workers remaining in Spain who, because of long-term unemployment, for example, have not been able to achieve fifteen years of contribution or have achieved less than two years of contribution within the last fifteen years similarly fail to complete these qualifying periods. Because of the 28th Additional Provision of the TRLGSS they too are unable subsequently to overcome the hurdle of the qualifying periods.

41. In a situation such as this there is no evidence of direct (overt) discrimination against migrant workers within the meaning of Article 39 EC.

42. Indirect (covert) discrimination against migrant workers would presuppose that there was at least a risk that the 28th Additional Provision of the TRLGSS (actually) placed migrant workers returning to Spain at a particular disadvantage.¹⁹ Only where such a disparity between migrant workers and workers remaining in Spain can be demonstrated — possibly from a

study of the statistics — can Article 39 EC preclude a rule such as the 28th Additional Provision of the TRLGSS.

43. Indirect discrimination would be suggested, for example, if migrant workers returning to their home country were exposed there to a far more frequent risk of long-term unemployment than workers who had been employed only in Spain. For it would then be more difficult for them to make up for the pension contribution periods they lacked, and the 28th Additional Provision of the TRLGSS would have a greater impact on them than on workers who had remained in Spain.

44. Neither the referring court²⁰ nor the parties to the proceedings²¹ have, however,

19 — *Merida* (paragraph 23) and *O'Flynn* (paragraph 20), both cited in footnote 17.

20 — The order for reference presupposes the existence of discrimination only in the wording of the questions referred ('...with the result that only workers who have exercised the right to freedom of movement are affected by that provision of national law ...').

21 — The Commission refers to Case C-290/00 *Duchon* [2002] ECR I-3567, paragraphs 37 and 38, and *Paraschi* (cited in footnote 9, paragraph 24). However, both cases explicitly concerned the failure to consider facts or circumstances which had occurred in other Member States. Nothing comparable is recognisable as regards the Spanish legislation relevant here (see paragraphs 39 and 40 of this Opinion). Inferences for the present case cannot therefore be drawn from either judgment.

referred to specific factors which might corroborate the contention that migrant workers are placed at a greater disadvantage by the Spanish legal situation than persons who have not exercised their right to freedom of movement. If the need arose, it would be for the national court to establish the necessary facts in this regard.

3. Article 12 EC

46. As Article 39 EC is already relevant to the main proceedings, the general prohibition of discrimination for which Article 12 EC provides does not apply.²³

4. Interim conclusion

45. It may be mentioned, in passing, that it is not an inadmissible *restriction* of workers' freedom of movement for there to be longer qualifying periods in one Member State than in another or for certain contribution periods to have the effect merely of increasing, not of establishing entitlement. For the Treaty does not guarantee a worker that the social security rules are the same in all the Member States. As Article 42 EC and Regulation No 1408/71 provide only for coordination, not for harmonisation of the Member States' legislation in the field of social security, material and formal differences may continue to exist between the social security systems.²² Where such differences exist, the principle of the aggregation of contribution periods ensures that migrant workers do not lose any social security entitlements or advantages.

47. For the aforementioned reasons neither Article 45 of Regulation No 1408/71 nor Articles 39 EC and 12 EC preclude national rules such as the Spanish 28th Additional Provision of the TRLGSS, which prescribes that certain pension contribution periods may have the effect merely of increasing, not of establishing entitlement.

B — *The second question*

48. With its second question the referring court essentially seeks to establish whether

²² — See also, in this context, *Hervein* (cited in footnote 10, paragraphs 50 and 51) and also, in the context of tax law, Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 55.

²³ — *Weigel* (cited in footnote 22, paragraphs 57 to 59); see also Case C-65/03 *Commission v Belgium* [2004] ECR I-6427, paragraphs 26 and 27.

the calculation of periods of insurance and residence within the meaning of Article 48 of Regulation No 1408/71 should take account only of periods which have the effect of establishing entitlement or also of periods which have the effect only of increasing entitlement.

