2. **Article 94 (5) of Regulation No 1408/71 must be interpreted as meaning that the competent institution of a Member State is not entitled to substitute itself for an insured person with regard to the review of the rights which that person acquired before the regulation came into force.**

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 13 October 1976.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 6 OCTOBER 1976 [1]

Mr President,
Members of the Court,

The plaintiff in the main action is the widow of an Italian mineworker who was employed first in Italy and then in Belgium, where he died on 8 August 1956 in the pit disaster at Bois du Cazier. She has three children who were born on 18 March 1948, 31 March 1954 and 1 March 1956.

After the death of her husband the plaintiff returned to Italy. She received in Italy a pension for accident at work on her own behalf and an orphan's pension and family allowances for her three children provided by the Belgian social security scheme. In fact, as we shall see, she did not receive the orphan's pension and family allowances in full.

The competent organization, the Caisse de compensation des allocations familiales for the mining industry of the Charleroi and Basse-Sambre coalfields, stopped paying her family allowances for her eldest child on 17 March 1966 and for her second child on 30 March 1972, that is, in each case, on the dates on which they reached their eighteenth birthdays. The payment of family allowances for the youngest child ceased on 30 September 1972, although she was then only sixteen years old.

It is difficult to be sure why the Belgian Caisse de compensation des allocations familiales considered itself justified in ceasing the payments in question since that organization did not consider it necessary to appear or be represented before the Tribunal du Travail (Labour

1 — Translated from the French.

Court), Charleroi. Furthermore, neither the Caisse nor the Belgian government has made use of the right to submit observations to this Court, and the file sent by the national court contains little information about the administrative stage of the case.

I am therefore reduced to conjecture on the basis of the observations submitted by the plaintiff in the main action and by the Commission.

However, I consider the reasoning behind the decision of the Caisse to be as follows:

(a) As regards the two elder children

The Caisse has applied, on the one hand, the combined provisions of the Belgian legislation on accidents at work and family allowances in conjunction with, on the other, Regulation No 3 of the Council on social security for migrant workers, at least, according to its own interpretation of that Community regulation.

Although you are not required to give a ruling on this latter point, it is nevertheless necessary to recall the national legislation on which the Caisse based its action.

Under Article 4 (2) (B) of the Law of 24 December 1903 on compensation for injury resulting from accidents at work (in the wording of the Royal Consolidating Decree of 28 September 1931).

'Where the accident has caused the death of the victim the following allowances shall be paid: ...

2. .....

B. In the case of legitimate children born or conceived before the accident and of natural children acknowledged before the accident, who are orphans of the father or of the mother and who have not reached the age of 18 years, *a temporary annuity up to the age of 18 years* amounting in respect of each child to 15 % of the annual salary, provided that *in toto* such pension shall not exceed 45 % of the said salary'.

At the same time, by virtue of Article 56 (a) of the Consolidated Laws on family allowances for employed persons (in the words of the Royal Consolidating Decree of 19 December 1939, as amended by the Law of 27 March 1951), the applicant was entitled on behalf of her children to benefits under the legislation on family allowances.

Under other provisions of the Belgian legislation in force at the time in question, family allowances were payable up to the age of 16 years. As an exception, however, they were payable until the age of 21 years where a child was receiving occupational training or secondary education and until 25 years where he was receiving higher education.

However, the *overlapping* of these two benefits, the orphan's temporary pension for accident at work and family allowances, was governed by Article 50 (a) (2) of the Consolidated Laws which provided that:

'The amount of any pensions paid to orphans under legislation on compensation for accidents at work and occupational diseases shall be deducted from the amount of the family allowances provided for in the present chapter. However, no such deduction shall be made if its effect is to reduce the aggregate amount of the family allowances paid to all the orphans of a worker to a sum which is less than twice that obtained by applying the scale provided for in Articles 40 and 42 ...'

This provision appears to have been repealed in 1967. However, Article 183 of the Consolidated Laws on family allowances which are still in force provides that:

'A person in receipt of the family allowances provided for under Articles 50 (a) and 56 (a) shall cease to receive any other allowances for orphans whether paid by the Treasury under the legislation and regulations at present in force, by the Fonds National de Retraite des Ouvriers Mineurs (National Pension Fund for Mineworkers), the Fonds des Veuves et Orphelins (Fund for Widows and Orphans) or the Fonds d'Allocations pour Employés (Fund for the Payment of Allowances to Workers.'

