OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 29 September 1998 *

1. The Social Security Commissioner seeks a preliminary ruling on the interpretation of Article 48 of the Treaty and, accordingly, on the basic principle of freedom of movement for workers, in relation to national legislation which makes entitlement to a special benefit in the form of income support contingent on the claimant's habitual residence in the United Kingdom, which, to be acquired, presupposes an appreciable period of residence in the territory of that State.

Although the question referred to the Court concerns only the interpretation of Article 48 of the Treaty, it cannot in my view be addressed without having regard also to the interpretation of Article 51 and the relevant provisions of Council Regulation (EEC) No 1408/71 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 (EEC) No 2001/83 of 2 June 1983, [1] as amended by Council Regulation (EEC) No 1247/92 of 30 April 1992. [2]

Facts and the relevant national legislation

2. Robin Swaddling, a British national, exercising the right to freedom of movement under the Treaty, worked in France from 1980 until 1988. [3] During that time, however, he continued to pay United Kingdom national insurance contributions. His work, on behalf of and in the employment of the French tourist service, involved escorting tourists to France, at first almost daily, and then weekly. Eventually he lived in France on a regular basis, returning to the United Kingdom only when necessary for reasons of work.

In 1988 Mr Swaddling was made redundant and returned to the United Kingdom, where he had a job for six months in cinema management. Later, he again worked in France, under fixed-term contracts in media-related activities. Most of those jobs were advertised in the British business press, and the relevant interviews took place in the United Kingdom.

* Original language: Italian.

1 — OJ 1983 L 230, p. 6.

2 — OJ 1992 L 136, p. 1.

3 — According to the order for reference, Mr Swaddling worked in France from the age of 21 until the age of 29, that is to say, after spending much of his life in his State of origin.

In one case, a training course was envisaged at two radio stations in the United Kingdom.

At the end of 1994 Mr Swaddling again lost his job because his employer went out of business. After a brief attempt to find another job in France, he returned in January 1995 to the United Kingdom and went to live with his brother. On 9 January 1995 he applied for income support under section 124 of the Social Security Contributions and Benefits Act 1992.

The United Kingdom rules on income support

3. The Social Security Contributions and Benefits Act 1992 confers entitlement to income support on all persons who have reached the age of 18, who have no income or whose income does not exceed the minimum prescribed, who are not engaged in remunerative work and who, except in certain circumstances, are available for, and actively seeking, employment. Section 21 of the Income Support (General) Regulations 1987 (the rules implementing the Act) prescribes an applicable amount of nil where the claimant is a person from abroad.

Those Regulations define 'person from abroad' as a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man. They further provide that no claimant is to be treated as not habitually resident in the United Kingdom who is a worker for the purposes of the Community legislation on freedom of movement for workers or who has a right to reside in the United Kingdom pursuant to Council Directives 68/360/EEC or 73/148/EEC. Nor may a person be treated as not habitually resident who is a refugee as defined by the relevant international legislation or who has been granted exceptional leave to remain in the United Kingdom by the Secretary of State.

4. Under United Kingdom legislation, 'habitual residence' is established for the purposes of applying the Social Security Contributions and Benefits Act if two conditions are satisfied. First, it is necessary for the claimant to have a settled purpose of establishing residence in the United Kingdom; secondly, there must be an appreciable period of residence in the territory of the United Kingdom. Having regard to all the circumstances in Mr Swaddling's case, the United Kingdom authorities found that he had been resident for eight

weeks and could therefore be regarded as 'habitually resident' in the United Kingdom only as from 4 March 1995. With regard to the period between 9 January and 3 March 1995 it was found that, although Mr Swaddling had shown the requisite intention of making the United Kingdom his country of residence, he could not be regarded as 'habitually resident' for the purposes of being granted income relief.

5. On the basis of those legal considerations, the Adjudication Officer refused Mr Swaddling's application for income relief. His appeal against that decision was upheld by the Appeal Tribunal, which found that he was habitually resident in the United Kingdom, purely on the basis of his intentions.

