OPINION OF ADVOCATE GENERAL JACOBS

delivered on 22 November 2001 [1]

1. In the present case, the Oberster Gerichtshof (Austrian Supreme Court) asks questions about the temporal scope and interpretation of Article 94 of Regulation No 1408/71 [2] and Articles 39 and 42 EC. [3] Those questions arise in proceedings brought by an Austrian national who, having suffered an accident in 1968 whilst working in Germany, is seeking to obtain an occupational disability pension under Austrian law with effect from 1 January 1998. The case raises two essential issues.

2. First, does Community law preclude national rules under which an exception to the requirement of a qualifying period, as a condition for entitlement to occupational disability pension resulting from an accident at work, applies only where the person suffering the accident was at the time of the accident insured compulsorily or privately under the legislation of the Member State concerned?

3. Second, does Community law preclude national rules under which the reference period, within which the qualifying period must be completed, can be prolonged only by periods during which the person was in receipt of a pension under the legislation of the Member State concerned?

The relevant legislative provisions

Community provisions

4. Article 9a of Regulation No 1408/71, [4] headed 'Prolongation of the reference period', provides:

1 — Original language: English.

2 — 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, subsequently amended on numerous occasions. The most recent codified version of that Regulation is to be found in Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1997 L 28, p. 1.

3 — Related questions were referred by the Oberster Gerichtshof in Case C-28/00 *Kauer*, in which I gave my Opinion on 25 September 2001.

4 — Inserted by Council Regulation (EEC) No 2332/89 of 18 July 1989 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self- employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1989 L 224, p. 1.

'Where, under the legislation of a Member State, recognition of entitlement to a benefit is conditional upon completion of a minimum period of insurance during a specific period preceding the contingency insured against (reference period) and where the aforementioned legislation provides that the periods during which the benefits have been granted under the legislation of that Member State or periods devoted to the upbringing of children in the territory of that Member State shall give rise to prolongation of the reference period, periods during which invalidity pensions or old-age pensions or sickness benefits, unemployment benefits or benefits for accidents at work (except for pensions) have been awarded under the legislation of another Member State and periods devoted to the upbringing of children in the territory of another Member State shall likewise give rise to prolongation of the aforesaid reference period.'

5. Article 61 of Regulation No 1408/71, headed 'Rules for taking into account the special features of certain legislations', provides as far as is relevant:

'...

5. Where the legislation of a Member State provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed previously shall be taken into consideration in order to assess the degree of incapacity, to establish a right to any benefit, or to determine the amount of benefit, the competent institution of that Member State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed previously under the legislation of another Member State as if they had occurred or had been confirmed under the legislation which it administers.

6. Where the legislation of a Member State provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed subsequently shall be taken into consideration in order to assess the degree of incapacity, to establish the right to any benefit, or to determine the amount of such benefit, the competent institution of that Member State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed subsequently under the legislation of another Member State, as if they had occurred or had been confirmed under the legislation which it administers, but only where:

(1) no compensation is due in respect of the accident at work or the occupational disease which had occurred or had been confirmed previously under the legislation which it administers; and

(2) no compensation is due by virtue of the legislation of the other Member State

under which the accident at work or the occupational disease occurred or was confirmed subsequently, account having been taken of the provisions of paragraph 5, in respect of that accident at work or that occupational disease.'

6. Article 94 of the Regulation, headed 'Transitional provisions for employed persons', provides so far as is relevant:

'1. No right shall be acquired under this Regulation in respect of a period prior... to the date of its application in the territory of the Member State concerned...

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State... before the date of its application in the territory of that Member State... shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior... to the date of its application in the territory of the Member State concerned...'.