It therefore appears that the plaintiff in the main action received on behalf of her children only family allowances paid at the increased rate for orphans and that the sum received was made up of the amount of the annuity to which the children were entitled together with the difference between these special family allowances and the benefit payable for accident at work.

However, and here I am approaching the area in which your interpretation is required, the Caisse also applied to the applicant the provisions of Article 43 (5) of Regulation No 3 on social security for migrant workers, in the version in force at that time. The terms of that provision are as follows:

'Where the death of a wage-earner or assimilated worker opens entitlement to a pension in respect of industrial accidents or occupational disease pursuant to the legislation of the Member State, family allowances in right of his children who permanently reside or were brought up in the territory of another Member State shall be granted in accordance with the legislation of the country from which the pension is due as though the children were permanently resident or were brought up in the territory of that State.'

It is on the basis of the application of the provisions of the national legislation in conjunction with the Community regulations that the Caisse stopped paying the applicant family allowances in respect of her two elder children. Underlying that application is an interpretation of the provisions of Article 42 (5) on which your are required to give a ruling and which appears to be as follows:

The Caisse considered that family allowances were only paid to the widow because her children received a temporary annuity as a result of the death of their father, a victim of an accident at work. As the payment of that annuity was absorbed or replaced by the payment of the larger sum of the special family allowances for orphans, it continued to pay the allowances in Italy under Article 42 (5) of Regulation No 3 but, on the basis of Article 4 (2) (B) of the abovementioned law on accidents at work, only until the age of 18 years. As the right to the payment of the temporary annuity for orphans ceases when the beneficiaries have reached the age of 18 years, the Caisse considered that the family allowances themselves were no longer payable. It thus linked the right to a pension for accident at work to the right to family allowances.

The Belgian legislation on accidents at work was subsequently amended by the Law of 10 April 1971. Article 19 of that law provides:

'Children, grandchildren, brothers and sisters shall receive a pension as long as they are entitled to family allowances and at all events until they reach the age of 18 years ...'

Henceforth, therefore, payment of the pension is solely dependent upon the right to family allowances and may be continued beyond the age of 18 years in so far as the right to family allowances is itself maintained (for example, where the children in question are still at school, undergoing vocational training or University study).

However, this provision, which came into force on 1 January 1972 (by virtue of the

Royal Decree of 25 October 1971), has no retroactive effect.

At that date, the eldest child was already more than 18 years old. The second child only reached that age on the following 30 March. I therefore consider that he was entitled to receive the continued payment of the orphans' annuity, provided at least that he satisfied the conditions laid down under Belgian law for the receipt of family allowances. However that may be, the Caisse appears to have considered that he did not fulfil the conditions and ceased payment of the family allowances on behalf of the second child as from the day on which he reached the age of 18 years.

(b) As regards the third and youngest child, who was only 16 years old on 1 January 1972 and was therefore entitled to receive family allowances on the basis of the new Belgian legislation, the Caisse appears to have based discontinuance of that payment on another area of the Community regulations.

Article 78 (2) (b) (i) of Regulation No 1408/71 provides that:

'Orphans' benefits shall be granted ... irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident or situated;

(b) for the orphan of a deceased worker who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State *in whose territory the orphan resides* provided that, taking into account where appropriate Article 79 (1) (a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State ...'

As regards family allowances for orphans, Article 78 abolished all reference to pensions for accidents at work or occupational disease. Furthermore, it excludes from its field of application pensions or orphans' pensions granted under insurance schemes for accidents at work or occupational diseases. As regards the family allowances payable to orphans under the Belgian scheme, the statement made by the Belgian State within the context of Article 5 of Regulation No 1408/71 (Official Journal of the European Communities No C 12 of 24 March 1973, p. 11) shows that they are covered by the term 'benefits' used in Article 78.

Furthermore, Article 94 (5) of Regulation No 1408/71 provides that:

'The rights of a person to whom a pension was awarded prior to the entry into force of this regulation may, on the application of the person concerned, be reviewed, taking into account the provisions of this regulation. This provision shall also apply to the other benefits referred to in Article 78.'

