supplement to the income of recipients of social security benefits, falls in principle within the field of social security referred to in Article 51 of the EEC Treaty and is not excluded from the scope of Regulation No 1408/71 by the provisions of Article 4 (4) thereof.

3. A social aid pension which is paid on the basis of objective criteria to elderly nationals in order to provide them with the minimum means of subsistence must be assimilated to an old-age benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71 and is included amongst the benefits referred to in the first subparagraph of Article 10 (1) of the same regulation. Since the regulation in question does not contain any specific provisions relating to that pension, the waiver of residence clauses provided for in Article 10 (1) of that regulation must be taken to apply to the benefit in question.

In Case 139/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Italian Corte di Cassazione [Court of Cassation] for a preliminary ruling in the action pending before that court between

PAOLA PISCITELLO

and

ISTITUTO NAZIONALE DELLA PREVIDENZA SOCIALE (INPS) [National Social Welfare Institution]

on the interpretation of 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 (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Lord Mackenzie Stuart and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

From 1 January 1973 Paola Piscitello, an Italian national, was in receipt of the social aid benefit, known as "pensione sociale", provided for in Article 26 of Law No 153 of 30 April 1969.

By virtue of that provision every Italian citizen who is 65 years of age, resides in the national territory and whose income from all sources is below the minimum income fixed by law, receives the social aid pension.

On 25 February 1976 the Regional Secretariat of the Associazione Cristiana dei Lavoratori Italiani, [Christian Association for Italian Workers], Liège, informed the Istituto Nazionale della Previdenza Sociale [hereinafter referred to as "the Institution"] that the plaintiff in the main proceedings had changed her residence on 1 August 1975 and was living with a member of her family in Belgium.

By a decision notified to the plaintiff on 26 June 1976 the Institution informed her that her social aid pension had been discontinued with effect from 1 August 1975.

Mrs Piscitello challenged that decision before the Pretura [Magistrate's Court], Enna, and subsequently appealed to the Tribunale di Enna [District Court, Enna] but her claim was rejected in both cases.

In her appeal to the Corte di Cassazione against the decision of the Tribunale di Enna, the plaintiff argued that the conditions applicable to the social aid pension provided for in Article 26 of the Italian law previously referred to were subject to the provisions of Article 10 of Regulation No 1408/71 of the Council of 14 June 1971, which relates to the waiving of residence clauses, even though the benefit was non-contributory.

By order of 14 January 1982 the Corte di Cassazione decided to refer the following question to the Court for a preliminary ruling:

"In view of the 'waiving of residence clauses' provided for in Article 10 of Regulation No 1408/71 of the Council of 14 June 1971, must the provisions of Article 26 of Law No 153 of 30 April 1969 to the effect that the grant and enjoyment of the social aid pension provided for in that article are conditional upon an Italian national's residence within the national territory be considered as abrogated and therefore may that pension be suspended or withdrawn by reason of the fact that the recipient transfers his residence to the territory of another Member State, regard being had to the fact that, on the one hand, the pension is granted by way of assistance (cf. judgment No 157 of the Corte Costituzionale [Constitutional Court] of 15 December 1980) and, on the other hand, that it is classifiable as an old-age benefit, account also being taken of the provisions of Article 4 (1) of Regulation No 1408/71 of the Council

according to which that regulation 'shall apply to all legislation concerning the following branches of social security: . . . old-age benefits'?"

The order making the reference was received at the Court Registry on 30 April 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiff in the main proceedings, Paola Piscitello, represented by Ugo Novelli, advocate with the right of audience before the Corte di Cassazione, by the Institution, represented by its President, Ruggero Ravenna, by the Italian Government, represented by Pier Giorgio Ferri, Avvocato dello Stato, by the United Kingdom, represented by G. Dagtoglou, of the Treasury Solicitor's Department, acting as Agent, assisted by Henry Knorpel, Solicitor to the Department of Health and Social Security, and by the Commission of the European Communities, represented by Oreste Montalto, a member of its legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 21 of the Statute of the Court and Article 45 of the Rules of Procedure, to conduct a preparatory inquiry.

