3. Free movement of persons — Workers — Community rules — Cases which have no factor linking them with Community law — Inapplicability — Worker who has never exercised the right to freedom of movement within the Community — Denial to a member of that worker's family of advantages granted to national workers — Whether permissible
(Regulation No 1612/68 of the Council)

1. Regulation No 1408/71 does not exclude from its scope *ratione materiae* a supplementary allowance paid by a national solidarity fund and granted to 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.

2. Members of the family of a worker can only claim derived rights under Regulation No 1408/71, that is to say the rights acquired through their status as members of the worker's family. It follows that a member of the family of a worker who is a national of a Member State cannot rely on Regulation No 1408/71 in order to claim a supplementary allowance connected with a pension which he receives in that Member State in a capacity other than that of a member of a worker's family.

3. The Community rules on freedom of movement for workers do not apply to cases which have no factor linking them with any of the situations governed by Community law. Such is the case with workers who have never exercised the right to freedom of movement within the Community. Accordingly, a member of the family of a worker who is a national of a Member State cannot rely on Regulation No 1612/68 in order to claim the same social advantages as workers who are nationals of that State when the worker of whose family he is a member has never exercised the right to freedom of movement within the Community.

REPORT FOR THE HEARING
delivered in Case 147/87 *

I — Facts and procedure

1. *Legal framework*

In France a 'fonds national de solidarité' (National Solidarity Fund) was set up in 1956 in order to pursue a general policy for the protection of old people or invalids, in particular by improving pensions, annuities and old-age or invalidity benefits. The fonds national de solidarité grants a supplementary allowance to recipients of

* Language of the Case: French.

old-age or invalidity benefits whose personal means are inadequate. At the time when the dispute giving rise to the main proceedings arose, the conditions for the grant of that allowance were laid down in particular by Articles L 685 and L 707 of the code de la sécurité sociale (Social Security Code). According to those provisions, the supplementary allowance was available only to French nationals or to aliens subject to international conventions based on reciprocity having been concluded. By a ministerial circular of 23 January 1980, stateless persons were equated, for the purposes of the grant of that allowance, to refugees. Refugees could claim the allowance in question if they fulfilled the conditions as to personal means laid down by Article L 685 *et seq.*

2. *Background to the dispute*

Mr Saada Zaoui, who was born on 24 July 1953 in Algeria, is married to a French woman and lives in France. He cannot claim either French nationality or the status of a stateless person, which was denied him by a decision of the Office français de protection de réfugiés et apatrides (French Bureau for the protection of refugees and stateless persons), or the status of refugee within the meaning of the Geneva Convention of 28 July 1951 on the status of refugees. Mr Zaoui is in receipt of an invalidity pension. He also qualifies for the allowance for handicapped adults, which was granted to him in his capacity as the husband of a French national.

In November 1980 Mr Zaoui applied to the fonds national de solidarité for the grant of the supplementary allowance. The caisse régionale d'assurance maladie (Regional Sickness Insurance Fund), Île-de-France, refused to grant him that allowance on the ground that he was neither a French national, nor a national of a State with which an international convention based on reciprocity had been concluded, nor a stateless person. In proceedings before the tribunal des affaires de sécurité sociale (Social Security Tribunal), Nanterre, Mr Zaoui contended that the supplementary allowance from the fonds national de solidarité constitutes a social security benefit for the purposes of Community law, in particular Regulation No 1408/71. Since he received the allowance for handicapped adults in his capacity as a member of the family of a Community national, the supplementary allowance should be granted to him on the same basis. The caisse régionale maintained that the allowance in question does not constitute a social security benefit but social assistance which does not come within the scope of the relevant Community rules. Nor can the allowance for handicapped adults and the supplementary allowance be equated.

3. *Questions submitted for a preliminary ruling*

Taking the view that the solution of the dispute depended on the interpretation of provisions of Community law, the national court decided, by judgment of 9 October 1986, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the operation of the fonds national de solidarité as laid down by Articles L 685 and L 707 (now both repealed) of the code de la sécurité sociale fall within the scope of Regulation No 1408/71 or any other Community regulation?

(2) Is Mr Zaoui, who is not a French national (and who has not, to date, been recognized as a stateless person)

but whose wife is a French national, entitled to avail himself of the legislation of the European Communities?

4. *Procedure*

The order for reference was received at the Court Registry on 11 May 1987.

