JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 *

In Case C-503/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom), made by decision of 16 November 2009, received at the Court on 4 December 2009, in the proceedings

Lucy Stewart

v

Secretary of State for Work and Pensions,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev (Rapporteur), A. Rosas, A. Ó Caoimh and P. Lindh, Judges,

* Language of the case: English.

Advocate General: P. Cruz Villalón,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2010,

after considering the observations submitted on behalf of:

— Ms Stewart, by P. Stewart, her appointee, and R. Drabble QC,

— the United Kingdom Government, by H. Walker, acting as Agent, and T. de la Mare, Barrister,

— the European Commission, by V. Kreuschitz and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4(1)(a) and (b), 10(1), 19 and 28 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1; 'Regulation No 1408/71').

2 The reference has been made in proceedings between Ms Stewart, a national of the United Kingdom residing in Spain, and the Secretary of State for Work and Pensions, concerning the latter's refusal to award her short-term incapacity benefit in youth.

Legal context

European Union legislation

3 Article 2 of Regulation No 1408/71, headed 'Persons covered', provides in paragraph 1:

'This Regulation shall apply to employed or self-employed persons and to students 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.'

4 Article 4 of Regulation No 1408/71, headed 'Matters covered', provides:

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

(a) sickness and maternity benefits;

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

...

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory …

...'

5 The first subparagraph of Article 10(1) of Regulation No 1408/71, headed 'Waiving of residence clauses – Effect of compulsory insurance on reimbursement of contributions', provides:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors cash benefits, pension[s] 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 Under Article 10a of Regulation No 1408/71, headed 'Special non-contributory benefits', the provisions of Article 10 and of Title III of that regulation do not apply to the special non-contributory cash benefits referred to in Article 4(2a) of that regulation. The persons to whom Regulation No 1408/71 applies are to receive those benefits exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as those benefits are mentioned in Annex IIa to that regulation.

7 The short-term incapacity benefit in youth at issue in the main proceedings is not mentioned in Annex IIa.

8 Article 19, headed 'Residence in a Member State other than the competent State – General rules', of Section 2, headed 'Employed or self-employed persons and members of their families', in Chapter 1, entitled 'Sickness and maternity', of Title III of Regulation No 1408/71 is worded as follows:

'1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

...

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers.

...

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.

...'

9 In Section 5, entitled 'Pensioners and members of their families', in Chapter 1 of Title III of Regulation No 1408/71, Article 28 thereof, entitled 'Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence', provides in paragraph 1:

'A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. ...

...'

National legislation

10 Under the terms of section 20(1)(b) of the Social Security Contributions and Benefits Act 1992 ('the SSCBA'), incapacity benefit is a contributory benefit.

11 Contributory benefits are paid, in accordance with section 163(1)(a) of the Social Security Administration Act 1992, from the National Insurance Fund. The budget necessary for that fund to make the payments in question is provided, pursuant to section 1(1) of the SSCBA, by means of contributions payable by income earners and employers.

12 Section 30A(4) and (5) of the SSCBA provide:

'4. In any period of incapacity for work a person is not entitled to short-term incapacity benefit for more than 364 days.

5. Where a person ceases by virtue of subsection (4) above to be entitled to short-term incapacity benefit, he is entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age.'

13 Under section 30B(2) of, and Part I of Schedule 4 to, the SSCBA, short-term incapacity benefit is payable at two rates. For the first 196 days, the rate payable is lower than that for the remainder of the period of 364 days. The basic rate of long-term incapacity benefit is higher than the higher rate of short-term incapacity benefit.

14 Those entitled to statutory sick pay from their employers are, under paragraph 1 of Schedule 12 to the SSCBA, excluded from entitlement to incapacity benefit.

15 Entitlement to incapacity benefit is essentially conditional on the claimant's record of contributions. However, those who are incapable of work in their youth are, under Article 30A(2A) of the SSCBA, entitled to incapacity benefit without a record of contributions, provided that the claimant:

'(a) … is aged 16 or over on the relevant day;

(b) … is under the age of 20 or, in prescribed cases, 25 on a day which forms part of the period of incapacity for work;

(c) … was incapable of work throughout a period of 196 consecutive days immediately preceding the relevant day, or an earlier day in the period of incapacity for work on which he [or she] was aged 16 or over;

(d) on the relevant day … satisfies the prescribed conditions as to residence in Great Britain, or as to presence there; and

(e) … is not, on that day, a person who is receiving full-time education.'