By letter of 16 December 1982 the Registrar invited the parties to the main action to reply before 11 January 1983 to a number of questions put by the Court.

The following questions were put to Mrs Piscitello:

1. Had she pursued any professional or trade activity and had she been insured under a social security scheme prior to the grant of the social aid pension?
2. Was she the widow of a migrant worker (Article 2 of Regulation No 1408/71 of 14 June 1971 (Official Journal, English Special Edition 1971 (II), p. 416))?
3. Was she, in Belgium, a dependant of a member of her family (Article 2 of Regulation No 1408/71, cited above, and Article 10 of Regulation No 1612/68 of 15 October 1968 (Official Journal, English Special Edition 1968 (II), p. 475))?

The Institution was asked to reply to the following question:

Were other benefits granted to Paola Piscitello in addition to the social aid pension? If so, which benefits?

The replies of the Institution and the plaintiff were received at the Court on 13 and 20 January 1983 respectively.

Pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court assigned the case, by order of 15 December 1982, to the Third Chamber.

II — Summary of the written observations submitted to the Court

According to the *plaintiff* the fact that the social aid pension provided for in Article 26 of Italian Law No 153 of 30 April 1969 is paid even where the beneficiary has not been in employment has no effect on the character of the benefit. In so far as the social aid pension is payable by the Institution to all citizens over the age of 60 years, whose income is insufficient, it is a compulsory benefit. She is also of the opinion that the waiving of residence clauses provided for in Article 10 of Regulation No 1408/71 of the Council applies to this case and as a result the residence requirement contained in Article 26 of the Italian law cited above is inoperative.

The *Institution* considers that the Community rules do not apply to this case and consequently the request for a

preliminary ruling made by the Corte di Cassazione is neither well founded nor admissible.

According to the Institution it is necessary, in relation to social security benefits, to distinguish between those, like the social aid pension at issue, which are granted under a social *assistance* scheme and those which are paid by virtue of social *insurance.*

The first category of social security benefit, which includes the social aid pension at issue, falls within the scope of the first paragraph of Article 38 of the Constitution. According to that provision, the basis of the social assistance scheme is the duty of collective responsibility discharged by the State for the benefit of those of its elderly citizens who are not entitled to the retirement pension paid to insured workers (Corte Costituzionale, Judgment No 157 of 15 December 1980).

The second category of social security benefit, which falls within the scope of the second paragraph of Article 38 of the Constitution, reflects the duty of mutual assistance imposed upon various groups by the compulsory insurance scheme (Corte Costituzionale, Judgment No 85 of 26 July 1979).

The Institution considers that the social aid pension does not fall within the spirit, purpose, terms or objectives of the Treaty of Rome and the implementing Community legislation.

According to the Institution, Regulation No 1408/71 of 14 June 1971, which applies solely to employed persons and their families moving within the Community, relates exclusively to compulsory social insurance based on paid employment. Therefore, the social aid pension in question is not to be equated with the old-age benefits referred to in Article 4 (1) (c) of that regulation.

In its opinion Article 10 of Regulation No 1408/71 concerning the waiving of residence clauses cannot apply to retirement benefits arising under a social assistance scheme in view of the fact that that regulation applies *ratione personae et materiae.*

The Institution, relying principally upon the Court's judgment of 16 May 1979 in Case 236/78 *Fonds National de Retraite des Ouvriers Mineurs* v *Giovanni Mura* [1979] ECR 1819, considers, moreover, that the Community rules cannot be relied upon in the present case in so far as the social aid pension was not acquired and may not be continued by virtue of those rules.

According to the *Italian Government* the question submitted by the Corte di Cassazione requires an examination of the nature of the social aid pension in question in order to determine whether or not it falls within the scope of Regulation No 1408/71.

