acquire a right to an invalidity pension it is necessary to take into account the insurance periods completed in one of these States as such insured person does not fulfil the conditions laid down in the other for entitlement thereto and where, under the legislation of this latter State, the calculation of benefits is based upon an average wage or an average contribution, without regard to the length of the period of employment, the pro rata calculation must be made after aggregation of all the insurance periods, as provided in Article 28 (1) (b) of Regulation No 3.

Lecourt Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 9 December 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 3 DECEMBER 1975

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour de Cassation of France. It raises a novel point of interpretation of the old Regulation No 3 concerning social security for migrant workers.

Your Lordships will remember that, by the combined effect of Article 24 of, and Annex F to, Regulation No 3, the legislation of Member States relating to invalidity pensions was classified into two types, viz. Type A, under which the amounts of invalidity benefits were, in principle, calculated independently of the duration of insurance periods, and Type B, under which the amounts of such benefits were, in principle, related to the duration of those periods.

The problem in this case arises from the circumstance that the relevant French legislation is of Type A. In order to qualify for an invalidity pension under that legislation a person must have been insured thereunder at least for the twelve months immediately preceding the occurrence of his disability. He must also have worked a specified number of hours. But a person so qualified, was and, I think, still is, entitled, regardless of the actual length of insurance periods

completed by him, to a pension of which the basic amount is a percentage of his average salary over a period of ten years, the percentage depending on the degree of his disability. Up to 1972, the relevant ten years were those immediately before the occurrence of the disability. A decree of 29 December 1972 altered this to the best ten years after 31st December 1947.

Mr Fernand Plaquevent, the appellant before the Cour de Cassation, was born in March 1904. He is a French national. He worked in France from December 1931 to September 1944 and in Germany from October 1944 to December 1952, when he became disabled. After his disablement he received, from the appropriate German social security institution, at first sickness benefit and then, as from August 1954, an invalidity pension. The relevant German legislation is of Type B, but this has no direct bearing on the problem, which would have been essentially the same had that legislation been of Type A.

In 1961 the appellant applied to the Caisse Primaire d'Assurance Maladie of Le Havre, which is the respondent before the Cour de Cassation, for a French invalidity pension. He was not entitled to such a pension under French law taken alone because he was not insured in France at the time when his disability occurred. But, pursuant to the provisions of Regulation No 3, the respondent treated the insurance periods completed by the appellant in Germany as if they had been completed in France and awarded him a pension with effect from 1 January 1959, the date of entry into force of Regulation No 3. As from 1 April 1964 that pension was converted into an old-age pension.

The dispute between the appellant and the respondent relates to the method of computation of the appellant's invalidity pension for the period 1 January 1959 to 1 April 1964. The papers before the Court tell the story of that dispute in some detail. It is a complicated story, both from the procedural point of view and from the point of view of the points of substance that have been raised at one time or another by the parties. There is, however, no necessity for this Court, in order to answer the question referred to it by the Cour de Cassation, to enter into all those complications. That question relates to a single issue between the parties, which is, putting it shortly, whether it was right, in computing the appellant's French invalidity pension, to apply the process of apportionment.

By Decision dated 21 June 1971 the Commission de Première Instance de Sécurité Sociale of Le Havre held that it was right to do so. The Decision of the Commission de Première Instance was affirmed by the Cour d'Appel of Rouen in a Judgment dated 18 October 1972. It is against that Judgment that the appellant now appeals to the Cour de Cassation.

The view upheld by the Commission de Première Instance and by the Cour d'Appel of Rouen was that the appellant's pension should be computed by:

(1) ascertaining the average salary earned by the appellant over the last ten years for which he worked in France — this is FF 5 048·08 per annum, a figure as to which there is now no dispute;

(2) applying to that average the percentage prescribed by French law for the appellant's degree of disability, so as to determine the basic amount of his pension — this percentage has varied over the years, being sometimes 30 %, sometimes 40 % and sometimes 50 %; thus, for instance, for 1959, when the percentage was 40 %, his basic pension worked out at FF 2 019·23 per annum; and

(3) reducing the basic pension thus ascertained to the proportion of it corresponding to the proportion that the insurance periods completed by the appellant in France bore to the

total of the insurance periods completed by him in France and Germany, i.e. in the proportion 44 : 77 — for 1959 this meant a reduction in his basic pension from FF 2 019·23 to FF 1 153·84.

The contention of the appellant is that this third step was not called for, that the mere fact that the insurance periods completed by him in Germany had to be treated as if they had been completed in France in order to render him entitled to a French pension at all did not mean that, in computing that pension, the process of apportionment should be applied.