16 Regulation 16(1) of the Social Security (Incapacity Benefit) Regulations 1994 ('the SSIBR') is worded as follows:

'The prescribed conditions for the purposes of section 30A(2A)(d) of the [SSCBA] as to residence or presence in Great Britain in relation to any person on the relevant day shall be that on that day:

(a) he is ordinarily resident in Great Britain;

(b) he is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or he is a person to whom paragraph 5 applies;

(c) he is present in Great Britain; and

(d) he has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding that day.'

17 Under Regulation 16(6) of the SSIBR, those conditions have to be satisfied on the date of the claim.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Ms Stewart is a British national born in November 1989 who has Down's Syndrome. She moved with her parents to Spain in August 2000 and they have lived there since then. She has retrospectively been awarded disability living allowance from its inception in April 1992. It has been paid to her in Spain under Article 95b of Regulation No 1408/71.

19 Ms Stewart's father last worked in Great Britain in the 2000/01 tax year. He has an occupational pension and, since October 2009, has received a retirement pension. Her mother has received a retirement pension since 25 July 2005 and previously received incapacity benefit.

20 The appellant in the main proceedings has never worked and, in all probability, will never be able to.

21 Ms Stewart's mother, as her daughter's appointee, made a claim for short-term incapacity benefit in youth for her daughter from her 16th birthday, that date being the first date on which she could claim it. The claim was refused on 24 November 2005 by the Secretary of State for Work and Pensions on the ground that Ms Stewart did not

satisfy the condition of presence in Great Britain. At the same time, the appellant in the main proceedings was informed that she would be credited with national insurance contributions as long as she continued to be incapable of work.

22 Ms Stewart's mother appealed on behalf of her daughter against the decision of the Secretary of State for Work and Pensions. Following rejection of that appeal, she appealed to the referring tribunal claiming that the decision of the United Kingdom authorities refusing to award her daughter such incapacity benefit was incompatible with European Union ('EU') law.

23 The referring tribunal points out that the incapacity benefit at issue is often presented, on account of all the circumstances in which it applies, as 'incapacity benefit in youth'.

24 It is stated, moreover, in the decision making the reference that the appellant satisfies all the conditions for the award of short-term incapacity benefit in youth, except those prescribed in Regulation 16(1) of the SSIBR connected with ordinary residence, past presence and presence in Great Britain on the date on which the claim was made. The referring tribunal points out that although the Secretary of State for Work and Pensions refused the appellant's claim on the ground that she was not present in Great Britain on the date on which the claim was made, it could also have been refused on the ground that she did not satisfy the other two abovementioned conditions.

25 The referring tribunal is asking, first, whether short-term incapacity benefit in youth is a sickness benefit within the meaning of Article 4(1)(a) of Regulation No 1408/71 or an invalidity benefit within the meaning of Article 4(1)(b). The tribunal considers

that the benefit at issue cannot be regarded as a sickness benefit, because it does not replace income during an interruption of earnings since the appellant, like most claimants in her situation, has never worked. Moreover, in the referring tribunal's view, the appellant's incapacity is not temporary.

26 That tribunal also has its doubts as to the classification of short-term incapacity benefit in youth as an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71 because it is payable for a maximum of 364 days. However, after that period, the appellant should receive, according to the tribunal, long-term incapacity benefit like many others in her situation. Short-term and long-term incapacity benefit is therefore a single benefit, despite its internal structure.

27 Secondly, the referring tribunal is asking whether the three conditions mentioned in paragraph 24 of the present judgment are compatible with the law of the European Union.

28 In those circumstances the Upper Tribunal (Administrative Appeals Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a benefit with the characteristics of short-term incapacity benefit in youth a sickness benefit or an invalidity benefit for the purposes of Regulation [No 1408/71]?

2. If the answer to question 1 is that such a benefit is to be treated as a sickness benefit:

   (a) Is a person, such as the claimant's mother, who has definitively ceased all employed or self-employed activity by virtue of retirement nevertheless an "employed person" for the purposes of Article 19 [of that regulation] by reason of [her] former employed or self-employed activity, or do Articles 27 to 34 [thereof] (pensioners) contain the applicable rules?

   (b) Is a person, such as the claimant's father, who has not undertaken an employed or self-employed activity since 2001, nevertheless an "employed person" for the purposes of Article 19 [of that regulation] by reason of [his] former employed or self-employed activity?