The Adjudication Officer appealed against the Tribunal's decision to the Social Security Commissioner. The latter decided that the arguments put forward on the basis of Regulation No 1408/71 were irrelevant on the ground that income relief was not sufficiently linked to any of the risks referred to in Article 4(1) of that Regulation, and referred the following question to the Court of Justice for a preliminary ruling:

'In circumstances where a person has worked and been habitually resident in one Member State, has then exercised the right to freedom of movement for workers to move to another Member State, where the person has worked and become habitually resident, and finally returns to the first Member State in order to seek work, is it compatible with the requirements of Article 48 of the Treaty of Rome for the first Member State to impose a condition of habitual residence in that State (involving the existence of an appreciable period of residence in that State) on entitlement to a general non-contributory means-tested State benefit with the characteristics of British income support?'

Relevance of Regulation No 1408/71

6. In contrast with the position adopted by the national court in the order for reference, I believe that income support as provided for by the United Kingdom legislation falls within the scope of Regulation No 1408/71. Accordingly, the question whether the national legislation concerned is compatible with Community law must be examined in the light of the interpretation of the relevant provisions of that regulation.

7. There is no doubt that Mr Swaddling is one of the persons covered by Regulation No 1408/71, pursuant to Article 2 thereof. Article 2(1) provides that the regulation '[applies] to employed or self-employed persons 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'. Such persons are defined in Article 1(a) of the regulation, not in terms of the pursuit of an occupation, but exclusively in terms of the person's current or past affiliation to a social security scheme in force under the legislation of one or more Member States. [4]

Mr Swaddling is affiliated to the United Kingdom National Insurance Scheme to which, moreover, he used to pay contributions. Equally, it could be argued that his affiliation to the French social security scheme during his stay in France gives him a further ground for claiming to be one of the persons covered by the regulation.

8. Turning to the question of the matters covered by Regulation No 1408/71, I mentioned above that the national court takes the view that income support as provided for under the United Kingdom legislation is not caught by the regulation because it is a general social benefit which is not sufficiently linked to one of the specific risks referred to in Article 4(1) thereof. [5]

9. Let me say at once that I do not share that view, especially given the regulation's extended scope in consequence of the amendments introduced by Regulation No 1247/92. Article 4(1) of the version of Regulation No 1408/71 previously in force listed certain social security benefits, thus delimiting the matters covered by the regulation. [6] The principle concerning the waiver of residence clauses applied only to those benefits expressly listed, which meant that a person claiming entitlement to those benefits retained it even if he resided in a Member State other than the State of the competent institution.

Although the Court has never questioned the fact that social and medical assistance fall outside the scope of the regulation by virtue of Article 4(4) thereof, it has conceded that benefits may be provided for under the various

4 — See, prior to Regulation No 1408/71, the case-law of the Court of Justice concerning the interpretation of the regulation previously in force, Regulation No 3 of the Council (EEC) on social security for migrant workers: Case 75/63 *Hoekstra* [1964] ECR 177. Obviously, given the growth in legislation, the approach taken in the case-law was amply confirmed in judgments given after the entry into force of the regulation: see Case 39/76 *Mouthaan* [1976] ECR 1901 and Case 182/78 *Pierik* [1979] ECR 1977. See also the Opinion of Advocate General Léger in Case C-20/96 *Snares* [1997] ECR I-6057, especially paragraphs 30 and 31.

5 — See, in particular, paragraph 28 of the order for reference.

6 — The benefits in question are sickness and maternity benefits, invalidity benefits, old-age benefits, survivor benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits.

national legislative arrangements which fall within both the category of social security benefits and that of social assistance benefits. [7] The gradual emergence of a new social security model has thus enabled the scope of the regulation to be extended to social assistance benefits as well, provided, of course, that the national legislation in question satisfied 'in particular, the condition of covering one of the risks specified in Article 4(1) of the regulation'. [8]

10. As I have already mentioned, the amendment introduced by Regulation No 1247/92 reflected the need to take into account the case-law referred to above on benefits which display the characteristic features of both social security and social assistance, thereby extending the scope of Regulation No 1408/71, which had previously made no express provision for such cases. [9] Thus, Article 4(2a), which was inserted by Regulation No 1247/92, provides that 'this regulation shall also apply to special non-contributory benefits which are provided under 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'.