All the evidence suggests, according to the Caisse, that the periods completed in Italy by the husband of the plaintiff entitle her to a pension under the Italian legislation. It is thus for her to request the competent Italian authorities to pay her such pension, which will at the same time entail the payment of Italian family allowances.

To the extent to which state of the file submitted by the national court enables an analysis to be made, the foregoing is the reasoning behind the action taken by the Belgian institution.

I am unable to share this point of view.

1. As regards the two eldest children.

The system established by the original version of Regulation No 3 in order to determine the rights to family allowances of beneficiaries of pensions was as follows:

The beneficiary of a pension under the legislation of a Member State is entitled

to the family allowances provided for by that legislation if he is permanently resident in the territory of the competent State.

If the beneficiary of a pension is permanently resident in the territory of a Member State other than the competent State, he is likewise entitled to the allowances in question but only up to the amount of the family allowances or supplements to pension in respect of dependent children payable under the legislation of the country of residence, or of the sum of those benefits if the latter legislation provides for the two types of benefits to be paid concurrently (Article 42 (2)).

After 1 February 1964, the date of the entry into force of Regulation No 1/64 of the Council of 18 December 1963, the principle laid down by the new wording of Article 42 is that the right to family allowances, to which are assimilated supplements or increases in pensions for dependent children, shall be determined in accordance with *a single system of legislation:* benefits in respect of dependent children shall be paid in accordance with the legislation and at the expense of the competent institution of a single Member State, as if the worker had completed his whole career under the legislation of that State. The total sum of the family allowances payable under the legislation applicable is thus transferred (Article 42 (2) (b)).

In my opinion the Italian Government is quite correct in its observation that the wording of Article 42 (5), which was in force when family allowances ceased to be paid on behalf of the two eldest children, in no way links the period during which family allowances are paid to the payment of a pension for accident at work. The payment of family allowances is regarded as taking place independently within the framework of the general social security scheme of the State which is liable to pay the pension, *as if the children were permanently resident or were brought up in the territory of that State.* Furthermore, the text of Article 42 (5) merely refers to *entitlement* to a pension for accident at work and not to its actual payment. It also refers, even though not exclusively, to the widow's pension for accident at work and makes the payment of family allowances dependent on the existence of a right to such a pension alone provided, of course, that, as regards age, the conditions for entitlement to those family allowances fixed by the legislation in question are satisfied. It will thus be for the Caisse to cooperate with the Italian authorities in enquiring whether this was in fact the case and, in particular, in discovering whether the plaintiff's children have continued their studies after the age of 18 years.

2. As regards the youngest child

Certain national systems of legislation provide for family allowances to be paid to the children of pensioners. Other systems provide for the same children to be awarded supplements to pension or orphans' pensions, while others allow the various benefits to be drawn concurrently. In order to resolve the difficulties resulting from these disparities Articles 77 and 78 of Regulation No 1408/71 establish the principle that all benefits granted to the children of pensioned or deceased workers by way of the other branches of social security, with the exception of benefits granted under insurance schemes for accidents at work and occupational diseases, are treated as family allowances.

Article 77 of Regulation No 1408/71, which corresponds to paragraphs (1) to (4) of Article 42 of Regulation No 3, now settles the question as follows: irrespective of the Member State in whose territory the children or the pensioner are residing, benefits for children shall be granted in accordance with the legislation and paid by the competent institution of *one Member*

State only, as if the worker had completed his career under the legislation of that State. Where a pension is payable under the legislation of one Member State only, the benefits shall be granted in accordance with the legislation of that State (Article 77 (2) (a)).

Under Article 78 of Regulation No 1408/71, which corresponds to Article 42 (5) of Regulation No 3 and extends to family allowances and special allowances for orphans, benefits for children shall be granted in accordance with the legislation and paid by the competent institution of *one Member State only,* irrespective of the Member State in whose territory the children or the pensioner are resident, as if the worker had completed his career under the legislation of that State (Article 79).

Where a deceased worker was subject to the legislation of one Member State only, orphans' benefits shall be granted in accordance with the legislation of that State (Article 78 (2) (a)).