   (c) Is a claimant to be treated as a "pensioner" for the purposes of Article 28 [of Regulation No 1408/71] by virtue of the award of a benefit acquired pursuant to Article 95b [thereof], notwithstanding the facts that: (i) the claimant in question has never been an employed person under Article 1(a) of Regulation [No 1408/71]; (ii) the claimant has not reached State retirement age; and (iii) the claimant only comes within the personal scope of Regulation [No 1408/71] as a family member?

   (d) Where a pensioner falls within Article 28 of Regulation [No 1408/71], can a family member of that pensioner who has at all times resided with and in the same State as the pensioner claim, pursuant to Article 28(1) [of that regulation], as read with Article 29 [thereof], a cash sickness benefit from the competent institution determined by Article 28(2) [of that regulation] where such benefit is (if due) payable to the family member (and not payable to the pensioner)?

(e) If applicable (by reason of the answers to (a) to (d) above), is the application of a condition of national social security law limiting the initial acquisition of entitlement to a sickness benefit to those having completed a requisite period of past presence within the competent Member State within a defined prior period compatible with the provisions of Articles 19 and/or 28 of Regulation [No 1408/71]?

3. If the answer to question 1 is that such a benefit is to be treated as an invalidity benefit, does the wording in Article 10 of Regulation [No 1408/71] referring to benefits "acquired under the legislation of one or more Member States" mean that Member States remain entitled under Regulation [No 1408/71] to set conditions of initial acquisition to such invalidity benefits that are based upon residence in the Member State or upon demonstration of requisite periods of past presence in the Member State, such that a claimant cannot first claim entitlement to such benefit from another Member State?'

Consideration of the questions referred

The first question

29 By its first question, the referring tribunal asks, in essence, whether short-term incapacity benefit in youth, such as that at issue in the main proceedings, is, for the purposes of Regulation No 1408/71, a sickness benefit or an invalidity benefit.

30 By way of a preliminary remark, that question does not therefore concern the general scheme of incapacity benefits awarded under the legislation of the United Kingdom of Great Britain and Northern Ireland, but relates specifically to incapacity benefit in youth, the nature of, and conditions for entitlement to which, are distinct, as is apparent from paragraphs 10 to 17 of the present judgment.

31 Under Article 4(1)(a) and (b) of Regulation No 1408/71, that regulation applies to legislation concerning the two branches of social security which relate, respectively, to sickness benefits and invalidity benefits, including those intended to maintain or improve earning capacity.

32 According to settled case-law, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, in particular, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37; Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 63; and Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 19).

33 In the present case, it is not disputed that that is the case in regard to the benefit at issue in the main proceedings since its grant depends on objective criteria legally defined in section 30A(2A) of the SSCBA and the competent authorities do not have the power to assess the individual needs of the claimant and the benefit is intended to cover, according to the particular case, the risks of sickness or invalidity which appear in Article 4(1)(a) and (b) of Regulation No 1408/71 respectively.

34 In addition, it is not disputed that the appellant in the main proceedings comes within the personal scope of Regulation No 1408/71, as defined in Article 2(1) thereof.

35 With regard to determining the precise nature of the benefit at issue in the main proceedings, it follows from the Court's settled case-law that the requirement that EU law be applied uniformly implies that the concepts to which that law refers should not vary according to the particular features of each system of national law but rest upon objective criteria defined in a context specific to EU law. In accordance with that principle, the concepts of sickness and invalidity benefits in Article 4(1)(a) and (b) of Regulation No 1408/71 are to be determined, for the purpose of applying the regulation, not according to the type of national legislation containing the provisions giving those benefits, but in accordance with EU rules which define what those benefits shall consist of (see, to that effect, Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 6).

36 In that regard, in order to distinguish between different categories of social security benefit, the risk covered by each benefit must also be taken into consideration (Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 27).

37 As the United Kingdom Government and the European Commission correctly submit, a sickness benefit, within the meaning of Article 4(1)(a) of Regulation No 1408/71, covers the risk connected to a morbid condition involving temporary suspension of the concerned person's activities.

38 By contrast, an invalidity benefit, within the meaning of Article 4(1)(b) of the regulation, is intended, as a general rule, to cover the risk of disability of a prescribed degree, where it is probable that such disability will be permanent or long-term (see, by analogy, Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 45).