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 Government of the French Republic, represented by E. Belliard and C. Chavance, acting as Agents, and by the Commission of the European Communities, represented by J. Griesmar, a member of its Legal Department, acting as Agent.

By decision of 30 September 1987, adopted pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the Fourth Chamber. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry.

II — Summary of the written observations submitted to the Court

(a) With regard to the first question, the *Commission* points out that there can be no doubt that the allowance in question comes within the scope *ratione materiae* of Regulation No 1408/71. It refers to the judgment of the Court of 24 February 1987 in Joined Cases 379 to 381/85 and 93/86 *Giletti and Others* [1987] ECR 955, according to which Article 4 (4) of Regulation No 1408/71 must be interpreted as meaning that it does not exclude from the scope *ratione materiae* of that regulation a supplementary allowance paid by a national solidarity fund. As for the expression 'any other Community regulation', the Commission considers that the only potentially relevant regulation for these purposes is Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475). Article 7 (2) of that regulation provides that workers from other Member States are to enjoy in the Member State of employment the same social advantages as national workers.

(b) The *French Government* and the *Commission* agree, however, in their suggested replies to the second question, that Mr Zaoui cannot rely on the provisions of Regulation No 1408/71 as he does not come within the scope *ratione personae* of that regulation. Article 2 (1) of that regulation is worded as follows: 'This regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors'. The Court has pointed out in its decisions, for instance in the judgment of 23 November 1976 in Case 40/76 *Kermaschek* [1976] ECR 1669, that this provision refers to two clearly distinct categories, workers on the one hand, and the members of their family and their survivors on the other. Whereas the persons belonging to the first category can claim the rights to benefits covered by the regulation as rights of their own, the persons belonging to the second category can only claim derived rights, acquired through their status

as a member of the family or as a survivor of a person belonging to the first category.

The *French Government* then considers whether Mr Zaoui can rely on rights derived from his status as a member of the family of a Community worker. In that regard, the French Government observes that the Court has consistently held that a worker who is a national of a Member State and has never been in paid employment in another Member State cannot be regarded as coming within the scope of the relevant Community regulations. Mr Zaoui cannot rely on derived rights because Mrs Zaoui has never carried on an occupation in another Member State and cannot therefore be regarded as a migrant worker within the meaning of Regulation No 1408/71.

For its part, the *Commission* contends that recipients of the supplementary allowance granted by the fonds national de solidarité receive it in their own right, and not as a derived right in their capacity as members of a worker's family. Mr Zaoui, who is not a Community migrant worker, cannot therefore rely on Regulation No 1408/71 in support of his claim for the supplementary allowance.

As for the application of Regulation No 1612/68, the Commission also points out that Mr Zaoui is not a member of the family of a 'worker who is a national of a Member State and who is employed in the territory of another Member State' within the meaning of that regulation. In that regard, the Commission refers to the Court's judgment of 27 October 1982 in Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.

(c) The *French Government* suggests that the answer to the questions submitted for a preliminary ruling should be as follows:

'The provisions of Community law on the free movement of workers must be interpreted as being inapplicable to situations which are wholly internal to a Member State, such as that of a member of the family of a national of a Member State who has never lived or worked in another Member State.'

The *Commission* suggests the following answers:

'(1) Article 4 (4) 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 must be interpreted as not excluding from the scope *ratione materiae* of that regulation a supplementary allowance paid by a national solidarity fund, financed from tax revenue and granted to recipients of old-age, survivors' or invalidity pensions with a view to providing them with the minimum means of subsistence, provided that they have a legally protected right to the grant of such an allowance.

(2) For the purposes of the application of Article 2 (2) of the aforesaid regulation, the members of the family of a worker within the meaning of Article 1 (1) of that regulation may, when they reside with the worker on the territory of a Member State, claim from the competent institution of that State benefits corresponding to the derived rights acquired by them in their capacity as members of a worker's family, and not benefits corresponding to entitlement in their own right, such as the supplementary allowance paid by

the fonds national de solidarité as a supplement to old-age or invalidity pensions allocated to beneficiaries as their personal entitlement, whether or not they are members of a worker's family.

(3) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community does not apply to cases which have no factor linking them with any of the situations governed by Community law. Accordingly, that regulation may not be relied upon by members of the family of a worker who is a national of a Member State and is not employed within the territory of another Member State where they reside with that worker in the Member State of which the worker is a national.'

T. Koopmans
Judge-Rapporteur