OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 31 MARCH 1976 [1]

Mr President,
Members of the Court,

1. The proceedings pending before the national court arise from the refusal of the French social security institution, to which the worker applied for award of his old-age pension, to take into account the contribution period completed in Algeria. The person concerned, a Belgian national, has always worked in France, from 1930 until pensionable age except for a period in Algeria from 1957 to 1961. At that time Algeria formed part of French territory so that then too he had the status of a migrant worker within the meaning of Regulation No 3 of the Council concerning social security for migrant workers.

The French social security organization had maintained that the Law of 26 December 1964, which provided that contribution periods completed in Algeria prior to 1 July 1962 should be taken into account in the case of French subjects, was not applicable to the applicant because the benefits conferred by this law were in principle reserved for nationals and aliens could avail themselves of it only if they satisfied the requirements laid down be the decree of 4 September 1962, namely that they must have shown devotion to France or have rendered exceptional services to that country. To have worked all their lives in France or, at least, on French territory, as employees of French undertakings was not considered sufficient.

On the other hand, the Commission de Recours Gracieux (committee for administrative review of social insurance decisions), to which the worker appealed, granted his application. The Directeur Régional de la Sécurité Sociale, Nancy (Regional Director of Social Security, Nancy), annulled this decision, whereupon the applicant appealed to the Commission de Première Instance du Contentieux de la Sécurité Sociale de Longwy (Commission of First Instance for Disputes in Social Security matters), Longwy, which once more ruled in his favour. An appeal against this decision was made before the Cour d'appel, Nancy, by the Regional Director, who maintained principally that because the law of 26 December 1964 was a law of national unity, it could not be regarded as applicable to aliens except in the cases expressly provided for by French legislation.

The Cour d'appel, Nancy, holding that under Article 8 of Regulation No 3 of the Council of the EEC, the nationals of a country of the Community who are permanently resident in another Member State enjoy social security benefits in the same way as nationals of the host country, and that, furthermore, the second paragraph of Article 16 of Regulation No 109/65 lays down that the removal of Algeria from the list of territories in Regulation No 3 does not affect acquired rights, has submitted questions for a preliminary ruling on the interpretation of Regulation No 3 in the following terms:

'1. May the discrimination provided for between French nationals and aliens by the Decree of 4 September 1962 be applied to a Community citizen where its effect must be to deprive him of an old-age pension awarded to French nationals?

2. Hence, in order to avail himself of the Law of 26 December 1964, which takes into account for the purposes of old-age benefits periods of employment completed in Algeria

1 — Translated from the Italian.

before 1 July 1962, must a Belgian national demonstrate that he fulfils the conditions imposed on aliens by the above-mentioned Decree of 4 September 1962?'

2. According to the Regional Director of Social Security, Nancy, the applicant worker cannot rely on Regulation No 3 because, by virtue of the provision in Article 5 of Regulation No 109/65 of the Council, it has not applied to Algeria since January 1965 and it is accordingly no longer applicable to the award of benefits falling due after that date.

If, however, it is accepted that, prior to 19 January 1965, the worker would, under Regulation No 3, have been entitled to have insurance periods completed in Algeria taken into account by the French insurance institution, the fact that Regulation No 3 has since that date no longer been applicable to Algeria cannot cause him to lose that entitlement. According to the preliminary ruling given by the Court in Case 110/73, 'Annex A to Regulation No 3, in its former wording, obliges the French Social Security institutions to honour rights acquired in Algeria by a migrant worker before 19 January 1965' *(Fiege* v *Assurance Maladie Strasbourg* [1973] ECR 1014). This principle was laid down in connexion with the case of a German national who after being awarded, as from 1 November 1962, an invalidity pension by the Caisse Sociale of Oran, a social security institution of the new state of Algeria, had then asked a French social security institution to transfer the pension to Germany.

