OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 18 November 1993 *

Mr President,
Members of the Court,

A — Introduction

1. The present request for a preliminary ruling by the Social Security Commissioner raises questions regarding the competent State for the payment of invalidity benefit and the possibility of taking into account periods of residence completed in another Member State in support of a claim.

2. Mrs Toosey, the appellant in the main proceedings, is a British national whose first employment was in the United Kingdom in 1964 and 1965. She ended that employment when she married and became a mother. In 1973 she moved with her family to Belgium for the purposes of her husband's work. Mrs Toosey there resumed employment in 1974 and continued working until 1982.

3. In 1982 she was obliged to cease working on health grounds. She suffers from spastic hemiplegia which confines her to a wheelchair. In 1983 the family moved to France, again for reasons connected with Mr Toosey's work, before returning to the United Kingdom in 1985.

4. Mrs Toosey there applied for severe disablement allowance ('SDA') but her application was rejected by the local authorities on the formal ground that the United Kingdom authorities were not competent as well as on the substantive ground that she did not satisfy the requirement of ten years' past residence over the previous 20-year period.

5. Mrs Toosey, however, takes the view that the United Kingdom authorities are competent by reason of Community law. Furthermore, she argues, periods of residence completed in another Member State must likewise be taken into account under Community law.

6. The Social Security Commissioner making the reference seeks to establish whether Article 71(1)(b)(ii) of Regulation No 1408/71 applies to someone in Mrs Toosey's position (Question 1). If it does so apply, the question then arises as to whether the competent institution is that of the State of employment (Article 39(1) of Regulation No 1408/71) or that of the State of residence (Article 39(5) in conjunction with Article

* Original language: German.

71(1)(b)(ii)) (Question 2). Questions 3, 4 and 5 seek to determine the circumstances under which periods of residence completed in another Member State may be taken into account for the purpose of establishing a claim. The final question referred seeks to determine the obligations on the competent institution of the State of residence in the case where the institution of the State of employment is competent, both under the procedural duties of cooperation as well as under a possible obligation to pay benefit in advance (Question 6).

7. Reference may be made to the Report for the Hearing for the wording of the questions, the detailed facts of the case, the legal framework and the pleas in law of the parties.

B — Opinion

8. As a British national who has been employed in more than one Member State, Mrs Toosey is undoubtedly a person who comes within the scope of Regulation No 1408/71 [1] (Article 2). Title III, Chapter 2, contains rules on the payment of benefits in the case of invalidity; in that connection, a distinction is drawn between cases in which the amount of benefit is *independent* of the duration of periods of insurance (Articles 37, 38 and 39) and cases in which the amount of benefit depends on the duration of periods of insurance or residence (Articles 40 and 41). According to Annex IV, Part A, of the regulation, [2] the 'legislation relating to the general invalidity scheme' (letter A), in the case of Belgium, and '[Section]... 36 of the Social Security Act 1975', [3] in the case of the United Kingdom, are to be regarded as covering benefits coming within the first of those two categories. There can for that reason be no doubt as to the applicability of Section 1 of the chapter on invalidity benefits.

9. Article 39, which is entitled 'Award of Benefits', contains a provision for determining the competent institution. Under that provision, competence is in principle vested in the institution of the Member State whose 'legislation *was* applicable *at the time when incapacity for work* followed by invalidity *occurred*'. [4] If there is entitlement, that institution alone will be competent within the meaning of the regulation (Article 39(2]. Only if there is no entitlement against that institution (even when account is taken of the completion of other periods creating entitlement in another Member State (Article 38], can there be any question of another institution being the competent institution (Article 39(3)). Both principal and alternative competent institutions will be institutions of a (former) State of employment.

1 — Consolidated version 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 (OJ 1992 C 325, p. 1).

2 — See Article 37(2).

3 — Introduced with retroactive effect from 29 November 1984 by Regulation No 2195/91 (OJ 1991 L 206, p. 2).

4 — My emphasis.

10. Article 39(5), in the version of the regulation applicable to this dispute, contains a derogating rule which provides that the institution of the State of residence is competent. [5] Mrs Toosey is relying on that article. Article 39(5) refers to Article 71(1)(a)(ii) and to the first sentence of Article 71(1)(b)(ii). Article 71 is itself a special provision in the chapter on unemployment benefits and constitutes a separate Section 3 entitled 'Unemployed persons who, during their last employment, were residing in a Member State other than the competent State'.

11. According to the general rules contained in Article 13(2)(a), the competent State is the State of employment. The personal scope of Article 71 is thus restricted *a priori* to persons who during their period of employment resided in another State, irrespective of the form which such residence may have taken. The first reference (Article 71(1)(a)(ii)) deals with frontier workers as defined in Article 1(b) of the regulation. There is no doubt that Mrs Toosey does not come within that category of workers. [6] However, she argues that she is an employed person within the meaning of the first sentence of Article 71(1)(b)(ii) since she returned as an employed person, other than a frontier worker, to the territory of the State in which she resided.