7. Austria acceded to the European Union on 1 January 1995. Article 2 of the Act of Accession [5] provides that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act. Regulation No 1408/71 became applicable in Austria, however, on 1 January 1994, by virtue of the Agreement on the European Economic Area. [6]

The national legislation

8. The (Austrian) Allgemeines Sozialversicherungsgesetz (General Law on Social Security, hereafter 'ASVG') provides for the grant of occupational disability pension to persons whose capacity for work has been reduced. Under those rules, entitlement to disability pension is conditional upon the completion by the person concerned of a qualifying period (*Wartezeit*). The qual-

5 — OJ 1994 C 241, p. 21.

6 — OJ 1994 L 1, p. 3; see in particular Article 29, Protocol 1 and Annex VI.

ifying period is calculated as the number of months in which the person contributed to pension insurance (*Versicherungszeiten*) within a certain period ('the reference period') prior to the date from which the pension entitlement is to run ('the relevant date', *Stichtag*).

9. Paragraph 235 of the ASVG, entitled 'Qualifying period as general condition for benefit entitlement', thus provides:

'(1) Entitlement to any of the benefits listed in Paragraph 222(1) and (2)... shall be... linked to the general condition that the qualifying period has been completed by means of months of insurance within the meaning of subparagraph (2) (Paragraph 236).

(2) As regards the qualifying period, the months of insurance of all branches of pension insurance... shall be taken into consideration.

...'

10. For persons aged less than 50 years on the relevant date, Paragraph 236(1) of the ASVG — entitled 'Completion of qualifying period' — provides with regard to benefits 'stemming from the insurance contingency of reduced capacity for work' that the qualifying period is 60 months. According to Paragraph 236(2), the 60 months of insurance which are necessary to complete the qualifying period must fall within 'the final 120 calendar months prior to the relevant date' (the reference period).

11. Those general rules are subject to a number of exceptions, two of which are in particular relevant to the present case.

12. First, entitlement to disability allowance is in certain circumstances not conditional upon completion of a qualifying period. Thus, Paragraph 235(3) in so far as relevant provides:

'The qualifying period shall not apply to a benefit stemming from the insurance contingency of reduced capacity for work..., where

(a) the insurance contingency is the result of an accident at work (Paragraphs 175 and 176) or an occupational disease (Paragraph 177) which materialised in respect of a person compulsorily insured with a pension insurance institution under this or another federal law or in respect of a person insured privately under Paragraph 19a.

...'

13. Second, the reference period of 120 months, within which the qualifying period must normally be completed, may be prolonged by 'neutral months' (*neutrale Monate*). Paragraph 236(3) provides:

'Where neutral months (Paragraph 234) fall within the periods provided for in subparagraph (2), the periods shall be prolonged by those months.'

14. Paragraph 234 of the ASVG, entitled 'Neutral months', provides:

'(1) The following periods, which are not periods of insurance, shall be regarded as being neutral:

...

(2) Periods during which the insured person had an entitlement, awarded by notification, to

...

(b) a disability pension stemming from statutory accident insurance on account of earning capacity reduced by at least 50%,

...'

15. According to the order for reference, the Austrian courts interpret the words 'statutory accident insurance' in Paragraph 234(1)(2)(b) of the ASVG as a reference to accident insurance under Austrian law, thus excluding disability pensions granted under the legislation of other States.

The facts and the questions referred

16. The facts, as set out in the order for reference, may be summarised as follows.

17. Johann-Franz Duchon, the applicant in the main proceedings, is an Austrian national born on 18 January 1949. On 8 September 1968 he suffered an accident while working as a holiday trainee in

Germany. Since that date he has been in receipt of a German accident-at-work insurance benefit equivalent to a reduced capacity for work of 50%.

18. The present case concerns the applicant's attempt to obtain an occupational disability pension under the provisions of the ASVG.