Article 10a of Regulation No 1408/71, which was also inserted by Regulation No 1247/92, lays down special rules for such of the special non-contributory benefits generally contemplated in Article 4(2a) as are specifically listed in Annex IIa to the regulation: claimants receive these 'exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State', that is to say, subject to a residence requirement. It follows that, in the case of the special non-contributory benefits referred to in Article 4(2a) of the regulation but not listed in the Annex thereto, the principle set out in Article 10(1) applies; in other words, in such cases, the residence clause must be waived.

11. Income support is expressly mentioned in Annex IIa, in subparagraph (e) of the United Kingdom section. So far as concerns the significance of that fact, I share the view expressed by Advocate General Léger in *Snares*, to the effect that 'the specification of a benefit ... in Annex IIa as being a special non-contributory benefit to which Article 10a applies is ... sufficient to bring it unambiguously within the scope of Article 4(2a)'. [10] To

7 — See Case C-356/89 *Newton* [1991] ECR I-3017, particularly paragraph 12. For references to other previous decisions, see the Opinion of Advocate General Léger in *Snares*, cited above, footnote 4; in academic writings, the development of the case-law is traced in Van Raepenbusch, *Le sécurité sociale des personnes qui circulent à l'intérieur de la Communauté économique européenne*, Brussels, 1991, p. 258 et seq.

8 — See Case 249/83 *Hoeckx* [1985] ECR 973, particularly paragraph 12.

9 — See again the Opinion of Advocate General Léger in *Snares*, cited above, footnote 4, which refers to the third and fourth recitals in the preamble to Regulation No 1247/92. See also the judgment in that case, particularly paragraph 33.

10 — See the Opinion cited above, footnote 4, paragraph 56.

my mind, that conclusion derives simply from the legal force of Annex IIa which, since it is annexed to legislation which refers to it, is equally binding. The Court itself has emphasised the weight to be attached to the fact that national social security legislation is mentioned in Annex IIa, stating that 'the fact that the Community legislature refers to legislation ... in Annex IIa to Regulation No 1408/71 must be accepted as establishing that benefits granted pursuant to that legislation are special non-contributory benefits falling within the scope of Article 10a of Regulation No 1408/71'. [11] Moreover, that approach merely confirms a parallel strand of Community case-law concerning the references in Annex IIa, namely the case-law on the weight to be attached to declarations made by the Member States pursuant to Article 5 of the regulation. That article provides that '[t]he Member States shall specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a) ... in declarations to be notified and published ...'. In the words of the Court, '... the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No 1408/71'. [12]

Consequently, income support as provided for under the United Kingdom social security scheme must be regarded as a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71.

12. In any event, even leaving aside such formal — though compelling — evidence, it is impossible to conclude otherwise. Income support is undoubtedly linked, albeit in a complementary or ancillary manner, to one of the situations contemplated in Article 4(1) and, in particular, to the risk of unemployment. One of the pre-conditions of income support, as I recall, is that the claimant must not be engaged in remunerative work (or, if he is a member of a couple, the other member must not be so engaged) and must be available for, and actively seeking, employment.

13. Since income support may be counted as one of the special non-contributory benefits referred to in Article 10a of the regulation, it must be determined whether Mr Swaddling met the requirements laid down in the relevant provision which refers, moreover, to those laid down in the legislation of the Member State of residence. According to the order for reference, Mr Swaddling meets all the requirements set by United Kingdom legislation except for that concerning 'habitual residence' which, as already indicated, requires not only the settled purpose of establishing residence in the territory of the United

11 — See *Snares*, cited above, footnote 4, paragraph 30, which refers to the previous judgment in Case 24/64 *Dingemans* [1964] ECR 647.