The Italian Government states that by virtue of Article 26 of Law No 153 of 30 April 1969 the social aid pension is granted automatically to any elderly person not in receipt of any other social assistance or social security benefit who, on the basis of his taxable income, does not have sufficient means to meet his vital needs. The benefit is granted regardless of whether the beneficiary was previously in paid employment or was a dependant of an employed person. Furthermore, if the beneficiary is in receipt of income above the minimum fixed by the law, the amount of the social aid pension is reduced accordingly.

The Italian Government considers that, in view of the nature of the social aid pension in question, the solution adopted by the Court in Case 24/74 *Caisse Régionale d'Assurance Maladie de Paris* v

Giuseppina Biason [1974] ECR 999 should not be extended to the present case in so far as that case was concerned with a supplementary allowance paid to a person who was entitled to an invalidity pension by virtue of her employment.

According to the Italian Government it is clear from the provisions of Regulation No 1408/71 which identify the subject-matter of the regulation and the persons to whom it applies that it concerns social security benefits granted by Member States to their nationals by virtue of the fact that they are employed persons or members of the family of employed persons within the meaning of Articles 1 and 2 of that regulation. In its opinion, it is necessary to distinguish between those social security benefits listed in Article 4 of Regulation No 1408/71 and social assistance benefits for elderly persons, by reason of their different functions and the different conditions for their award.

In the view of the *United Kingdom* the question formulated by the Corte di Cassazione relates directly to the effect upon Article 26 of the Italian Law No 153 of 30 April 1969 of Articles 4 and 10 of Regulation No 1408/71.

The United Kingdom states that whilst, according to well-established case law, the Court has no jurisdiction to pronounce on a provision of national law with regard to a Community rule, it may provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of such provision. Accordingly, the United Kingdom considers that it would be helpful if the Court were to define, on the one hand, the criteria by which to determine whether a minimum income for elderly persons constitutes an old-age benefit falling within Article 4 (1) (c) of Regulation No 1408/71 or a social assistance benefit falling outside the scope of that regulation by virtue of Article 4 (4) thereof and on the other hand, to state in what circumstances that minimum income is subject to the waiver of residence clauses for which Article 10 of Regulation No 1408/71 makes provision.

According to the United Kingdom the Court has held consistently that legislation concerning both social security benefits and social assistance benefits may not be amenable to any all-embracing classification with regard to the provisions of Community law.

According to the case-law of the Court social assistance benefits fall within the field of application of Community rules if, on the one hand, the benefit is applied for by a migrant worker in addition to social security benefits to which he is entitled as an employed person (judgment of 22 June 1972 in Case 1/72 *Rita Frilli* v *Belgian State* [1972] ECR 457; judgment of 28 May 1974 in Case 187/73 *Odette Callemeyn* v *Belgian State* [1974] ECR 553; judgment of 9 October 1974 in the *Biason* case, cited above) and if, on the other hand, the grant by the authorities of a Member State of a benefit to a member of a migrant worker's family helps to protect that worker's freedom to work in that Member State (judgment of 13 November 1974 in Case 39/74 *Luciana Mazzier (née Costa)* v *Belgian State* [1974] ECR 1251; judgment of 17 June 1975 in Case 7/75 *Mr and Mrs F.* v *Belgian State* [1975] ECR 679; judgment of 7 December 1976 in Case 63/76 *Vito Inzirillo* v *Caisse d'Allocations Familiales*

de l'Arrondissement de Lyon [1976] ECR 2057).

According to the United Kingdom the Corte di Cassazione has not provided all the information needed in order to decide whether the social aid pension forms part of the social assistance system or of the system of insurance for employed persons. The United Kingdom nevertheless points out that objective conditions must be complied with for the grant of the benefit in question and that such grant does not depend on an assessment of an applicant's particular situation allowing the competent institution to vary the amount of the benefit by reference to the applicant's needs and resources.

In the opinion of the United Kingdom, if the social aid pension is to be regarded as forming part of a branch of social security falling under Article 4 (1) of Regulation No 1408/71, it constitutes specifically an old-age benefit within the meaning of Article 4 (1) (c) because the condition for entitlement laid down by Italian law is attainment of the age of 65.