19. The applicant initially applied for such a pension with effect from 1 January 1994. That application was rejected by the defendant in the present case, the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution), and by the lower Austrian courts. On 15 April 1997, the Oberster Gerichtshof dismissed the applicant's claim essentially on the grounds that (i) he had not completed the qualifying period of 60 months within the reference period of 120 months laid down in the ASVG, (ii) he did not fall within the exceptions laid down in Paragraphs 235(3)(a), 236(3) and 234(1)(2)(b) of the ASVG, and (iii) since the accident giving rise to the claim for pension had taken place before 1 January 1994 he could not rely on Community law. A reference was not made to the Court of Justice in that case.

20. On 22 December 1997, the applicant presented to the defendant a new application for occupational disability pension with effect from 1 January 1998. That application was rejected, again on the grounds that the applicant had not completed the qualifying period under the ASVG. The applicant challenged that decision before the Landesgericht (Regional Court), Linz, and the Oberlandesgericht (Higher Regional Court), Linz. Having failed in substance, he applied for a review of the judgment of the Oberlandesgericht, Linz, by the Oberster Gerichtshof. Before the Oberster Gerichtshof, the applicant did not contest the fact that he had not completed the qualifying period for the grant of an occupational disability pension under the ASVG. He contended, however, that the judgment of the Oberster Gerichtshof of 15 April 1997 rested on a misunderstanding of the temporal scope of Community law and that Paragraphs 235(3)(a), 234(1)(2)(b) and 236(3) of the ASVG are contrary to Regulation No 1408/71 and Articles 39 and 42 EC.

21. Considering that the case before it raised issues of Community law, and that it was not bound by its earlier judgment between the parties, the Oberster Gerichtshof decided to stay the main proceedings and refer the following questions to this Court:

'1. Does the situation of an employed person who, as a national of a country

which is now a Member State, was employed prior to the accession of that Member State in another Member State and sustained an accident there, fall within the scope of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1249/92 of 30 April 1992, where the person concerned applies for an occupational disability pension after the accession of the Member State and the accident at work can have the effect of establishing entitlement to an occupational disability pension?

If the first question is to be answered in the affirmative:

2. Are Articles 48(2) and 51 of the EC Treaty (now Articles 39(2) and 42 EC) and Regulation (EEC) No 1408/71 to be interpreted as precluding national rules which, for the qualifying period for a benefit stemming from the insurance contingency of reduced capacity for work not to apply, require not only that the insurance contingency is the result of an accident at work, but also that the insurance contingency materialised in respect of a person insured compulsorily with a pension insurance institution under the (Austrian) *Allgemeines Sozialversicherungsgesetz* (General Law on Social Security) (ASVG) or another (Austrian) federal law or in respect of a person insured privately under Paragraph 19a of the (Austrian) *Allgemeines Sozialversicherungsgesetz* (ASVG) and therefore do not cover accidents at work sustained during employment in other Member States?

3. Are Articles 48(2) and 51 of the EC Treaty (now Articles 39(2) and 42 EC) to be interpreted as precluding Article 9a of Regulation (EEC) No 1408/71 and national rules which exclude in general any prolongation of the reference period in respect of the period during which a pension is received or limit such prolongation to cases of entitlement to a pension stemming from the statutory accident insurance of the Member State concerned?'

22. The applicant, the Austrian Government and the Commission have submitted written observations. A hearing has not been held.

The first question

23. By its first question, the Oberster Gerichtshof asks whether the situation of an employed person who, as a national of a country which is now a Member State, was employed prior to the accession of that Member State in another Member State and sustained an accident there, falls within the scope of Regulation No 1408/71, where that person applies for an occupational disability pension after the accession of the Member State and — under the legislation of that State — the accident at work can have the effect of establishing entitlement to an occupational disability pension.

24. In the order for reference, the Oberster Gerichtshof explains that it desires to know, in particular, whether an accident at work is to be regarded as a contingency within the meaning of Article 94(3) of Regulation No 1408/71. It adds that if Regulation No 1408/71 applies, considerable doubts arise as to the conformity with EU law of Paragraph 235(3)(a) of the ASVG.

