JUDGMENT OF THE COURT (Third Chamber)

11 June 1998 *

In Case C-297/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before him between

Vera A. Partridge

and

The Adjudication Officer

on the interpretation 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 (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),

* Language of the case: English.

THE COURT (Third Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and N. Paines, Barrister,

— the Council of the European Union, by F. Anton and A. P. Feeney, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, and C. Docksey, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1998,

gives the following

Judgment

1 By order of 2 September 1996, received at the Court on 11 September 1996, the Social Security Commissioner referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation 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 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71'), as subsequently amended by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1).

2 That question arose in a dispute between Mrs Partridge, a United Kingdom national, and the Adjudication Officer concerning the award of the attendance allowance ('AA') provided for under United Kingdom legislation.

The national legislation

3 Prior to 1 April 1992 United Kingdom legislation provided for two invalidity benefits: AA and mobility allowance ('MA').

4 On 1 April 1992 the Disability Living Allowance and Disability Working Allowance Act 1991 introduced disability living allowance ('DLA'), which was at the centre of the case giving rise to the judgment of 4 November 1997 in Case C-20/96 *Snares* v *Adjudication Officer* [1997] ECR I-6057. DLA has two components: a care component, intended for dependent persons and corresponding to the former AA, and a mobility component, intended for those with impaired walking ability

and corresponding to the former MA. The care component is payable at three different rates depending on the nature of the person's disability and care needs, while the mobility component is payable at two different rates depending on the nature and extent of impairment of the ability to walk. The two highest rates of the care component correspond to those at which AA was payable and the higher rate of the mobility component corresponds to that at which MA was payable.

5 With effect from 1 April 1992, AA, in the case of recipients under the age of 65, and MA already awarded were converted into awards of the care and mobility components of DLA. As from that date, therefore, no new awards of AA or MA were to be made, with the exception of AA in the case of recipients over the age of 65. In the latter case, AA, previously governed by the Social Security Act 1975, is payable under section 64(1) of the Social Security Contributions and Benefits Act 1992 and the Social Security (Attendance Allowance) Regulations 1991.

6 Like DLA and, previously, MA, AA is non-contributory, is not linked to incapacity for work, and is not means-tested. Claimants must also satisfy conditions of residence and presence in Great Britain.

7 Regulation 2(1) and (2) of the Social Security (Attendance Allowance) Regulations 1991 provides as follows:

'(1) Subject to the following provisions of this regulation, the prescribed conditions for the purposes of [section 64(1) of the Social Security Contributions

and Benefits Act 1992] as to residence and presence in Great Britain in relation to any person on any day shall be that —

(a) on that day —

(i) he is ordinarily resident in Great Britain; and

(ii) he is present in Great Britain; and

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

...

(2) For the purposes of paragraph (1)(a)(ii) and (iii), notwithstanding that on any day a person is absent from Great Britain, he shall be treated as though he were present in Great Britain if his absence is by reason only of the fact that on that day —

...

(d) his absence from Great Britain is, and when it began was, for a temporary purpose and has not lasted for a continuous period exceeding 26 weeks; or

(e) his absence from Great Britain is temporary and for the specific purpose of his being treated for incapacity, or a disabling condition, which commenced before he left Great Britain, and the Secretary of State has certified that it is consistent with the proper administration of the Act that, subject to the satisfaction of the foregoing condition in this subparagraph, he should be treated as though he were present in Great Britain.'

The Community legislation

8 Prior to 1 June 1992, the date on which Regulation No 1247/92 entered into force, Article 4 of Regulation No 1408/71 provided as follows:

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

...

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

...

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

...

4. This regulation shall not apply to social and medical assistance ...'

9 Article 5 of Regulation No 1408/71 added:

'The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2) ... in declarations to be notified and published in accordance with Article 97.'

10 Section L (United Kingdom) of the updated declarations of the Member States provided for in Article 5 of Regulation No 1408/71 (OJ 1986 C 338, p. 1) refers to the legislation covering AA.

11 Finally, Article 10 of Regulation No 1408/71 provided as follows:

'1. Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death

grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated ...'

