OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 February 2001 [1]

1. In this reference from the Conseil Supérieur des Assurances Sociales (Social Insurance Appeals Board), Luxembourg, the Court is asked a series of questions on the validity and interpretation of Regulation No 1408/71 of the Council 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 [2] and on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [3] The questions arise in the context of the refusal by the defendant institution, the Luxembourg Caisse Nationale des Prestations Familiales (National Family Benefits Fund), to pay certain allowances to the family of a Belgian national resident in Belgium, formerly employed as a frontier worker in Luxembourg and currently in receipt of an invalidity pension from the Luxembourg social security services, on the ground essentially that the residence condition in the Luxembourg legislation governing entitlement to the allowances is not satisfied.

National legislation

Antenatal, childbirth and postnatal allowances

2. These allowances are governed by the Law of 20 June 1977 (i) establishing a system of medical supervision for pregnant women and young children and (ii) amending existing legislation on childbirth allowances. That Law has, since the one year's residence requirement for the award of the antenatal and the childbirth allowances was declared discriminatory and hence unlawful by the Court in *Commission* v *Luxembourg*, [4] been amended by the Law of 31 July 1995. However, since that judgment speaks from 10 March 1993, when it was delivered, and since it appears that the defendant institution stopped enforcing that requirement as from that date, the Law as applicable at the relevant time (from early 1995 onwards) must be taken as not incorporating that requirement. The

1 — Original language: English.

2 — The consolidated version published in OJ 1992 C 325, p. 1, was that applicable at the beginning of the material period (shortly before the birth of the applicants' child on 13 March 1995). Minor amendments, irrelevant to the present case, where made to the provisions at issue with effect from 1 January 1996.

3 — OJ, English Special Edition 1968 (II), p. 475.

4 — Case C-111/91 [1993] ECR 817; see further paragraphs 30 to 32 below.

following summary is accordingly based on the Law as amended.

3. The Law divides the childbirth allowance into three instalments, namely the antenatal allowance, the childbirth allowance proper and the postnatal allowance.

4. Each allowance is payable only on condition that certain medical examinations have been carried out. Those examinations are listed in paragraphs 46 to 48 below.

5. The antenatal allowance is paid only if the mother-to-be is officially resident in Luxembourg at the time of the last medical examination.

6. The childbirth allowance is paid after the birth of the child provided that the mother is officially resident in Luxembourg at the time of the birth and that the child is born on Luxembourg territory (or elsewhere during a temporary absence of the mother).

7. The postnatal allowance is paid only when the child reaches the age of two years and then only on condition that the child has been brought up in Luxembourg.

8. The antenatal, childbirth and postnatal allowances each consist of a single payment. The antenatal allowance is payable to the mother-to-be; the childbirth and postnatal allowances are paid to the mother if, as in the present case, the parents live together.

Maternity allowance

9. The maternity allowance is provided under the Law of 30 April 1980. That law has also been amended by the Law of 31 July 1995 following the judgment in *Commission* v *Luxembourg*, which ruled that the original requirement for the mother to have been officially resident in Luxembourg for the whole year preceding the date on which entitlement to the allowance arose was discriminatory and hence unlawful. For the reasons given above, I am assuming that the Law as amended is the applicable version.

10. The Law requires the mother to have been officially resident in Luxembourg at the date on which entitlement to the allowance arose, that date being eight weeks before the anticipated date of birth. The allowance is paid to the mother for a maximum of 16 weeks commencing on the

eighth week prior to the anticipated date of birth.

Child-raising allowance

11. Created by the Law of 1 August 1988, the child-raising allowance is payable to every person who is officially resident in Luxembourg, actually resides there and brings up at home one or more children in respect of whom family allowances are paid to the applicant or his or her spouse. The allowance is payable from the first day of the month following the end of the mother's maternity leave or from the end of the mother's entitlement to maternity allowance and ends on the first day of the month after that in which the child reaches two years of age. The allowance is a fixed amount regardless of the number of children raised at home.

Community legislation

12. Article 1 of Regulation No 1408/71 provides:

'(u) (i) *family benefits* means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances referred to in Annex II;

(ii) *family allowances* means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.

13. Annex II includes in Section II 'Special childbirth allowances excluded from the scope of the regulation pursuant to Article 1(u)' under 'I. Luxembourg':

'(a) antenatal allowance;

(b) childbirth allowance.'

14. Article 4(1) provides, in so far as is relevant:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

...

(h) family benefits.'

15. Article 4(2a) was inserted by Regulation (EEC) No 1247/92. [5] It provides:

'This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h),

or

(b) solely as specific protection for the disabled.'

16. Article 4(4) provides, in so far as is relevant:

'This Regulation shall not apply to social and medical assistance...'

17. Article 10a of Regulation No 1408/71 [6] provides:

'Special non-contributory benefits

5 — Council Regulation of 30 April 1992, OJ 1992 L 136, p. 1.

6 — Inserted by Regulation No 1247/92, cited in note 5.

1. Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

2. The institution of a Member State under whose legislation entitlement to benefits covered by paragraph 1 is subject to the completion of periods of employment, self-employment or residence shall regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other Member State as periods completed in the territory of the first Member State.'

18. Annex IIa sets out under 'I. Luxembourg':

'(c) Maternity allowance (Law of 30 April 1980)'. [7]

7 — Point (c) became point (b) with effect from 1 January 1996 after amendment by Council Regulation (EC) No 3095/95 of 22 December 1995, OJ 1995 L 335, p. 1.

