OPINION OF ADVOCATE GENERAL LÉGER

delivered on 5 March 1998 *

1. In the *Snares* case, [1] the Social Security Commissioner referred to the Court a question concerning the exportability of disability living allowance ('DLA') since the entry into force, on 1 June 1992, of Regulation (EEC) No 1408/71 as amended by Regulation (EEC) No 1247/92 [2] ('the Regulation' or 'Regulation No 1408/71'). In the present case, the Social Security Commissioner's question relates to attendance allowance ('AA').

2. As the judgment in *Snares* has in the meantime been delivered, I shall be referring extensively to it and to my Opinion, delivered on 6 May 1997, since very little distinguishes the two cases. The observations of the United Kingdom Government, the Council and the Commission also refer substantially to those submitted in *Snares*.

The context of the dispute

3. It is necessary to outline briefly the national legislation.

4. AA is a non-contributory, non-means tested benefit payable, irrespective of a prior finding of incapacity for work, to persons dependent by reason of a physical or mental disability. The amount payable varies according to the degree of attendance necessary. Grant of the benefit is subject to conditions in respect of the claimant's residence and presence in Great Britain.

5. Since the reform of 1 April 1992 in Great Britain, this benefit has, in most cases, been replaced by DLA, grant of which is subject to identical conditions. AA continues, however, to be paid to persons aged 65 and over who require special care and attention. [3]

* Original language: French.

1 — Case C-20/96 *Snares* v *Adjudication Officer* [1997] ECR I-6057.

2 — 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 (OJ 1983 L 230, p. 6), as subsequently amended by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1).

3 — The national legislation is set out in points 3 to 6 of my Opinion in *Snares*.

6. Mrs Partridge, the claimant in the main proceedings, was in precisely the latter situation, since she was granted entitlement to AA at the age of 83, with effect from 21 July 1992.

7. Award of that benefit to her was discontinued, however, as from 28 July 1993, the date on which she became permanently established in France, since the competent authority formed the view that, from that date, she no longer satisfied the conditions of presence and residence in Great Britain governing award of AA.

8. Her application for that decision to be reconsidered was unsuccessful and she then brought the matter before the Blackpool Social Security Appeal Tribunal ('the Appeal Tribunal'), which also found against her.

9. The Social Security Commissioner, before whom the matter was brought on appeal, formed the view that the decision of the Appeal Tribunal ought to be set aside as being wrong in law inasmuch as it failed to take account of the relevant Community legislation. [4]

10. In this regard, the Social Security Commissioner takes the view that if the claimant in the main proceedings had been awarded AA and then transferred her residence from Great Britain before 1 June 1992, the date on which Regulation No 1247/92 entered into force, she would have continued to be entitled to receive AA, her departure notwithstanding. [5]

11. Until Regulation No 1247/92 entered into force, AA was in fact treated as an invalidity benefit within the meaning of Article 4(1)(b). This classification follows from the analogy which can be drawn with the same classification attributed in certain circumstances to mobility allowance ('MA'), the 'twin' benefit of AA, [6] in the Court's judgment in *Newton*. [7] AA was also (and is still) mentioned by the United Kingdom in its declaration under Article 5 of Regulation No 1408/71 in regard to schemes referred to in Article 4(1). [8]

4 — For an outline of the Community legislation, I would refer to points 7 to 20 of my Opinion in *Snares*.

5 — Paragraph 21 of the order for reference.

6 — On the similarities between the two benefits, MA and AA, see in particular points 5 and 60 of my Opinion in *Snares*.

7 — Case C-356/89 *Newton* v *Chief Adjudication Officer* [1991] ECR I-3017. In that judgment (to which particular reference is made at points 25, 43, 44 and 45 of my Opinion in *Snares*), which predated the 1992 reform, the Court treated MA in the same way as an invalidity benefit within the meaning of Article 4(1)(b) of the Regulation in cases where it was granted to beneficiaries who were or had been insured under United Kingdom legislation.

8 — Point L of the Council Communication updating the declarations of the Member States provided for in Article 5 of Regulation No 1408/71, as most recently amended in December 1986 (OJ 1986 C 338, p. 1). I refer to this declaration at points 9, 39 and 60 of my Opinion in *Snares*.

12. In that capacity, and in accordance with Article 10(1) of Regulation No 1408/71, AA benefited from the principle of the waiver of residence clauses and could be granted irrespective of the fact that its holder had changed residence. [9]

13. On the other hand, the Social Security Commissioner points out [10] that, since the AA here in dispute was granted only after 1 June 1992 and the transfer of residence of the claimant in the main proceedings was effected after that date, the rights which the latter derives from Regulation No 1408/71 must be considered in the light of the amendments made by Regulation No 1247/92. She could not therefore rely on application of the transitional provisions set out in Article 2 of Regulation No 1247/92, since, according to the findings of fact made, her entitlement did not arise before the provisions of Regulation No 1247/92 entered into force. [11]

14. Within the context of that amended legislation, the Social Security Commissioner notes that the question arises as to whether AA must, in accordance with the law in force prior to the 1992 amendment, continue to be treated as an invalidity benefit within the meaning of Article 4(1) of the Regulation, or whether it must, since that date, be classified as a 'special non-contributory benefit' within the meaning of the new Article 4(2a). In the first case, waiver of the residence clauses provided for under Article 10 would apply, and the benefit in question could continue to be paid despite a change of residence; in the second case, pursuant to the new Article 10a, the benefit in question could be awarded subject to the condition of residence.