25. All of those submitting observations in the present case take the view that the first question referred by the Oberster Gerichtshof should be answered in the affirmative. I agree with that proposition.

26. It will be recalled that Article 94(3) provides: 'Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior... to the date of its application in the territory of the Member State concerned'.

27. That provision is, as I understand it, concerned with situations where a contingency, such as a work-related accident causing death or dismissal of a person causing that person to become unemployed, [7] arose prior to the entry into force of the Regulation in the Member State concerned. In such situations, the rights which flow from the Regulation must be granted to the affected person with immediate effect from the point in time when the Regulation enters into force. [8] The aim of Article 94(3) is thus, essentially, to prevent the Member State in question from denying those rights solely on the grounds that the contingency which triggered them arose before the Regulation entered into force.

28. That rule is however explicitly 'subject to the provisions of paragraph 1' according

7 — See to that effect Case 44/65 *Singer* [1965] ECR 965, at p. 972 and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraphs 23 and 24 of the judgment.

8 — See for a similar interpretation of Article 53(3) of Regulation No 3 of 1958, Case 68/69 *Brock* [1970] ECR 171, paragraphs 6 to 9 of the judgment.

to which no right shall be acquired under the Regulation in respect of a period prior to the date of its application in the territory of the Member State concerned. In my view, and here I agree with the Commission, it follows from that wording that the duty of the Member States to grant rights under the Regulation with effect from the date of the entry into force of the Regulation in respect of contingencies which materialised before that date, applies only where those contingencies were capable of giving rise to an entitlement to social benefits under national law.[9] Otherwise Article 94(3) would have the effect of creating — with retroactive effect — new rights contrary to Article 94(1).

29. In the present case, it is — as the Commission points out — clear that a work-related accident causing a reduction in the capacity for work of the person concerned is capable of giving rise to an entitlement to a disability pension under the provisions of the ASVG. An Austrian national who was employed prior to 1 January 1994 in another Member State and sustained an accident there thus falls within the scope of Regulation No 1408/71 where after that date that person applies for an occupational disability pension and the accident at work can have the effect of establishing entitlement to an occupational disability pension under the ASVG.

9 — Or to recognition of certain periods as equivalent to contribution periods. See my Opinion in *Kauer*, cited in note 3, at paragraph 67.

30. However, that conclusion does not in itself affect the compatibility with Community law of provisions of national law such as those in issue in the main proceedings.

31. Article 94 of Regulation No 1408/71 is a transitional provision, placed in Title VII ('Transitional and final provisions'), which determines the temporal scope of the Regulation. In my view, that provision cannot confer any rights upon individuals which do not flow from the substantive provisions of the Regulation. The fact that an accident at work may be regarded as a contingency cannot, therefore, affect the outcome of the main proceedings unless the substantive provisions of the Regulation are to be interpreted as precluding national rules — such as Paragraphs 235(3)(a), 234(1)(2)(b) and 236(3) of the ASVG — which prevent workers from relying on exceptions to the rules on qualifying periods and reference periods where they have suffered accidents at work whilst working in other Member States.

32. However, the Regulation contains no provisions capable of bearing such an interpretation.

33. On the one hand, there are no general provisions in the Regulation which oblige

the Member States to recognise, for the purpose of awarding disability pensions in respect of reduced capacity for work, accidents at work which take place in other Member States. Nor are there in the Regulation any specific provisions concerned with exceptions to national rules on qualifying periods. Article 61(5) and (6) of the Regulation lay down specific rules which oblige the authorities of the Member States to recognise, in certain circumstances, accidents at work sustained in other Member States. [10] It is clear however from the wording of those provisions, and from the fact that, as the Commission points out, they are placed in Chapter 4 of Title III of the Regulation ('Accidents at work and occupational diseases') rather than in Chapter 2 ('Invalidity'), that they do not apply in the context of occupational disability pensions.

