OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 13 July 2006 [1]

I — Introduction

1. In this case the Court is requested to give an interpretation of Articles 4(2a) and 10a 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 [2] ('Regulation No 1408/71'), in conjunction with Annex IIa thereof. In particular the Cour de cassation asks whether the supplementary allowance from the Fonds national de solidarité (National Solidarity Fund) referred to in Annex IIa to Regulation No 1408/71 constitutes a special non-contributory benefit within the meaning of Article 4(2a) thereof.

II — Applicable provisions

A — *Community law*

2. Article 4(1) of Regulation No 1408/71 provides, in so far as is relevant:

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

...

(c) old-age benefits;

...'

1 — Original language: Dutch.
2 — OJ 1997 L 28, p. 1.

3. Article 4(2a), incorporated by Regulation (EEC) No 1247/92, [3] is worded as follows:

'This Regulation shall also apply to special non-contributory benefits which are provided under a 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.'

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

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

5. Article 10(1), which provides for the waiving of residence clauses, states:

'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.'

6. Article 10a of Regulation No 1408/71 [4] provides:

'Special non-contributory benefits

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

3 — Regulation of 30 April 1992 amending 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 (OJ 1992 L 136, p. 1).

4 — Incorporated by Regulation No 1247/92, cited in footnote 3 above.

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.'

7. Annex IIa, which was added to the regulation by the insertion of Article 4(2a) and Article 10a, is headed 'Special non-contributory benefits (Article 10a of the Regulation)'. Subparagraph (a) of Point 'E. France' states:

'Supplementary allowance from the National Solidarity Fund (Law of 30 June 1956).'

B — *National law*

8. In 1956 a Fonds national de solidarité ('FNS') was set up in France to promote a general policy of affording elderly people greater protection, in particular by improving pensions and old-age benefits. On 1 January 1994 the FNS became the Fonds de solidarité vieillesse ('FSV'). This fund awards supplementary allowances to recipients of old-age or invalidity benefits who have insufficient incomes.

9. The conditions for the award of that allowance are laid down in Articles L. 815-1 to 815-11 of the Code de la sécurité sociale (Social Security Code, 'CSS'). Under those provisions, there is no requirement that the person to whom it is awarded should be a retired employed or self-employed worker. The benefit is paid as a supplement to resources of any kind, including contributory benefits, so as to achieve what is regarded as the essential minimum level, having regard to the cost of living in France. In addition, Article L. 815-11 provides that payment of the supplementary allowance is to cease where the recipient transfers his residence outside the territory of the French Republic. [5]

III — Facts and proceedings

10. The claimant in the main proceedings, J. Perez Naranjo, is a Spanish national, born on 27 September 1931, who now lives in

5 — See also the report for the hearing in Joined Cases 379/85, 380/85, 381/85 and 93/86 *Giletti* [1987] ECR 955, and the judgment in Case C-236/88 *Commission* v *France* [1990] ECR I-3163.

Spain. The claimant worked in France from 1957 to 1964. He has received a French old-age pension since 1 November 1991.

11. The claimant applied for payment of the supplementary allowance from the Fonds national de solidarité which was refused him by decision of 5 August 1999. The claimant lodged an appeal against this decision. The Cour d'appel dismissed the appeal brought by Mr Perez Naranjo on the grounds that the supplementary allowance at issue constitutes a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71 which, under this article, cannot be awarded to a person who is habitually resident in a Member State other than the French Republic.

12. The claimant subsequently lodged an appeal with the Cour de Cassation which stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is Community law to be interpreted as meaning that the supplementary allowance at issue, listed in Annex IIa to Regulation No 1408/71, is of a special and non-contributory character, thereby excluding, pursuant to Articles 10a and 95b of Regulation No 1408/71, its award to a non-resident who did not satisfy the age condition on 1 June 1992, or as meaning that it constitutes a social security benefit and must therefore, pursuant to Article 19(1) of that regulation, be provided to the person concerned who satisfies the conditions for its award, irrespective of the Member State in which that person is resident?'

