**consideration in calculating the pensions referred to in Chapters 2 and 3 of Regulation No 3 even if the risk materializes and the claim for a pension is made after that date.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 26 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President

## OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 10 JUNE 1975 [1]

*Mr President,*
*Members of the Court,*

The proceedings for a preliminary ruling, in which I am today giving my opinion, relate to the interpretation of Regulation No 3 concerning social security for migrant workers. A decision is sought as to whether certain insurance periods completed by a German in Algeria are to be taken into consideration for the purposes of the abovementioned regulation.

I should first like to recall the findings in an earlier case, 110/72 *(Fiege v Assurance Maladie Strasbourg* [1973] ECR 1001).

Until Algeria gained its independence on 1 July 1962, it was a part of the territory of France and was included within the scope of Regulation No 3. This appears from Annex A to Regulation No 3 containing the 'Definition of territories and nationals to which and to whom the regulation applies'. In addition to Metropolitan France under the title 'France' Algeria and the Overseas Departments were included. In Annex B to Regulation No 3, which, according to Article 3 of that regulation, 'specifies, for each Member State, the social security legislation in force in its territory, at the date of adoption of this Regulation, to which the Regulation applies', includes under the heading 'France', amongst the legislation applicable in Algeria 'special social security schemes, *inter alia,* the mines' scheme'. These provisions at first remained in existence after Algeria was granted independence. Reference to Algeria was only deleted from Annex A of Regulation No 3 by Article 5 of Regulation No 109/65 of the Council of 30 June 1965 (OJ No 125 of 9.7.1965) which under Article 16 thereof came into

1 — Translated from the German.

force on 1 August 1965, the deletion being effective, according to Article 16 (2) of that regulation, as from 19 January 1965. Article 16 (2) however, expressly begins with the words 'without prejudice to rights acquired before the time set out in Section 1 (1 August 1965)...' The reference to Algeria in Annex B to Regulation No 3 was also deleted with effect from 19 January 1965.

Mention must also be made of the French law of 26 December 1964 whereby French nationals resident in France have the right to full validation of the insurance periods completed in Algeria before 30 June 1962 for old-age pensions and the right to an allowance in respect of Algerian invalidity pensions arising out of risks which materialized before 30 June 1962.

These provisions are also relevant in the present case.

The appellant in the main action, Mr Horst, who now lives in the Federal Republic of Germany, was affiliated to the German Miners' Insurance Fund and has completed 209 German insurance months. In addition he worked for the Algerian National Oil Company for the period from 1 July 1960 until 30 June 1962. During this time social insurance contributions were paid on his behalf to the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie.

The question is one of the taking into consideration of the abovementioned insurance periods both in connexion with the mineworkers' pension paid by the Federal Mineworkers Association as from 1 January 1962 on the ground of diminished capacity for work in the mines arising in December 1961, and also in connexion with the federal mineworkers' disablement pension granted as from 3 July 1971, after the occurence of the occupational invalidity. Contrary to the opinion of the plaintiff the Federal Mineworkers Association, which is the competent German insurance institution, considers that it is impossible to take such periods into consideration.

Proceedings were therefore brought, at first only in respect of the mineworkers' pension, before the Sozialgericht (Social Court) Hanover and the respondent was ordered to increase the mineworkers' pension granted to Mr Horst in proportion to the insurance periods completed in Algeria on the ground that these were French insurance periods.

The Landessozialgericht (Higher Social Court) Niedersachsen annulled this judgment, giving as its reasons, which also apply to the federal mineworkers' disablement pension, that the addition of the 25 Algerian insurance months to the 209 relevant insurance months completed by the appellant was contrary to the scheme of Article 28 of Regulation No 3 according to which a person in receipt of benefits in respect of insurance periods completed in various Member States does not have a single claim. It was also stressed that the fact that mention of Algeria was deleted from Annex A to Regulation No 3 and that there were no transitional provisions in respect of risks which materialized before 19 January 1965 pointed against taking into account Algerian insurance periods. As regards the Federal mineworkers' disablement pension a decisive factor is that the risk only materialized after the deletion of Algeria from Annex A to Regulation No 3.

The appellant appealed against this judgment to the Bundessozialgericht (Federal Social Court). He relies principally on the argument that the abovementioned Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie had been a French institution until 1 July 1962. Further, the deletion of mention of Algeria from Annex A to Regulation No 3 could only affect insurance periods which were completed in Algeria after 18 January 1965. He therefore seeks a declaration that the

insurance periods completed by him in Algeria are to be taken into consideration for the purposes of Regulations Nos 3 and 4, and this is the only matter now in dispute.

