OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 9 December 1987 *

Mr President,
Members of the Court,

1. A — The tribunal des affaires de sécurité sociale (Social Security Tribunal), Nanterre, has submitted two questions to the Court for a preliminary ruling regarding the scope *ratione materiae* (in the first question) and the scope *ratione personae* (in the second question) of the Community regulations on social security.

2. The national court refers to 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 [1] but its questions extend to 'any other Community regulation'. As the Commission points out in its observations, the latter category would appear to include only Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. [2]

3. The questions arose in proceedings concerning the recognition of entitlement, if any, to the grant by the French fonds national de solidarité of a supplementary allowance payable to recipients of old-age and invalidity pensions who lack sufficient means of their own.

4. According to Articles L 685 and L 707 of the French Social Security Code, which is applicable in the main proceedings, the contested benefit may be granted only to French nationals or to nationals of States with which France has concluded a convention based on reciprocity. A ministerial circular equated stateless persons, for the purposes of the grant of the benefit, with refugees, who qualify for the benefit in question if they fulfil the conditions laid down in Article L 685 *et seq.* of the Social Security Code.

5. The specific nature of these proceedings, in relation to others in which the Court has already had occasion to state its views on the aforementioned benefit, stems from the status of the claimant.

6. Mr Saada Zaoui, who was denied the supplementary allowance by decision of the competent French institution, was unable to claim either French nationality or the nationality of another Member State of the Community or that of any State with which France has concluded an international convention based on reciprocity.

7. Furthermore, the French authorities refused to grant him the status of a stateless person, and he does not have refugee status either.

8. Mr Zaoui, who was born in Algeria, lives in France where he is in receipt of invalidity pension and of an allowance for handicapped adults; he is married to a French citizen, although he has not acquired French nationality by virtue of his marriage.

* Translated from the Portugese.

1 — Official Journal, English Special Edition, 1971 (II), p. 416.

2 — Official Journal, English Special Edition, 1968 (II), p. 475.

9. **B** — The questions referred by the national court, as well as the observations submitted by the French Government and the Commission, are set out or summarized in the Report for the Hearing.

10. **C** — (a) In its first question, the national court seeks to ascertain whether a benefit such as the supplementary allowance payable by the fonds national de solidarité falls within the scope *ratione materiae* of Regulation No 1408/71, as defined in Article 4 thereof, or within that of any other Community regulation, in particular Regulation No 1612/68.

11. (b) A negative answer to the second question submitted by the national court might make it unnecessary, in these proceedings, to answer the first question.

12. However, in response to the request made by the national court, I shall clarify once again the issue of the applicability of the Community rules to benefits of the kind allocated by the fonds national de solidarité.

13. (c) I shall briefly recall the chief characteristics of the benefit in question, which have already been summarized by the Court in its judgment in *Giletti*.[3]

14. The supplementary allowance is a solidarity allowance financed from tax revenue, it is intended to guarantee in general a minimum means of subsistence, it is paid as a supplement to another benefit, whether contributory or otherwise, it is granted on the basis of the claimant's resources but without regard to his occupation and it may under certain circumstances be recovered from the recipient's estate.

15. (d) I propose to consider in the first place how the problem raised can be resolved from the point of view of Regulation No 1408/71.

16. The answer can undoubtedly be gleaned from the case-law of the Court.

17. As is laid down by Article 4 (2) of Regulation No 1408/71 and as the Court has most recently pointed out in paragraph 7 of its judgment in *Giletti*, 'non-contributory benefits are not excluded from the scope of the regulation'. Similarly, by virtue of Article 1 (t) of the regulation, which is referred to in paragraph 8 of the same judgment, the concept of benefit comprises 'revalorization increases and supplementary allowances'.

18. Furthermore, whilst social assistance measures fall outside the scope of the regulation by virtue of Article 4 (4) thereof, the Court did not rule out the possibility that by reason of the persons covered, its objectives and its methods of application, national legislation may, at one and the same time, have links to both social security and assistance (*Giletti*, paragraph 9 of the decision).