The United Kingdom emphasizes that in paragraphs 20 and 21 of the Court's judgment of 22 June 1972 in the *Frilli* case, cited above, it stated that, although the difficulties which may occur as regards the Community rules as a result of the application of general systems of social protection which are intended to protect simultaneously employed persons covered as such by social security and persons who are not thus covered and which are based on requirements of nationality and residence, can only be resolved as a whole in the context of legislative action taken by the Community, nevertheless that fact cannot adversely affect the right and duty of courts and tribunals to ensure that migrant workers receive protection under the principles of the social legislation of the Community without thereby breaking up the systems set up by the national legislation in question.

The Court interpreted Article 10 of Regulation No 1408/71 in the light of those principles when it stated in its judgment of 9 October 1974 in the *Biason* case, cited above, that a person entitled to an invalidity pension who is paid a supplementary allowance in one Member State is entitled to continue to receive such allowance if he transfers his residence to another Member State, provided that such allowance falls within the area of application of the Community rules, even if the supplementary allowance is limited, by national legislation, to persons residing within the national territory.

The United Kingdom states that it shares the view of the Advocate General expressed in the *Biason* case, cited above, that it may probably be deduced "at the very least that there can be no question of a *general* application of the possibility of exportation provided in Articles 10 of Community Regulations No 3 and No 1408/71 to *all cases* of supplementary social security payments or guaranteed minimum incomes".

In the opinion of the United Kingdom three major principles may be derived from an examination of the provisions of Community law and from the jurisprudence of the Court.

First, Article 10 comes within the framework of Article 51 of the EEC Treaty and is intended to ensure that a migrant worker and his dependants are not deprived of the fruit of his labours by reason of a change of residence to another Member State.

Secondly, it does not seem to be necessary to decide the question whether the plaintiff in the main proceedings may continue to enjoy a minimum income if she transfers her residence to another

Member State on the basis of an interpretation of Article 10 of Regulation No 1408/71. That right is secured, according to the judgments of the Court in Case 187/73 *Callemeyn* v *Belgian State* and Case 63/76 *Inzirillo* v *Caisse d'Allocations Familiales de l'Arrondissement de Lyon,* cited above, by Article 3 (1) of Regulation No 1408/71 and by Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community. That right is further protected, in particular, by the European Convention on Social and Medical Assistance of 11 December 1953, which has been ratified by all the Member States.

Thirdly, the United Kingdom states that to attempt to impose the principle of exportability on social assistance benefits would cause the system set up by the national legislation of the various Member States to be upset, in the absence of Community mechanisms designed in particular to assess incomes in another Member State and to apportion the costs between the Member States involved.

For the various reasons stated above the United Kingdom considers that the social aid pension in question should not be extended beyond those cases in which national legislation confers upon employed (and now self-employed) persons and members of their families a right to benefits which constitute a supplementation of other benefits under the legislation of the same Member State which are themselves made exportable by Article 10 of Regulation No 1408/71.

The *Commission* states it has begun preparatory work with a view to presenting a new regulation concerning the coordination of mixed non-contributory benefits. The work undertaken by the Administrative Commission on Social Security for Migrant Workers of the European Communities is based on a memorandum of 24 March 1981 prepared by the International Labour Office at the request of the Commission. In that memorandum the International Labour Office emphasized the residual nature of the proposed system of coordination since Regulation No 1408/71 already applies to certain non-contributory benefits.

According to the Commission, the majority of the members of the Administrative Commission seem to be moving towards the view that if, after becoming entitled to a non-contributory benefit, the beneficiary left the territory of the Member State by which that benefit is payable, he would no longer comply with the conditions for entitlement to the benefit in question but should be entitled to the corresponding benefits under the legislation of the Member State to whose territory he has transferred his residence.

According to the Commission those preliminary observations must not influence the reply which it proposes should be given to the Corte di Cassazione on the basis of Community law at present in force.