15. The Social Security Commissioner takes the view [12] that the claimant's case here is at least as strong as that of Mr Snares. [13] In addition to these arguments, neither the abovementioned declaration of the United Kingdom under Article 5 of Regulation No 1408/71, which states that the disputed award comes under Article 4(1), nor Point 11 of Section L of Annex VI, defining AA as an invalidity benefit for the application of Article 10, was amended in 1992 or has been amended since then.

16. The Social Security Commissioner adds [14] that if the Court were to rule in a manner favourable to Mr Snares, by holding that there was a continued right to export an invalidity benefit such as DLA under Article 10(1), notwithstanding its inclusion in 1992 in the category of special non-contributory benefits, then it would seem inevitable that the claimant in the main proceedings in the present case would also be entitled to export the AA which she receives. He points out that if, on the other hand, as the defendant in the main proceedings argues, the Court

9 — Ibid., point 39.

10 — Paragraph 23 of the order for reference.

11 — See in this regard, by way of analogy, point 68 of my Opinion in *Snares*.

12 — Paragraph 25 of the order for reference.

13 — The claimant's case in *Snares* is set out in point 25 of my Opinion in that case.

14 — Paragraph 26 of the order for reference.

should rule against Mr Snares, the abovementioned declaration of the United Kingdom or Point 11 of Section L of Annex VI would not be sufficiently clear as to justify the AA granted in the circumstances of this case being entitled, in contrast to DLA, which was the subject of the *Snares* judgment, to benefit from the principle of waiver of residence clauses.

17. In the light of those considerations, the Social Security Commissioner decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'How, if at all, would the answers given to the questions referred in the case of *Snares* v *Adjudication Officer* (Case C-20/96) differ in the case of a claimant entitled under United Kingdom legislation to attendance allowance as an employed or self-employed person, in the light of the terms of the United Kingdom's declaration of 31 December 1986 under Article 5 of Council Regulation (EEC) No 1408/71 and of Point 11 of Section O (previously Section L) of Annex VI to that Regulation?'

The *Snares* judgment

18. In its judgment in *Snares*, the Court ruled along lines contrary to those proposed by the Social Security Commissioner, taking the view that the position of a person such as the claimant in the main proceedings, who, after 1 June 1992, the date on which Regulation No 1247/92 entered into force, satisfied the conditions for the award of DLA, is governed exclusively by the system of coordination established by the new Article 10a of Regulation No 1408/71. Consequently, such a special non-contributory benefit may henceforth be awarded subject to a condition of residence.

19. In reply to the second question submitted, the Court ruled that 'Examination of Regulation No 1247/92, in so far as it sets aside, in the case of disability living allowance, the principle of waiver of residence clauses laid down in Article 10 of Regulation No 1408/71, has not disclosed any factor of such a kind as to affect its validity'. Although the Social Security Commissioner also appears in the present case to be raising the question of the validity of Regulation No 1247/92, referring *to the* 'answers given to the questions referred in the case of *Snares*', I shall not return to this issue in what follows, [15] since no fresh argument on this point has been advanced during the present proceedings.

20. I take the view that the Court's reasoning in reply to the first question in

15 — The question of the validity of Regulation No 1247/92 was dealt with in points 70 to 104 of my Opinion in *Snares*, to which I shall refer as and when the need arises.

Snares is perfectly transposable to the present case.

The reply to the question

21. It is important at the outset to draw the Social Security Commissioner's attention to the importance of ascertaining whether the claimant in the main proceedings does in fact come with the *scope ratione personae* of Regulation No 1408/71, as defined in Article 2(1) thereof. It clearly suffices in that regard, notwithstanding the fact that she was not engaged in a trade or profession, that she was subject to a social security scheme in one or more Member States, whether personally or in her capacity as the surviving spouse of a worker. [16]

For my part, in the absence of specific indications, I shall treat this as an established fact, since the Social Security Commissioner himself merely notes that this view has not been challenged and that, not having direct access himself to the records of social security contributions, he proceeds 'on the basis that the claimant falls within Article 2'. [17]

22. Under the new Article 10a of the Regulation, the persons to whom the Regulation applies are entitled to the special non-contributory cash benefits referred to in Article 4(2a), provided that such benefits are listed in the new Annex IIa. [18] In paragraph 29 of its judgment in *Snares*, the Court stated that this is the case with regard to DLA. Likewise, it suffices to point out that AA is mentioned in Point (d) of Section L of that annex.

23. This reference, the Court stated in paragraph 30 of its judgment in *Snares*, '... 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'. [19]

24. I might also point out that the characteristics of AA, which are identical to those of DLA, derive from its 'mixed' nature, as belonging simultaneously to both social assistance and social security, this being a characteristic of the special non-contributory

16 — Ibid., points 30 and 31.