39 The referring tribunal's doubts as regards the classification of short-term incapacity benefit in youth as a sickness benefit or as an invalidity benefit, within the meaning of Article 4(1)(a) or (b) of Regulation No 1408/71, arise from the fact that the benefit is covered by national legislation which provides for payment in two stages, the first designated as short-term incapacity benefit, for a maximum period of 364 days, and the second, designated as long-term incapacity benefit, for an indefinite period until the claimant reaches State pensionable age.

40 It is appropriate to note in that regard, as the referring tribunal states, that the appellant, like most of those who claim short-term incapacity benefit in youth, is unable to work and has never done so. That is, in that tribunal's view, a regular feature of claimants who qualify for that benefit.

41 The referring tribunal points out next that, at the end of the period for payment of short-term incapacity benefit in youth, the appellant, like most people entitled to that benefit, will inevitably be entitled, because of the permanent nature of her disability, to long-term incapacity benefit.

42 Indeed, it is clear from the contents of the file submitted to the Court that if short-term incapacity benefit in youth is awarded, it is converted, at the end of the period for its payment, into long-term incapacity benefit, on the sole condition that the claimant's disability persists. However, the claimant cannot be entitled to long-term incapacity benefit from the outset, even if it is accepted, in the light of the permanent or long-term nature of the disability, that he or she is eligible for it. Thus, for a claimant with such a disability, short-term incapacity benefit in youth is but a preliminary stage so that he or she may claim, at the end of the period for its payment, entitlement to long-term incapacity benefit.

43 Therefore, in a case such as that in the main proceedings, where the claimant has a permanent or long-term disability, short-term and long-term incapacity benefits in youth necessarily form part of a continuum.

44 In fact, the referring tribunal points out that short-term and long-term incapacity benefits are a single benefit, despite the rules for their application.

45 Consequently, in circumstances, such as those in question in the main proceedings, where it is established, at the time of the claim, that the claimant has a permanent or long-term disability, short-term incapacity benefit in youth has, in view of the continuity between it and long-term incapacity benefit, the characteristics of an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71.

46 That conclusion is supported both by the subject-matter and purpose of short-term incapacity benefit in youth and by the basis on which it is calculated and the conditions for granting it (see, by analogy, Case 171/82 *Valentini* [1983] ECR 2157, paragraph 13; *De Cuyper*, paragraph 25; and *Petersen*, paragraph 21).

47 As regards, first, the subject-matter and purpose of short-term incapacity benefit in youth, it replaced severe disablement allowance. Those entitled to the incapacity benefit are those aged from 16 to 25 who are incapable of work because of sickness or disability.

48 However, those entitled to statutory sick pay are excluded, under paragraph 1 of Schedule 12 to the SSCBA, from entitlement to the benefit. Thus, those who are incapable of work because of a temporary health problem who simultaneously satisfy the requirements for the grant of both statutory sick pay and short-term incapacity benefit in youth, receive, as a general rule, the former and not the latter.

49 Moreover, it appears from the file submitted to the Court that such benefit is intended to provide claimants with the financial means to meet their needs. The referring tribunal makes clear in that regard that, as opposed to a sickness benefit, short-term incapacity benefit in youth is not to replace income during an interruption of earnings, since most of those entitled to that benefit, just like the appellant, have never worked. There is, consequently, according to that tribunal, neither income to be replaced nor interruption of earnings.

50 As regards, next, the conditions for the award of that benefit, they relate essentially, under section 30A(2A) of the SSCBA, to the claimant's age and incapacity for work, to the fact that he or she is not receiving full-time education, as well as requirements in respect of residence and presence in Great Britain. In that regard, those conditions are the same for short-term and long-term incapacity benefit in youth. Long-term incapacity benefit is a continuation of short-term incapacity benefit in youth with no need to demonstrate again that those conditions are met, provided that the incapacity for work persists.

51 As regards, finally, the basis for calculating both short-term and long-term incapacity benefit in youth, it is a weekly benefit, the amount of which depends neither on recipients' means nor on their contributions record. That amount is fixed according to three different rates applicable respectively during the first half of the period for

payment of short-term incapacity benefit in youth, the second half of that period and the period for payment of long-term incapacity benefit.

