In Case 32/76,

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail (Labour Tribunal) of Charleroi, for a preliminary ruling in the proceedings pending before that court between

ALFONSA REALE, NÉE SAIEVA, residing at Montaperto, Italy,

and

LA CAISSE DE COMPENSATION DES ALLOCATIONS FAMILIALES FOR THE MINING INDUSTRY OF THE CHARLEROI AND BASSE-SAMBRE COALFIELDS, Charleroi, Belgium,

on the interpretation of Article 42 (5) of Regulation No 3 of the Council of the EEC of 25 September 1958 concerning social security for migrant workers OJ No 30 of 16 December 1958, p. 561), as amended by Regulation No 1/64/EEC of the Council of 18 December 1963 (OJ No 1 of 8 January 1964, p. 1), and Article 94 (5) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416),

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment referring the matter and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The consolidated Belgian legislation on family allowances provides that such allowances shall normally be payable

until a child reaches the age of 16 years. However, they are payable up to the age of 21 years where a child is receiving vocational training, up to the age of 25 years where he is undergoing full-time education and without any age-limit where he suffers from serious invalidity.

2. Article 4 (2) (B) of the laws of 24 December 1903 on compensation for injury suffered in an accident at work provided that orphans were entitled to the temporay pension for accidents at work up to the age of 18 years. At present, Article 19 of the Law of 10 April 1971 on accidents at work provides that children shall receive the pension for accident at work as long as they are entitled to family allowances and at all events up to the age of 18 years.

3. The applicant in the main action, who is an Italian national, is the widow of Calogero Reale, an Italian worker who had worked first in Italy and then in Belgium. He died on 8 August 1956 in the pit disaster at Marcinelle. There are three children of the marriage, Alfonso, born on 18 march 1948, Maria Rosa, born on 31 March 1954, and Lina, born on 1 March 1956.

4. Although, after the death of her husband, Mrs Reale returned to Italy with her children, she received under Belgian legislation a pension for accident at work for herself and her three children and family allowances for the children.

5. The Caisse de compensation des allocations familiales for the mining industry of the Charleroi and Basse-Sambre coalfields (hereinafter referred to as 'the Caisse') stopped paying Mrs Reale family allowances in respect of her two eldest children when they reached the age of 18 years and in respect of her youngest child on 30 September 1972, although, at that time, she had not reached the age of 18 years. The Caisse justified its refusal to pay family allowances in respect of the two eldest children after the age of 18 years by reference to Article 42 (5) of Regulation No 3 under which, it maintains, Belgium is only liable to pay family allowances to orphans as long as such orphans are entitled to pensions for accidents at work. Under the Belgian legislation applicable in this instance such pensions are payable up to the age of 18 years.

Article 42 (5) provides:

'Where the death of a wage-earner or assimilated worker opens entitlement to a pension for industrial accidents or occupational disease pursuant to the legislation of one 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.'

6. As regards the third child, the Caisse claimed that its duty to pay family allowances came to an end as from 1 October 1972, the date on which Regulation No 1408/71 came into force, since Mr Reale had completed an insurance period of five years, two months and four weeks in Italy and under Article 78 (2) (b) of the new regulation the payment of family allowances is the responsibility of the relevant Italian institution, in this instance, the Istituto Nazionale delle Previdenza Sociale (National Institution for Social Insurance, hereinafter referred to as 'the INPS'.

The article in question provides:

'2. Orphans' benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident or situated;
(a) .....

(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 ...'

The Caisse found that, as regards orphans' benefits, Article 78 of Regulation No 1408/71 removes all reference to pensions for accidents at work or occupational diseases and excludes from its sphere of application orphans' pensions granted under insurance schemes for accidents at work and occupational diseases. It is impossible for the applicant in the main action to have acquired rights since the only provision in Regulation No 1408/71 relating to such rights appears in Article 94 (9), which does not apply to the present case.

7. The Caisse asked the INPS to examine the rights of the applicant's children to family allowances for orphans after 1 October 1972 in the light of Regulation No 1408/71.