19. Article 73 provides:

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

20. Annex VI contains no relevant qualification with regard to Luxembourg.

21. Article 77 sets out the benefits for dependent children of pensioners, as follows:

'1. The term "benefits", for the purposes of this article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under

insurance schemes for accidents at work and occupational diseases.

2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension'.

22. Article 1 of Regulation No 1612/68 guarantees the nationals of every Member State the right to take up and carry on paid work in any other Member State, irrespective of their place of residence.

23. Article 7 provides that:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.'

The facts and the main proceedings

24. The applicants are Belgian nationals (Alina Deaconescu, originally of Romanian nationality, having acquired Belgian nationality in September 1998) resident in Belgium who have been married since 1 April 1994. Mr Leclere was employed as a frontier worker in Luxembourg. During the period of his employment there, he was required to make compulsory contributions to the Luxembourg social security system. Following an accident at work, he has been receiving, since 18 May 1981, an invalidity pension from the Luxembourg social security services. Neither he nor his wife has ever lived in Luxembourg. Their child was born in Luxembourg on 13 March 1995 and is a Belgian national. He lives with his parents in Belgium.

25. As the recipient of an invalidity pension, Mr Leclere continues to contribute to Luxembourg's compulsory medical insur-

ance scheme and is in principle subject to income tax in Luxembourg (although it appears that his income is such that no tax is in fact payable). He has never taken up paid work in Belgium and has always been assessed, as a worker employed in Luxembourg, by the Luxembourg social security services. He will never be entitled to receive an old-age pension or an invalidity pension in Belgium.

26. Following the birth of their son, the applicants have received no childbirth, maternity or child-raising allowances in Belgium. It appears that Mr Leclere has exhausted every remedy available on the matter in Belgium and that he has no claim under Belgian legislation since he was not subject to Belgian social security and the Convention between Belgium and Luxembourg on the social security of frontier workers of 16 November 1959 applied only to employed persons and persons assimilated thereto and not to non-employed recipients of an invalidity pension. Had his child been born three months later, Mr Leclere would have benefited from the new Convention of 24 March 1994, which entered into force on 1 June 1995 and which applies to former frontier workers and recipients of a pension.

27. The applicants' claims for the award of allowances connected with the birth of a child (antenatal, childbirth, postnatal, maternity and child-raising allowances) were rejected by the Luxembourg National Family Benefits Fund [8] on the grounds that the residence requirement laid down by the relevant Luxembourg legislation had not been satisfied and that the postnatal allowance was moreover not within the scope of Article 77 of Regulation No 1408/71.

28. The applicants appealed unsuccessfully to the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Board) and thence to the Appeals Board, which stayed the proceedings and referred the following questions to the Court of Justice:

'1. Are Articles 1(u)(i) and 10a and Annexes II and IIa of Regulation (EEC) No 1408/71, which lay down the principle of the non-exportability of childbirth and maternity allowances, consistent with Articles 48 and 51 of the EC Treaty?

2. Is Regulation No 1408/71 to be interpreted as meaning that, in respect of dependent children, it grants workers in receipt of an invalidity pension who reside in a different country from that which pays the invalidity pension,

8 — The applicants' claim for child benefit was however successful, and they have been receiving such benefit from the National Family Benefits Fund from 1 March 1995.

family allowances only, to the exclusion of the child-raising allowance which is not granted by reference to the number of children?

3. Is Article 73 of Regulation No 1408/71 to be interpreted as meaning that the recipient of an invalidity pension who continues to make compulsory sickness insurance contributions in the country which provides the pension, may, notwithstanding his pension, be considered in that country as an employee who is entitled to receive family benefits, including the child-raising allowance, and — in the event that the non-exportability clause is held to be incompatible with the Treaty — childbirth allowances?

4. Does the concept of "worker" within the meaning of Regulation No 1612/68 include the recipient of an invalidity pension who resides in a different country from that which provides the pension?

5. Is Article 7 of Regulation No 1612/68 to be interpreted as meaning that the recipient of an invalidity pension or his spouse may, on the basis of that article, enjoy social advantages which are denied him by Regulation No 1408/71, notwithstanding the principle of non-exportability laid down therein in the event that that principle is found by the Court to be compatible with the EC Treaty?'

29. Written observations have been submitted by the applicants, the defendant, the Austrian, Luxembourg, Portuguese, Spanish and United Kingdom Governments, the Council and the Commission. The defendant institution, the Austrian, Spanish and United Kingdom Governments, the Council and the Commission were represented at the hearing, where Mr Leclere very ably presented oral argument in person. The Council's observations were limited to the first question.

Commission v *Luxembourg*

30. The observations presented to the Court make frequent reference to the Court's ruling in *Commission* v *Luxembourg*,[9] in which the Commission brought an action for infringement in respect of the one year's residence condition originally attached to the receipt of the antenatal allowance, the childbirth allowance and the maternity allowance.

31. In that case, where it was accepted by the parties that all three allowances were social advantages within the meaning of Article 7(2) of Regulation No 1612/68, the Court ruled that that residence requirement was discriminatory since it was in practice more easily met by Luxembourg nationals

9 — Cited in note 4.

than by nationals of other Member States; it was hence contrary to both Article 7(2) of Regulation No 1612/68 and Article 52 of the Treaty (now, after amendment, Article 43 EC). With regard to the maternity allowance, the Court added that the residence requirement was also incompatible with Article 18(1) of Regulation No 1408/71, which requires account to be taken of periods of residence completed under the legislation of any other Member State.