52 The fact that different rates apply to short-term and long-term incapacity benefit in youth does not lead to the conclusion that the nature of the benefit changes by reference to the rates applicable since, in this case, there are two different rates for short-term incapacity benefit in youth, as stated in the preceding paragraph. In any event, as stated in paragraph 44 of the present judgment, short-term and long-term incapacity benefits are, despite their internal structure, a single benefit.

53 Therefore it follows both from the subject-matter and purpose of short-term and long-term incapacity benefit and from its conditions for entitlement that, in a situation such as that in the main proceedings, where it is clear, when the claim is made, that the claimant has a permanent or long-term disability, and notwithstanding the fact that such benefit will be paid in two successive stages, it relates directly to the risk of invalidity referred to in Article 4(1)(b) of Regulation No 1408/71.

54 In the light of the foregoing, the answer to the first question is that short-term incapacity benefit in youth, such as that at issue in the main proceedings, is an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71 if it is clear that, on the date on which the claim is made, the claimant has a permanent or long-term disability.

The second question

55 Given the reply to the first question there is no need to reply to the second question.

The third question

56 By its third question, the referring tribunal asks, in essence, whether, if short-term incapacity benefit in youth, such as that at issue in the main proceedings, is to be treated as an invalidity benefit, the first subparagraph of Article 10(1) of Regulation No 1408/71 is to be interpreted as precluding a Member State from making the award of that benefit subject to conditions requiring the claimant's ordinary residence or past presence in that Member State.

57 It is clear from the decision making the reference that the award of short-term incapacity benefit in youth is subject, among other matters, to three cumulative conditions, namely that the claimant:

— is ordinarily resident in Great Britain;

— has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding the date on which the claim was made for the benefit in question, and

— is present in Great Britain on that date.

58 It is appropriate to make clear that those conditions concern the acquisition of the benefit in question but not its retention.

The ordinary residence condition

59 As is clear from the reply given to the first question, short-term incapacity benefit in youth is to be treated, in circumstances such as those in the main proceedings, as an invalidity benefit for the purposes of applying Regulation No 1408/71. As such, it comes within the scope of Article 10 of that regulation. Under the first subparagraph of Article 10(1), '[s]ave as otherwise provided in this Regulation, invalidity … cash benefits … 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'.

60 In that regard, the United Kingdom Government submits that Regulation No 1408/71 establishes a system of coordination, under which the Member States remain competent to define the conditions for granting social security benefits provided that those conditions do not give rise to any discrimination between EU workers. Thus, that regulation permits a distinction to be drawn between the acquisition of a benefit, on the one hand, and its retention, once acquired, on the other. The wording of the first subparagraph of Article 10(1) of that regulation confirms that that provision has no effect on the conditions for acquiring the right to invalidity benefit.

61 That submission cannot be accepted. As the Court has already observed, the purpose of Article 10 of Regulation No 1408/71 is to protect the persons concerned against

any adverse effects that might arise from the transfer of their residence from one Member State to another. It follows from that principle not only that the person concerned retains the right to receive benefits referred to in that provision acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that the acquisition of such entitlement may not be refused on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated (see, to that effect, Case 51/73 *Smieja* [1973] ECR 1213, paragraphs 20 to 22; Case 92/81 *Camera* [1982] ECR 2213, paragraph 14; and Joined Cases 379/85 to 381/85 and 93/86 *Giletti and Others* [1987] ECR 955, paragraph 15).

62 The Court has also had occasion to rule that, contrary to the United Kingdom Government's submission, under Article 10 of Regulation No 1408/71, neither the acquisition nor the retention of entitlement to the benefits covered by that provision may be denied on the sole ground that the person concerned does not reside in the territory of the Member State in which the institution responsible for payment is situated (Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 23).

63 In addition, making the application of the principle of waiving residence clauses enshrined in the first subparagraph of Article 10(1) of Regulation No 1408/71 dependent on whether such clauses are imposed in the national legislation as a condition for acquiring the benefits listed in that provision or as a condition for retaining them would be tantamount to permitting the Member States to frustrate that principle's effectiveness by choosing to treat residence clauses which they impose as conditions for the acquisition of those benefits rather than as conditions for retaining them so as to exclude a particular benefit from the scope of that principle.

64 The fact that short-term incapacity benefit in youth is a non-contributory benefit, since it is awarded irrespective of the record of contributions by claimants, does not affect the preceding analysis.

65 Indeed, it is clear from Article 4(2) of Regulation No 1408/71 that the regulation applies, as a rule, to both contributory and non-contributory social security schemes.