12 Regulation No 1247/92, adopted pursuant to Articles 51 and 235 of the EEC Treaty, added a paragraph 2a to Article 4 of Regulation No 1408/71. Article 4(2a) is worded as follows:

'2 a.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.'

13 At the same time, Article 5 of Regulation No 1408/71 was amended to ensure that the declaration made by Member States under that provision should also cover 'the special non-contributory benefits referred to in Article 4(2a)'. The United Kingdom has not made any declaration in regard to those benefits.

14 Regulation No 1247/92 also added Article 10a, which provides as follows:

'1. Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

2. The institution of a Member State under whose legislation entitlement to benefits covered by paragraph 1 is subject to the completion of periods of employment, self-employment or residence shall regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other Member State as periods completed in the territory of the first Member State.

3. Where entitlement to a benefit covered by paragraph 1 but granted in the form of a supplement is subject, under the legislation of a Member State, to receipt of a benefit covered by Article 4(1)(a) to (h), and no such benefit is due under that legislation, any corresponding benefit granted under the legislation of any other Member State shall be treated as a benefit granted under the legislation of the first Member State for the purposes of entitlement to the supplement.

4. Where the granting of a disability or invalidity benefit covered by paragraph 1 is subject, under the legislation of a Member State, to the condition that the disability or invalidity should be diagnosed for the first time in the territory of that Member State, this condition shall be deemed to be fulfilled where such diagnosis is made for the first time in the territory of another Member State.'

15 AA is listed in Point (d) of Section L (United Kingdom) of Annex IIa to Regulation No 1408/71.

16 Finally, Article 89 of Regulation No 1408/71 provides that special procedures for implementing the legislation of certain Member States are set out in Annex VI. That annex, in the version applicable to the main proceedings, states in Point 11 of Section L (United Kingdom):

'For the purpose of Articles 10 ... of the Regulation, the attendance allowance granted to an employed or self-employed person under United Kingdom legislation shall be considered as an invalidity benefit.'

17 Following the adoption of Council Regulation (EEC) No 1249/92 of 30 April 1992 amending Regulation No 1408/71 and Regulation (EEC) 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ 1992 L 136, p. 28), Point 5 of Section L of Annex VI to Regulation No 1408/71 provides:

'For the purposes of applying Article 10a(2) to the provisions governing entitlement to attendance allowance ... a period of employment, self-employment or residence completed in the territory of a Member State other than the United Kingdom shall be taken into account in so far as it is necessary to satisfy conditions as to presence in the United Kingdom, prior to the day on which entitlement to the benefit in question first arises.'

The dispute in the main proceedings

18 Mrs Partridge was in receipt of a State retirement pension and a United Kingdom civil service pension when, at the age of 83, she was awarded by the Adjudication Officer AA at the lower rate with effect from 21 July 1992.

19 Mrs Partridge left the United Kingdom on 27 July 1993 to live with her son in France. She died there on 11 November 1996.

20 Taking the view that, from the outset, the claimant's absence from the United Kingdom was not intended to be temporary and that one of the conditions laid down in Regulation 2(1) and (2) of the Social Security (Attendance Allowance) Regulations 1991 was therefore no longer satisfied, the Adjudication Officer decided, on 29 July 1993, to withdraw Mrs Partridge's entitlement to AA. That decision was upheld on 20 September 1993.

21 On 11 July 1994 the Blackpool Social Security Appeal Tribunal dismissed Mrs Partridge's appeal against that decision, finding that, from 28 July 1993, she ceased to satisfy the condition laid down in Regulation 2(1)(a)(i) of the Social Security (Attendance Allowance) Regulations 1991. No reference was made in that decision to the Community legislation.

22 Mrs Partridge thereupon appealed to the Social Security Commissioner, who set aside the decision of the Blackpool Social Security Appeal Tribunal on the ground that it had failed to consider the relevance of Community law to the resolution of the dispute.

23 With regard to Community law, the Social Security Commissioner first pointed out, in his order for reference, that it was common ground that Mrs Partridge came within the scope of Regulation No 1408/71, as defined in Article 2 thereof.