17 — Paragraph 22 of the order for reference.

18 — Points 51 and 52 of my Opinion in *Snares*.

19 — See also, along these lines, points 54 to 56 of my Opinion in *Snares*.

benefits henceforth covered by Article 4(2a) of the Regulation. [20]

25. The only conclusive distinction between AA and DLA, which was the subject of the *Snares* judgment, lies, as the Social Security Commissioner points out, in the fact that, although AA is classified, as I have noted, in the category of 'special non-contributory benefits' in the new Annex IIa to the Regulation, to which Article 10a henceforth applies, it none the less continues at the same time to feature in both the unchanged Annex VI (at Point 11 of Section L) to the Regulation — which treats it as an 'invalidity benefit' for the application of Article 10 — and the United Kingdom's declaration pursuant to Article 5 of the Regulation, also unchanged, under the 'legislation and schemes referred to in Article 4(1) and (2)' of the Regulation.

26. That contradiction is in fact merely apparent.

27. AA has, since the 1992 reform, been capable of having two separate classifications, depending on the time at which entitlement arose.

28. In accordance with the transitional provisions set out under Article 2 of Regulation No 1247/92, according to which that regulation does not affect the maintenance of the rights of persons who, prior to its entry into force, were already entitled to the benefit (Article 2(1)) or who fulfilled the conditions for the grant of that benefit (Article 2(2)), the allowance in question awarded prior to the entry into force of Regulation No 1247/92 continues, in accordance with the previous system, to be regarded as a benefit coming within the scope of Article 4(1) of the Regulation, as confirmed by its mention at Point 11 of Section L of Annex VI. AA awarded prior to 1 June 1992 thus still continues at present to benefit from the principle of the waiver of residence clauses, as set out in Article 10 of the Regulation.

29. On the other hand, the fact that this reference continues to feature in Annex VI to the Regulation has no bearing on those situations in which AA first became payable after the 1992 reform. Given that AA has, since that date, been mentioned by the United Kingdom in Point (d) of Section L of Annex IIa, the provisions of Article 10a are applicable to it, and this benefit, regarded as coming within the scope of the new Article 4(2a), can be granted only subject to the condition of residence, in accordance with Article 10a.

30. The fact that the reference to AA has not been removed from Annex VI since the 1992

20 — See, by way of analogy, paragraph 33 of the *Snares* judgment, which refers to points 59 to 63 of my Opinion.

reform thus does not preclude Article 10a from applying to it in situations in which entitlement to AA first arose after the 1992 reform. Annex VI cannot therefore affect the relationship introduced in 1992 between Articles 10 and 10a.

31. In the circumstances of this case, it is common ground that the claimant in the main proceedings first became entitled to AA after Regulation No 1247/92 had entered into force. In accordance with the principle of the immediate temporal application of law, [21] her position thus falls under the new provisions set out in Articles 4(2a) and 10a, by reason of the fact that AA is mentioned in Annex IIa to the Regulation. The claimant cannot, however, rely on the principle of the maintenance of acquired rights in order to claim entitlement to benefit under the scheme applicable to AA granted before the 1992 reform, mentioned in Annex VI to the Regulation, [22] since her entitlement first arose after 1 June 1992.

32. These views are not affected by the fact that, in the above declaration made pursuant to Article 5 of Regulation No 1408/71, the United Kingdom mentioned AA under 'legislation and schemes referred to in Article 4(1) and (2)' of the Regulation. Suffice it to point out that this declaration was most recently amended in 1986, and thus prior to the 1992 reform. Since the adoption of Regulation No 1247/92, and in accordance with the principle of the immediate temporal application of law, those new provisions alone apply to situations arising after those provisions have been adopted.

33. From this I conclude that AA awarded after 1 June 1992, the date on which Regulation No 1247/92 entered into force, must be treated as a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71, award of which, provided that the claimant's acquired rights are respected, may, by virtue of the fact that it is mentioned in Annex IIa to Regulation No 1408/71, validly be made subject to a condition of residence within the territory of the issuing Member State.

34. Consequently, neither the wording of Annex VI to the Regulation nor the United Kingdom's declaration under Article 5 thereof can preclude the solution which the Court upheld in its judgment in *Snares* from being applied to the AA granted in the circumstances of the present case.

21 — See, by analogy, points 66 and 67 of my Opinion in *Snares*.

22 — Ibid., point 68, by way of analogy.

Conclusion

35. For the foregoing reasons, I propose that the Court reply to the Social Security Commissioner in the following terms:

The answer given to the questions referred in Case C-20/96 *Snares*, in which judgment was delivered on 4 November 1997, does not differ in the case of a person, such as the claimant in the main proceedings, who, after 1 June 1992, the date on which Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community entered into force, satisfied the conditions for the award of attendance allowance. Such a situation is governed exclusively by the system of coordination established by Article 10a of Council Regulation (EEC) No 1408/71 of 14 June 1971, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as subsequently amended by Regulation No 1247/92.