32. *Commission* v *Luxembourg* is in my view of limited relevance to the present case for a number of reasons. First, the antenatal and childbirth allowances were considered solely from the point of view of their compatibility with Regulation No 1612/68; their position under Regulation No 1408/71 was not considered. Second, the postnatal allowance was not at issue. Third, at the time the period for compliance with the reasoned opinion expired Regulation No 1408/71 had not been amended by Regulation No 1247/92; the validity of Article 10a and Annex IIa, or of the inclusion of the maternity allowance in Annex IIa, was accordingly not at issue. Fourth, the pre-litigation procedure appears to have been explicitly directed, at least in the early stages, on the effect of the residence requirement on employed and self-employed workers; the Court accordingly approached the action on that basis. Finally, as the Austrian Government points out, the question whether the allowances were payable to non-residents was never raised: the issue before the Court was rather the position of persons moving to Luxembourg in the course of the year preceding the birth of a child.

The first question referred

33. By its first question the referring court asks whether Articles 1(u)(i) and 10a and Annexes II and IIa of Regulation (EEC) No 1408/71, described as laying down the principle of the non-exportability of childbirth and maternity allowances, are consistent with Articles 48 and 51 of the EC Treaty (now, after amendment, Articles 39 and 42 EC).

34. Article 1(u)(i) and Annex II have the effect that Luxembourg's antenatal and childbirth allowances are excluded from the definition of 'family benefits' under the Regulation. Article 10a and Annex IIa have the effect that Luxembourg's maternity allowance is a non-exportable benefit under the Regulation.

35. As a preliminary point, and as noted by the Portuguese Government and the Commission, it is incorrect to refer to the provisions at issue as laying down the 'principle of non-exportability of childbirth and maternity allowances'; those provisions rather (i) in the case of Article 1(u)(i)

and Annex II, exclude the specified special childbirth allowances from the scope of Regulation No 1408/71 altogether and (ii) in the case of Article 10a and Annex IIa, permit Member States to limit entitlement to the special non-contributory benefits expressly mentioned in Annex IIa to persons resident in that State, even where a provision of the Regulation would otherwise require export of that benefit.

36. The applicants and the Portuguese Government submit that the provisions at issue are not compatible with the Treaty while the defendant institution, the Austrian, Luxembourg, Spanish and United Kingdom Governments and the Commission submit that they are compatible.

37. It is helpful to deal separately with the two issues raised in the question.

The validity of Article 1(u)(i) and Annex II excluding special childbirth allowances from the scope of Regulation No 1408/71

38. The antenatal allowance and the childbirth allowance proper are listed in Annex II to the Regulation and hence, by virtue of Article 1(u)(i), fall outside the scope of the term 'family benefits' as there defined.

39. The Commission suggests that it would not have been necessary expressly to exclude the allowances from the scope of the Regulation if they would not otherwise have fallen within it. I am not convinced by that argument: a Member State may wish to avoid any doubt by expressly excluding an allowance. I will accordingly first consider whether the antenatal allowance and the childbirth allowance would fall within the scope of the Regulation as family benefits if they were not expressly excluded therefrom.

Do the allowances fall within the definition of 'family benefits'?

40. It may be noted as a preliminary point that the fact that the allowances are non-contributory cannot prevent them from falling within the material scope of the Regulation. [10]

41. It is clear from the case-law of the Court that the distinction between benefits

10 — See Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 21 of the judgment, and Article 4(2) of the Regulation.

excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and that a benefit is to be regarded as a social security benefit if it is granted to recipients without any individual and discretionary assessment of personal needs on the basis of a legally defined position and if it concerns one of the risks expressly listed in Article 4(1). [11]

42. The antenatal allowance and the childbirth allowance satisfy the requirement of automatic entitlement on the basis of objective criteria. The Council however in effect doubts whether they satisfy the second requirement, namely that they concern a risk listed in Article 4(1). That provision includes 'family benefits' as defined in Article 1(u)(i). According to the Council, the exclusion of the two allowances from the material scope of the Regulation is justified because they are not 'intended to meet family expenses' as required by Article 1(u)(i) of 'family benefits' within the scope of the Regulation but, requiring medical examinations, pursue a particular public health objective.

43. The Court has stated that it is clear from Article 1(u)(i) and 1(u)(ii) that 'family benefits or family allowances are intended to provide social assistance for workers with dependent families in the form of a contribution by society towards their expenses'. [12]

44. The defendant institution states that the essential purpose of the Law of 1977 governing birth allowances may be ascertained from its legislative history and in particular from the explanatory memorandum published with the draft law submitted on 29 August 1976 to the Chamber of Deputies. The Law sought to improve the medical follow-up of pregnant women and young children with the aim in particular of reducing infant mortality which was 1.8% in the period from 1970 to 1974. That aim has been attained: in 1997 the infant mortality rate had fallen to 0.4%.

45. The provisions of the Law, the text of which has been supplied to the Court, support the view that its principal purpose was to improve the health of pregnant women and young children. Chapter 4 of the law, entitled 'Childbirth allowance' (clearly intended in the composite sense), lays down the residence condition already mentioned and certain practical provisions such as how payments are made. Chapters 1 to 3 lay down the other conditions of entitlement to the antenatal allowance, the childbirth allowance proper and the postnatal allowance respectively.

11 — Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraphs 17 and 18 of the judgment.