8. Mrs Reale contested the interpretation of Article 42 (5) of Regulation No 3 by the Caisse and took the view that the Caisse could not substitute itself for her under Article 94 (5) of Regulation No 1408/71 in order to achieve a review of her rights to family allowances.

Article 94 (5) provides:

'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.'

She therefore referred the matter to the Tribunal du Travail, Charleroi, in order to obtain family allowances for her three children after their eighteenth birthdays. She asked the Tribunal to submit certain questions relating to the interpretation of Regulation No 3 and Regulation No 1408/71 to the Court of Justice of the European Communities.

9. In a judgment delivered on 25 March 1976 the Tribunal du Travail, Charleroi, stayed the proceedings in the case and requested the Court of Justice under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'1. *Interpretation of Article 42 (5) of Regulation No 3 of the Council of the EEC*

Must this provision be interpreted as meaning that family allowances cease to be payable when the orphans' right to the temporary pension for accidents at work expires under the legislation of the State liable to pay the benefits, that is, in this instance, at the age of 18 years?

2. *Interpretation of Article 94 (5) of Regulation (EEC) No 1408/71 of the Council*

(a) Is the competent institution of a Member State entitled to substitute itself for an insured person with regard to the review of the rights which that person acquired before Regulation No 1408/71 came into force?

(b) If the preceding question is answered in the affirmative, can such review have the effect of reducing the benefits received by the person concerned until the coming into force of that regulation?'

10. The judgment of the Tribunal du Travail was entered in the Court Register on 29 March 1976.

Written observations were submitted by Mrs Reale, represented by Daniele Rossini, Director of the Welfare Service

of the Patronato A.C.L.I., the Commission, represented by its Legal Adviser, Marie-José Jonczy, and the Italian Government, represented by the Ambassador, Adolfo Maresca, assisted by Ivo Maria Braguglia, Deputy State Advocate-General.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the court decided to open the oral procedure without holding any preparatory inquiry.

II — Written observations submitted to the Court

1. As regards the *first question* referred by the Tribunal du Travail, the *applicant* in the main action maintains that there is nothing in Article 42 (5) of Regulation No 3 to justify the suspension of the payment of the family allowances. Family allowances remain payable as long as the orphans satisfy the conditions for payment laid down by the legislation of the State liable to pay the pension. If the orphans resided in Belgium they would have continued to receive family allowances after the age of 18 years because they have continued with their education.

Mrs Reale suggests that the following reply be given to the first question referred by the Tribunal du Travail, Charleroi:

'The family allowances referred to in Article 42 (5) of Regulation No 3 of the Council remain payable until such time as the children to whom they are paid satisfy the conditions for payment laid down by the legislation of the State liable to pay the pension for accident at work.'

As regards the *second question* referred by the Tribunal du Travail, the applicant in the main action maintains that under Article 94 (5) of Regulation No 1408/71, rights acquired before the entry into force of that regulation may only be reviewed on the application of the persons concerned. As is shown in particular by the fifth recital of the preamble to Regulation No 1408/71, Regulations Nos 1408/71 and 574/72 were adopted by the Council in order to improve the standard of living of workers and their dependants.

Mrs Reale received no pension from the INPS despite a request to this effect from the Caisse and she thus received no family allowances. Furthermore, as the treatment of an insured person under Article 78 of Regulation No 1408/71 differs according to whether the said person received a pension under the legislation of one Member State or of several, and as its application may therefore be unfavourable to her she does not intend to apply for a survivor's pension in Italy on the basis of the insurance periods completed by her late husband. The Court of Justice is required to resolve this problem in Case 19/76, *Pietro Triches* v *Caisse de compensation pour allocations familiales de la réligion liégeoise.*

In conclusion, the applicant in the main action suggests that the following reply be given to the second question referred to the Court for a preliminary ruling:

'The competent institution of a Member State is not entitled to substitute itself for an insured person in order to achieve a review of the rights which that person acquired before Regulation No 1408/71 of the Council came into force, if the intended effect of such action is to reduce or discontinue payment of the benefits for which that institution is liable under its own legislation.