Again, in its judgment in Case 6/75 *(Horst* v *Bundesknappschaft* [1975] ECR 823) the Court held that the fact that the risk insured against materializes and the claim for a pension is made after that date does not in the least affect the worker's rights. In that case, the main action was concerned with an invalidity claim submitted to a German insurance institution by a German national who had worked in Algeria from July 1960 to June 1962, for which period social security contributions had been paid to the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie. In its judgment the Court, in a further reference to the concept of acquired rights, which Article 16 (2) of Regulation No 109/65/EEC was designed to protect, held that the insurance period completed in Algeria before Regulation No 3 ceased to apply in that territory must be taken into consideration in Member States of the Community for the purposes of acquisition and maintenance of the right to benefit and must therefore be taken into consideration for determining the pensions referred to in Chapters 2 and 3 of Regulation No 3.

This obligation on the part of the insurance institutions of each Member State to take the periods completed in Algeria into account in determining the pension and the fact that these insurance periods relate to work performed on a territory which was French at the material time mean that, ultimately, the financial responsibility for those periods rests with the insurance institutions of the French State. The outcome is clearly that the migrant worker who has reached pensionable age while employed in France, and is resident there at the time of the award of the pension, has the right to require the competent French social security institution also to take into account the insurance periods completed in Algeria under the French social security scheme, regardless of the date on which the application for the award of the pension was submitted.

3. In the light of these precedents, the Commission has suggested that the reply to be given to the French court should be to the effect that a right acquired in Algeria may be asserted against French insurance institutions regardless of any relevant provision of the law in the State concerned.

On the other hand, I would rather reply to the Cour d'appel, Nancy, by keeping strictly to the questions which it has

submitted to the Court. In essence, the French court asks this Court whether it is lawful to deprive the worker concerned of the benefit of the French Law of 26 December 1964 which, as we have seen, allows French nationals to transfer to France insurance periods completed in Algeria before 1 July 1962.

The answer to that question which must be in the negative, necessarily implies that the nationals of the other Member States have the same rights as French nationals but no more.

In Case 110/73, referred to earlier, the Court, after laying down the principle to which I have drawn attention, went on to declare as follows in ground of judgment No 14: 'Moreover, in view of the prohibition, contained in Articles 48 to 51 of the Treaty, on any discrimination based on nationality between workers of the Member States, any worker from one of the Member States is to be treated, for the purposes of Regulation No 3, as if he were a national in similar circumstances'. This constitutes an implied reference to the abovementioned French Law and makes it impossible for the claim that the Law is one 'of national unity' to prevent its extension to the nationals of other Member States whenever this is necessary to ensure compliance with the principle of nondiscrimination in the field of social security.

The Court turned to this principle as a further reason for the affirmative reply which it gave to the question whether Annex A to Regulation No 3, in its former wording, imposed special obligations on the French social security institutions which differed from those incumbent on the Algerian institutions.

4. I am of the opinion that the Court could confine itself to answering the questions referred to it by the Cour d'appel, Nancy, in the same way. In the case of an answer which, in accordance with the precedents established by this Court, takes account of Article 16 of Regulation No 109/65, a reply in these terms would have the advantage of enabling the Court to avoid having to give consideration of its own motion to certain questions which would arise in the case of a reply which held in favour of the worker quite regardless of French law. Otherwise, the reservation contained in Article 16 of Regulation No 109/65 concerning the maintenance of rights acquired might assume importance not as a provision referring to substantive national law defining and governing social security matters but a straightforward substantive provision capable, in itself, of, in theory, applying to any set of circumstances. It is doubtful whether this would be compatible with the general purpose of Community social legislation which, in the field of social security, does not seek to substitute its own substantive provisions for those of national laws but is essentially designed to coordinate the different national legislative systems in order to eliminate obstacles to the free movement of workers in the Community which may have been produced by the very fact that separate and independent national systems exist alongside each other on the territory of the common market.

Nevertheless, although it must be agreed that, in Article 16 of Regulation No 109/65, the Community legislature intended to enable a migrant worker to transfer, at the cost of French social security institutions, rights which he had acquired against insurance institutions which, while coming within the jurisdiction of the French State until 30 June 1962, subsequently became wholly independent of it (notwithstanding a provision of French law laying down that the transfer shall be available to French nationals), it would be a task of some difficulty to determine the legal basis on which a Member State was burdened with obligations which a third State was under a duty to fulfil. On the basis of the concept of rights acquired, it would be comparatively easy to justify the taking into account of insurance periods

completed in Algeria when it formed part of France, since they could be regarded as periods completed under the French social security scheme to which the rights accrued by workers against that State are, therefore, related, but this does not apply to the insurance periods completed after Algeria became an independent State outside the Community.