12 — Case 104/84 *Kromhout* [1985] ECR 2205, paragraph 14 of the judgment.

46. Chapter 1 of the Law, entitled 'Protection of pregnant women', requires the pregnant women to have five medical examinations, both gynaecological and general, and a dental examination. If any of the medical examiners considers that the woman's state of health or situation calls for special protection, the local medical officer may appoint a health visitor to visit the woman at home, advise her as to appropriate measures and report back to the medical examiner and officer.

47. Chapter 2 of the Law, entitled 'postnatal examination of the mother', requires the mother to have had a postnatal examination to determine whether her health has been affected by the pregnancy.

48. Although the postnatal allowance is not in issue here, it was introduced by the same law and the conditions of entitlement to its grant may help in assessing the purpose of that law with regard to the other allowances. Chapter 3 of the Law, entitled 'Protection of young children', requires the child to have had two perinatal [13] examinations and four subsequent examinations within the first two years of life.

49. The tenor of the Law thus suggests that its principal aim was to improve the health of pregnant women and young children. That does not mean however that it cannot also have been intended to meet family expenses. As I indicated in my Opinion in *Hoever and Zachow*, [14] common sense suggests that a payment to an unsalaried parent devoting himself to the care of a child will in practice tend to contribute to family expenses. Although that statement was made in the context of a child-rearing allowance payable only to a parent with no full-time gainful employment, the underlying assumption could apply equally to payments made around the birth of a child, when even a working mother will necessarily have to interrupt her employment however briefly, frequently with adverse financial consequences. It is clear that family benefits within the meaning of Article 1(u)(i) may have more than one purpose. [15] I accordingly do not share the Council's view that the allowances cannot be family benefits purely because they have a public-health objective.

50. The fact that a given benefit is 'intended to meet family expenses' does not in itself however necessarily mean that it is a family benefit for the purpose of the Regulation. Many social security benefits are by their nature intended to meet family

13 — Within the first year after birth.

14 — Cited in note 11, paragraph 30 of the Opinion.

15 — *Hughes*, cited in note 10, paragraphs 19 and 20 of the judgment. See also the Opinion of Advocate General Alber in Case C-33/99 *Fahmi* delivered on 12 October 2000, paragraph 45.

expenses; they will not all be correctly analysed as 'family benefits' on that ground alone. The definition in Article 1(u)(i) continues 'under the legislation provided for in Article 4(1)(h)'. Article 4 defines the branches of social security to which the Regulation applies; Article 4(1)(h) includes 'family benefits'. This is not as circular as it seems: the rider in Article 1(u)(i) simply makes it clear that there is more to being a family benefit than being intended to meet family expenses. I am not aware of any decision of the Court on the treatment or categorisation of family benefits which does not involve an ongoing payment made in regular instalments over time on the basis that the family includes dependent children. Indeed Advocate General Darmon stated in *Kromhout* [16] that the Court in its earlier decision in *Robards* [17] 'acknowledged that the decisive factor as regards family allowances [in the broad sense, including family benefits] is the existence of a child in respect of whom entitlement to benefits has arisen...'.

51. The antenatal allowance at issue in the present case consists of a single payment to the mother-to-be entitlement to which arises before the birth of the child. The childbirth allowance consists of a single payment entitlement to which arises once the mother has had her postnatal examination. In my view both those allowances are in the nature of maternity benefits rather than family benefits. The Court in *Jordens-Vosters* [18] ruled that: 'the concept of "sickness and maternity benefits" appearing in Article 4(1)(a) of Regulation No 1408/71 is to be determined for the purpose of applying the regulation not according to the type of national legislation containing the provisions giving those benefits, but in accordance with Community rules which define what those benefits shall consist of..... Regulation No 1408/71 includes among sickness and maternity benefits referred to in Article 4(1)(a) all benefits provided in the case of sickness and maternity...' [19]

52. Since no argument has been addressed to this issue, I do not consider that I should express a definitive view on it. If however it were the case that the antenatal allowance and the childbirth allowance should correctly be classified as maternity benefits for the purpose of the Regulation, there would of course be no need to exclude them from the definition of 'family benefits' in Article 1(u)(i); their mention in Annex II to the Regulation would therefore be irrelevant. The allowances would then in my view be exportable by virtue of Article 19 of the Regulation, which is applicable to a recipient of an invalidity pension on the basis of *Pierik* [20] and *Twomey*. [21]

16 — Cited in note 12.

17 — Case 149/82 *Robards* [1983] ECR 171.

18 — Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraphs 6 and 8 of the judgment.

19 — Paragraphs 6 and 8 of the judgment.

20 — Case 182/78 [1979] ECR 1977, paragraph 4 of the judgment.

21 — Case C-215/90 [1992] ECR I-1823, paragraphs 13 to 18 of the judgment.

53. If however the Court concludes that the allowances at issue fall within the concept of 'family benefits' within the meaning of Article 1(u)(i), the question still remains whether their express exclusion in Article 1(u)(i) and Annex II from the material scope of the Regulation is lawful.

If the allowances are family benefits, is their exclusion from the material scope of the Regulation lawful?

54. I do not consider that the express exclusion of the allowances in Annex II from the material scope of the Regulation is on that analysis unlawful.