In order to enhance the clarity of its observations the Commission divides the question referred to the Court into three parts.

With reference first to the question whether the social aid pension in question is a social security benefit within the meaning of Article 51 of the Treaty and of Regulation No 1408/71, the Commission states that that benefit is not fundamentally different from other mixed non-contributory benefits held by the Court to fall within the area of

application of the Community rules. In addition to the cases cited by the United Kingdom the Commission cites the judgment of 12 July 1979 in Case 237/78 *Caisse Régionale d'Assurance Maladie, Lille,* v *Diamante Palermo* [1979] ECR 2645.

The Commission draws attention to the view expressed by the Court in Cases 1/72, 187/73, 24/74 and 39/74, cited above:

"Although it may seem desirable from the point of view of application of the regulation, to distinguish between legislation concerning social security and assistance . . ., the possibility cannot be excluded that by reason of the persons covered thereby, its objectives and its manner of application, legislation may at the same time fall within both categories, and thus not be amenable to any overall classification."

The Commission points out that in paragraph 14 of its judgment in Case 1/72, cited above, which is repeated in similar terms in Cases 187/73, 39/74 and 7/75, cited above, the Court stated as follows:

"Although, by virtue of certain of its features, national legislation on guaranteed income has certain affinities with social assistance . . ., nevertheless it approximates to social security because it does not prescribe consideration of each individual case, which is a characteristic of assistance, and confers on recipients a legally defined position giving them the right to a benefit which is analogous to the old-age pensions mentioned in Article 2 of Regulation No 3."

According to the Commission it follows from those statements that the Italian social aid pension is to be regarded as an old-age benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71. The Commission's view is that the Italian Government's failure to make the declaration provided for in Article 5 of that regulation cannot justify the exclusion of that benefit from the specific area of application of that provision.

The second question considered by the Commission is whether Regulation No 1408/71 applies to the plaintiff as an employed person or as a member of the family of a migrant worker.

The Commission states that in its view the recipient of an Italian social aid pension is not a worker in so far as that benefit is awarded only in the absence of other income, that is, a normal social security pension.

The Commission points out that by virtue of Article 1 (f) the term "member of the family" means any person defined or recognized as a member of the family "by the legislation under which benefits are provided . . .; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the worker in question is mainly dependent on that worker".

The Commission states that the Italian social aid pension is based on a subjective right of the national who fulfils the requirements laid down in Law No 153 of 30 April 1969, which makes no reference to the concept of member of the family.

According to the Commission, which refers to paragraph 13 of the judgment in Case 63/76, cited above, the concept of member of the family, within the

meaning of Regulation No 1408/71, must be interpreted in the light of the fifth recital in the preamble to that regulation and in the light of Article 10 (1) (a) and (b) of Regulation No 1612/68 of 16 October 1968 on freedom of movement for workers within the Community, the provisions of which are as follows:

"(1) The following shall, irrespective of their nationality, have the right to instal themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse."

Having concluded that Regulation No 1408/71 applies *ratione materiae* to the Italian social aid pension and *ratione personae* to Mrs Piscitello, the Commission considers, in the third place, whether Article 10 of that regulation permitted the plaintiff to continue to receive the benefit in question in Belgium.

The Commission states that the principle of the "exportability" of social assistance benefits may give rise to considerable difficulties, such as those connected with assessment of the financial position of an applicant resident in another Member State, the possibility of taking into account food credits or death duties, and the apportionment of the obligations, where applicable, between the paying institutions in the country of origin and the country of residence.

Nevertheless the Commission considers that, in order to answer the question submitted, it is necessary to refer to the Court's reasoning in the judgment in the *Biason* case, cited above, in relation to the interpretation of Article 10 of Regulation No 3 of the Council. In the light of that judgment the Commission considers that Article 10 of Regulation No 1408/71, which is virtually identical in wording to Article 10 of Regulation No 3, provides for the abolition of all residence clauses "save as otherwise provided in this regulation". In fact, Regulation No 1408/71 does not provide otherwise as regards the Italian social aid pension.