Although the concept of rights acquired, to which the abovementioned Article 16 refers, was designed to safeguard existing rights which workers had acquired against France, it obviously does not apply to insurance periods completed under a social insurance scheme of a third state since they could not have conferred any right on the worker under the French system. Otherwise the provision would have to be regarded as being designed not merely for the purpose of safeguarding rights but rather for creating new ones *(ex novo)*, which clearly conflicts with the concept of an acquired right.

This would, in all probability, have consequences which, to put it mildly, would be surprising. Even if he had never had any connexion with the French social security scheme, a national of Member State who had begun work in Algeria after it obtained its independence would, by virtue of Community law, automatically acquire the right until 1965 to benefits in the Community the cost of which, though related to insurance periods completed in a third State, would in the end have to be borne by France, and this right would be in addition to the right which, with respect to the same insurance periods, he was able to assert against Algeria. The need to safeguard freedom of movement for workers in the Community could certainly not be invoked to justify such a result.

There would also be a possibility that, as regard their rights against France, foreign workers might be placed in a position of advantage compared with French nationals. If the latter had worked in Algeria until 1 July 1962 they could not be treated as migrant workers and they could benefit from the transfer of the insurance rights which they had acquired against an institution which now belonged to a third State only by virtue of a French domestic law which had restricted its applicability to the period before Algeria gained its independence. For the succeeding period, in order to avoid differences of treatment which placed them at a disadvantage compared with the nationals of other Member States who could avail themselves of Regulation No 3 until 19 January 1965, should they, too, perhaps be treated as migrant workers within the meaning of Regulation No 3?

On a wider view, however, it would be difficult to discover a satisfactory legal basis for the application or, rather, the extension to circumstances outside the area of the common market of a Community regulation designed to encourage the free movement of workers within the Community. Above all, the question would arise whether such extension had been correctly carried out.

If Article 5 of Regulation No 109/65, which removes Algeria only with effect from 19 January 1965 from the list of territories to which Regulation No 3 applies, were to impose on a Member State obligations relating to circumstances and relationships which were extraneous to it, it would in fact constitute a derogative provision whose effect would in substance be to give Regulation No 3 retroactive effect for workers who were nationals of a Member State of the Community and who had continued to work in Algeria after 1 July 1962. The acquisition of independence by a section of the territory of a Member State, with its concomitant departure from the territory of the Community, means in fact that, in the absence of a provision to the contrary, any Community law designed to govern situations developing within the

Community automatically ceases to apply to that territory. It might also be observed that Regulation No 109/65 contains no explanation whatever of the reasons for extending the application of a provision of an internal Community law to circumstances outside the Community, which, as I have stated, is an exceptional occurrence and a departure from principle.

These difficult issues will not arise if, in defining the subjective scope of the French law to which the court of reference refers, the Court accepts my recommendation to base its decision purely on the principle of non-discrimination, contained in the abovementioned provisions of the Treaty and reiterated in Article 8 of Regulation No 3.

I conclude by suggesting that the answer to be given to the Cour d'appel, Nancy, should be that Articles 48 to 51 of the Treaty and Article 8 of Regulation No 3 do not allow the French State to make the rights conferred under its Law of 26 December 1964 concerning the recognition, in the case of workers who are nationals of other Member States of the Community, for the purposes of old-age benefits, of insurance periods completed in Algeria before 1 July 1962, subject to the conditions imposed on aliens by the Decree of 4 September 1962. The said Community provisions confer on nationals of every Member State the right to avail themselves of that Law on terms of equality with French nationals.

If, however, the Court prefers to base its ruling on Article 16 of Regulation No 109/65, it would be advisable that, in declaring that contribution periods completed in Algeria by a national of a Member State create acquired rights within the meaning of that provision, and with the consequences already indicated by the relevant case-law, the judgment should, as suggested in the second question, confine itself to laying down the principle for the period prior to 1 July 1962.