13. The claimant, the French, Spanish, Finnish, Italian and United Kingdom Governments and the Commission have submitted written observations. The French, Spanish and United Kingdom Governments and the Commission presented oral argument at the hearing on 20 June 2006.

IV — Observations of the parties concerned

14. The claimant in the main proceedings contends that the French supplementary allowance is not a special non-contributory benefit within the meaning of Article 4(2a) of this regulation but rather a social security benefit as it is awarded to the recipients of an old-age benefit without any individual and discretionary assessment of personal needs. Furthermore, the claimant takes the view, which is supported by the Spanish Government, that the supplementary allowance is

financed indirectly by social contributions. The allowance is paid by the old-age solidarity fund which is financed primarily by the general social contribution (contribution sociale généralisée, 'CSG'). The supplementary allowance must therefore be paid irrespective of the recipient's place of residence.

15. The French Government takes the view that the benefit concerned should be regarded as a special non-contributory benefit within the meaning of Article 4(2a) and Article 10a of the regulation.

16. In the view of the French Government, the supplementary allowance is a special benefit because it is by nature both a social security benefit and social assistance.

17. Firstly, the benefit is connected to social security. It is awarded only to recipients of old-age benefits who have attained the age of 65, or 60 in the case of incapacity for work. It is linked to the old-age benefit referred to in Article 4(1)(c) of Regulation No 1408/71 since it is provided to supplement pensions. In addition, the supplementary allowance is awarded without any individual and discretionary assessment of personal needs to recipients of one or more old-age benefits on the basis of a legally defined ground, namely Article L. 815-2.

18. Secondly, the allowance is connected to social assistance. It is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. The supplement is paid to persons who have reached pensionable age and whose total income falls below a statutory threshold. The conditions of entitlement are not based upon the aggregation of periods of employment or contributions.

19. The French Government further takes the view that the benefit concerned is not contributory. It relates to a solidarity benefit financed by tax revenue which is paid through the FSV. The tax revenues consist of the contribution sociale de solidarité à la charge des sociétés [6] ('CSSS'), the CSG and a 2% levy. Therefore, the supplementary allowance is financed exclusively from compulsory taxation intended to cover general public expenditure.

20. The Commission and the Italian Government take a similar view to that of the French Government. The Commission also notes that the supplementary allowance is paid through the sickness insurance fund which is then reimbursed by the old-age

6 — Social solidarity contribution levied on businesses.

solidarity fund. It is therefore ultimately the fund and not the sickness insurance fund which bears the costs. Moreover, the method of calculating the benefit and the conditions on which it is awarded are not subject to the payment of a contribution by the beneficiary.

V — Admissibility

21. In its written observations the Finnish Government argued that there are grounds for declaring inadmissible the question referred by the national court since the order for reference contains no definition of the legal context of the questions being asked but merely a reference to the relevant national provisions. The Finnish Government points out that the information provided in the order for reference must not only be such as to enable the Court usefully to reply but must also make it possible for the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. [7]

22. The Finnish Government's observation that the legal context is defined only briefly in the order for reference is correct. The national court refers only to the number of the articles concerned. In particular there is no explanation of the conditions on which the supplementary allowance is awarded or a definition of the purpose of the allowance and the way in which it is financed. For these reasons the Court asked the national court for additional information on the French legislation. This was provided by letter of 10 May 2006. On the basis thereof the interested parties were able to reply as to the substance at the hearing of 20 June 2006.

23. Since the governments of the Member States and the other interested parties had an opportunity to reply to the additional information retrospectively at the hearing, I can see no reason to declare inadmissible the present question referred.

VI — Appraisal

24. The present case raises the question whether the French supplementary allowance constitutes a special non-contributory benefit within the meaning of Article 4(2a) of this regulation. If the benefit at issue can be regarded as a special non-contributory benefit, entitlement to the supplementary allowance can be restricted, pursuant to Article

7 — Order in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5.