Alonso's application was partly based on that provision. In the meantime, the grounds for that decision have changed. The rejection of Mrs Salgado Alonso's application for a pension is no longer based on Article 48 of Regulation No 1408/71, thus bringing it into line with the joint administrative practice of INSS and INEM.²⁵ The problem with the interpretation of that provision is therefore now only hypothetical and no longer relevant to the ruling in the main action. *To this extent* the request for a preliminary ruling has thus become superfluous, and an answer is no longer necessary.²⁶

1. Relevance to the ruling

49. Although it is in principle solely a matter for the national court to determine whether a question referred is relevant to its ruling, the Court of Justice can, in exceptional circumstances, examine the conditions in which the case was referred to it by the national court, since the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.²⁴

50. Originally, the interpretation of Article 48 of Regulation No 1408/71 was relevant to the judgment to be given by referring court, since INSS's decision rejecting Mrs Salgado

2. Appraisal of the substance

51. It is therefore merely in the alternative and for the sake of completeness that the legal problems raised by the referring court in its second question are discussed briefly in the following.

52. Article 48 of Regulation No 1408/71 was created for cases where the insured person completes the applicable qualifying periods (owing to the recognition of periods completed in other Member States²⁷), but the

²⁴ — See paragraphs 26 and 27 of my Opinion of today's date in Case C-225/02 (cited in footnote 3, with further references).

²⁵ — See paragraph 13 of this Opinion.

²⁶ — On the matter of requests for preliminary rulings being superfluous because they are no longer relevant to the judgment to be given, see paragraphs 28 to 38 of my Opinion in Case C-225/02 (cited in footnote 3).

²⁷ — Article 45 of Regulation No 1408/71.

pension entitlement is so small (because of the pro rata principle²⁸) that the payment of a '*trivial pension*' would result. To avoid the administrative expense of determining and paying such pensions, the pension insurance institution concerned is released from its obligation to pay benefits (Article 48(1)) and the relevant contribution periods are instead taken into account by other institutions (Article 48(2) and (3)).

53. If Article 48(1) of Regulation No 1408/71 were interpreted as meaning that it did not cover all contribution periods, only some of them, namely those which established entitlement, there would be a greater likelihood of only a trivial pension being calculated and, therefore, of a pension insurance institution being released from its obligation to pay benefits. In Mrs Salgado Alonso's case, for example, the recognition only of the contribution period of 182 days in 1992, which is considered to establish entitlement, would result in the payment of a trivial pension of this kind; the situation would be different if the additional 3 219 days for which INEM paid contributions were also taken into account: the pension would then no longer be trivial.

54. The release of an institution from its obligation to pay trivial pensions and the burden consequently placed on the institutions of other Member States (Article 48(2)

and (3) of Regulation No 1408/71) can, however, only ever be an absolute exception, since the institutions of other Member States cannot reasonably be expected to tolerate a Member State's institution releasing itself from its obligation at their expense simply by not taking contribution periods into account. Thus, to minimise the burden on the institutions of other Member States, Article 48 of Regulation No 1408/71 should be interpreted to mean that it takes into account *all* contribution periods, including those which have the effect merely of increasing entitlement, not of establishing it.

55. The regulative context of Article 48 of Regulation No 1408/71 likewise argues for *all contribution periods* to be taken into account, including those which have the effect merely of increasing entitlement. Article 48 of Regulation No 1408/71 provides for an exception to Article 46(2) of the same regulation. Article 48 should therefore be interpreted in accord with Article 46(2), which for its part concerns the calculation of the actual amount of pension entitlement,²⁹ not the basic conditions for the existence of an entitlement to benefits.³⁰ In the calculation of the actual amount of pension entitlements, of course, account must also

²⁸ — Article 46(2) of Regulation No 1408/71.

²⁹ — Meaning the calculation of the theoretical amount of benefit and the amount of benefit actually due.

³⁰ — Whether an entitlement to benefits actually exists is determined in accordance with Article 45 of Regulation No 1408/71, to which Article 46(2) explicitly refers. Accordingly, it can be only in the context of Article 45 that it is decisive whether a contribution period has the effect of (merely) increasing or of (also) establishing entitlement.

be taken of periods which have the effect merely of increasing, not of establishing entitlement.

residence within the meaning of Article 48 of Regulation No 1408/71 of *all contribution periods*, including those which do not have the effect of establishing entitlement, merely of increasing it.

56. Consequently, account should be taken in the calculation of periods of insurance and

V — Conclusion

57. In view of the foregoing considerations I propose that the Court of Justice should answer the questions referred to it by the Juzgado de lo Social nº 3 de Orense for a preliminary ruling as follows:

Neither 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 nor Articles 39 EC and 12 EC preclude a national rule such as the Spanish 28th Additional Provision of the TRLGSS, which prescribes that certain pension contribution periods may have the effect merely of increasing, not of establishing entitlement.

There is no longer any need to reply to the remainder of the request for a preliminary ruling.