At all events, such review cannot have the effect of reducing the benefits received by the worker or his dependants under earlier legislation.'

2. As regards the *first question* asked by the Tribunal du Travail, *the Commission* observes that Article 42 of

Regulation No 3 specifies the legislation which is applicable in the various situations which may arise. Under the terms of Article 42 (5), the right of children to family allowances cannot be made subject to the condition that such children are themselves receiving a pension. Article 42 (5) does not define who are the beneficiaries of the pension; it simply determines the legislation applicable where a pension is payable.

As regards paragraph (a) of the second question referred to the Court for a preliminary ruling the Commission maintains that the term 'benefits' in Article 78 of Regulation No 1408/71 includes family allowances and that there is no doubt that Article 94 (5) of that regulation applies to those benefits.

The wording of Article 94 (5) is sufficiently clear for it to be said that only a person to whom benefits have already been paid or his representative may ask for such a review and that a social security institution cannot substitute itself for such person. The words 'on the application of the person concerned' were in fact inserted into this paragraph precisely in order to prevent the benefits paid before the entry into force of the regulation being reduced by the competent institutions.

In the light of the reply given to paragraph (a) of the second question the Commission considers that paragraph (b) has become irrelevant. However, it observes that when it adopted Regulation No 1408/71 the Council wished to prevent an insured person from adversely affecting his own position by requesting the review of benefits already paid and therefore made the following statement, which was recorded in the minutes of the meeting;

'It is agreed that the benefits awarded under Regulation No 3 of the Council concerning social security for migrant workers which are higher than the benefits resulting from the application of the present regulation shall not be reduced: in this respect, rights already acquired shall be maintained.'

The Commission considers, therefore, that the following replies may be given to the questions submitted by the court making the order for reference;

'(1) Article 42 (5) of Regulation No 3 must be interpreted as determining the legislation governing the payment of family allowances to the children of a worker whose death was caused by accident at work, which is that of the Member State in which the pension for accident at work is payable.

(2) The competent institution of a Member State is not entitled to substitute itself for an insured person in order to obtain a review of the rights which that person acquired before the entry into force of Regulation No 1408/71 since, under Article 94 (5) of Regulation No 1408/71, that power is reserved only to the person who has acquired the rights or to his representative.'

3. As regards the *first question, the Italian Government* maintains that the wording of Article 42 (5) of Regulation No 3 and its role within Article 42 considered as a whole show clearly that the expiry of the right to a pension for accident at work cannot also bring to an end the right of the children to the payment of family allowances.

It is true that Article 42 (5) establishes the right to a pension as a condition precedent of entitlement to family allowances. However, once this condition precedent has been satisfied family allowances for orphans residing or brought up in the territory of another Member State are regarded by Article 42 (5) as coming within the framework of the general social security scheme of the State which is liable to pay the pension, as if the children resided or were brought up in the territory of that State.

As regards the function of the provision, the Italian Government points out that

the question of family allowances which stem from entitlement to a pension for accident at work is governed by Article 42 (5) alone, without reference to other provisions. This confirms the fact that the criterion laid down in Article 42 (5) is in itself independent and decisive and that it is, therefore, impossible to resort to other criteria which have been established with regard to different situations.

As regards paragraph (a) of the *second question,* the Italian Government maintains that Article 94 (5) is a special provision for the persons to whom it refers and that it presupposes that situations which arose and were consolidated under the earlier regulations have become final and cannot now be challenged.

As the rights acquired by those concerned before the entry into force of Regulation No 1408/71 cannot therefore be challenged, the abovementioned Article 94 (5) may only be interpreted as conferring solely on the persons to whom it refers the power to request the review of such rights.

In so far as paragraph (b) of the second question is not to be regarded as purposeless, the Italian Government proposes that it should be answered in the negative.

Mrs Reale, represented by Daniele Rossini, Director of the Welfare Service of the Patronato A.C.L.I., and the Commission, represented by its Legal Adviser, M.-J. Jonczy presented oral argument at the hearing on 22 September 1976.

The Advocate-General delivered his opinion at the hearing on 6 October 1976.