Whether that contention is correct or not is a question of interpretation of Regulation No 3 and, in particular, of Articles 24 to 28 of that Regulation.

In setting forth the provisions of those Articles, I shall, for convenience, use the present tense, although those provisions are no longer in force.

Article 24, which I mentioned earlier, introduces the Chapter concerning invalidity pensions and defines, by reference to Annex F, legislations of Type A and those of Type B.

Article 25 provides in effect that, in a case where a worker has been subject only to legislations of Type A, bilateral or multilateral conventions between Member States may contain specific provisions differing from those applicable under Article 26.

Article 26 provides, so far as here material, that, in all other cases, the provisions of Articles 27 and 28 (relating to old-age pensions and pensions payable upon a death) shall apply by analogy.

Article 27 (1) sets out the general principle of aggregation derived from Article 51 of the EEC Treaty. Its terms are familiar to Your Lordships. There being no authentic English text of Regulation No 3, I read the French:

'En vue de l'acquisition, du maintien ou du recouvrement du droit aux prestations, lorsqu'un assuré a été soumis successivement ou alternativement à la législation de deux ou plusieurs États membres, les périodes d'assurance et les périodes assimilées accomplies en vertu de la législation de chacun des États membres sont totalisées pour autant qu'elles ne se superposent pas.' (OJ No 30 of 16. 12. 1958)

Article 27 (2) is not here in point.

Article 28 is a long Article, consisting of four paragraphs, of which the purpose is to lay down in detail how effect is to be given to the general principles stated in Article 27. The longest paragraph of Article 28, and the only one in point here, is paragraph (1). This itself has seven subparagraphs lettered from (a) to (g), all introduced by the following formula:

'Les prestations auxquelles un assuré visé à l'article 27 du présent règlement ou ses survivants peuvent prétendre en vertu des législations des États membres selon lesquelles l'assuré a accompli des périodes d'assurance ou des périodes assimilées sont liquidées de la manière suivante:' (OJ No 30 of 16. 12. 1958)

Subparagraph (a) is in these terms:

'(a) L'institution de chacun de ces États membres détermine, d'après sa propre législation, si l'intéressé réunit les conditions requises pour avoir droit aux prestations prévues par cette législation, compte tenu de la totalisation des périodes visée à l'article précédent;' (OJ No 30 of 16. 12. 1958)

Subparagraph (b) provides for what has come to be called the process of apportionment. It reads as follows:

'(b) si le droit est acquis en vertu de l'alinéa précédent, ladite institution détermine, pour ordre, le montant de la prestation à laquelle l'intéressé aurait droit si toutes les périodes

d'assurance ou périodes assimilées, totalisées suivant les modalités visées à l'article précédent, avaient été accomplies exclusivement sous sa propre législation; sur la base dudit montant, l'institution fixe le montant dû au prorata de la durée des périodes accomplies sous ladite législation avant la réalisation du risque par rapport à la durée totale des périodes accomplies sous les législations de tous les États membres intéressés avant la réalisation du risque; ce montant constitue la prestation due à l'intéressé par l'institution dont il s'agit;' (OJ No 30 of 16. 12. 1958)

Those are the provisions by virtue of which, according to the respondent, the appellant is entitled to his pension and by virtue of which it is subject to apportionment. There can, I think, be no doubt that, if those provisions stood alone, that conclusion would be unquestionable.

The appellant, however, relies on subparagraph (c). This, so far as directly in point, provides as follows:

'(c) s'il résulte de la législation de l'un des États membres que le calcul des prestations repose sur un salaire moyen, une cotisation moyenne, ou une majoration moyenne ... ces moyennes ... sont déterminées pour le calcul des prestations à la charge de l'institution de cet État, compte tenu des seules périodes d'assurance et périodes assimilées accomplies en vertu de la législation dudit État membre ...' (OJ No 30 of 16. 12. 1958)

The submission of the appellant is that, where subparagraph (c) applies, as it undoubtedly does here, since the calculation of the French pension is based on an average salary, subparagraph (b) cannot apply. Those two subparagraphs, says the appellant, are mutually exclusive. Thus, as is in the submission of the appellant 'logical', apportionment is called for only where aggregation is necessary, not only for the purpose of establishing a right to a pension, but also for the purpose of computing that pension, that is to say where the legislation of the Member State concerned relates the amount of the pension to the duration of insurance periods completed. Where, as here, the legislation of the Member State concerned relates the amount of the pension to an average salary, regardless of the duration of insurance periods completed, there is no room for apportionment.