34. On the other hand, Article 9a of the Regulation provides that for the prolongation of reference periods 'periods during which benefits for accidents at work (except for pensions) have been awarded under the legislation of another Member State... shall... give rise to prolongation'. As is common ground between those who have submitted observations in the present case, it follows from the wording of that provision that the Regulation does not require account to be taken, for the purpose of prolonging reference periods applicable under national law, of pensions which have been awarded in connection with accidents at work under the legislation of other Member States.

10 — See Joined Cases 173/78 and 174/78 *Villano* [1979] ECR 1851.

The second question

35. By its second question the Oberster Gerichtshof asks, in substance, whether Articles 39 and 42 EC preclude national rules under which an exception to the requirement of a qualifying period, as condition for entitlement to occupational disability pension, applies only where the disability is the result of an accident at work and the person suffering the accident was at the time of the accident insured compulsorily or privately under the legislation of the Member State concerned.

36. It may be recalled that the Treaty provisions relating to freedom of movement for persons are, according to settled case-law, [11] intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community. Those provisions therefore preclude measures which place nationals of one Member State at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. Moreover, measures which deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an

11 — See, in particular, Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraph 39 of the judgment; Case C-190/98 *Graf* [2000] ECR I-493, paragraphs 21 and 23 and the case-law cited there.

obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

37. With regard to social security in particular, the Court has held that Articles 39 to 42 EC are intended to prevent a worker who, by exercising his right of free movement, has been employed in more than one Member State from being placed in a worse position than one who has completed his entire career in only one Member State. [12] More specifically, the Court has accepted that the aim of Articles 39 to 42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State; such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [13]

38. In my view, it is clear that a provision such as Paragraph 235(3)(a) of the ASVG is liable, even though it applies without regard to the nationality of the workers concerned, to place migrant workers in a worse position as regards social security than those who have worked in only one Member State.

39. Under that provision, an exception to the requirement of a qualifying period, as condition for entitlement to occupational disability pension, applies only where the disability is the result of an accident at work and the person suffering the accident was at the time of the accident insured compulsorily or privately under the relevant provisions of the ASVG. As the Commission points out, migrant workers who sustain accidents while working in other Member States are in practice less likely to fulfil the requirement of insurance under the ASVG than workers who have remained in Austria. The resulting disadvantage for migrant workers might discourage Community nationals from exercising their right to freedom of movement. A provision such as Paragraph 235(3)(a) of the ASVG thus constitutes an obstacle to that freedom.

40. Moreover there is, as the Austrian Government accepts, no objective justification for the restriction on freedom of movement for workers inherent in Paragraph 235(3)(a) of the ASVG.

41. I agree therefore with the applicant and the Commission that the second question referred by the Oberster Gerichtshof should be answered in the affirmative.

12 — See Case 10/90 *Masgio* [1991] ECR I-1119, paragraph 17 of the judgment and the case-law cited there.

13 — See, in particular, *Masgio*, cited in note 12, paragraph 18 of the judgment; Case 349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

The third question

42. By its third question, the Oberster Gerichtshof asks the Court of Justice whether Articles 39(2) and 42 EC are to be interpreted as precluding Article 9a of Regulation No 1408/71 and national rules which exclude in general any prolongation of the reference period in respect of the period during which a pension is received or limit such prolongation to cases of entitlement to a pension stemming from the statutory accident insurance of the Member State concerned.

43. It appears that by that question the Oberster Gerichtshof seeks to ascertain, first and foremost, whether Articles 39 and 42 EC preclude national rules such as those laid down in Paragraphs 236(3) and 234(1)(2)(b) of the ASVG.

44. Guidance for answering that question may be found in *Paraschi*.[14] That case concerned provisions of German law governing the award of occupational disability pensions. Under those provisions, pensions in respect of reduced capacity for work were granted only if the insured person had engaged in an activity subject to compulsory insurance and paid at least 36 monthly contributions within a reference period of 60 months before the invalidity arose. The German legislation provided for prolongation of the reference period by 'non-computed periods', including periods in which no contributions were made by the person concerned owing to, *inter alia* incapacity for work. However, no provision was made for prolongation of the reference period where events or circumstances, corresponding to those which otherwise enabled the period to be prolonged, occurred in another Member State.