The Commission proposes that the question submitted be answered as follows:

"The Italian social aid pension provided for in Article 26 of Law No 153 of 30 April 1969 falls within the specific area of application of Regulation (EEC) No 1408/71 of the Council. Since she is a member of the family within the meaning of Regulation (EEC) No 1408/71, Mrs Piscitello is entitled, pursuant to the provisions of Article 10 of that regulation, to continue to receive that benefit in Belgium, the country to which she has transferred her residence."

III — Summary of the written observations submitted in reply to the questions put by the Court

In reply to the questions put to the plaintiff in the main proceedings, Mr Rossini, a member of Associazione Cristiana dei Lavoratori Italiana, Brussels, states that the plaintiff has never worked and has never been insured in her own right under the Italian social security scheme.

Mrs Piscitello is a widow of her first marriage to Paolo Barbagallo, who died in 1955 and was in receipt of a war pension.

In the period from 1962 to 1972 she lived in Belgium with her daughter and son-in-law, who were both migrant workers. In 1972 she contracted marriage again, with Michele Bognanno, who was at that time in receipt of an old-age pension.

On 1 October 1973 Mrs Piscitello was granted the social aid pension benefit provided for by Italian law. Because of a disagreement with her husband she returned to Belgium on 1 August 1975 in order to live with her daughter. On that date her social aid pension was withdrawn.

Mrs Piscitello is now in a rest home in Enna. Since the death of her husband in August 1982 she is in receipt of an Italian survivor's pension.

The Institution states that as the plaintiff has never been insured under the social security scheme, the social aid pension was not awarded in addition to other benefits.

According to the Institution the survivor's pension she is now receiving is additional to the social aid pension.

The Institution adds that Michele Bognanno, the plaintiff's second husband, was never a migrant worker and was affiliated to the social security scheme by virtue of his being an agricultural worker.

IV — Oral procedure

At the sitting on 9 February 1983 oral argument was presented by the parties to the main proceedings, the Italian Government, the Government of the United Kingdom and the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 10 March 1983.

Decision

1 By order of 14 January 1982, which was received at the Court registry on 30 April 1982, the Corte di Cassazione [Court of Cassation] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of 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 (Official Journal, English Special Edition 1971 (II), p. 416).

2 The question is submitted in the context of a dispute between Mrs Piscitello and the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institution, hereinafter referred to as "the Institution"].

3 Mrs Piscitello, an Italian national, received as from 1 January 1973 the social aid pension provided for in Article 26 of Law No 153 of 30 April 1969. By virtue of that provision, the social aid pension is paid to nationals who are 65 years of age and reside within Italian territory and whose annual income,

including, if they are married, that of their spouse, is below the amount provided for by the Law.

4 Italian Law No 153 of 30 April 1969 confers on those persons who satisfy the conditions laid down therein rights which are not conditional upon any discretionary assessment of their personal circumstances or lack of means. The social aid pension is automatically granted to all Italian nationals aged 65 who are not in receipt of any other social security or social assistance benefit and who, on the basis of their taxable income, do not have sufficient means to meet their vital needs. Furthermore, if the beneficiary is in receipt of other income, the amount of the social aid pension is reduced accordingly.

5 By decision of the Institution of 26 June 1976, which took effect as from 1 April 1975, payment of the social aid pension to Mrs Piscitello was discontinued on the ground that since on the latter date she had transferred her residence to Belgium in order to live with a member of her family she no longer fulfilled all the conditions laid down by Article 26 of the above-mentioned law.