12. That reading of the provision fails to take account of the fact that the State to which the employed person (within the meaning of the provision) returns must already have been designated as the State of residence during the period of employment. It is clear from the content, context and systematic position of the provision that this connection must already have existed during the period of employment. Under what conditions the question as to whether there is 'residence' is to be answered in the affirmative, however, is a separate matter. [7] In any event, it has not been suggested that Mrs Toosey resided in the United Kingdom during her period of employment in Belgium.

13. The above interpretation of Article 71 of the regulation is supported by the case-law. In its judgment in *Di Paolo*, [8] the Court ruled that Article 71(1)(b)(ii) was to be given a narrow interpretation. In its judgment in *Guyot*, [9] the Court held that Article 71 did *not* apply to an unemployed person who, during his last employment, was residing in

5 — The rule in Article 39(5) now features in the first subparagraph of Article 39(6), as amended by Regulation No 1248/92 (OJ 1992 L 136, p. 7), which came into force on 1 June 1992. In 1991 and 1992 the relevant provisions were amended both at Community- law level and in national law. As a result, according to the United Kingdom's representative, Mrs Toosey has been receiving SDA since 1992, and it is for that reason to be assumed that the replies to the questions in the reference are relevant only to the previous legal position.

6 — Neither as a genuine frontier worker nor otherwise, which the applicability of Article 71(1)(b)(ii) would in certain circumstances have made possible (judgment in Case 1/85 *Miethe* v *Bundesanstalt fur Arbeit* [1986] ECR 1837). In Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315, the Court took the view that the fact that the employed person left her family in the State in question constituted evidence that she retained her residence there.

7 — In Case 236/87 *Bergemann* v *Bundesanstalt fur Arbeit* [1988] ECR 5125, the applicant transferred her residence to another Member State during the employment relationship. She did not thereafter return to the State of employment as she did not reside there during the last few weeks of the employment relationship because she was on leave. In Case C-102/91 *Knoch* v *Bundesanstalt fur Arbeit* [1992] ECR I-4341, the applicant returned for a number of months at a time to her State of residence after spending the academic year as a foreign-language assistant in the United Kingdom.

8 — Cited above in footnote 6.

9 — Case 128/83 *Caisse Primaire d'Assurance Maladie de Rouen* v *Guyot* [1984] ECR 3507.

the Member State in which he was employed. In *Gray*, [10] finally, the Court was not expressly asked whether Article 71 applied in view of the fact that the national court had (as the Court noted) already excluded its application. Had the Court taken the view that that premiss was incorrect, it would certainly have indicated so in its decision on the preliminary reference.

14. As Mrs Toosey accordingly does not come within the personal scope of Article 71 of the regulation, she cannot rely on Article 39(5) thereof. For that reason, the general rule contained in Article 39(1) and (2) applies to her; under that rule, the competent Belgian institution would be competent as the institution of the last State of employment. If for any reasons (which are not here evident) a claim against that institution should fail, the competent institution of the United Kingdom, as the institution of a previous State of employment, would become relevant under Article 39(3) of the regulation.

15. Question 1 in the Social Security Commissioner's reference must accordingly be answered in the negative. Questions 2, 3 and 4 relate to the applicability of Article 39(5). In view of the solution here proposed, it is unnecessary to examine those questions.

16. Legally relevant also to the issue of competence under Article 39(1) or (3) of the regulation is the question concerning the consideration of periods of residence under Article 38, which the Social Security Commissioner raises in Question 4 and substantively repeats in Question 5, which was expressly posed in case Question 1 should be answered in the negative.

17. Article 38 of the regulation, in the version applicable at the time of the application for invalidity benefit in 1986, expressly provided that only *periods of insurance* completed under the legislation of another Member State could be considered for the acquisition of entitlement.

18. The United Kingdom takes the view that periods of residence completed in another Member State cannot be taken into account. In its opinion, benefits can be granted only subject to the conditions of the legislation of the Member State under which the minimum period of residence in the United Kingdom is required. The Commission, on the other hand, considers that periods of residence completed in another Member State must be taken into account.

19. The purpose of Article 38 of the regulation is to recognize conditions of entitlement imposed by the legislation of one Member State and satisfied under the legislation of another Member State. To that extent, Article 38 is an example of the specific implementation of Article 51(a) of the EC

10 — Case C-62/91 *Gray* v *Adjudication Officer* [1992] ECR I-2737. Mr Gray, a British national, had lived and worked for almost 20 years in Spain. Following his return to the United Kingdom, he there applied for unemployment benefit.

Treaty, which requires 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'.

20. For the purpose of enforcing claims under a *non-contributory* system, it is not normal to complete periods of *insurance* under that system. A restrictive interpretation of Article 38 would for that reason normally be bereft of practical relevance in the case of claims against a non-contributory system. The intervention of Regulation No 1408/71 would not render an applicant eligible. The objective of Article 51 of the EC Treaty and of Regulation No 1408/71 adopted to implement it, which is to place a migrant worker in the position he would have been in had he worked in only one Member State, would not be attained if the social security system of another Member State failed to take account of factors arising in connection with the exercise of the freedom of movement of employed persons.