55. There is, as Advocate General Warner elegantly observed as long ago as 1975, 'a golden thread woven into the fabric' of the decisions in which the Court has ruled that a provision of Regulation No 1408/71 or its predecessor, Regulation No 3,[22] is incompatible with Article 51 and hence unlawful: 'Article 51 empowers and requires the Council to confer rights on migrant workers, but does not, so long as different national systems subsist, empower it to take away rights that those workers have under national law.'[23]

56. The Regulation must not therefore, at least so long as different national systems subsist, take away rights that workers have under national law. Nor must the Regulation exacerbate differences between those systems.[24]

57. Excluding the antenatal and childbirth allowances from the material scope of the Regulation does not, however, either add to such differences or extinguish entitlement under national legislation to those allowances: it simply has the effect that entitlement to the allowances remains wholly governed by national law.

58. In my view, therefore, if the antenatal allowance and the childbirth allowance are properly regarded as family benefits Article 1(u)(i) of, and Annex II to, Regulation No 1408/71 are not incompatible with Article 51 of the Treaty in so far as they exclude those allowances from the material scope of the Regulation.

22 — Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, JO 1958, p. 561.

23 — Case 24/75 *Petroni* [1975] ECR 1149, at p. 1166.

24 — See for example Case 41/84 *Pinna* [1986] ECR 1.

The validity of Article 10a and Annex IIa lifting the waiver of residence clauses for specified benefits

59. The second limb of the national court's first question concerns the maternity allowance. Maternity benefits are in general within the material scope of the Regulation, being listed in Article 4(1)(a). By virtue of Article 19 of the Regulation they are payable to insured persons resident in a Member State other than the competent State. The importance of that principle is illustrated by the fact that the preamble to the Regulation states that, 'in the field of sickness and maternity benefits, it is necessary to guarantee the protection of persons living or staying in a Member State other than the competent Member State'.[25] It will be recalled that the maternity allowance at issue in the main proceedings is listed in Annex IIa to the Regulation; by virtue of Article 10a it accordingly appears not to be exportable. The national court has asked whether those provisions are compatible with Article 51 of the Treaty.

60. The defendant institution, the Austrian, Luxembourg, Spanish and United Kingdom Governments, the Council and the Commission observe that the Court has already confirmed the compatibility of Article 10a and Annex IIa with the Treaty in *Snares*[26] and *Partridge*.[27]

61. In *Snares*, the Court was asked whether Regulation No 1247/92,[28] which inserted Article 10a and Annex IIa into Regulation No 1408/71, was valid in the light of Article 51 in so far as it set aside, in the case of the listed allowances, the principle of waiver of residence clauses laid down in Article 10 of Regulation No 1408/71. The Court ruled that the system of coordination established by Regulation No 1247/92, in so far as it applied to the allowance at issue (United Kingdom disability living allowance), was not at variance with Article 51.

62. That conclusion was affirmed in *Partridge*.

63. It is thus clear that Article 10a and Annex IIa are not in themselves inconsistent with Article 51 of the Treaty.

25 — 15th recital in the preamble to Regulation No 1408/71 as published in Part I of Annex A to Regulation 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. The competent Member State is in essence the Member State where the person concerned is insured or where the institution which would pay the benefits were the person concerned resident in its territory is situated.

26 — Case C-20/96 *Snares* [1997] ECR I-6057.

27 — Case C-297/96 [1998] ECR I-3467.

28 — Cited in note 5.

64. Moreover, the Court stated in both *Snares*[29] and *Partridge*[30] and repeated in *Swaddling*[31] that the fact that the Community legislature refers to legislation in Annex IIa must be accepted as establishing that benefits granted pursuant to that legislation are special non-contributory benefits falling within the scope of Article 10a.

65. It appears from that wording that the inclusion of a benefit in Annex IIa is conclusive of its status for the purpose of the Regulation as a special non-contributory benefit. I am not convinced however that the effect of those cases is that a Member State may, merely by entering a benefit in the list in Annex IIa, necessarily defeat a requirement to export that benefit which would otherwise flow from the Regulation. Only 'special non-contributory benefits' may validly to my mind be listed in Annex IIa.

66. Advocate General Alber comes to the same conclusion on that point in his Opinion in *Jauch*.[32] He notes that the classification as special non-contributory benefits of the various benefits concerned was not at issue in *Snares*, *Partridge* or *Swaddling*. Moreover the Court followed its statements in *Snares* and *Partridge* with the less categorical proposition that 'the wording of Article 10a *implies* that the benefits to which it refers *also* come within Article 4(2a) of Regulation No 1408/71'.[33] The Advocate General notes too that it is stated in the preamble to Regulation No 1247/92, which inserted Articles 4(2a) and 10a of, and Annex IIa to, Regulation No 1408/71, that 'it is necessary... to ensure that the existing system of coordination in Regulation No 1408/71 continues to apply to benefits which *either* do not fall within the special category of benefits referred to *or* are not expressly included in an Annex to that Regulation'.[34] That formulation emphasises that the mention in Annex IIa is only *one* of the conditions of application of Article 10a. Finally, Advocate General Alber states that it is not obvious why an annex to Regulation No 1408/71 adopted by the Community legislature should be more definitive than other provisions of Community legislation, the compatibility of which with legal rules of a higher order may be the subject of judicial review at any point.

67. Advocate General Alber accordingly concludes that it must be permissible to

29 — Paragraph 30 of the judgment.

30 — Paragraph 33 of the judgment.

31 — Case C-90/97 [1999] ECR I-1075, paragraph 24 of the judgment.

32 — Case C-215/99, Opinion delivered on 14 December 2000. See in particular paragraphs 66 to 79 of the Opinion.