For its part the respondent Federal Mineworkers Association refers to a decision of the competent French insurance institution, the Caisse Autonome Nationale de la Sécurité Sociale dans les Mines, whereby with reference to the abovementioned French law of 26 December 1964 it refused to accept insurance periods completed in Algeria by the appellant as French insurance periods. The Federal Mineworkers Association feels itself bound by this in view of Article 1 (b) of Regulation No 3.

By an order of 4 December 1974 the Bundessozialgericht stayed the proceedings and referred the following two questions on the interpretation of Regulation No 3 for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

'(a) Are pension rights which have accrued by virtue of contributions paid by a German in Algeria before 19 January 1965 to the Caisse Autonome de Retraite et de Prévoyance des Mines d'Algérie also to be taken into account when determining a pension under Chapters 2 and 3 of Regulation No 3 of the Council of the EEC even when the risk insured against materializes and the claim of the insured person now resident in the Federal Republic of Germany is made only after this date?

(b) Does the principle of equality of treatment provided for by Article 8 of Regulation No 3 mean that the provisions of a national law of a Member State which stipulate the taking into account and adjustment of accrued rights and social security benefits in respect of the insurance periods completed in a part of that State which has in the meantime become independent, also apply to all nationals of another Member State of the Community, who are resident in the territory of one of the other Member States?'

My opinion on the matter is as follows:

The central question raised by the reference is whether Algerian insurance periods are to be taken into account in so far as it is necessary for the calculation of a right to a pension.

In the present proceedings there are no grounds for examining whether it is at all necessary to take such periods into account, having regard to the right to a pension at issue in the main proceedings. This is concerned with the relevance of the questions referred to the decision of the national court, a problem which the Court of Justice on principle excludes from its consideration. On this point let it suffice to note that according to the case-law (Judgment in Case 1/67 of 5 July 1967, *Stanislas Chiechelski v Caisse régionale de Sécurité Sociale du centre in Orléans* and *Directeur régionale de la Sécurité Sociale in Orléans [1967] ECR 181)*, Judgment of 10 November 1971 in Case 27/71, *August Keller v Caisse régionale d'assurance vieillesse des travailleurs salariés de Strasbourg*, Rec. 1971, p. 885, and Judgment of 28 May 1974 in Case 191/73, *Rudolf Niemann v Bundesversicherungsanstalt für Angestellte* [1974] *ECR)* it is clear that the aggregation of insurance periods is unnecessary where the acquisition of a right to benefits is granted by national law even without such aggregation. Admittedly in the present case the Commission has pointed out that the appellant may well have an interest in the Algerian insurance periods being taken into consideration in view of the peculiarities of the pension from the Federal Mineworkers Association. Thus it certainly cannot be said that the question referred by the Bundessozialgericht clearly has no justification.

Since the Federal Mineworkers' Association apparently takes the view that, for the purposes of considering the question whether certain Algerian insurance periods can be regarded as insurance periods of the Member State, France, it is bound by a corresponding decision of the French insurance institution, it seems appropriate to make clear straight away that this is based on an erroneous interpretation of Community law. Article 1 (p) of Regulation No 3 on which the Federal Mineworkers Association relies does indeed provide that 'the term "insurance periods" shall cover contribution periods or periods of employment as defined or reckoned as insurance periods in the legislation concerning a contributory scheme under which they were completed'. However it clearly does not follow from this that the institution of the relevant Member State *alone* can make the necessary determination. It clearly follows from the provisions of Article 27 and 28 of Regulation No 3 and Article 33 of Regulation No 4 that a German institution is unquestionably also competent so far as is necessary, to determine whether Algerian insurance periods can be taken into consideration. It is only the determination under Article 34 of Regulation No 4, in an appropriate case, of the benefits which relate to the foreign, in this case Algerian, insurance periods which is reserved to the French insurance institution. This is quite evident from the Commission's observations on the subject. Further explanations are therefore not necessary in the present case.

If we now turn to the questions referred by the Bundessozialgericht themselves, and in particular the question as to the possibility of taking Algerian insurance periods into consideration in aggregating insurance periods the answers appear to present no particular problems in the light of the observations submitted by the Commission.