45. Asked to rule on the compatibility of those rules with Community law, the Court of Justice held that '[e]ven if [legislation of the kind at issue in the main proceedings] applies, formally, to every Community worker and can thus lead to a prolongation of his reference period, nevertheless, in so far as it makes no provision for any possibility of prolongation where events or circumstances corresponding to those which enable the period to be prolonged occur in another Member State, it is liable to have a much greater adverse effect on migrant workers since they above all, particularly in case of sickness or unemployment, tend to return to their countries of origin'.[15]

14 — Cited in note 13.

15 — Paragraph 24 of the judgment.

46. On that basis the Court concluded that 'Articles [39(2) and 42 EC]... preclude [national] legislation where it permits the reference period to be prolonged, subject to certain conditions, but does not provide for the possibility of a prolongation where events or circumstances corresponding to the events or circumstances which would enable a prolongation to be granted occur in another Member State'.

47. I agree with the applicant, the Austrian Government, the Commission and the Oberster Gerichtshof that that reasoning may be transposed to the present case. Rules of national law — such as Paragraphs 236(3) and 234(1)(2)(b) of the ASVG — which provide for prolongation of a reference period by periods in which the person concerned has been in receipt of an occupational disability pension under the law of the Member State in question, to the exclusion of pensions granted under the legislation of other Member States, are liable to affect migrant workers more gravely than persons who have not exercised their rights to freedom of movement. Those rules therefore have the effect of dissuading migrant workers from exercising their right of free movement. Moreover, there is — as the Austrian Government itself accepts — no objective justification for refusing prolongation of the reference period in respect of periods of entitlement to pension under the law of other Member States.

48. I consider, therefore, that the third question referred by the Oberster Gerichtshof should also be answered in the affirmative.

49. The Oberster Gerichtshof asks, moreover, whether Articles 39 and 42 EC are to be interpreted as precluding Article 9a of Regulation 1408/71. It appears that by that question, it seeks to ascertain whether Article 9a is contrary to Articles 39 and 42 EC and thus invalid in so far as it does not require account to be taken, for the purpose of prolonging the reference period, of pensions which have been awarded under the legislation of another Member State.

50. In my view, it is not necessary for the Court of Justice to rule on that issue in the present case since it is clear from the facts as presented in the order for reference that the reply given to the first part of the third question gives the Oberster Gerichtshof sufficient guidance to give judgment in the main proceedings.

Additional comments: the temporal scope of Articles 39 and 42 EC

51. While the Austrian Government accepts that the provisions in issue in the present case, as interpreted hitherto by the Austrian courts, are contrary to Article 39 and 42 EC, it none the less doubts the relevance for the main proceedings of those Treaty provisions. Referring to *Tsiotras*,[16] it stresses that the Treaty does not have retroactive effect in Austria. A distinction must therefore be drawn between situations occurring before and after Community law entered into force in Austria, pursuant to the EEA Agreement, on 1 January 1994. Since the work-related accident giving rise to the main proceedings occurred in 1968, it follows that the freedom of movement provisions are inapplicable *ratione temporis* to those proceedings.

52. It is true that in accordance with a general principle of law,[17] provisions of the EC Treaty do not have retroactive effect.[18] However, as the Court held in *Österreichischer Gewerkschaftsbund*[19] and *Saldanha and MTS*[20] provisions of the EC Treaty are, in accordance with Article 2 of the Act of Accession, immediately applicable from the date of accession and capable of applying to the present effects of situations which have arisen prior to accession.

