

periods ... does not amount to one year' and, secondly, that under the legislation of that Member State 'no right to benefits is acquired by virtue only of those periods' it follows that this article cannot be applied where the right to benefits of a migrant worker or his survivors already arises solely from the provisions of the legislation of the Member State in question.

Lecourt	Kutscher	Donner	
Mertens de Wilmars	Pescatore	Sørensen	O'Keeffe

Delivered in open court in Luxembourg on 20 November 1975.

A. Van Houtte  
Registrar

R. Lecourt  
President

OPINION OF MR ADVOCATE-GENERAL REISCHL  
DELIVERED ON 11 NOVEMBER 1975<sup>1</sup>

*Mr President,  
Members of the Court,*

In proceedings pending before the Sozialgericht Augsburg which have resulted in the question referred for a preliminary ruling with which I shall deal today, we are concerned with a claim for the grant of a survivor's pension under the German pensions insurance scheme for workers. The claim is made by Mrs Borella, an Italian citizen residing in Italy.

Apart from 119 months completed under the Italian legislation which can be taken into account for insurance purposes, Mrs Borella's husband also had 10 months which can be taken into account for

insurance purposes under the German insurance laws. During the period from 24 March 1941 to 3 January 1942 he had in fact paid contributions to the German pensions insurance scheme in respect of 9 months; one month was counted as an equivalent period (Ausfallzeit) under German law. In these circumstances, on the basis of a decision of 9 April 1965 Mr Borella received a pension for occupational invalidity as from 1 April 1964 and on the basis of a decision of 21 September 1972 he received a disablement pension as from 1 July 1972.

On 20 September 1973 Mr Borella died. On 23 October 1973 Mrs Borella applied for the grant of a widow's pension. This

<sup>1</sup> — Translated from the German.

application was rejected by the Landesversicherungsanstalt Schwaben on the ground that the deceased's spouse had only completed insurance periods of less than a year in Germany.

Thereupon Mrs Borella brought an action before the Sozialgericht Augsburg.

On examining the facts the Court came to the conclusion that under Paragraph 1263 (2) of the Reichsversicherungsordnung a survivor's pension is payable when at the time of his death the deceased was entitled to an insurance pension, even if this is based on an erroneous decision. On the other hand the Court was faced with an objection on the part of the Landesversicherungsanstalt which, because this was a new insurance risk which had materialized subsequent to the coming into force of Regulation No 1408/71, referred to Article 48 (1) of that regulation. This objection argues that the German institution is not under a duty to pay benefits since the total length of the insurance periods completed by the deceased under the German legal provisions amounts to less than a year.

In view of this fact the Court stayed the proceedings by order of 28 May 1975 and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Is Article 48 (1) of Regulation 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 L 149) to be interpreted in such a way that the relevant institution of the Member State is under an obligation to pay benefits to the survivors of an insured person, who are resident in another Member State and who possess the nationality of that State, if the insurance periods completed under the legislation of this Member State amount to less than one year, but benefits were due to the deceased insured person

arising out of these insurance periods until his death after the coming into force of Regulation No 1408/71?'

I can make the observations which arise from the point of view of Community law in a few sentences.

Article 48 (1) of Regulation No 1408/71 reads as follows:

'Notwithstanding the provisions of Article 46 (2), if the total length of the insurance periods completed under the legislation of a Member State does not amount to one year, and if under that legislation no right to benefits is acquired by virtue only of those periods the institution of that State shall not be bound to award benefits in respect of such periods.'

As several parties have argued in the proceedings, the purpose of this provision is quite clear. The costly administrative apparatus of social insurance schemes ought not to be set in motion where one is merely concerned with rights based on relatively short insurance periods. On the other hand the limits of this objective are equally clear: it is not a matter — though this may have been conceivable — of simply excluding claims to benefits arising from short periods of insurance, that is, a matter of avoiding the award of mini-pensions, which would be virtually absorbed by bank and postal charges in connexion with the transfer; rather does the provision apply only to claims the *establishment* of which requires aggregation of insurance periods arising in different Member States. This emerges clearly from the reference to Article 46 (2) and in this connexion the French version in using the word 'non-obstant' (notwithstanding) makes it even clearer that Article 48 (1) contains an exception to the provision laid down in Article 46 (2). The conclusion of Article 48 (1) clearly yields the same meaning. As a negative condition for excluding the claim, this provides that under the

legislation of the institution against which the claim is made no right to benefit is acquired by virtue only of those periods which are completed under the legislation of the Member State to which the relevant institution belongs.

Therefore Article 48 (1) clearly does not apply where a claim depends simply on the existence of another claim and if the mere application of a particular percentage suffices for the award thereof. Admittedly it is perhaps impossible to say in this case that the claim to benefits exists solely on the basis of periods completed in the Member State to which the institution making the award belongs; above all this applies where the entitlement giving rise to the survivor's claim depended on taking into account foreign insurance periods, a circumstance which, bearing in mind the German conditions as to the qualifying period, applied to the claim to pension on the part of the plaintiff's deceased spouse. However it is not this which is decisive but the fact that for the purpose of the award of the claim to a survivor's pension no arithmetical operation within the meaning of Articles 45 and 46 of Regulation No 1408/71 was required, that is, the examination of insurance periods and of their duration.

As we have heard in the course of the proceedings this apparently is so in the present case, although the relevant examination is a matter for the court making the reference since it involves the interpretation of national law. Until his death the plaintiff's spouse was

entitled to a German pension. This resulted from Article 28 (2) of Regulation No 4 which still applied at the time and which provided that the test was a minimum insurance period of six months. This also remained the situation after Regulation No 4 had as from 1 October 1972 been replaced by Article 48 (1) of Regulation No 1408/71 with its provision as to a minimum period of one year. That this was lawful can be demonstrated — as the Commission has shown — with the aid of a converse argument derived from Article 94 (5) of Regulation No 1408/71 in conjunction with the seventh recital of the preamble to that regulation.

For the purposes of the plaintiff's claim to a German pension it therefore clearly depends solely on Paragraph 1263 (2) of the Reichsversicherungsordnung, according to which the survivor's pension is granted where at the date of his death the deceased was entitled to an insurance pension. This provision must of course be interpreted in the light of European law — this point has also rightly been pointed out by the Commission; its application cannot therefore be limited to German claimants but, bearing in mind the principle of equal treatment laid down in the Community regulations on social insurance law, it applies likewise to migrant workers and their survivors. Since however the award of a survivor's pension certainly cannot be based on the completion of periods of insurance or residence, likewise the claim cannot be rejected by relying on Article 48 (1) of Regulation No 1408/71.

Without going into further considerations — protection of legitimate expectation, avoidance of loss of rights, etc. — the question referred by the Sozialgericht Augsburg may therefore be answered as follows;

Article 48 (1) of Regulation No 1408/71 does not apply if claims to benefits exist under the legislation of a Member State, unless it is necessary for the award thereof under Article 45 of that regulation to take into account periods of insurance or residence which were completed under the legislation of another Member State.