33 — Paragraph 31 of the judgment in *Snares* and paragraph 32 of the judgment in *Partridge*, emphasis added.

34 — Eighth recital in the preamble, emphasis added by Advocate General Alber.

review the validity of the inclusion of a benefit in Annex IIa to the Regulation. I concur with that conclusion.

68. Article 4(2a) [35] states that the Regulation is to apply to special non-contributory benefits provided under legislation or schemes other than those referred to in paragraph 1 (or excluded by virtue of paragraph 4). Special non-contributory benefits are defined as benefits intended '(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h), or (b) solely as specific protection for the disabled'. Article 4(1)(a) includes maternity benefits.

69. Regulation No 1247/92, which inserted Articles 4(2a) and 10a of, and Annex IIa to, Regulation No 1408/71, sought to take account of the case-law of the Court [36] stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security (within the scope of the Regulation by virtue of Article 4(1)) and social assistance (outside the scope of the Regulation by virtue of Article 4(4)) because of the class of persons to whom such laws apply, their objectives and their manner of application. [37] Such a benefit is thus 'mixed' or 'hybrid'. The case-law is summarised thus in the preamble to Regulation No 1247/92:

'the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries'. [38]

70. Benefits which the Court had found to be such mixed or hybrid benefits before adoption of Regulation No 1247/92 included: guaranteed income for old persons in Belgium [39] and in France; [40] United King-

35 — Inserted by Regulation No 1247/92, cited in note 5.

36 — For a summary of that case-law, see paragraphs 40 to 42 of the Opinion of Advocate General Léger in Case C-20/96, cited in note 26.

37 — See the third recital in the preamble.

38 — Fourth recital. Further discussion of the background to Regulation No 1247/92 may be found in paragraphs 22 and 23 of my Opinion in Case C-132/96 *Stinco and Panfilo* [1998] ECR I-5225.

39 — Case 1/72 *Frilli* [1972] ECR 457 and Case 261/83 *Castelli* [1984] ECR 3199.

40 — Case 24/74 *Biason* [1974] ECR 999; Joined Cases 379/85, 380/85, 381/85 and 93/86 *Giletti* [1987] ECR 955; Case C-236/88 *Commission* v *France* [1990] ECR I-3163 and Case C-307/89 *Commission* v *France* [1991] ECR I-2903.

dom 'family credit';[41] the social benefit accorded by Netherlands law to certain unemployed persons[42] and disabled persons' allowances provided for by Belgian,[43] French[44] and United Kingdom[45] legislation.

71. The preamble to Regulation No 1247/92 states that 'such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family... without discrimination on grounds of nationality'.[46] Those benefits are defined in Article 4(2a) as special non-contributory benefits.

72. Benefits which the Court has accepted as being special non-contributory benefits within the meaning of Article 4(2a) include the United Kingdom disability living allowance,[47] attendance allowance[48] and income support[49] and, in passing, the Italian minimum old-age pension supplement.[50]

73. All these benefits satisfy the requirement developed in the case-law that need should be an essential criterion.

74. The overwhelming majority of the 'special non-contributory cash benefits' listed in Annex IIa to the Regulation also reflect that requirement. In the version of the Regulation applicable when Mr Leclere's son was born,[51] Annex IIa lists 55 such benefits. Of that total, and in so far as can be ascertained from the description of the benefit in Annex IIa, 37 take the form of allowances or supplementary income for those suffering from some type of disability, invalidity or incapacity for work and/or for the elderly. The remaining benefits comprise either allowances for children of non-working mothers whose husbands are on military service or in prison, for widows and orphans, for lone parents and for nursing mothers (seven in total) or variously named benefits apparently intended to supplement income (10 in total). The Luxembourg maternity benefit

41 — Case C-78/91, cited in note 10.

42 — Case C-66/92 *Acciardi* [1993] ECR I-4567.

43 — Case 39/74 *Costa* [1974] ECR 1251; Case 7/75 *Mr and Mrs F.* [1975] ECR 679, and Case 187/73 *Callemeyn* [1974] ECR 553.

44 — Judgment in Case 63/76 *Inzirillo* [1976] ECR 2057.

45 — Case C-356/89 *Newton* [1991] ECR I-3017.

46 — Seventh recital.

47 — *Snares*, cited in note 26.

48 — *Partridge*, cited in note 27.

49 — *Swaddling*, cited in note 31.

50 — *Stinco and Panfilo*, cited in note 38.

51 — See the Consolidated version of Regulation (EEC) No 1408/71 of the Council 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, OJ 1992 C 325, p. 1, as amended by Council Regulation (EEC) No 1945/93 of 30 June 1993, OJ 1993 L 181, p. 1.

at issue in the main proceedings is the remaining allowance listed in Annex IIa.

75. In my view, a maternity allowance available as of right to all pregnant women whatever their circumstances is not correctly classified as a special non-contributory benefit for the purposes of Article 10a of and Annex IIa to the Regulation. First, there is no element of need as 'an essential criterion in its implementation', as required of such benefits by the Court's case-law which led to Regulation No 1247/92. There is moreover no suggestion that the benefit is intended 'to provide supplementary, substitute or ancillary cover' for maternity as required by the definition of 'special non-contributory benefits' in Article 4(2a) of Regulation No 1408/71. [52] Nor finally is there anything to suggest that it is a 'special' benefit: it appears on the contrary to be in the nature of a straightforward maternity benefit. Since the definition of 'special non-contributory benefits' in Article 4(2a) expressly excludes benefits provided under legislation referred to in Article 4(1), and hence under legislation concerning maternity benefits, I cannot see how the maternity allowance can fall within that definition.

