OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 March 1988 *

Mr President,
Members of the Court,

1. This reference for a preliminary ruling raises the question of the temporal application of the Community regulations on social security for migrant workers. In substance the Court is asked to state whether, where pension rights were initially awarded before 1 October 1972, the date on which the repeal of Regulations Nos 3 and 4 [1] took effect, the provisions of those regulations continue to apply in respect of the recalculation of pension rights after that date following an alteration in the personal circumstances of the recipient or whether, on the contrary, Regulations Nos 1408/71 [2] and 574/72 [3] apply in such a situation.

2. The dispute in the main proceedings is between Mario Viva, a migrant worker of Italian nationality, and the Fonds national de retraite des ouvriers mineurs (National Pension Fund for Miners — hereinafter referred to as 'the Fund'). Mr Viva was in receipt of the following pensions:

(a) From 1 June 1963, an Italian invalidity pension calculated on a proportional basis pursuant to Regulations Nos 3 and 4;

(b) From 1 August 1963, a Belgian invalidity pension at the married rate, subject to a deduction pursuant to the national rules against overlapping benefits.

Under Article 94 (5) of Regulation No 1408/71, migrant workers who had been awarded a pension prior to the entry into force of the regulation were entitled to apply for the review of their rights taking into account the new provisions. Mr Viva did not avail himself of this possibility. Following the death of his wife on 2 November 1983, the Fund, on its own initiative, altered his Belgian pension rights by applying the 'single' rate. On the ground that he had made no application pursuant to Article 94 (5), the Fund considered that Regulations Nos 3 and 4 continued to apply. Mr Viva does not contest the application of the 'single' rate, but submits that the Fund was bound, with regard to the question of overlapping benefits, to apply the rules which were in force when, on its own initiative, it reassessed his rights following the alteration in his personal circumstances, namely the provisions of Regulations Nos 1408/71 and 574/72.

3. As the national court noted, whereas, as regards the temporal application of these regulations, the possibility of an application by the insured person for a review of his rights was expressly envisaged in Article 94 (5), that of a review on the initiative of the competent institution following an alteration in the personal circumstances of the person in receipt of the pension was not expressly provided for. However, the two regulations

* Translated from the French.

1 — *Journal officiel* 30, 16.12.1958, pp. 561 and 597. *Journal officiel* 62, 20.4.1963, p. 1314.

2 — Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

3 — Council Regulation No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159).

which have been in force since 1972 and the rules to be found in previous decisions of the Court provide the basis for a reply to all the questions submitted by the national court.

4. As the Commission pointed out, there is, in the first place, a striking similarity between the facts of this case and those of the case which gave rise to the first *Sinatra* judgment. [4]

5. In that decision, the Court ruled that Article 46 of Regulation No 1408/71 applied where a Belgian miner's invalidity pension awarded before the repeal of Regulations Nos 3 and 4 and the entry into force of Regulation No 1408/71 and calculated at that time at the 'married' rate provided for under Belgian law, was altered, after the entry into force of that regulation, by the application of the 'single' rate provided for in Belgian law, because the pensioner's wife engaged in a gainful occupation.

6. The question now before the Court is whether Article 46 of Regulation No 1408/71 must apply where a miner's invalidity pension awarded before the repeal of Regulations Nos 3 and 4 and the entry into force of Regulation No 1408/71 and calculated at the 'married' rate is altered, after the entry into force of that regulation, by the application of the 'single' rate as a result of the death of the pensioner's wife.

7. This comparison of the facts of the two cases might be sufficient in itself to justify the conclusion that in the abovementioned *Sinatra* judgment the Court resolved by implication the question which it has been asked to determine in this case. Legal analysis of the position strengthens that conclusion.

4 — Judgment of 2 February 1982 in Case 7/81 [1982] ECR 137.

8. The position adopted by the Fund, namely that the provisions of Regulations Nos 3 and 4, which were repealed with effect from 1 October 1972, should be applied to alterations after that date affecting the situation of a person in receipt of an invalidity pension, is in fact based on a questionable use of *a contrario* reasoning.