12 — See the recent judgment in Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869, paragraph 21.

Kingdom, but also completion of an appreciable period of residence, assessed, in the circumstances, as of eight weeks' duration.

14. The requirement that the claimant reside in the State of the competent institution, far from being a condition imposed solely by national law, derives directly from the Community rule precluding the special non-contributory benefits listed in Annex IIa from being exported and leaving responsibility for such benefits exclusively with the State of residence. [13]

15. In that legislative context, the claimant's residence becomes the crucial factor underpinning coordination of the national legislative arrangements in the field of social security, which is the fundamental objective of Article 10a of Regulation No 1408/71, the instrument intended to safeguard the interests of migrant workers in accordance with Article 51 of the Treaty. [14] If there were marked differences in the meaning ascribed by the various national systems to the concept of residence, migrant workers would be in danger of losing insurance cover in respect of non-exportable benefits.

16. Aware of that danger, the Community legislature took it upon itself to provide a definition of residence in the regulation. Thus, Article 1(h) thereof states that '"residence" means habitual residence'. The significance of that definition is not so much that it serves to enlighten — in fact, as a guide to interpretation its usefulness is negligible because it engenders speculation as to what is meant by 'habitual' — as that it makes it clear that the concept of residence is a Community notion and as such its meaning cannot be adapted to suit the unilateral and uncoordinated preferences of the various national systems.

The concept of residence is also the decisive criterion determining entitlement to unemployment benefit for workers who, during their last employment, were residing in the territory of a Member State other than the competent State. In such cases, pursuant to Article 71(1)(ii) of the regulation, a person other than a frontier worker receives the benefit in question if he makes himself available for work to the employment services in the territory of the State in which he resides or if he returns there. Thus, the crucial factor is the residence of the person concerned in a Member State other than the State to whose legislation the worker was subject during his last employment. The Court has already had occasion to rule on the meaning of residence for the purposes of Article 71 of the regulation.

In particular, it has indicated that the factors to be taken into consideration when seeking to identify the residence of a worker who moves from one Member State to another are

13 — The justification for the residence requirement lies in the special nature of the benefit which, being closely linked to the social environment in which the claimant lives on a settled basis, may be relied upon only in the country of residence: see *Snares*, cited above, footnote 4, paragraph 42.

14 — See, most recently, *Snares*, cited above, footnote 4, paragraph 46.

his family situation, the reasons which have led him to move, and the nature of the work. In other words, in applying Article 71, the Court has found it necessary to consider not only objective factors, such as the length and continuity of residence before the move or the nature of the work, but also subjective factors such as the person's state of mind as it appears from all the circumstances. [15] In a later judgment given in 1992, [16] again on the question of Article 71, the Court reiterated that, for the purposes of identifying the State of residence, it is necessary to determine the principal centre of the worker's interests, having regard not only to his family situation, but also to the reasons which led him to move and the nature of the work. In that case, the Court found it irrelevant that the woman in question had been employed for two academic years in another Member State as a university foreign language assistant, notwithstanding the fact that, after a period of unemployment, she attempted — like Mr Swaddling — to find work in that State.

17. The criterion of the principal or habitual centre of the worker's interests has, moreover, been reaffirmed in the case-law on other branches of Community law. Merely by way of example, I would mention the case-law on the European civil service concerning the expatriation allowance granted to officials who, by reason of their entry into the service of the Communities, are obliged to move from their country of residence to the country where they are posted. Since the purpose of that allowance is to alleviate the expense and inconvenience entailed in integrating into a new environment, the (habitual) residence of the person concerned prior to entry into service, that is to say, the place where he had established the permanent centre of his interests, is one of the primary criteria governing recognition of entitlement to the allowance. [17] In the quite different area of tax exemption, the Court explained that normal residence — which, for the purposes of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, [18] serves to determine whether a vehicle has been temporarily imported — is the place where the person concerned established the permanent centre of his interests and is to be identified in the light of all the relevant factual circumstances of the particular case. In *Ryborg* the Court ruled that the fact that, for more than a year, the person in question spent every night and every weekend in a State other than that of residence was not sufficient for it to be concluded that he had transferred the permanent centre of his interests to that State. The Court