Law

1 By judgment of 25 March 1976, received at the Court Registry on the following 29 March, the Tribunal du Travail, Charleroi, referred to the Court under Article 177 of the EEC Treaty certain questions concerning the interpretation of, first, Article 42 (5) of Regulation No 3 of the Council concerning social security for migrant workers (OJ No 30 of 16 December 1958, p. 561) and, secondly, of Article 94 (5) of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

2 These questions arose within the context of an action brought by the widow of an Italian worker who died in 1956 in an accident at his place of work in Belgium. She has since returned to Italy with her three children and is seeking on their behalf the right to receive family allowances after the age of 18 years and, as regards her youngest child in particular, after 1 October 1972, the date on which Regulation No 1408/71 came into force.

3 The file shows that the Caisse de compensation des allocations familiales for the mining industry of the Charleroi and Basse-Sambre coalfields, the defendant in the main action, automatically stopped paying the widow family allowances for her two eldest children when they reached the age of 18 years and for her third child on 30 September 1972 although at that time she had not reached the age of 18 years.

4 The first question asks whether Article 42 (5) of Regulation No 3 must be interpreted as meaning that family allowances cease to be payable when the orphans' right to the temporary pension for accident at work expires under the legislation of the State liable to pay the benefits, that is, in this instance, at the age of 18 years.

5 During the course of the proceedings before the Court it has been suggested that the main action arose out of a questionable application of the Belgian legislation by the Caisse.

6 It has been pointed out that, contrary to the view apparently put forward by the Caisse, the Belgian legislation does not link the award of family allowances to the right to a pension for accident at work but rather the award of the pension is linked to the rights to family allowances.

7 However, the Court is not required to rule within the context of a request for a preliminary ruling under Article 177 of the Treaty on the meaning and scope of national legislative provisions but must restrict itself to the interpretation of the provisions of Community law in question.

8 Article 42 (5) of Regulation No 3 provides that:

'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.'

9 The wording of this paragraph shows that its aim is to determine the legislation of the State which is liable to pay the pension for accidents at work as the sole legislation applicable with regards to the payment of family allowances in the cases to which it refers.

10 The fact that the children are residing in another Member State does not rule out the applicability of such legislation, since the family allowances must be granted as if the children were permanently resident or were brought up in the territory of the State from which the pension is due.

11 The family allowances payable to the children of a deceased worker under this paragraph are not merely those awarded in the case of entitlement to an orphans' pension but include those awarded in the case of entitlement to any pension payable as a result of the death, in particular, the pension awarded to the widow.

12 The reply to be given to the question referred must therefore be that Article 42 (5) is to be interpreted as determining the legislation applicable to the payment of family allowances to the children of a worker who has died as a result of an accident at work and as meaning that the right of the children of the deceased to family allowances is not linked to the award of an orphans' pension.

13 The second question asks whether Article 94 (5) of Regulation No 1408/71 entitles the competent institution of a Member State to substitute itself for an insured person with regard to the review of the rights which that person acquired before the entry into force of the regulation.

14 Article 94 (5) 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.'

15 The transitional provisions of the regulation, including the abovementioned paragraph, are based on the principle that benefits awarded under Regulation No 3 which are more favourable than those payable under the new regulation shall not be reduced.

16 The aim of the provision is to give to a person to whom benefits were awarded under the old regulation the right to request the review, in his favour, of such benefits.

17 It would be contrary to this aim to acknowledge that the competent institution has the power to review such benefits of its own motion and to the detriment of the person concerned.

18 The reply to be given to the second question referred is, therefore, that Article 94 (5) 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.

Costs

19 The costs incurred by the Italian Government and the Commission of the European Communites, which have submitted observations to the Court, are not recoverable.

20 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal du Travail, Charleroi, by judgment dated 25 March 1976, hereby rules:

1. **Article 42 (5) of Regulation No 2 must be interpreted as determining the legislation applicable to the payment of family allowances to the children of a worker who died as a result of an accident at work and as meaning that the right of the children of the deceased to family allowances is not linked to the award of an orphan's pension;**

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.