66 In addition, the first subparagraph of Article 10(1) of Regulation No 1408/71 prohibits the competent institutions, in general terms, from reducing, modifying, suspending, withdrawing or confiscating invalidity benefits by reason of the fact that the recipient resides in a Member State other than that in which the institution responsible for payment is situated. The only exceptions to that prohibition are those expressly provided for in EU legislation (see, to that effect, *Giletti and Others*, paragraph 16).

67 Such an exception is laid down in Article 10a of Regulation No 1408/71. It provides that the persons to whom that regulation applies are to receive the special non-contributory benefits referred to in Article 4(2a) thereof exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as those benefits are mentioned in Annex IIa to that regulation. However, short-term incapacity benefit in youth is not mentioned in that annex. Consequently, the principle stated in Article 10a of Regulation No 1408/71 under which special non-contributory benefits are not exportable does not apply to the benefit at issue in the main proceedings.

68 Since no other provision of that regulation allows Member States to derogate, in a situation such as that of Ms Stewart, from the principle, enshrined in the first subparagraph of Article 10(1) of that regulation, of waiving residence clauses, it follows that invalidity benefits are, as a rule, exportable to a Member State other than that in which the institution responsible for payment is situated (see, to that effect, Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 40, and *Petersen*, paragraph 38).

69 Short-term incapacity benefit in youth is therefore not outside the principle of waiving residence clauses stated in the first subparagraph of Article 10(1), which precludes, as is clear from paragraphs 61 and 62 of the present judgment, both acquisition and retention of entitlement to the benefits referred to in that provision from being refused on the sole ground that the claimant resides in a Member State other than the competent Member State.

70 Consequently, the first subparagraph of Article 10(1) of Regulation No 1408/71 precludes the acquisition of entitlement to short-term incapacity benefit in youth from being made subject to a condition of ordinary residence in the competent Member State.

The past presence condition

71 The appellant in the main proceedings and the Commission submit that the first subparagraph of Article 10(1) of Regulation No 1408/71 precludes not only a condition of ordinary residence in the competent Member State but also a condition of past presence there. They submit that it is not appropriate to differentiate between two such conditions, since the condition of past presence should be treated as a condition of temporary residence inasmuch as it requires a claimant to have been present in Great Britain for a certain period.

72 In that regard, the first subparagraph of Article 10(1) of Regulation No 1408/71 covers residence clauses, as is clear, in particular, from its heading. However, for the purposes of applying that regulation, the word 'residence' means, under Article 1(h) thereof, 'habitual residence'.

73 Admittedly, in certain cases, a condition of past presence could be equivalent, in practice, to an habitual residence clause, if, in particular, such condition requires long periods of presence in the Member State concerned and/or if that condition must be met for as long as the benefit in question is paid. In such cases, the first subparagraph of Article 10(1) of Regulation No 1408/71 also precludes a condition of past presence since it can be assimilated to a residence clause within the meaning of that provision.

74 In this case, as is clear from paragraphs 17 and 57 of the present judgment, it is a question of a condition of presence in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding the date on which the claim to entitlement to the benefit in question was made, with that condition having to be met only on the date of that claim. Since the condition of past presence is therefore not necessarily a 'residence clause' within the meaning of the first subparagraph of Article 10(1) of Regulation No 1408/71, the Court must examine its conformity with the other relevant provisions of EU law.

75 It must be pointed out, in that regard, that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes (Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23; Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27; and *Petersen*, paragraph 41). Thus, according to settled case-law, Member States retain the power to organise their social security schemes (see, to that effect, Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 43).

76 Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits (Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 18 and the case-law cited).

77 In exercising those powers, Member States must none the less comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States (see, by analogy, Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19, and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 22).

78 It is appropriate to recall, in that regard, that Article 20 TFEU confers on every person holding the nationality of a Member State the status of citizen of the Union (see, in particular, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paragraph 40). The appellant in the main proceedings, who holds the nationality of a Member State, benefits from that status.

79 Even if the referring tribunal has limited its question to the interpretation of Regulation No 1408/71, such a situation does not prevent the Court from providing the national court or tribunal with all the elements of interpretation of EU law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29; and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64).

80 The status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard (see, to that effect, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; *D'Hoop*, paragraph 28; and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 62).

81 Situations falling within the material scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the Treaties, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU (see, to that effect, *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29; and *Rüffler*, paragraph 63 and the case-law cited).