19. As the Court stated, that is precisely the case with regard to legislation such as that adopted by France in relation to the fonds national de solidarité, which 'in fact fulfils a dual function, in so far as, in the first place, it guarantees a minimum means of subsistence to persons in need and, in the second place, it provides additional income for the recipients of social security benefits which are inadequate' (*Giletti*, paragraph 10 of the decision).

3 — Judgment of 24 February 1987 in Joined Cases 379 to 381/85 and 93/86 *Giletti and Others* v *Caisse régionale d'assurances maladie Rhône-Alpes and Others* [1987] ECR 955, paragraphs 3 and 4 of the decision. See also my Opinion of 21 January 1987 in those cases.

20. 'In so far as such legislation confers a right to supplementary benefits designed to increase the amount of pensions paid by way of social security, without any assessment of individual needs or circumstances, which is a characteristic of assistance, it comes within the social security scheme within the meaning of Regulation No 1408/71' (*Giletti*, paragraph 11 of the decision).

21. Accordingly, there is no doubt that the benefit from the fonds national de solidarité falls, as a social security benefit, within the scope *ratione materiae* of Regulation No 1408/71, as defined in Article 4 thereof, when it is granted as a supplement to an invalidity pension of the kind awarded to the plaintiff in this case (Article 4 (1) (b)).

22. In a specific case, however, everything depends on the question whether or not the recipient of the benefit comes within the scope *ratione personae* of Regulation No 1408/71 and, consequently, on the answer to be given to the second question.

23. (e) Before I turn to the second question, however, it is necessary to deal with the problem whether the allowance from the fonds national de solidarité comes within the scope *ratione materiae* of another Community regulation, to be more precise, Regulation No 1612/68.

24. The relevant provision is Article 7 (2) of that regulation, which provides that workers who are nationals of other Member States are to enjoy, in the State in which they are employed, 'the same social and tax advantages as national workers'.

25. The application of that provision, which merely implements the principle of equal treatment, depends, as is clear from its wording, on the status of the person relying upon it; in these proceedings, therefore, it is sufficient to consider the problem in relation to the second question submitted by the national court.

26. Accordingly, it would not seem to be necessary to ascertain whether or not a 'social advantage' within the meaning of Article 7 (2) of Regulation No 1612/68 is involved in the case under consideration. [4]

27. **D** — In its second question the national court seeks to ascertain whether a person who is not a national of a Member State or of another State with which a convention based on reciprocity has been concluded, and who is denied, in the Member State in which he resides, the legal status of a stateless person, may, in his capacity as a member of the family of a worker who is a national of the Member State in which she resides and has always resided and, at the same time, as a recipient of one or more invalidity benefits, rely on Community Regulations Nos 1408/71 and 1612/68 for the purpose of obtaining entitlement, in the Member State in which he resides, to a benefit such as that paid by the fonds national de solidarité.

28. It is therefore necessary to define the scope *ratione personae* of those Community regulations in relation to the context of the question submitted by the national court.

29. It must be said in that regard that the principles to be applied in order to resolve the problem cannot be the same in the case of each of those two regulations since, as is clear from its case-law, the Court has given

4 — Since the supplementary allowance from the fonds national de solidarité falls within the scope *ratione materiae* of Regulation No 1408/71, it would appear useful to recall the reasoning adopted by the Court in its judgment of 27 March 1985 in Case 122/84 *Scrivner* [1985] ECR 1027 at p. 1034, paragraph 16 of the decision, in which it proceeded from the premise that the classification of a benefit (in that case the Belgian 'minimex') in relation to the concept of 'social advantage' referred to in Article 7 of Regulation No 1612/68 falls to be considered 'only if it is established that the benefit is not a social security benefit for the purposes of Regulation No 1408/71'.

an interpretation of the regulations on social security that goes beyond the scope of the provisions on freedom of movement for workers.[5]

30. (a) I shall consider Regulation No 1408/71 first.