10a(1) of the regulation, to persons who have their place of residence in that Member State, in so far as such benefits are referred to in Annex IIa to this regulation. If, however, the allowance at issue must be regarded as a social security benefit, general rules apply, that is to say, in accordance with Article 10 of Regulation No 1408/71, the residence clause does not apply.

25. For Article 10a to take effect in law, it is necessary to ascertain whether the benefit in question is a special non-contributory benefit within the meaning of Article 4(2a). In order to determine the characteristics of a benefit of that nature, it is first necessary to refer back to Regulation No 1247/92, which inserted both Article 4(2a), Article 10a and Annex IIa in the regulation. The third and fourth recitals indicate the background to and the reasons for its adoption. They state:

'Whereas it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

Whereas 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.'

26. It is clear from the preamble to Regulation No 1247/92 that the amendments by this regulation were largely prompted by the case-law of the Court 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. Such a benefit is thus mixed or hybrid.

27. One of the first cases in which the Court ruled on mixed benefits concerned the *Giletti* judgment of 1987. In that judgment

the Court considered whether a French allowance to supplement old-age, survivors' and invalidity pensions fell within the scope of Regulation No 1408/71. [8] In that case the Court ruled that the supplementary allowance under the FNS — which, in the first place, guarantees a minimum means of subsistence to persons in need and, in the second place, provides additional income for the recipients of social security benefits which are inadequate — comes within the social security scheme within the meaning of the regulation.

28. The above judgment related to the French allowance to supplement old-age, survivors' and invalidity pensions, which is also at issue in this case. Furthermore, this allowance was again central to subsequent proceedings against the French Republic [9] for breach of its Treaty obligations by reason of failure to waive the residence clause in connection with the grant of a supplementary allowance designed to guarantee the minimum for subsistence in France. In that judgment the Court based itself on the judgment in *Giletti* [10] and gave judgment against France.

29. As one of the consequences of these judgments Regulation No 1408/71 was amended by Regulation No 1247/92 by which special non-contributory benefits were expressly included within the scope of the regulation. However, because these benefits are linked to social assistance they are excluded from the general rule that social security benefits are exportable.

30. As was seen in paragraph 25, the exception to the exportability of social security benefits can take effect only if the benefits in question satisfy the conditions laid down in Article 4(2a) of Regulation No 1408/71, that is to say are both special and non-contributory, and are listed in Annex IIa to this regulation.

31. According to case-law, a special benefit within the meaning of Article 4(2a) of Regulation No 1408/71 is 'defined by its purpose. It must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria.' [11] A benefit is non-contributory where it is financed exclusively from compulsory taxation intended to cover general public expenditure. The relevant determining cri-

8 — Cited in footnote 5 above, paragraph 11.

9 — C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraph 6.

10 — The Court also based itself on the judgment in *Biason*. That judgment related to an allowance to supplement an invalidity pension which was withdrawn after the claimant in the main proceedings had moved to another Member State. According to the Court, under Article 10 of Regulation No 1408/71 Member States may not make the grant of certain benefits (including old-age and invalidity benefits) conditional on the beneficiary's residence in the awarding State. Case 24/74 [1974] ECR 999.

11 — See, inter alia, Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 25.

terion is how the benefit is actually financed. The Court must consider whether that financing comes directly or indirectly from social contributions or from public resources. [12]

32. The benefits which the Court has recognised as constituting special non-contributory benefits following the adoption of Regulation No 1247/92 include a disability living allowance, [13] an attendance allowance, [14] income support [15] and a compensatory supplement for retired self-employed persons. [16] The benefits which the Court has not recognised as constituting special non-contributory benefits include a Luxembourg maternity allowance [17] and an Austrian care allowance. [18]

33. The supplementary allowance at issue in this case is referred to in the list of special non-contributory allowances within the meaning of Article 4(2a) of Regulation No 1408/71 which has been incorporated into Annex IIa to this regulation.