15 — See Case 76/76 *Di Paolo* [1977] ECR 315. Advocate General Capotorti also accorded particular importance to the subjective factors in his Opinion in the case just cited, after comparing the various national legislative arrangements, including the United Kingdom's social security scheme. In a previous case, the Court used subjective factors — the person's intentions and choice of a principal centre of interests — as the criteria on which it based its finding that a business representative who spent nine months each year touring Germany in a caravan visiting clients and had at his disposal a post box and business address was resident in France for the purposes of the social security system: see Case 13/73 *Angenieux* [1973] ECR 935. The Opinion of Advocate General Trabucchi in that case is particularly significant. He states that '... the problem can only be resolved by asking: has he not a permanent residence? Because if he does not have a place to which he returns, where he has all his social connections, where he votes, where he pays taxes, and where he keeps [his] goods and chattels ..., he does not have a permanent residence anywhere else, even though the length of time spent away continuously on the move happens to be greater than the time spent in the place which is the centre of his existence ...'.

16 — See Case C-102/91 *Knoch* [1992] ECR I-4341, particularly paragraphs 21 to 29.

17 — See Case 284/87 *Schäflein* [1988] ECR 4475 and Case C-452/93 P *Magdalena Fernández* [1994] ECR I-4295. For the case-law of the Court of First Instance, see Case T-63/91 *Benzler* [1992] ECR II-2095, paragraph 25, and Case T-90/92 *Magdalena Fernández* [1993] ECR II-971, paragraph 27.

18 — OJ 1983 L 105, p. 59.

added — significantly in that it affirms the need for a subjective criterion — that 'the position would be different if the person concerned settled in Member State B and manifested an intention to live there with his woman friend and not to return to Member State A'. [19]

18. Those examples may come from different areas of law, but they show that the references to residence in the various Community rules cited above share the same conceptual basis, namely the idea that the country of residence is that to which the person concerned has formed a 'social attachment' which is stronger and more stable than any links he may have with other Member States. It is a connection of that nature which justifies, in the present case, payment of the special non-contributory benefits referred to in Article 10a of the regulation, or, given the fulfilment of certain other conditions, confers entitlement to unemployment benefits on the basis of Article 71, just as, in a different context, it gives a person who enters the service of the Communities a right to the expatriation allowance.

19. It follows that in Community law, and particularly in the field of social security, the concept of residence — in the sense of habitual abode — must be taken to mean the place where the person concerned has established the permanent centre of his interests. The location of that centre must be determined on the facts, having regard to all the circumstances which point to a person's real choice of a country as his State of residence. [20] Accordingly, although the length of the person's stay in the territory of a State may be used to gauge his intention to make that State the principal and permanent centre of his interests, it cannot be treated as a constituent element— that is to say, a *conditio sine qua non* — of residence.

According to the order for reference, the competent United Kingdom authority determined that Mr Swaddling had no longer worked in France; nor had he a residence there or relatives or even close friendships with persons resident there. On the other hand, he appears to live in the United Kingdom with his brother and, even though he was unemployed at the material time, sought work which would allow him to use his knowledge of languages, but would not compel him to leave the country save for occasional trips. Those factors, verification of which is in any event a matter for the national court, are to my mind sufficient to support the conclusion that the United Kingdom is the permanent centre of Mr Swaddling's interests and has been ever since his return there. Moreover, it should be borne in mind that Mr Swaddling is a British national and, all other things being equal, certain effects must follow from the fact that, usually, citizens who return to their own country after definitively ceasing work

19 — See Case C-297/89 *Ryborg* [1991] ECR I-1943, particularly paragraphs 24 and 25.

20 — See *Schäflein*, cited above, footnote 17, particularly paragraph 10.

in another State and who do not maintain either a residence or particularly close relationships in that State, do so with the intention of remaining there on a settled basis.

