special old-age allowance paid to old persons whether or not they are related to a worker.

3. The term 'social advantage' within the meaning of Article 7 (2) of Regulation No 1612/68 includes all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community.

The grant of a special old-age allowance which guarantees a minimum income to old persons constitutes a social advantage within the meaning of Regulation No 1612/68. Article 7 (2) of that regulation must be interpreted to the effect that the grant of such a social advantage may not be made subject to a condition requiring actual residence in the territory of a Member State for a specified number of years if such a condition is not laid down in respect of nationals of that Member State.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 21 March 1985 *

Mr President,
Members of the Court,

A — The French proceedings which have given rise to this request for a preliminary ruling relate to the entitlement of an Italian national to a 'special old-age allowance'.

The plaintiff is a widow and since September 1976 she has lived with her son, who is in salaried employment in France and supports her.

She herself is in receipt of a widow's pension from the Istituto nazionale della previdenza sociale [Italian National Social Welfare Institution]. Since that pension amounts to only FF 1 000 per month she applied, in 1981, for the aforementioned special old-age allowance. Her application was rejected on 21 April 1982 on the ground that she failed to satisfy the requirement of 15 years' residence in France.

In that connection it should be noted that the special old-age allowance is granted to persons who are not French nationals on one of two conditions:

— they must be nationals of a State with which France has concluded a reciprocal agreement; or

— they must be nationals of a State which is a signatory of the European Interim Agreement of 11 December 1953 concerning social security, and in addition they must have resided in France for at least 15 years after attaining the age of 20.

* Translated from the German.

On 10 June 1982 the plaintiff brought an action before the Commission de première instance du contentieux de la sécurité sociale [Social Security First Instance Appeals Board, hereinafter referred to as the 'Appeals Board'], Hauts-de-Seine. By judgment of 8 December 1983, which was received at the Court of Justice on 20 June 1984, the Appeals Board submitted for a preliminary ruling the question whether the provisions of the European Interim Agreement of 11 December 1953 are compatible with Regulation No 1408/71 of the Council.

B — My views on that question are as follows:

The question actually submitted by the Appeals Board may be answered very briefly by reference to the Court's judgment of 28 May 1974. [1] In that judgment the Court stated as follows:

'Under Article 7 (1) (b) of Regulation No 1408/71 the provisions of the Regulation shall not affect obligations arising from the European Interim Agreements on social security of 11 December 1953 concluded between the Member States of the Council of Europe.

Furthermore, Article 5 of the European Interim Agreements provides that these do not derogate from the provisions of national laws and regulations, international agreements or bilateral or multilateral agreements that are more favourable to those entitled.

Thus, to apply Regulation No 1408/71 in preference to the European Interim Agreements, to the extent that it is more favourable than those Agreements for those entitled, does not infringe the obligations arising from these Agreements and is not therefore capable of infringing Article 7 (1) (b) of the Regulation'.

The Court went on to rule as follows:

'Within its field of application to persons and to matters covered, Regulation No 1408/71 takes precedence over the European Interim Agreement on Social Security Schemes in respect of old age, invalidity and survivors, signed in Paris on 11 December 1953, and referred to in Article 7 (1) (b) of the Regulation, to the extent that this Regulation is more favourable than the said Agreement for those entitled'.

Although that ruling would suffice as a reply to the question actually referred to the Court, the matter cannot rest there.

The Commission of the European Communities has stated in its submissions to the Court that it has serious doubts whether Regulation No 1408/71 is even applicable in this case.

The Commission's doubts are based on the Court's decisions defining the dividing line between 'old-age benefits' as referred to in Article 4 (1) (c) of the regulation and 'social assistance' as referred to in Article 4 (4). [2] The former fall within the scope of the regulation, whereas the latter do not. If a social benefit is intended to provide the recipient of other social security benefits with additional income it falls within Article 4 (1) of the regulation. However, a benefit which is granted exclusively to persons who

1 — Case 187/73 *Odette Callemeyn* v *Belgian State* [1974] ECR 553.

2 — Judgment of 22 June 1972 in Case 1/72 *Rita Frilli* v *Belgian State* [1972] ECR 457; judgment of 5 May 1983 in Case 139/82 *Paola Piscitello* v *Istituto nazionale della previdenza sociale (INPS)* [1983] ECR 1427.

are outside the social security system must be classified as social assistance within the meaning of Article 4 (4). That is so in this case, the Commission observes, since the 'special old-age allowance' is only granted to persons who belong to no social insurance scheme.

Moreover, according to Article 2 (1) of Regulation No 1408/71, the regulation is to apply 'to workers ... as well as to the members of their families and their survivors'. However, the Commission points out that the provision distinguishes between two distinct categories of persons and cites the Court's judgment of 23 November 1976, [3] in which it was stated that:

'Whereas the persons belonging to the first category [workers] can claim the rights to benefits covered by the regulation as rights of their own, the persons belonging to the second category [members of their families and survivors] can only claim derived rights, acquired through their status as a member of the family or a survivor of a worker, that is to say of a person belonging to the first category.

The Commission concludes that the plaintiff's claim, even if it relates to a benefit which falls within the scope of Regulation No 1408/71 cannot be based on that regulation, since she claims the special old-age allowance in her own right and not as a right derived from her son's legal status as a migrant worker.

I share the Commission's doubts, but propose that the Court should not give the matter further consideration since it is not covered by the Appeal Board's question. Nevertheless, the Court should indicate to the national court those other provisions of Community law which would be relevant should the national court decide that Regulation No 1408/71 is, after all, not pertinent.

In that regard I refer to the Court's judgment of 12 July 1984, [4] which also concerned the relationship between a (Belgian) benefit guaranteeing a minimum income to old people, on the one hand, and Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and Regulation No 1612/68 on freedom of movement for workers within the Community, on the other.

In that case, in which the facts were similar to those here, the Court of Justice left open the question whether Regulation No 1408/71 was applicable, but declared that the minimum income guaranteed to old people came within the term 'social advantages' in Article 7 (2) of Regulation No 1612/68.

The Court should proceed in the same manner in this case.

C — I therefore propose that the Court should reply to the question referred to it by the Commission de première instance du contentieux de la sécurité sociale des Hauts-de-Seine as follows:

3 — Case 40/76 *Slavica* v *Kermaschek Bundesanstalt für Arbeit* [1976] ECR 1669.

4 — Case 261/83 *Carmela Castelli* v *Office National des Pensions pour Travailleurs Salariés (ONPTS)* [1984] ECR 3199.

(1) Regulation No 1408/71 takes precedence over the European Interim Agreement on social security schemes in respect of old age, invalidity and survivors signed in Paris on 11 December 1953, to which Article 7 (1) (b) of the regulation refers, in so far as it is more favourable for the person entitled.

(2) Article 7 (2) of Regulation No 1612/68 must be interpreted to the effect that the grant of a social advantage, such as the special old-age allowance guaranteed to a dependent relative in the ascending line of a worker by the legislation of a Member State, must be made on the same conditions as apply to dependent relatives of national workers and that in particular the grant is not conditional on the existence of a reciprocal agreement between that Member State and the Member State of which such a relative is a national.