76. I accordingly conclude that the maternity allowance is not validly included in Annex IIa to the Regulation. Article 10a is accordingly inapplicable to the allowance and the residence condition is ineffective by virtue of Article 19.

The second question referred

77. By its second question the referring court asks whether workers in receipt of an invalidity pension from a Member State other than their State of residence are entitled under Regulation No 1408/71 to family allowances only for dependent children, to the exclusion of the child-raising allowance which is not granted by reference to the number of children.

78. This question concerns the interpretation of Article 77 of the Regulation, and in particular the question whether the Luxembourg child-raising allowance is included among the benefits exportable by virtue of that article.

79. Article 77 provides for the export of benefits to persons receiving invalidity pensions. However, the term 'benefits' is defined for the purposes of the article as 'family allowances'. 'Family allowances' are defined in Article 1(u)(ii) as 'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.

52 — See paragraph 68 above.

80. The applicant and the Spanish Government submit that the child-raising allowance is included among the benefits exportable by virtue of Article 77 while the defendant, the Austrian, Luxembourg and Portuguese Governments and the Commission submit that it is not. The United Kingdom submitted no observations on the second question.

81. The defendant institution, the Austrian and Portuguese Governments and the Commission all submit — correctly in my view — that the answer to this question follows from the Court's ruling in *Lenoir*.[53] In that case, the Court was asked whether Article 77 entitled a national of a Member State resident in another Member State to payment by the social security institution of his country of origin solely of family allowances and not of other family benefits. The Court confirmed that 'benefits' within the meaning of Article 77 meant family allowances as defined in Article 1(u)(ii) of the Regulation.

82. Since the child-rearing allowance is a fixed amount regardless of the number of children raised at home, it cannot fall within the scope of that definition and is not therefore covered by Article 77.

83. I would also add (although the Court has not been asked to rule on this point) that the postnatal allowance, which is not listed in Annex II and hence not excluded from the scope of the Regulation), cannot be exportable by virtue of Article 77 since, being a single payment, it is not a 'periodical cash benefit' within the definition of 'family allowances' in Article 1(u)(i).

The third question referred

84. By its third question the referring court asks whether under Article 73 of Regulation No 1408/71 the recipient of an invalidity pension who continues to make compulsory sickness insurance contributions in the Member State providing the pension may be considered in that State to be an employee entitled to receive family benefits, including the child-raising allowance, and — in the event that the non-exportability clause is held to be incompatible with the Treaty — childbirth allowances.

85. Article 73 entitles an employed person subject to the legislation of a Member State

53 — Case C-313/86 [1988] ECR 5391.

to the family benefits provided for by that legislation, in respect of members of his family residing in another Member State. 'Employed person' is defined in Article 1(a) of the Regulation in very general terms so as to include any person who is insured for one or more of the contingencies covered by the branches of a social security scheme.

86. The applicants and the Portuguese and Spanish Governments consider that the recipient of a pension is an employed person with the meaning of Article 73 while the defendant institution, the Austrian and Luxembourg Governments and the Commission consider that he is not. The United Kingdom submitted no observations on the third question.

87. Although it would appear from a reading of Article 73 in conjunction with Article 1(a) that the recipient of an invalidity pension who continues to make compulsory sickness insurance contributions in the country which provides the pension falls within the definition of 'employed person', I concur with the defendant institution and the Commission that that reading does not survive a scrutiny of Article 73 in the context of the Regulation as a whole.

88. Article 73 is in Chapter 7, Family benefits. The following chapter, Benefits for dependent children of pensioners and for orphans, which contains Article 77, must in that context be taken to displace Article 73 where the situation at issue is precisely that envisaged by Article 77, namely the extent of the right to family benefits of a recipient of an invalidity pension resident in a Member State other than that paying the pension. [54]

89. It has moreover been acknowledged by the Court that Article 73 ceases to apply, in favour of Article 77, when the person concerned loses his status as worker and becomes the recipient of an invalidity pension [55] and that a self-employed person did not fall within the concept 'employed person' for the purpose of Article 73 even though that person strictly fell within the definition in Article 1(a) at the material time by virtue of compulsory insurance. [56]

90. I accordingly conclude that the recipient of an invalidity pension who continues to make compulsory sickness insurance contributions in the Member State providing the pension is not to be considered to be

54 — See also the analysis of Advocate General Van Gerven in Case C-198/90 *Commission* v *Netherlands* [1991] ECR I-5799, paragraphs 4 and 8 of the Opinion.

55 — Case 1/88 *Baldi* [1989] ECR 667, paragraphs 18 to 20 of the judgment.

56 — Case C-15/90 *Middleburgh* [1991] ECR I-4655, paragraphs 6 to 10 of the judgment. Article 73 has applied to self-employed persons since its amendment by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), but the relevant period in *Middleburgh* ante-dated the effect of that amendment.

an employee for the purpose of Article 73 of the Regulation; he is not therefore entitled to receive family benefits in his State of residence by virtue of that provision.

91. The answers which I propose to the national court's second and third questions appear to me to follow inescapably from the scheme and wording of Articles 73 and 77 and the Court's ruling in *Lenoir*.[57] I am conscious however that the result in the present case is most unfortunate: Mr Leclere, who has been a model Community national exercising his right of free movement, is denied family benefits to which he would have been entitled had he been employed rather than in receipt of invalidity benefit when his son was born. The Commission suggested at the hearing that for that reason Article 77 should be regarded as inapplicable. That solution however would be contrary to the express wording of the provision as interpreted by the Court. The answer perhaps lies in a future amendment of the Regulation, although that solution will not of course assist Mr Leclere.