Relevance of Article 48 of the Treaty

20. The interpretation suggested above of Article 10a of Regulation No 1408/71 and, in particular, of residence as a precondition for entitlement to the special non-contributory benefits listed in Annex IIa, is the only interpretation consistent with Article 48 of the Treaty and, more generally, with the principle of freedom of movement for workers. It is settled law that the provisions of the regulation must be interpreted 'in the light of their objective, namely to contribute, particularly in the field of social security, to the establishment of the greatest possible freedom of movement for migrant workers'. [21]

21. The United Kingdom rules governing habitual residence, which are at issue in these proceedings and which require migrant workers who return to their own State to have accomplished an appreciable period of residence in the territory of the United Kingdom in order to be entitled to the benefits referred to in Article 10a, give rise to discrimination against persons who have exercised their right to freedom of movement by comparison with United Kingdom residents who have never gone to other Member States to work there. In other words, Community social security legislation ultimately makes it easier for the Community worker to exercise his right of establishment in other Member States, but not to resettle in his own country. Clearly, a national of a Member State might be deterred from leaving his country of origin in order to work in the territory of another Member State if, on returning to the Member State of which he is a national, the conditions of his entry and residence were not equivalent to those which would be available to him in the territory of another Member State or even in the territory of his own State if he had never left it. [22]

22. In the light of the case-law of the Court of Justice, the unfavourable treatment accorded to a worker who returns to his own country may in the end nullify a social security advantage provided for by legislation which, like that at issue in *Masgio*, 'is liable, even though it applies without regard to the nationality of the workers concerned, to place migrant workers in a worse position as regards social security than those who have worked in only one Member State'. [23]

21 — See, for example, Case C-293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 13, and Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 16.

22 — This is essentially discrimination in the form of an 'exit penalty', which the Court held to be unacceptable in Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 19.

23 — *Masgio*, cited above, footnote 21, paragraph 19. The principle was confirmed, albeit in relation to other circumstances, in Case C-165/91 *Van Munster* [1994] ECR I-4661.

23. According to the United Kingdom Government, the argument that the social security position of migrant workers who return to their own country of origin must be exactly the same as if they had never left is inconsistent with a number of rulings in which the Court recognises that entitlement to social security benefits is subject to conditions laid down by the regulation, without the objectives pursued by Articles 48 and 51 of the Treaty being undermined thereby.

That is a view that I cannot endorse, even though I understand the caution shown by the Member States in the delicate area of social security, one of their concerns being to avoid fraud. Admittedly, Article 51 of the Treaty does not prevent the Community legislature from making easier freedom of movement for workers subject to conditions and limitations. [24] Equally, however, such limitations must stem directly from the Community legislation and, in any case, they cannot impair the effectiveness of the principle of freedom of movement. On the question of unemployment benefit, the Court has confirmed the validity of the arrangements under Articles 67 and 69 of the regulation, according to which the institution responsible for paying the benefit is solely that of the State in which the worker most recently completed periods of insurance or employment and the exportability of the benefit is allowed for a period not exceeding three months and is subject, in any event, to the condition that the unemployed person must be registered with the employment services of the country where he was last employed. [25] That ruling makes it lawful to attach conditions to a migrant worker's entitlement to social security advantages, but it cannot overturn the principle of equal treatment as between the migrant worker and a worker who has never exercised his right to freedom of movement. Equality in that context must be interpreted as being compatible with differences in treatment — save for exceptions manifestly based on nationality and accordingly prohibited — which are justified by requirements inherent in the system and which must always comply with the principle of proportionality. In the case of Articles 67 and 69 of the regulation, the exclusive competence of the State of last employment or the requirement that the worker be registered with the employment services of that State are limitations which are justified by the fact that unemployment benefits are paid on the basis of the social legislation of that State, which must reimburse them to the competent institution of the State in which the unemployed person has gone to find work; in that case, there is yet another purpose — this time of a 'social' nature — which concurrently justifies the limitation: the need to encourage the person in question to seek work in the territory of the State where he was last employed. [26]

Income support, a special non-contributory benefit governed by Article 10a of the regula-

24 — See, to that effect, Joined Cases 41/79, 121/79 and 796/79 *Testa and Others* [1980] ECR 1979, paragraph 14, and, more generally and not merely with reference to national social security legislation, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 21.