My Lords, that argument has its attractions, but I have come to the conclusion that it should be rejected.

The structure, and correct mode of application, of Article 28 (1), on a proper reading of it, seem to me to be as follows:

Subparagraph (a) requires the competent institution, in a particular case, first to ascertain whether, according to its own legislation (meaning thereby the legislation that it is responsible for administering in the Member State to which it belongs) the claimant has, aided by the process of aggregation, established a right to benefit. Of course, according to a long and well-known line of authorities in this Court, if a claimant is able to establish a right to benefit in a particular Member State without recourse to the process of aggregation, he may assert that right independently of Community law and cannot then be subjected to the process of apportionment or to any other provision of Community law designed to prevent duplication of benefits. But that is not this case. Here the applicant had, in order to establish his right to benefit, to invoke the process of aggregation. He was accordingly a beneficiary, if I may so put it, of subparagraph (a).

Subparagraph (b) applies in any case where a right to benefit is established by virtue of subparagraph (a). This is made

clear by the opening words of subparagraph (b): 'si le droit est acquis en vertu de l'alinéa précédent . . .'. To that conditional clause there is no qualification. So the process of apportionment provided for by subparagraph (b) must be applied to the pension the right to which had been acquired by the appellant by virtue of subparagraph (a).

Subparagraphs (c) and (d) of Article 28 (1) are at first sight obscure. But, when one analyses them closely, one sees that they are designed to deal with special features of the social security legislations of some of the Member States and that they are not designed to detract from the general principles laid down in subparagraphs (a) and (b).

In my opinion, the only purpose and effect of the relevant part of subparagraph (c), which I have read, is to exonerate the competent social security institution of any Member State in which a pension is to be computed on the basis of an average salary, average contribution or average increase, from any obligation to take into account, in order to determine that average, salaries earned, contributions made or increases awarded in another Member State. As was pointed out by the Commission, such an obligation could create for that institution considerable and, in some cases, insuperable difficulties. So, in my opinion, the effect of subparagraph (c) in the present case was simply to require the appellant's 'average salary' to be ascertained, for the purposes of the French legislation, by reference to what he had earned in France in the last ten years when he worked there, and to exclude any consideration, for the computation of his French pension, of what he had earned in Germany. It went no further than that.

I need not dwell on subparagraphs (e), (f) and (g) of Article 28 (1), which are concerned with cases where a person, even with the benefit of aggregation, fails to qualify, or to qualify at once, for pensions in all the Member States where he has been insured — save to say that those subparagraphs seem to me to be framed on the footing that subparagraph (b) applies wherever the right to a pension is established by virtue of subparagraph (a), and so to confirm the correctness of the view I have expressed.

The Commission pointed out that the adoption of that view could lead to anomalies. If the appellant had started his working life in Germany and ended it in France, instead of vice versa, he might have earned the same pension in Germany as he in fact did and yet he would have been entitled in France to a full pension not subject to apportionment. This is because he would then have fulfilled the requirements of French law for the award of that pension without any resort to aggregation. And, in its written Observations, the Commission gave vivid examples of how, on that view, the pension rights of a person who had worked part of his life in a Member State with legislation of Type A and part of it in a Member State with legislation of Type B would differ according to whether he had worked in the one or in the other first.

But, my Lords, the adoption of the view contended for by the appellant would also lead to anomalies, though of a different kind. Thus a person who had worked successively in two Member States both of which had legislations of Type B, and who needed to resort to aggregation in each of them in order to obtain a pension there, would find that both his pensions were subject to apportionment, whereas a person who had worked successively in two Member States both of which had legislations of Type A would, whether or not he needed to resort to aggregation in either of them, be entitled to two full pensions.

The truth is that, as the Court has so often pointed out, no interpretation of Community social security Regulations,

be it Regulation No 3 or now Regulation No 1408/71, can avoid anomalies so long as those Regulations merely seek to coordinate the differing legislations of the Member States without harmonizing them.

In the result I am of the opinion that Your Lordships should answer the question referred to the Court by the Cour de Cassation by declaring that, on the proper interpretation of Regulation No 3, where an insured person has been successively subject to the legislation of two Member States, in one of which it is necessary, in order to establish his right to an invalidity pension, to take into account insurance periods completed in the other, the process of apportionment prescribed by Article 28 (1) (b) of that Regulation should be applied in computing the pension to which his right is thus established, notwithstanding that the amount of that pension is, under the legislation of the Member State concerned, to be calculated by reference to an average salary, regardless of the length of insurance periods completed.