On the other hand, where a deceased worker was subject to the legislation of several Member States, benefits shall be granted in accordance with the legislation of the Member State in whose territory the orphan *resides* provided that a right to one of the benefits referred to in Article 78 (1) is acquired under the legislation of that State (Article 78 (2) (b) (i)).

If no benefit is payable under the legislation of the Member State in whose territory the orphan resides, benefits shall be granted in accordance with the legislation of the Member State under which the deceased worker had completed the longest insurance period, provided that a right is acquired by the orphan under the legislation of that State. If no right is acquired, the conditions for the acquisition of such right under the legislations of the other Member States shall be examined in decreasing order of the length of insurance or residence periods completed under the legislation of those Member States (Article 78 (2) (b) (ii)). This is, moreover, the interpretation which you had given to Article 42 (6) of Regulation No 3 (Judgment of 17 June 1970, *Caisse de compensation pour allocations familiales des charbonnages du couchant de Mons* v *Francesca Beninato (née Di Bella), widow of Vincenzo Beninato,* [1970] ERC 415).

The foregoing provisions of Regulation No 1408/71 have thus filled a lacuna in Regulation No 3. Articles 42 (5) and (6) of that regulation only referred to family allowances for orphans, a fact which sometimes justified the payment of reduced benefits alone or on the other hand resulted in total or partial overlapping of benefits, depending on the country of residence of the orphan, where, during his career, the deceased worker had been subject to various systems of legislation, some of which provided for the payment of pensions and some for the award of family allowances to orphans.

However, this does not seem to be the case here: under Italian legislation the plaintiff receives neither orphans' benefit nor any family allowances on behalf of her children. The fact that the plaintiff is entitled to apply to the Italian authorities for orphans' benefits or family allowances and that, if such benefits are granted, they might overlap with the Belgian benefits, contrary to the prohibition contained in Regulation No 1408/71, cannot entitle the Belgian authorities to rely on such a possibility in order to discontinue payment of the benefits which they were paying to the plaintiff when to do so results in the immediate future in a total absence of benefits.

In fact, by taking such action, the Caisse is seeking to compel the plaintiff in the main action to use her right to apply for a proportion of the Italian pension. For reasons of which she is the sole judge the plaintiff did not decide to take that

course of action. It is possible that one of those reasons is that, if such a pension were granted, she would lose the right to the Belgian family allowances and that the loss would not be compensated by equivalent Italian benefits.

In a similar situation (Judgment of 13 July 1976, in Case 19/76, *Pietro Triches* v *Caisse de compensations pour allocations familiales de la région Liègeoise)* you ruled that the fact that Article 42 (2) of Regulation No 3 establishes inequality of treatment according to whether an insured person receives a pension under the legislation of a single Member State or of several States does not affect the validity of that provision. I therefore consider that if the plaintiff's position with regard to her children were to be settled directly on the basis of the provisions of Article 78 of Regulation No 1408/71, the aim of which is to avoid both the overlapping of benefits and a total absence thereof, the settlement would be in no way unlawful.

However, Article 94 of Regulation No 1408/71 has expressly limited the right to apply for the review of a pension or other benefit *to those to whom a pension was awarded.*

When the Community authorities have adopted a different solution they have said so expressly. Thus, for example, Article 4 (4) of Regulation No 1/64 provided as a transitional provision:

'Family allowances due in pursuance of Article 42 and supplements or increases to pensions in respect of children, which have already been the subject of determination before the entry into force of this regulation, shall be the subject of a fresh determination on the part of a competent institution in pursuance of the provisions of this regulation as from the date of its entry into force.'

That is not the case here.

I therefore consider it unnecessary to resort, in order to reinforce this interpretation, to the statement contained in the minutes of the Council meeting at which the regulation was adopted which shows that the intention of the authors of that regulation with regard to Article 94 was that it should maintain acquired rights.

I am therefore of the opinion that you should rule that:

(1) The allowances paid under Article 42 (5) of Regulation No 3 do not inevitably cease to be payable on the expiry of the right to an orphans' pension which is payable under a national system of legislation;

(2) The competent institution of a Member State is not entitled to substitute itself for an insured person with regard to the review of a right to family allowances acquired by that person before Regulation No 1408/71 came into force.