25 — See Case C-62/91 *Gray* [1992] ECR I-2737, a judgment which was anticipated, however, in Case C-272/90 *Van Noorden* [1991] ECR I-2543.

26 — See *Gray*, cited above, footnote 25, paragraph 12.

tion, is conditional on residence because of the close connection between recognition of entitlement to that benefit (and its size) and the claimant's social environment. However, that cannot in any circumstances justify according a migrant worse treatment where he has settled in the territory of the State and, accordingly, as Article 10a requires, is resident there. Mr Swaddling's case must be decided in the light of that principle.

24. Nor do I accept the United Kingdom's argument that, according to the case-law of the Court, nationals of the Member States who move to another Member State in search of work are precluded from equal treatment in the field of social and tax advantages by operation of Article 7 of Council Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475). [27] That provision does indeed restrict equal treatment solely to workers although, according to well-established case-law on the scope *ratione personae* of Article 48, the term 'worker' covers a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration. [28] On the other hand, as I have already stressed, the scope *ratione personae* of Regulation No 1408/71 is defined in terms of a wider concept of 'worker', which coincides with the field of application of the social security system of one of the Member States. Furthermore, given the fact that the two sources of law differ in scope, there is no reason, whether based on the wording or on logic, why Article 10a of Regulation No 1408/71 should be interpreted in the same way as Article 7 of Regulation No 1612/68.

25. More generally, the lack of harmonisation in the field of social security explains why each Member State remains competent to determine the conditions governing the right or the obligation to join a social security scheme, provided there is no discrimination on grounds of nationality. [29] However, the exercise of national competence cannot go so far as to undermine the fundamental objective pursued by Article 51 of the Treaty, which is to prevent migrant workers from losing social security rights guaranteed under the law of a Member State, as a result of exercising their right to freedom of movement. That would run counter to the aim of Article 48 of the Treaty and would accordingly constitute a breach of a basic principle of Community law. [30]

In cases, therefore, where entitlement to social security benefits is defined by a provision of Regulation No 1408/71 in terms of a Com-

27 — See Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 25 to 27.

28 — See Case 66/85 *Lawrie-Blum* [1986] ECR 2121, Case 344/87 *Bettray* [1989] ECR 1621 and Case C-3/90 *Bernini* [1992] ECR I-1071.

29 — A principle which has been reaffirmed by the Court on numerous occasions: see Case 43/86 *De Rijke and Another* [1987] ECR 3611, paragraph 12, and Case 368/87 *Hartmann Troiani* [1989] ECR 1333, paragraph 21.

30 — See Case 284/84 *Spruyt* [1986] ECR 685, paragraph 19.

munity concept, that concept must be interpreted and applied in the national legal systems in the light of the fundamental objectives referred to above, without impairing coordination, an aim which the provision pursues precisely by means of that concept, and thus without denying migrant workers a right which they would have been accorded under national legislation if they had not exercised their right to freedom of movement.

26. On the basis of the foregoing considerations, I therefore propose that the Court reply as follows to the question referred by the Social Security Commissioner:

Article 10a(1) of Council Regulation (EEC) No 1408/71 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 subsequently amended, must, having regard to Articles 48 and 51 of the Treaty, be interpreted as precluding national legislation which, in the case of a person who worked and was habitually resident in one Member State, who then exercised his right to freedom of movement in order to settle in another Member State where he worked and established his habitual abode, and who eventually returned to the former Member State in search of work, makes a special non-contributory benefit with the characteristic features of income support as provided for under United Kingdom legislation subject to the requirement of habitual residence, which, to be fulfilled, presupposes completion of an appreciable period of residence in that State.