24 The Social Security Commissioner went on to note that if Mrs Partridge had been awarded AA and then left the United Kingdom before 1 June 1992, the date on which Regulation No 1247/92 entered into force, she could, in accordance with Article 10 of Regulation No 1408/71, have continued to receive that allowance. In the light of the case-law of the Court of Justice (see, to that effect, Case C-356/89 *Newton* v *Chief Adjudication Officer* [1991] ECR I-3017), Point 11 of Section L of Annex VI to Regulation No 1408/71, and the declaration made by the United Kingdom under Article 5 of Regulation No 1408/71, which includes that benefit among the schemes referred to in Article 4(1) thereof, AA was at the time recognised as an invalidity benefit within the meaning of Article 4(1) of Regulation No 1408/71.

25 Since, in this case, Mrs Partridge's entitlement to the allowance in question arose after 1 June 1992, the rights which she derived from Regulation No 1408/71 must be considered on the basis of the amended version of that regulation resulting from Regulation No 1247/92, without her being able to rely on the transitional provisions contained in the latter regulation, which provide that that regulation does not affect the maintenance of the rights of persons who, before that regulation entered into force, were already entitled to the benefit or who satisfied the conditions for entitlement thereto.

26 The Social Security Commissioner considered that the position of Mrs Partridge was very similar to that of Mr Snares, even though his case concerned DLA. Consequently, if the Court's reply in *Snares* were to be that there was a continued right to export DLA under Article 10(1) notwithstanding its inclusion in the category of special non-contributory benefits, Mrs Partridge should also be entitled to export AA. If, on the other hand, the Court were to decide that, in the light of Article 10a

of Regulation No 1408/71, as amended, DLA could not be exported in Mr Snares's case, the same solution should, in the view of the Adjudication Officer, be adopted for AA in the case of Mrs Partridge, notwithstanding the United Kingdom's declaration under Article 5 of Regulation No 1408/71 and Point 11 of Section L of Annex VI.

27 In the light of those considerations, the Social Security Commissioner decided to stay proceedings and refer the following question to the Court:

'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 question submitted for a preliminary ruling

28 It should be noted at the outset that, in *Snares*, the Court ruled that, on a proper construction of Article 10a of Regulation No 1408/71, as amended by Regulation No 1247/92, read in conjunction with Annex IIa, DLA falls within the scope of that provision and is therefore a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, with the result that the position of a person who, after 1 June 1992 when Regulation No 1247/92 entered into force, satisfied the conditions for the award of that benefit is governed exclusively by the system of coordination established by the said Article 10a.

29 The Court also ruled in that judgment that examination of Regulation No 1247/92, in so far as it sets aside, in the case of DLA, the principle of waiver of residence clauses laid down in Article 10 of Regulation No 1408/71, did not disclose any factor of such a kind as to affect its validity.

30 Next, under Article 10a of Regulation No 1408/71, as amended by Regulation No 1247/92, persons to whom that regulation applies are entitled to the special non-contributory cash benefits referred to in Article 4(2a) in accordance with the coordination rules set out therein, provided that such benefits are listed in Annex IIa. That is the case with regard to AA, which is mentioned under Point (d) of Section L (United Kingdom) of that annex.

31 The fact that the Community legislature refers, in Annex IIa to Regulation No 1408/71, to legislation such as that relating to AA 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 (see, in particular, to that effect, *Snares*, paragraph 30).

32 Furthermore, the wording of Article 10a implies that the benefits to which it refers also come within Article 4(2a) of Regulation No 1408/71, as amended by Regulation No 1247/92 (*Snares*, paragraph 31).

33 In those circumstances, a benefit such as AA is, by reason of the fact that it is listed in Annex IIa, governed by the coordination rules of Article 10a and is consequently a special non-contributory benefit within the meaning of Article 4(2a) (see, to this effect, *Snares*, paragraph 32).

34 That interpretation is borne out by the third, fourth, fifth and sixth recitals in the preamble to Regulation No 1247/92, from which it is clear that the intention of the legislature was to provide a specific system of coordination taking account of the special characteristics of certain benefits falling simultaneously within the categories of both social assistance and social security and treated, according to the Court's case-law, as social security benefits as regards workers already covered by the social security scheme of the State whose legislation is relied on (see, in particular, *Newton* and *Snares*). As the Advocate General has stated at point 24 of his Opinion, a benefit such as AA is indeed a benefit of that kind.