34. In the present case, it is common ground that the French supplementary allowance is connected to social security. The allowance is awarded to increase the amount of pension paid by way of social security. It is linked to the old-age benefit referred to in Article 4(1)(c) of Regulation No 1408/71. Furthermore, the allowance confers on the recipient a legally defined position since the social security authorities with the power to decide on the award of the allowance have no discretion as regards personal needs or circumstances. If the conditions laid down are satisfied, the person concerned is entitled to the supplementary allowance.

35. However, the parties concerned disagree as to whether the French supplementary allowance is connected to social assistance. With the exception of the claimant all the parties take the view that it is. The claimant disputes this but has put forward no arguments in support of its view.

36. Unlike the claimant I take the view that the supplementary allowance is by nature social assistance. It is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. The supplement is paid to persons who have reached pensionable age and whose total income falls below a statutory threshold. The conditions of entitlement are not based upon the aggregation of periods of employment or contributions.

12 — See, inter alia, *Skalka*, paragraph 28.
13 — Case C-20/96 *Snares* [1997] ECR I-6057.
14 — Case C-297/96 *Partridge* [1998] ECR I-3467.
15 — Case C-90/97 *Swaddling* [1999] ECR I-1075.
16 — *Skalka*, cited in footnote 12 above.
17 — Case C-43/99 *Leclere and Others* [2001] ECR I-4265.
18 — Case C-215/99 *Jauch* [2001] ECR I-1901.

37. It follows from the foregoing that the French supplementary allowance is mixed in nature and must be regarded as a special benefit.

38. It is necessary to examine whether the French supplementary allowance constitutes a non-contributory benefit.

39. It should be stated to begin with that the additional documents and the French Government's observations show that the allowance to supplement old-age, survivors' and invalidity pensions in France is paid by the FSV through the sickness insurance fund and that the FSV, and thus indirectly the supplementary benefit, are financed from three sources. Firstly, finance is provided by the CSSS which is based on the turnover tax of taxable companies. Secondly, it involves a 2% levy charged on income from assets and income from investments of natural persons who are resident for tax purposes in France. The third source of revenue is formed by the CSG which is charged on income from assets, investment income, sums wagered or winnings, as well as employment income and substitute income.

40. The claimant in the main proceedings takes the view that the supplementary allowance must be regarded as a contributory benefit since it is indirectly financed also by the CSG. In support of its view the claimant refers to the judgment in *Commission* v *France* to which the CSG was central. [19]

41. In that case the Commission brought an action for failure to fulfil obligations by reason of the application of the CSG to the employment income and substitute income of employed and self-employed persons who are resident in France but not covered by French social security legislation. The Court ruled that, in contrast to levies designed to meet general public charges, the CSG is allocated specifically and directly to financing social security in France, the corresponding revenue being allocated to the Caisse nationale des allocations familiales, the FSV and the compulsory sickness schemes. According to the Court, '[t]he purpose of the CSG is therefore to finance more particularly the branches which concern old-age, survivors', sickness and family benefits, which are covered by Article 4 of Regulation No 1408/71'.

19 — Case C-169/98 [2000] ECR I-1049.

42. The French Government considers that in the above judgment the Court did not rule on whether or not the CSG must be classified as a tax. [20] The Court merely ruled that there is such a direct and sufficiently relevant link between the CSG and the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71 so that it can be regarded as a levy covered by the prohibition against double contributions.

43. As the French Government has correctly stated, in examining the possible existence of an infringement of Article 13 of the regulation in *Commission* v *France* the Court did not examine whether the levy concerned must be regarded as a tax or a contribution.

44. I take the view that the CSG cannot be regarded as a contributory benefit in respect of the French supplementary allowance. Persons subject to the CSG are not entitled to any social security benefit in return for that contribution, whereas all persons resident in France, whether or not they are employed, may, on account of that residence, enjoy the social benefits financed by the CSG and which form part of the national solidarity scheme, namely benefits from the FSV. Therefore, payment of the CSG does not give entitlement to any direct and identifiable benefit in return.

45. Therefore, it follows that the French supplementary allowance must be regarded as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71.