82 In the case in the main proceedings, it is common ground that Ms Stewart has, in her capacity as a citizen of the Union, exercised her freedom to move and to stay in a Member State other than her Member State of origin.

83 Inasmuch as a citizen of the Union must be granted, in all Member States, the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were citizens to receive, in the Member State of which they are nationals, treatment less favourable than that which they would enjoy if they had not availed themselves of the opportunities offered by the Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30, and *Pusa*, paragraph 18).

84 Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of

his freedom to move and to stay in another Member State by national legislation penalising the fact that he has used them (see, to that effect, *D'Hoop*, paragraph 31; *Pusa*, paragraph 19; *Tas-Hagen and Tas*, paragraph 30; and Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029, paragraph 34; and *Rüffler*, paragraph 65).

85 Legislation, such as that at issue in the main proceedings, which makes acquisition of the right to short-term incapacity benefit in youth subject to a condition of past presence is likely, by its very nature, to deter claimants such as the appellant from exercising their right to freedom of movement and residence by leaving the Member State of which they are nationals to take up residence in another Member State. Indeed, while claimants who have not made use of the opportunities offered by the Treaty in relation to freedom of movement and residence can easily satisfy the abovementioned condition, that is not the case for claimants who have taken advantage of them. It is actually very probable that the latter, because they have take up residence in another Member State, do not satisfy that condition.

86 Such national legislation, which disadvantages some nationals of a Member State simply because they have exercised their freedom to move and to reside in another Member State, amounts to a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union (see *D'Hoop*, paragraph 35; *Pusa*, paragraph 20; *De Cuyper*, paragraph 39; and *Rüffler*, paragraph 73).

87 Such a restriction can be justified, under EU law, only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions (see *De Cuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33; *Zablocka-Weyhermüller*, paragraph 37; and *Rüffler*, paragraph 74).

88 The United Kingdom Government submits in that regard that there are objective justifications permitting acquisition of the right to short-term incapacity benefit in youth to be made subject to a condition of past presence in the competent Member State. It submits that the national legislation is intended to guarantee, first, the existence of a continuous effective link between that Member State and the recipient of the benefit and, second, the financial balance of the national social security system.

89 The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between a claimant to a benefit and the competent Member State (see, to that effect, *D'Hoop*, paragraph 38, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 67), as well as to guarantee the financial balance of a national social security system (see, to that effect, *Kohll*, paragraph 41, and *Petersen*, paragraph 57).

90 It follows that the objectives of national legislation such as that at issue in the main proceedings which seek to establish a genuine link between a claimant to short-term incapacity benefit in youth and the competent Member State and to preserve the financial balance of the national social security system, constitute, in principle, legitimate objectives capable of justifying restrictions on the rights of freedom of movement and residence under Article 21 TFEU.

91 The United Kingdom Government argues, further, that the condition of past presence in the competent Member State is proportionate in the light of the objective pursued, since it requires only a short period of presence of 26 weeks in total. In addition, the claimant has to satisfy that condition only on the date on which the claim is made. Moreover, in that government's submission, there is no other means which enables

both the existence of a sufficient link with the United Kingdom to be established and the integrity of the social security system to be protected.

92 In circumstances such as those in the main proceedings, where acquisition of entitlement to a non-contributory benefit is not subject to conditions as regards contributions, it can be considered to be legitimate for a Member State to award such benefit only after it has been established that there was a genuine link between the claimant and the competent State.

93 The existence of such a link could effectively be established, in particular, by a finding that the person in question had been, for a reasonable period, actually present in that Member State.

94 In this case, the condition of past presence in the competent Member State means, under the national legislation, that, to be eligible for short-term incapacity benefit in youth, the claimant must have been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding the date of the claim. In addition, under Article 16(6) of the SSIBR, as the United Kingdom Government argues, it suffices if that condition of past presence is satisfied on the date on which the claim is made.

95 While the rules for applying that condition do not, in themselves, appear to be unreasonable, none the less that condition is too exclusive in nature. Indeed, by requiring specific periods of past presence in the competent Member State, the condition of past presence unduly favours an element which is not necessarily representative of the real and effective degree of connection between the claimant to short-term incapacity benefit in youth and that Member State, to the exclusion of all other representative

elements. It therefore goes beyond what is necessary to attain the objective pursued (see, by analogy, *D'Hoop*, paragraph 39).