Under Articles 25 and 27 of Regulation No 3 the sole prerequisite for aggregating insurance periods in respect of invalidity benefits under Type B legislation, under which invalidity benefits are in principle calculated with regard to the length of the completed periods, and in respect of old-age pensions, is that an insured person has been successively or alternately subject to the legislation of two or more Member States. In view of what has already been said in the course of setting out the facts of the case, the sole question in relation to Algerian insurance periods in thus concerned with the scope of Regulation No 3 as provided by Annexes A and B thereto, and the effects of the later Regulation of the Council No 109/65.

Looked at in this way, three periods may be distinguished so far as the present case is concerned

- the period which expired on 30 June 1962;
- the period from 1 July 1962 to 18 January 1965 and
- the period from 19 January 1965 to 31 July 1965.

During the first period Algeria was a part of French territory. Therefore during this time, insurance periods completed in Algeria are to be regarded as insurance periods completed under French legislation. Thus there can be no doubt about their being able to be taken into account. In this connexion moreover, as the Commission has convincingly explained, this applies only to the payment of contributions. On the other hand the materialization of the risk and the date of the application for benefits, events which the Bundessozialgericht lays great stress on, are of no importance.

During the second period Algeria was, as is clear from Regulation No 109/65, not yet deleted from Annex A to Regulation No 3. Therefore at that time the territorial scope of Regulation No 3 included Algeria, although Algeria was no longer part of French territory after it had gained independence. One can therefore proceed on the basis that for

nationals of Member States Regulation No 3 continued to apply without qualification as regards Algerian insurance periods; at least, as the Commission rightly pointed out, it gave the appearance in law of doing so. Moreover as there are no transitional rules with express provisions to the contrary, the requirement of legal certainty accordingly demands that the same conclusion in respect of Algerian insurance periods must be reached about this period as about the one which expired on 30 June 1962.

Finally, although nothing more was asked about the third period, which as you know ended on the day before Regulation No 109/65 came into force, that is on 31 July 1965, it must be included for the sake of completeness. Although at this time Algeria no longer came within the scope of Regulation No 3 (see Article 16 (2) (a) of Regulation No 109/65) it is however important that the deletion of the mention of Algeria from Annex A was *retroactive*. Therefore the transitional provisions of Article 16 (2) stipulated that rights acquired before 1 August 1965 should not be lost. This can only mean that Algerian insurance periods from this time must also be taken into account. The Commission rightly stressed that accrued rights in the sense of this provision must also be pension expectancies, and not merely rights to benefit which have matured on the materialization of the risk. It was able to refer, not only to the relevant decided cases (Judgment of 15 July 1964, Case 100/63, *Mrs J. Kalsbeek (neé J. G. van der Veen) v Bestuur van de Sociale Verzekeringsbank* and nine other cases [1964] 565 and Judgment of 13 July 1966 in Case 4/66, *Mrs J. E. Labots (neé Hagenbeek) v Raad van Arbeid, Arnhem,* [1966] ECR 425) but also on the fact that this interpretation corresponds with internationally recognized principles of social security as set out in Article 22 (2) of International Labour Convention No 48 on the Maintenance of Migrants' Pension Rights of 1935.

Therefore the same conclusion is reached under Community law in respect of all three relevant periods as regards Algerian insurance periods.

All that is necessary for the answer of the first question has thus been said. However, in view of the opinion of the Bundessozialgericht which emerged in the order for reference, it should be added that the answer given applies quite irrespective of whether there were claims for benefits against a French institution. The Commission also dealt with this convincingly in my opinion. In addition there is the fact that according to the case-law (Case 110/73), it is clear that in its original form Annex A to Regulation No 3 places the French institution under an obligation to respect rights acquired by a migrant worker in Algeria before 19 January 1965.

With the aid of these answers it should be possible for the Bundessozialgericht to find a solution to the problems raised before it. It therefore does not appear to me to be necessary to examine the second question which in the event is only subsidiary, and on which, it should be said in passing, the Commission has also put forward interesting an convincing arguments.

I therefore suggest that the question referred by the Bundessozialgericht for a preliminary ruling should be answered as follows:

In so far as is necessary for the acquisition, maintenance or recovery of rights to benefit, insurance periods completed in Algeria before 31 July 1965 are to be taken into account in determining pensions under Chapters 2 and 3 of Regulation No 3 of the EEC even when the risk materializes and the claim for the pension is made after that date.