OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 12 June 1990 *

Mr President,
Members of the Court,

1. In this action based on Article 169 of the EEC Treaty, the Commission is asking for a declaration that, by refusing to grant the supplementary allowance of the Fonds national de solidarité (National Solidarity Fund) to recipients of a French invalidity, old-age or survivor's pension who reside in or transfer their residence to another Member State of the Community, the French Republic has failed to fulfil its obligations under Articles 48 to 51 of the Treaty and Article 10 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. [1]

This case is closely connected with Case C-307/89, in which the Commission has also brought an action against the French Republic for a declaration that, by refusing to grant the same supplementary allowance to nationals of other Member States who reside in France, the French Republic has failed to fulfil its obligations.

2. The first subparagraph of Article 10(1) of Regulation No 1408/71 reads as follows:

'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.'

The obligation incumbent on the Member States is clear from the wording of Article 10; there remains the question whether the supplementary allowance from the Fonds national de solidarité which is at issue here forms part of the legislation to which Regulation No 1408/71 applies.

The relevant passages in Article 4(1) and (4) of Regulation No 1408/71 read as follows:

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

...

* Original language: Dutch.

1 — Updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, Annex I).

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

...

4. This regulation shall not apply to social and medical assistance ...'

Article 1(t) of the regulation contains a broad definition of 'benefits', 'allowances' and 'pensions', which is as follows:

'"Benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorization increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions.'

3. Taking account of those broad definitions, the Court has already held on several occasions that the allowance at issue here falls within the scope of Regulation No 1408/71 and not within the social assistance schemes excluded by Article 4(4). In that regard reference may be made *inter alia* to the *Biason* judgment of 9 October 1974[2] and the *Giletti* judgment,[3] in which the Court stated with regard to the supplementary allowance of the Fonds national de solidarité that:

'In its judgment of 9 October 1974 in Case 24/74 *Biason* [1974] ECR 999 the Court took the view that, whilst it may seem desirable from the point of view of applying the Community regulations on social security, to establish a clear distinction between legislative schemes that fall respectively within social security and assistance, the possibility cannot be excluded that by reason of the persons covered, its objectives and its methods of application, national legislation may, at one and the same time, have links to both those categories' (paragraph 9).

'Those considerations apply to the present case. Legislation of the type with which the request for a preliminary ruling is concerned in fact fulfils a dual function, in so far as, in the first place, it guarantees a minimum means of subsistence to persons in need and, in the second place, it provides additional income for the recipients of social security benefits which are inadequate' (paragraph 10).

'In so far as such legislation confers a right to supplementary benefits designed to increase the amount of pensions paid by way of social security, without any assessment of individual needs or circumstances, which is a characteristic of assistance, it comes within the social security scheme within the meaning of Regulation No 1408/71. The fact that a single law may also provide for advantages which can be classified as assistance cannot alter, for the purposes of Community law, the intrinsic social security character of a benefit linked to an invalidity, old-age or survivor's pension to which it is an automatic supplement' (paragraph 11).

2 — Judgment in Case 24/74 *Caisse régionale d'assurance maladie* v *Biason* [1974] ECR 999, paragraphs 9 to 12.

3 — Judgment in Joined Cases 379/85 to 381/85 and 93/86 *CRAM Rhône-Alpes* v *Giletti* [1986] ECR 955.

'Accordingly, the answer to the first question must be that Article 4(4) of Regulation No 1408/71 must be interpreted as not excluding from the matters covered by that regulation a supplementary allowance paid by a fonds national de solidarité financed from tax revenue and granted to the recipients of old-age, survivors' or invalidity pensions with a view to providing them with a minimum means of subsistence, provided that the persons concerned have a legally protected right to the grant of such an allowance' (paragraph 12).

In its judgment in *Zaoui* on the same supplementary allowance, the Court again followed its previous decisions. [4]

4. There is nothing in the French Republic's defence and rejoinder which may cast doubt on the applicability of those decisions here. I therefore consider the Commission's application to be well founded. Nevertheless, for the sake of completeness, I shall briefly consider the arguments on which the French Republic relies in its defence and rejoinder.

5. To begin with, the French Republic refers to the proposals which the Commission has submitted to the Council and which would lead to a change in the rules of Regulation No 1408/71 now in force.

However, it is impossible to predict either the course of the discussions within the Council or whether any future rules (on interpretation) could have retroactive effect; moreover, the question could arise whether individuals can in that way be retroactively divested of rights derived from the social legislation of the Community.

It is not for the Court to anticipate any amendments which may be made to the Community legislation.

This argument is therefore untenable.

6. Secondly, the French Republic refers to a number of practical problems to which the Court's interpretation gives rise and to which the provisions of Regulation No 1408/71 do not provide a satisfactory solution. Those practical questions are concerned, in particular, with the difficulty of ascertaining the actual income of persons residing in another Member State, taking out a mortgage on any immovable property and so on.

The Commission points out that, in accordance with the case-law of the Court, the practical 'difficulties that might arise from the application of the Community regulations . . . must not prejudice the rights which the workers referred to by Article 1(a) of Regulation No 1408/71 derive from the principles of the social legislation of the Community'. [5]

4 — Judgment in Case 147/87 *Zaoui* v *Cramif* [1987] ECR 5511, paragraph 9. Reference may also be made to the judgment in Case 139/82 *Piscitello* v *INPS* [1983] ECR 1427, in which the Court came to the same conclusion in connection with an Italian allowance of the same kind for old people.

5 — Judgment in Case 187/73 *Callemeyn* v *Belgium* [1974] ECR 553, paragraph 12.

In that connection, the Commission refers to the possibility of finding a solution to those difficulties within the Administrative Commission on Social Security for Migrant Workers, which was specifically set up for that purpose by Article 81(d) of Regulation No 1408/71. Furthermore, the Commission points out that practical difficulties of that kind in connection with the implementation of obligations resulting from the Treaty and Article 10 of the regulation may also arise in other circumstances.

In my view, the Commission is right.

7. Nor, finally, is it possible to accept the French Republic's argument to the effect that the supplementary allowance at issue in this case cannot be exported outside the national territory of a Member State because the amount thereof is closely connected with a specified economic and social environment. The aim of the EEC Treaty, and in particular Articles 48 to 51 thereof, and of Article 10 of Regulation No 1408/71, is to promote the mobility of workers within the Community and, consequently, to preserve the benefits for migrant workers and their families unchanged regardless of their place of residence within the Community or of differences in economic and social circumstances. [6] The argument that economic and social circumstances vary from one place to another, for instance differences in the cost of living, is no more applicable as between Member States than it is as between different regions in a single Member State. Furthermore, it takes no account of the costs resulting from mobility itself. Policy arguments based on general economic considerations of that kind are a matter of domestic politics and have no place before the Court.

Conclusion

8. In the light of the aforesaid considerations I propose that the Court uphold the Commission's application and order the defendant to pay the costs.

6 — In its judgment in Case 313/86 *Lenoir* v *Caisse d'allocations familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 16, the Court admittedly acknowledged in connection with a dependent child allowance for pensioners (Article 77 of Regulation No 1408/71) that a benefit designed to cover certain costs incurred at the beginning of the school year is in most cases closely linked with the social environment and therefore the place where the recipients reside. In the same paragraph of that judgment, however, the Court considered that, in the case of ordinary family allowances which are granted by reference to the number and the age of the members of the family, the place of residence was unimportant. Accordingly, the judgment in *Lenoir* follows the aforesaid line of decisions in which the Court brings the contested supplementary allowance within the scope of Regulation No 1408/71.