53. The main proceedings concern a person who has applied for a disability pension with effect from a date which falls after the entry into force of the Treaty in Austria. In my view, the application of Articles 39 and 42 EC to such a situation does not entail retroactive application of the Treaty; it amounts to no more than the immediate application of Community law to facts which have occurred in the past. Since the act of deciding upon entitlement to a disability pension is of necessity based on facts which have occurred in the past, the application of Articles 39 and 42 EC to that act does not of itself involve the recognition of Community law rights with retroactive effect, in any event where the applicant seeks a pension with effect only

16 — Case C-171/91 [1993] ECR I-2925.

17 — See, in particular, Case 98/78 *Racke* [1979] ECR 69, paragraph 20 of the judgment and, with regard to the temporal effect in the Member States of provisions of the Treaty on European Union, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 42.

18 — See, with regard to Article 39 EC, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 55 of the judgment and, with regard to Article 73B EC, Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 21.

19 — Cited in note 18, paragraph 55 of the judgment.

20 — In the context of Article 12 EC, Case C-122/96 [1997] ECR I-5325, paragraph 14 of the judgment.

after the date on which Community law entered into force in the Member State concerned. The application of Articles 39 and 42 EC in such circumstances merely ensures that there is no current discriminatory treatment of migrant persons.

54. Support for that view may, as the Commission points out, be found in *Vougioukas*. [21] That case concerned the refusal of the Greek authorities to take into account, for the acquisition of the right to an occupational pension, periods of employment completed by a Greek national in another Member State prior to the accession of Greece to the Community. The Court held, without in any way restricting the temporal effects of its judgment, that that refusal was contrary to Articles 39 and 42 EC in so far as it might place migrant workers at a disadvantage.

55. Moreover, that view is not at variance with *Tsiotras*. [22] In that case a Greek national who before the accession of Greece to the Community had worked in Germany, but who on the date of accession was unemployed, who remained afterwards unemployed but seeking employment in Germany and for whom it was objectively impossible to find employment sought to rely on the freedom of movement for workers in order to extend his German residence permit. The Court held that a residence entitlement could not be based on facts which had occurred before the accession of Greece. However, the rationale was that Community law rights cannot be acquired before accession and as a consequence cannot be recognised after accession when the conditions for their acquisition or existence are no longer in place. [23] The present case is different. Like *Vougioukas* [24] the present case does not concern recognition of Community law rights allegedly acquired before accession; it concerns discriminatory treatment of migrant workers with regard to their current status which itself is the consequence of past events.

56. It follows therefore that a claim by a person such as the applicant in the main proceedings, who applies for a disability pension under the ASVG with effect from a date which falls after the entry into force of the Treaty in Austria, falls within the scope *ratione temporis* of Articles 39 and 42 EC.

21 — Cited in note 11.

22 — Cited in note 16.

23 — See similarly, in the context of a national of a Member State who died before that State acceded to the European Community, Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraphs 17 to 19 of the judgment.

24 — Cited in note 11.

Conclusion

57. In the light of all the foregoing observations, I am of the opinion that the Court should answer the questions referred by the Oberster Gerichtshof as follows:

(1) The situation of a national of a Member State who was employed prior to the accession of that State in another Member State, and sustained an accident there, falls within the scope of Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community where the person concerned applies for an occupational disability pension after the accession of the first Member State and the accident at work can have the effect of establishing entitlement to an occupational disability pension under the law of that State.

(2) Articles 39 and 42 EC preclude national rules under which an exception to the requirement of a qualifying period, as condition for entitlement to occupational disability pension resulting from an accident at work, applies only where the person suffering the accident was at the time of the accident insured compulsorily or privately under the legislation of the Member State concerned.

(3) Articles 39 and 42 EC preclude national rules which permit a reference period to be prolonged by periods during which the person concerned was in receipt of a pension under the statutory accident insurance of the Member State concerned, but do not provide for the possibility of a prolongation where the person was in receipt of a pension under the legislation of another Member State.