21. A person who has a status by virtue of which he comes within the personal scope of Regulation No 1408/71 [11] (see Article 2 of the regulation) should in principle be entitled to expect that matters relevant for purposes of social insurance law will also be recognized in another Member State. It is for that reason that I take the view that periods of residence completed in those circumstances under the legislation of one Member State ought also to be taken into account under the legislation of another Member State to the extent to which those periods constitute conditions of entitlement. Article 38 of the regulation ought in my opinion to receive a broad interpretation, with the result that not only periods of *insurance* but also periods of *residence* completed under the same conditions should be recognized.

22. The rules introduced by subsequent amending regulations do not argue against such a result:

In my opinion, the amplification of Annex VI, Part L, Nos 18 and 19, of the regulation following in the wake of the introduction of Article 13(2)(f) [12] by Regulation No 2195/91 [13] does not argue against recognition of periods of residence. The extension of Annex VI, Part L, resulting from the introduction of severe disablement allowance [14] casts light on the legal consequences of the recently introduced Article 13(2)(f).

23. A possible alternative claim by Mrs Toosey against the United Kingdom institution would be based on Article 39(3) of the regulation. In that situation, Annex

11 — This need not necessarily require active work.

12 — Article 13(2)(f) provides as follows: 'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone'.

13 — Cited above in footnote 3.

14 — See the seventeenth recital in the preamble to Regulation No 2195/91.

VI, Part L, No 17(b), would be applicable. That provision reads as follows:

'[any employed or self-employed person] shall be entitled to have periods of insurance as an employed or self-employed person completed in the territory or under the legislation of another Member State treated as periods of presence or residence in the United Kingdom'.

That extension of the regulation's scope does not, in my view, argue against a similar recognition of periods of residence completed before the entry into force of that rule.

24. Furthermore, the entry into force of amending Regulation No 1248/92 [15] does not lead to any different result. That regulation expressly provides that with effect from 1 June 1992 periods of residence completed in other Member States are also to be taken into account for the purposes of Article 38. The recitals in the preamble to that regulation [16] expressly provide as follows:

'... it is necessary to amend Articles 38 and 45 of Regulation (EEC) No 1408/71 for the purpose of *clarifying* the rules for taking account of the periods of insurance or of residence completed in two or more Member States as an employed person and a self-employed person and/or in the context of a general scheme and a special scheme'.

25. In view of the fact that we are here dealing with clarification, rather than with new rules, an amendment or even a mere supplement, it is in my opinion not possible to draw any *a contrario* conclusion from the intervention of the amending regulation to the effect that periods of residence should not be taken into account in respect of periods prior to the entry into force of that regulation.

26. In conclusion, it is necessary to reply to Question 6 in the reference by the Social Security Commissioner, which concerns the case in which the Belgian institution is competent under Article 39(1). The Social Security Commissioner seeks to determine whether the institution of the State of residence has any obligations of a formal or substantive nature. If one proceeds on the premiss that the institution of the State of employment is under an obligation to pay, there can be no such obligation on the institution of the State of residence. In the context of invalidity payments there is no provision for the apportionment of the obligation to pay between the competent State and the State of residence, as there may be, for example, under the chapter on sickness and maternity, with subsequent reciprocal claims for reimbursement between institutions.

27. In view of the formal criteria for the making of a claim, on the other hand, provisions have been adopted which pursue the objective of facilitating the making of a claim by a person entitled and at the same time of binding the institutions of the Member States. For example, Article 86 of Regulation No 1408/71 offers the possibility for a claim to be submitted, *without loss of time under the specified period*, to an institution of a Member State other than the competent

15 — OJ 1992 L 136, p. 7.

16 — Fourth recital in the preamble to Regulation No 1248/92.

Member State. Article 35 of Regulation No 574/72, however, contains a specific provision regarding applications for invalidity benefits. That article expressly provides that a claim can be submitted to the institution of the State of residence. That institution will then be responsible for forwarding the claim to the competent institution.

28. The procedural provisions cited above constitute *minimum requirements* with which the institutions of the Member States are obliged to comply. There is nothing to prevent the Member States from imposing more stringent requirements with a view to facilitating the making of a claim by a person entitled. It is particularly in the case of invalidity benefits that one might envisage a duty on the part of the authorities of the State of residence to provide assistance, in view of the fact that the pursuit of a claim in another Member State, which in any case involves expense, is incomparably more difficult for a disabled person. However, no such express duty under Community law can be inferred from Regulation No 1408/71 or Regulation No 574/72.

C — Conclusion

29. In the light of the above arguments, I suggest the following answers to the questions referred:

(1) The first sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 does not apply to a worker who, after the conclusion of his employment, transfers his residence to another Member State.

(2) The competent institution of a Member State is required to take account of periods of residence completed in another Member State by a person coming within the personal scope of Regulation No 1408/71 in the same way as periods of residence completed in the territory of the competent Member State.

(3) A claimant may, without loss of time under the specified period, apply to the institution of the State of residence, which will be responsible for forwarding the claim to the competent institution. The institution of the State of residence is not under an obligation to pay the benefit in question.