31. That regulation, according to Article 2 (1) thereof, is to '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'.

32. It was on the basis of that provision that Mr Zaoui claimed that he came within the scope *ratione personae* of the regulation in his capacity as a member of the family (the husband) of a worker who is a national of a Member State and subject to its legislation.

33. He therefore maintains that the principle of equal treatment laid down in Article 3 of the regulation is applicable to him and enables him to come within the scope of national legislation on the same terms as French nationals, particularly since he is already in receipt of a benefit (the allowance for handicapped adults) which was granted to him in his capacity as a member of a worker's family in accordance with a procedure which makes it possible to assimilate to that benefit the supplementary allowance from the fonds national de solidarité.

34. However, that view would appear to be incorrect.

35. Instead, the Commission would appear to be right in taking the view that Mr Zaoui, although married to a French worker, cannot rely on Regulation No 1408/71, and in particular Articles 2 (1) and 3 thereof, in order to receive a social security benefit such as that granted by the fonds national de solidarité to recipients who are entitled to it in their own right and not as holders of a derived right, that is to say as a result of the incorporation of the necessary status of member of a worker's family in the definition.

36. Like the Commission, I would refer in the first place to the Court's judgment of 23 November 1976 in *Kermaschek*[6] which was concerned with the right to German unemployment benefits claimed, on the basis of Articles 67 and 69 of Regulation No 1408/71, by a national of a non-member country who was married to a German national.

37. The Court stated in paragraph 7 of its judgment that Article 2 (1) of Regulation No 1408/71 '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 a survivor of a worker, that is to say of a person belonging to the first category'.

38. In other words, the equality of treatment to which a relative of a worker belonging to the first category is entitled by

5 — See the judgment of 19 March 1964 in Case 75/63 *Hoekstra* [1964] ECR 177.

6 — Case 40/76 [1976] ECR 1669.

virtue of Article 2 (1) in conjunction with Article 3 of the regulation must be established by reference not to the legal position and the rights of workers who are nationals of the Member State in question but to the legal position of members of the family of workers who are nationals of that Member State and their derived rights.

39. The principle laid down by the Court in *Kermaschek* was subsequently upheld by the judgment of 6 June 1985 in *Frascogna*[7] and by the judgment of 20 June 1985 in *Deak*.[8]

40. Accordingly, as Mr Zaoui is neither a worker who is a national of another Member State, nor a stateless person or a person treated as such, but only a member of the family of a national worker, he can rely only on the rights conferred on members of the family of national workers as such, that is to say, in their capacity as relatives of those workers.

41. The supplementary allowance from the fonds national de solidarité is granted to recipients in their own right and not to members of the worker's family as a derived right, with the result that a person in Mr Zaoui's position cannot rely on the provisions of Regulation No 1408/71 in order to claim the grant of the allowance in question.

42. That conclusion is not affected by the fact that the plaintiff is in receipt (rightly or wrongly) of an allowance for handicapped adults.

43. The analogy which the plaintiff draws between that benefit and the allowance from the fonds national de solidarité in order to substantiate his claim to the latter allowance is not a problem which needs to be resolved on the basis of Community law. Moreover, the conditions for the grant of the two benefits would appear to coincide only in part.

44. (b) As for Article 7 (2) of Regulation No 1612/68, which provides that workers who are nationals of other Member States are to enjoy, in the Member State in which they are employed, the same social advantages as national workers, it would seem not to apply to a person in a situation such as that of Mr Zaoui, who is not a national of any Member State.

45. Admittedly, it follows from the Court's previous decisions that the principle of equal treatment applies not only to migrant workers themselves but also to members of their family — even though they are not nationals of a Member State — who have exercised the right to install themselves with those workers in the territory of the Member State of employment in accordance with Article 10 of Regulation No 1612/68.[9]

46. As the Commission points out in its observations, the rights conferred on members of a migrant worker's family by Articles 7 and 10 of Regulation No 1612/68 are connected with the rights conferred on the worker himself by Article 48 of the Treaty and by its implementing provisions.