35 Furthermore, the fact that the United Kingdom has not made a declaration under Article 5 of Regulation No 1408/71, as amended by Regulation No 1247/92, in so far as it provides that Member States are to specify the special non-contributory benefits covered by Article 4(2a), does not preclude AA from being classified as a special non-contributory benefit within the meaning of the latter provision (see, to that effect, *Snares*, paragraph 34).

36 As the Court pointed out in paragraph 35 of its judgment in *Snares*, the fact that rules have not been mentioned in the declaration made by a Member State is not conclusive in this regard and is therefore not of itself proof that those rules do not come within the scope of the provision in question.

37 Similarly, such a classification cannot be called in question by the fact that Point 11 of Section L of Annex VI to Regulation No 1408/71 defines AA as an invalidity benefit for the purposes of application of Article 10 of that regulation or by the fact that, in accordance with the United Kingdom's declaration under Article 5 of the same regulation, AA falls under Article 4(1) thereof.

38 With regard, first, to the definition in Point 11 of Section L of Annex VI, it follows from its wording that, while AA is classified as an invalidity benefit for the purposes of the application of Article 10 of Regulation No 1408/71, this does not, as such, preclude the possibility that Article 10a of that regulation may, in an appropriate case, apply to the same benefit.

39 It should be noted in this connection that, according to Article 2 of Regulation No 1247/92, that regulation does not affect the maintenance of rights of individuals who, before that regulation entered into force, were already in receipt of the benefit (Article 2(1)) or satisfied the conditions for receiving it (Article 2(2)). Consequently, while Point 11 of Section L of Annex VI to Regulation No 1408/71 applies to persons who were already in receipt of AA, or who satisfied the conditions governing its award before the date on which Regulation No 1247/92 entered into force, and who, as such, may continue to rely on the principle of waiver of residence clauses laid down in Article 10 of Regulation No 1408/71, that annex none the less does not prevent the situation of persons satisfying the conditions for entitlement to AA as from 1 June 1992 from being governed, as is clear from the present judgment, by Article 10a of Regulation No 1408/71.

40 That interpretation, to the effect that AA, depending on the point in time at which the disability arose, comes either under the scheme established by Article 10 of Regulation No 1408/71 or under that introduced by Article 10a, is corroborated by Point 5 of Section L of Annex VI to that regulation, as amended by Regulation No 1249/92, which, for its part, expressly envisages the possibility of Article 10a(2) applying to the provisions governing entitlement to AA.

41 Second, the fact that the above declaration, made by the United Kingdom under Article 5 of Regulation No 1408/71, was not adapted at the time when Regulation No 1247/92 entered into force provides no ground for calling in question the interpretation of the provisions of that regulation according to which a person such as the applicant in the main proceedings, whose disability, which gave rise to payment of AA, arose after Regulation No 1247/92 entered into force, is covered exclusively by the provisions of the latter regulation.

42 In those circumstances, the answer to the question submitted must be that, on a proper construction of Article 10a of Regulation No 1408/71, as amended by Regulation No 1247/92, read in conjunction with Annex IIa, AA falls within the scope of that provision and is therefore a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, with the result that the position of a person, such as the applicant in the main proceedings, who satisfied the conditions for the award of that benefit after 1 June 1992 when Regulation No 1247/92 entered into force, is governed exclusively by the system of coordination established by the said Article 10a.

Costs

43 The costs incurred by the United Kingdom Government, the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Third Chamber)

in answer to the question referred to it by the Social Security Commissioner by order of 2 September 1996, hereby rules:

On a proper construction of Article 10a 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, as subsequently amended by Council Regulation (EEC) No 1247/92 of 30 April 1992, read in conjunction with Annex IIa, attendance allowance falls within the scope of that provision and is therefore a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, with the result that the position of a person, such as the applicant in the main proceedings, who satisfied the conditions for the award of that benefit after 1 June 1992 when Regulation No 1247/92 entered into force, is governed exclusively by the system of coordination established by the said Article 10a.

Gulmann Moitinho de Almeida Puissochet

Delivered in open court in Luxembourg on 11 June 1998.

R. Grass C. Gulmann

Registrar President of the Third Chamber