6 Mrs Piscitello challenged that decision before the Pretura [Magistrate's Court], Enna, and subsequently appealed to the Tribunale di Enna [District Court, Enna] and to the Corte di Cassazione, which referred the following question to the Court of Justice for a preliminary ruling:

"In view of the 'waiving of residence clauses' provided for in Article 10 of Regulation No 1408/71 of the Council of 14 June 1971, must the provisions of Article 26 of Law No 153 of 30 April 1969 to the effect that the grant and enjoyment of the social aid pension provided for in that article are conditional upon an Italian national's residence within the national territory be considered as abrogated and therefore may that pension be suspended or withdrawn by reason of the fact that the recipient transfers his residence to the territory of another Member State, regard being had to the fact that, on the one hand, the pension is granted by way of assistance (see Judgment No 157 of the Corte Costituzionale [Constitutional Court] of 15 December 1980) and, on the other hand, that it is classifiable as an old-age benefit, account also being taken of the provisions of Article 4 (1) of Regulation No 1408/71 of the Council according to which that regulation 'shall apply to all legislation concerning the following branches of social security: ... old-age benefits'?"

7 As is clear from its wording, the question submitted by the Corte di Cassazione seeks to ascertain, in the first place, whether a benefit such as the Italian social aid pension falls within the substantive field of application of Regulation No 1408/71 and, secondly, whether the waiver of residence clauses provided for in Article 10 (1) of that regulation applies to that benefit.

First point

8 By virtue of Article 4 (1) (c) and Article 4 (2) of Regulation No 1408/71, the regulation is to apply to all legislation concerning the branches of social security which relate to old-age benefits, whether the schemes established under such legislation are contributory or non-contributory. Article 1 (t) of the regulation provides that the term "benefits" means all benefits granted under national legislation "including all elements thereof payable out of public funds". Article 4 (4) provides that the regulation does not apply to "social and medical assistance".

9 In its order making the reference, the Corte di Cassazione observes that according to Judgment No 157 of 15 December 1980 of the Corte Costituzionale, the social aid pension provided for by Law No 153 of 30 April 1969 is granted, under Italian law, by way of assistance. That fact, however, as the Corte di Cassazione itself points out, is not in itself sufficient to exclude that benefit, under Community law, from the field of application *ratione materiae* of Regulation No 1408/71.

10 As the Court held in its judgment of 6 July 1978 in Case 9/78 *Gillard* [1978] ECR 1661, the distinction between benefits which are excluded from the scope of Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant.

11 It must be observed, in the first place, that although by virtue of certain of its features legislation such as Italian Law No 153 of 30 April 1969 has something in common with social assistance legislation — particularly in view of the fact that that Law adopts lack of means as the fundamental criterion for its application and does not prescribe any requirements as to

periods of employment, affiliation or insurance — it is none the less related to social security in view of the fact that, whilst no provision is made for individual assessment, which is a feature of social assistance, it confers a legally defined status on recipients entitling them to a benefit analogous to the old-age benefits referred to in Article 4 of Regulation No 1408/71.

12 It must be observed, in the second place, that in view of the broad terms in which the beneficiaries are defined, such legislation in fact fulfils a dual purpose which consists not only in guaranteeing a minimum means of subsistence to persons who are entirely outside the social security system but also in supplementing the income of recipients of inadequate social security benefits.

13 In those circumstances, it must be recognized that a benefit such as the social aid pension provided for in Article 26 of Italian Law No 153 of 30 April 1969 which, in the first place, confers on the recipients thereof a legally defined status, which is not conditional upon any discretionary individual assessment of their personal needs or circumstances, and, secondly, may be paid as a supplement to the income of recipients of social security benefits, in principle falls within the field of social security referred to in Article 51 of the EEC Treaty and is not excluded from the scope of Regulation No 1408/71 by the provisions of Article 4 (4) thereof.

Second point

14 The first paragraph of Article 10 (1) of Regulation No 1408/71 provides as follows:

"1. Save as otherwise provided in this regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated."

15 The aim of that provision is to promote freedom of movement for workers and members of their families by protecting them against any adverse consequences which might arise as a result of the transfer of their residence

from one Member State to another. That provision therefore seeks to ensure that such persons retain their right to benefits, pensions and allowances to which they are entitled under the legislation of one or more Member States if they reside in the territory of a Member State other than that in which the institution responsible for payment is situated.