7 — Case 157/84 [1985] ECR 1739, at p. 1748, paragraphs 15 to 17 of the decision.

8 — Case 94/84 [1985] ECR 1873, at pp. 1884 and 1885, paragraphs 14 to 16 of the decision.

9 — See *Frascogna*, paragraph 23 of the decision, and *Deak*, paragraph 22 of the decision. See also the judgment of 30 September 1975 in Case 32/75 *Cristini* [1975] ECR 1085, at p. 1095, paragraph 14 *et seq.* of the decision; judgment of 16 December 1976 in Case 63/76 *Inzirillo* [1976] ECR 2057, at p. 2068, paragraphs 19 and 20 of the decision.

47. As the Court recalled in its judgment of 18 June 1987 in *Lebon*,[10] the equality of treatment enjoyed by workers who are nationals of Member States, 'as regards the advantages which are granted to the members of a worker's family, contributes to the integration of migrant workers in the working environment of the host country in accordance with the objectives of the free movement of workers'.

48. Accordingly, members of a worker's family may, as indirect beneficiaries with a derived right, rely on the Community rules to their own advantage only in so far as the worker has exercised the aforesaid right. In other words, for Article 7 (2) of Regulation No 1612/68 to be applicable, those who rely upon it must be members of the family of a 'worker who is a national of one Member State and who is employed in the territory of another Member State' (Article 10 of the regulation).

49. As the Commission points out, in this case, the plaintiff — whose wife is a French national and has never, according to the documents before the Court, worked in another Member State — is not the spouse of a worker for the purposes of Article 10 of Regulation No 1612/68. Hence that regulation is not applicable to him.

50. The Court has already given a ruling to the same effect in its judgment of 27 October 1982 in *Morson and Jhanjan*[11] concerning the position of two Surinam nationals wishing to install themselves with their children, who were Netherlands nationals, were working in the Netherlands and had never been employed in another Member State. The Court stated in paragraph 13 of the judgment that the provisions of Regulation No 1612/68 do not cover dependent relatives of a worker who is a national of the Member State within whose territory he is employed. In paragraph 16 of the same judgment, the Court further explained that the Treaty provisions on freedom of movement for workers (in particular Article 48) and the rules adopted to implement them (including Regulation No 1612/68) 'cannot be applied to cases which have no factor linking them with any of the situations governed by Community law'.[12]

51. **E** — I therefore suggest that the Court answer the questions submitted by the tribunal des affaires de sécurité sociale, Nanterre, as follows:

'(1) Article 4 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families

10 — Case 316/85 [1987] ECR 2811, paragraph 11 of the decision.

11 — Joined Cases 35 and 36/82 [1982] ECR 3723, at p. 3736, paragraph 13 *et seq.* of the decision.

12 — Along the same lines, see the judgment of 28 June 1984 in Case 180/83 *Moser* [1984] ECR 2539, at p. 2547, paragraphs 14 to 16 of the decision; judgment of 23 January 1986 in Case 298/84 *Iorio* [1986] ECR 247, paragraph 14 of the decision.

moving within the Community must be interpreted as meaning that the scope *ratione materiae* of that regulation covers a supplementary allowance granted by a national solidarity fund to recipients of invalidity pensions, with a view to providing them with a minimum means of subsistence, provided that they have a legally protected right to the grant of that allowance.

(2) Articles 2 (1) and 3 of Regulation No 1408/71 may not be relied upon by members of the family of a worker who is a national of a Member State, regardless of their nationality, for the purpose of obtaining an allowance such as that granted by the fonds national de solidarité to recipients as their personal entitlement, whether or not they are members of a worker's family.

(3) Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community is not applicable to situations which have no factor linking them with Community law. That regulation cannot therefore be relied upon by members of the family of a worker who is a national of a Member State where, although not being nationals of a Member State, they reside with that worker in the Member State of which he is a national and in which he is employed without ever having exercised his right to freedom of movement within the Community.'