9. The Fund took the view that despite the express repeal (Article 100 of Regulation No 1408/71) of Regulations Nos 3 and 4, those regulations continued to govern pensions awarded before their repeal, in accordance with Article 94 (5) of Regulation No 1408/71, which provides that 'the rights of a person to whom a pension was awarded prior to 1 October 1972 . . . may, on the application of the person concerned, be reviewed, taking into account the provisions of this regulation'. If an express application from the person in receipt of a pension awarded prior to 1 October 1972 is required for the review of that pension to be carried out in accordance with the provisions of Regulation No 1408/71, that means, according to the Fund, that where no such application is made an alteration affecting the pension cannot entail the application of Regulation No 1408/71, and that Regulations Nos 3 and 4, which were in force when the pension was awarded, must apply.

10. This construction seeks to make a rule of an exception. Article 94 (5) gives a person in receipt of a pension awarded before 1 October 1972 the right to obtain, on demand, the review of those rights in accordance with the provisions of Regu-

lation No 1408/71, in other words in accordance with provisions which in principle do not apply to him. Article 94 (1) of Regulation No 1408/71 provides that 'no right shall be acquired under this regulation in respect of a period prior to 1 October 1972'. This is the express application by the Community legislature of the principle laid down in the Court's judgment of 5 May 1977 in *Jansen* v *Landesversicherungsanstalt Rheinprovinz*,[5] according to which a new provision of a Community regulation — in that case Article 10 (2) of Regulation No 1408/71 — cannot be extended to facts which occurred outside the period covered by the regulation. Article 94 (5) creates an exception from the principle laid down in Article 94 (1) by making it possible to rely on the provisions of the new regulation merely by submitting an application, irrespective of the occurrence of any objective fact subsequent to its entry into force. On the other hand, alterations to the pension as a result of events subsequent to the date of the entry into force of Regulation No 1408/71 give rise to the application of that regulation's provisions in the normal way, in accordance with the 'generally accepted principle' expressly cited in the Court's judgment of 15 February 1978 in *Bauche* v *Administration des douanes*,[6] according to which new rules apply, 'save as otherwise provided, to the future effects of situations which arose under the previous law'.

11. Neither examination of specifically transitional Community provisions other than those already considered, in the relevant sphere, nor study of the Court's judgment in *Sinatra* leads to the conclusion that in this case the normal principles governing the temporal application of the law should be discarded.

5 — Case 104/76 [1977] ECR 829.

6 — Case 96/77 [1978] ECR 383.

12. On the basis of Article 94 (1) of Regulation No 1408/71, Article 118 (1) of its implementing regulation, Regulation No 574/72, provided, where a contingency arose before 1 October 1972 and the claim for a pension had not yet been awarded before that date, for a double award in accordance with the provisions of:

(a) Regulation No 3 or agreements in force between the Member States concerned, for the period prior to 1 October 1972;

(b) Regulation No 1408/71, for the period commencing 1 October 1972.

These specific provisions do not apply to the case before the Court, where a pension actually awarded before 1 October 1972 is affected by an event altering the family circumstances of the recipient after 1 October 1972. However, for the purposes of legal analysis, it may be noted that they do not seek in principle to extend beyond 1 October 1972 the effects of the old regulation, since such a 'survival' is envisaged only by way of derogation, in the last subparagraph of paragraph 1 of Article 118, in order to enable the recipient of the pension to retain the benefit of the most favourable calculation.

13. However, once again it is above all the Court's judgment in *Sinatra*, cited above, which shows clearly that where a situation which gave rise to the award of a pension before the entry into force of Regulation No 1408/71 changes, the provisions of that regulation apply. The Court found that the application under a decision of June 1976 of the 'single' rate to an invalidity pension calculated originally at the 'married' rate by

virtue of the decision of 10 May 1971 awarding the pension, with effect from 1 April 1971, required 'a recalculation in accordance with the provisions of Article 46 of Regulation No 1408/71'.

14. It was precisely on the question whether Mr Viva could, following the alteration in his personal circumstances, claim the benefit of the provisions of Article 46 of Regulation No 1408/71, which provides for a comparison between the national rules and the system of aggregation and apportionment in order to determine which is the most favourable, that the argument arose before the national court which led it to refer a question to the Court in this case. Accordingly, in replying to the question referred to it by the cour de travail, Mons, the Court should be guided by the same principles which were the basis for its decision in the first *Sinatra* judgment.

15. In the light of these observations, the Court should, in my view, rule as follows:

A recalculation in accordance with the provisions of Article 46 of Regulation No 1408/71 is necessary where an invalidity pension awarded by a Member State prior to the date of the entry into force of Regulation No 1408/71 at the 'married' rate is, as a result of an event subsequent to that date affecting the individual circumstances of its recipient, altered by application of the 'single' rate.