46. For the sake of completeness, I will also consider the Commission's argument that the claimant may be able to claim rights under the transitional provisions as contained in Article 95b of Regulation No 1408/71. [21]

47. Article 95b(9) provides that the application of Article 1 of Regulation No 1247/92 may not result in the rejection of an application for a special non-contributory benefit awarded as a supplement to a pension, which was submitted by the person concerned who had satisfied the conditions for the award of this benefit before 1 June 1992, even where the person concerned resides on the territory of a Member State other than the competent Member State, provided that the application for the benefit is submitted within a period of five years starting from 1 June 1992.

20 — Case C-169/98 *Commission* v *France*, paragraph 32.

21 — As amended by Council Regulation (EC) No 3095/95 of 22 December 1995 amending 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, Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71, Regulation (EEC) No 1247/92 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 1945/93 amending Regulation (EEC) No 1247/92 (OJ 1995 L 335, p. 1).

48. It is clear from the order for reference that the claimant's application was rejected on the ground that on 1 June 1992 he did not fulfil the age condition fixed by Articles L. 815-2 and R. 815-2 of the CSS. The supplementary allowance is awarded to recipients of old-age benefits who have attained the age of 65, or 60 in the case of incapacity for work. The claimant has received a French old-age pension since 1 November 1991 on a normal legal basis and not on account of incapacity for work and therefore an age limit of 65 applies.

49. The Commission considers that in the present case the age limit of 60 rather than 65 should be applied. It states that the documents before the Court show that the claimant is in possession of a Spanish medical report stating that he has been unfit for work since 1991 but this report was not recognised by the national court as a legally valid document. If an age limited of 60 were applied, the claimant could claim a right under Article 95b(9) of Regulation No 1408/71 since he would have satisfied the conditions for the award of the supplementary benefit, that is to say would have attained the age of 60 before 1 June 1992.

50. It must first be observed that it is settled case-law that as regards the division of jurisdiction between national courts and the Court of Justice under Article 234 EC the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment. Nevertheless, in the event of questions having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 234 EC the Court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation having regard to the subject-matter of the dispute. [22]

51. For example, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider

22 — See, in particular, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraphs 25 and 26, and Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 21.

provisions of Community law to which the national court has not referred in the text of its question. However, it is for the national court to decide whether or not the rule of Community law, as interpreted by the Court of Justice pursuant to Article 234 EC, is applicable in the case brought before it. [23]

52. As the Commission has correctly stated, the claimant may be able to claim rights under Article 95b of Regulation No 1408/71 and Article 51(1)(b) and (f) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71. [24] The latter provision is worded as follows:

'When a person in receipt of benefits, in particular:

...

(b) old age benefits awarded in the event of unfitness for work,

...

(f) benefits awarded on condition that the means of the recipient do not exceed a prescribed limit;

is staying or residing in the territory of a Member State other than the State in which the institution responsible for payment is situated, administrative checks and medical examinations shall be carried out, at the request of that institution, by the institution of the place of stay or residence of the recipient in accordance with the procedures laid down by the legislation administered by the latter institution. The institution responsible for payment shall, however, retain the right to arrange for the examination of the recipient by a doctor of its own choice.'

53. In addition, in the judgment in *Dafeki* the Court ruled that 'in proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question'. [25]

23 — See, in particular Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9.

24 — OJ, English Special Edition 1972(I), p. 159.

25 — Case C-336/94 *Dafeki* [1997] ECR I-6761, paragraph 21.

54. It follows from the foregoing that a national court must accept documents relative to the commencement and duration of incapacity for work issued by the competent authorities of the other Member States.

55. It is for the national court to decide whether or not Article 95b(9) of Regulation No 1408/71, in conjunction with Article 51 of Regulation No 574/72, is applicable in the case brought before it.

VII — Conclusion

56. I consider that the Court should answer the question referred by the national court as follows:

Article 10a 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 and Annex IIa thereto are to be interpreted as meaning that the supplementary allowance within the meaning of the Code de la sécurité sociale (Social Security Code) constitutes a special non-contributory benefit within the meaning of Article 4(2a) of that regulation.