96 In fact, is not inconceivable that the existence of such a connection could be established from other representative elements.

97 Such elements must be sought, in the first place, in the relationship between the claimant and the social security system of the competent Member State. In that regard, the decision making the reference states that the appellant is already entitled, under United Kingdom legislation, to disability living allowance.

98 Moreover, it is apparent from that decision that the appellant is credited with United Kingdom national insurance contributions which are added each week to her national insurance account.

99 It follows that Ms Stewart is already, in a certain way, connected to the national social security system in question.

100 Other elements capable of demonstrating the existence of a genuine link between the claimant and the competent Member State may, secondly, be apparent from the claimant's family circumstances. In the case in the main proceedings, it is common ground that Ms Stewart, who is incapable of acting on her own behalf because of her disability, remains dependent on her parents who care for her and represent her

in her relations with the outside world. Both Ms Stewart's mother and her father receive retirement pensions under United Kingdom legislation. In addition, her father worked in that Member State before retiring, whereas her mother previously received, also under United Kingdom legislation, incapacity benefit.

101 Finally, it is common ground that the appellant, a United Kingdom national, has passed a significant part of her life in the United Kingdom.

102 The elements mentioned in paragraphs 97 to 101 of the present judgment appear to be capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State.

103 The foregoing considerations also apply with regard to the objective of guaranteeing the financial balance of the national social security system. In fact, the necessity of establishing a genuine and sufficient connection between the claimant and the competent Member State enables that State to satisfy itself that the economic cost of paying the benefit at issue in the main proceedings does not become unreasonable.

104 Consequently, national legislation, such as that at issue in the main proceedings, which makes acquisition of the right to short-term incapacity benefit in youth subject to a condition of past presence in the competent Member State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, goes beyond what is necessary to attain the objective pursued and therefore amounts to an unjustified restriction on the freedoms guaranteed by Article 21(1) TFEU for every citizen of the Union.

The condition of presence on the date on which the claim is made

105 It is clear from the decision making the reference that the appellant's claim to short-term incapacity benefit in youth was rejected because she was not present in the United Kingdom on the date on which the claim was made. In those circumstances, even if the formulation of the third question does not refer expressly to that condition of presence, in the procedure laid down by Article 267 TFEU for cooperation between national courts and the Court of Justice, it is for the latter to examine that condition in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (see, in particular, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18; and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 32).

106 In that regard, the condition of presence in the competent Member State on the date on which the claim is made constitutes, for the reasons stated in paragraphs 80 to 87 of the present judgment, a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union.

107 Such a restriction can be justified, under EU law, only if it is, among other things, appropriate to attain the legitimate objective of the national provisions.

108 However, that condition cannot be described as an appropriate means of attaining the objectives referred to in paragraph 89 of the present judgment. Indeed, the fact that claimants must be present in the competent Member State on the date on which their claims are made for short-term incapacity benefit in youth enables neither a genuine link to be established between those claimants and the competent Member State nor the financial balance of the national social security system to be preserved.

109 It follows that the condition of presence in the competent Member State on the date on which the claim is made, to which acquisition of short-term incapacity benefit in youth is subject, amounts to an unjustified restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union.

110 In the light of the foregoing, the reply to the third question is as follows:

— the first subparagraph of Article 10(1) of Regulation No 1408/71 precludes a Member State from making the award of short-term incapacity benefit in youth, such as that at issue in the main proceedings, subject to a condition of ordinary residence by the claimant in that State;

— Article 21(1) TFEU precludes a Member State from making the award of such a benefit subject:

— to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or

— to a condition of presence of the claimant in that State on the date on which the claim is made.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Short-term incapacity benefit in youth, such as that at issue in the main proceedings, is an invalidity benefit within the meaning of Article 4(1)(b) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, if it is clear that, on the date on which the claim is made, the claimant has a permanent or long-term disability.**

2. **The first subparagraph of Article 10(1) of Regulation No 1408/71, in that version, as amended by Regulation No 647/2005, precludes a Member State from making the award of short-term incapacity benefit in youth, such as that at issue in the main proceedings, subject to a condition of ordinary residence by the claimant in that State.**

Article 21(1) TFEU precludes a Member State from making the award of such a benefit subject:

— **to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or**

— **to a condition of presence of the claimant in that State on the date on which the claim is made.**

[Signatures]