The fourth question referred

92. By its fourth question the national court asks whether the concept of 'worker' within the meaning of Regulation No 1612/68 includes the recipient of an invalidity pension who resides in a different Member State from that which provides the pension.

93. The applicants, the Portuguese and Spanish Governments and the Commission consider that this question should be answered in the affirmative, while the Austrian, Luxembourg and United Kingdom Governments consider that it should be answered in the negative.

94. It is settled case-law that the concept of worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68 has a specific Community meaning: a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended.[58]

95. The Portuguese Government and the Commission rely on the Court's rulings in *Meints*[59] and *Commission* v *France*[60] to support their argument that Mr Leclere

57 — Cited in note 53.

58 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32 of the judgment.

59 — Case C-57/96 [1997] ECR I-6689.

60 — Case C-35/97 [1998] ECR I-5325.

remains a worker within the meaning of Regulation 1612/68. I am persuaded however by the careful analysis of the case-law presented by the representative of the United Kingdom Government at the hearing in support of the contrary view.

96. The United Kingdom referred to the Court's repeated definition of 'social advantages' within the meaning of Article 7(2) of Regulation No 1612/68 as 'all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory...'. [61] Thus 'social advantages' are classified in two main categories: first, those that the host State grants to its workers and, second, those that the host State grants to its residents. The benefits at issue in these proceedings are plainly in the second of those categories.

97. *Meints* and *Commission* v *France* are both cases in which the benefit in question was granted to the workers of the Member State concerned. Thus in *Meints* the Court confirmed entitlement to a benefit (a compensation payment for dismissed agricultural workers) 'the payment of which is dependent on the prior existence of an employment relationship which has recently come to an end... since entitlement to the benefit is intrinsically linked to the recipients' objective status as workers.' [62] In *Commission* v *France*, which concerned qualification for supplementary retirement pension points for former workers placed in early retirement, the Court ruled that the application of Regulation No 1612/68 [63] could 'not be precluded by the fact that the concessionary points system benefits persons whose contract of employment has terminated. Workers are guaranteed certain rights linked to their status as such... even when they are no longer in an employment relationship'. [64]

98. Both those cases are accordingly consistent with the rule that a benefit may be claimed as a social advantage by virtue of Regulation No 1612/68 by former workers whether or not resident in the State granting the benefit if the benefits are granted to former workers because of their objective status as such. Neither case establishes a rule that former workers who are not resident in that State may under that Regulation claim as a social advantage a benefit of a type granted by the State to its residents alone. That situation remains governed by the general proposition that former workers are not 'workers' within

61 — Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 18 of the judgment, citing Case C-249/83 *Hoeckx* [1985] ECR I-973; *Meints*, cited in note 59, paragraph 39.

62 — Paragraph 41 of the judgment.

63 — The Court was in fact considering Article 7(1), set out in paragraph 23, which precludes different treatment as regards dismissal.

64 — Paragraph 41 of the judgment.

the meaning of Regulation No 1612/68 for the purpose of such social advantages.

99. I accordingly conclude that Regulation No 1612/68 does not entitle a recipient of an invalidity pension resident in a State other than that of his former employment to receive a benefit payable by the latter State to its residents but not granted to former workers because of their objective status as such.

The fifth question referred

100. By its fifth question the national court asks essentially whether under Article 7 of Regulation No 1612/68 the recipient of an invalidity pension or his spouse may enjoy social advantages which are denied him by Regulation No 1408/71.

101. Since in my view, as discussed in the context of the fourth question, the recipient of an invalidity pension is not a 'worker' within the meaning of Regulation No 1216/68, this question does not arise.

Conclusion

102. I am accordingly of the opinion that the questions referred by the Conseil Supérieur des Assurances Sociales should be answered as follows:

(1) Article 1(u)(i) of, and Annex II to, Regulation (EEC) No 1408/71 of the Council 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 are not incompatible with Articles 48 and 51 of the EC Treaty (now, after amendment, Articles 39 and 42 EC) in so far as

they exclude the antenatal allowance and the childbirth allowance from the material scope of the Regulation. If, however, those allowances are correctly analysed as maternity benefits, their mention in Annex II is irrelevant and they are exportable by virtue of Article 19 of the Regulation.

(2) Article 10a of, and Annex IIa to, Regulation No 1408/71 are not incompatible with Articles 48 and 51 of the EC Treaty in so far as they preclude the export of special non-contributory benefits as defined in Article 4(2a). Those provisions cannot however apply to an allowance such as the maternity allowance in issue, since it does not fall within the concept of a special non-contributory benefit.

(3) An allowance such as the child-raising allowance at issue is not a benefit within the meaning of Article 77 of Regulation No 1408/71; it is accordingly not payable to workers in receipt of an invalidity pension from a Member State other than their State of residence.

(4) A recipient of an invalidity pension who continues to make compulsory sickness insurance contributions in the Member State providing the pension is not an 'employed or self-employed person' within the meaning of Article 73 of Regulation No 1408/71.

(5) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community does not entitle a recipient of an invalidity pension resident in a State other than that of his former employment to receive a benefit payable by the latter State to its residents but not granted to former workers because of their objective status as such.