16 It is clear from the preceding observations that a pension of the kind provided for in Article 26 of the above-mentioned Italian law is paid in accordance with the conditions and on the basis of objective criteria laid down by that Law to elderly nationals in order to provide them with minimum means of subsistence. Such a pension must therefore be assimilated to an old-age benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71. Consequently, it is included amongst the benefits referred to in the first subparagraph of Article 10 (1) of Regulation No 1408/71. Since Regulation No 1408/71 does not contain any specific provisions relating to that pension, it must be recognized that the waiver of residence clauses provided for in Article 10 (1) of that regulation applies to the benefit in question.

17 In the light of the foregoing considerations, the question raised by the Corte di Cassazione must be answered as follows:

1. A benefit such as the social aid pension provided for in Article 26 of Italian Law No 153 of 30 April 1969 which, in the first place, confers on recipients a legally defined status which is not conditional upon any discretionary individual assessment of their personal needs or circumstances, and, secondly, may be paid as a supplement to the income of recipients of social security benefits, in principle falls within the field of social security referred to in Article 51 of the EEC Treaty and is not excluded from the scope of Regulation No 1408/71 by the provisions of Article 4 (4) thereof.

2. A pension of the kind provided for in Article 26 of the above-mentioned Italian law is paid in accordance with the conditions and on the basis of objective criteria laid down by that law to elderly nationals in order to provide them with minimum means of subsistence. Such a pension must therefore be assimilated to an old-age benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71. Consequently, it is included amongst the benefits referred to in the first subparagraph of Article 10 (1) of Regulation No 1408/71. Since Regulation No 1408/71 does not

contain any specific provisions relating to that pension, it must be recognized that the waiver of residence clauses provided for in Article 10 (1) of that regulation applies to the benefit in question.

Costs

18 The costs incurred by the Italian Government, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question submitted to it by the Corte di Cassazione by order of 14 January 1982, hereby rules:

1. **A benefit such as the social aid pensions provided for in Article 26 of Italian Law No 153 of 30 April 1969 which, in the first place, confers on recipients a legally defined status which is not conditional upon any discretionary individual assessment of their personal needs or circumstances, and, secondly, may be paid as a supplement to the income of recipients of social security benefits, in principle falls within the field of social security referred to in Article 51 of the EEC Treaty and is not excluded from the scope of Regulation No 1408/71 by the provisions of Article 4 (4) thereof.**

2. **A benefit of the kind provided for in Article 26 of the abovementioned Italian law is paid in accordance with the conditions and on the basis of objective criteria laid down by that law to elderly nationals in order to provide them with minimum means of subsistence. Such a pension must therefore be assimilated to an old-age benefit within the meaning of Article 4 (1) (c) of Regulation No 1408/71. Consequently, it is included amongst the benefits referred to in the first subparagraph of Article 10 (1) of Regulation**

No 1408/71. Since Regulation No 1408/71 does not contain any specific provisions relating to that pension, it must be recognized that the waiver of residence clauses provided for in Article 10 (1) of that regulation applies to the benefit in question.

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 5 May 1983.

For the Registrar

H. A. Rühl

Principal Administrator

U. Everling

President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 10 MARCH 1983 [1]

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling the Court of Justice is requested to interpret certain provisions of 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 (Official Journal, English Special Edition 1971 (II), p. 416) in relation to the Italian Law which provides for the award of a social aid pension to Italian nationals aged over 65 living in conditions of financial hardship.

2. I shall summarize the facts of the case.

Mrs Paola Piscitello, the plaintiff in the main proceedings, is an Italian national. On 30 December 1972 she applied to the Enna branch of the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institution, hereinafter referred to as "the Institution"], and obtained as from 1 January 1973 the social aid pension for elderly persons living in conditions of financial hardship provided for in Article 26 of Law No 153 of 30 April 1969. By decision of 26 June 1976, however, the Enna branch of the Institution discontinued her pension as from 1 August 1975 on the ground that she had ceased to fulfil one of the requirements laid down by that Law,

1 — Translated from the Italian.