scheme, are given effect by increasing the value of the pension to which the recipient is entitled.

However, the rule in Article 10 cannot be applied without restriction to a general old-age insurance scheme, such as the Netherlands scheme, in which the mere fact of residence in the State is sufficient qualification for insurance purposes. Consequently, Point 2 of the part entitled 'Netherlands' in Annex VI to Regulation No 1408/71 lays down special provisions governing the waiving of residence clauses in that system, particularly with regard to the treatment of periods prior to 1 January 1957 as periods of insurance for persons who satisfy certain conditions. Interpreted in the light of those provisions, Article 10(1) thus does not preclude a provision of the relevant Netherlands legislation from preventing a person from acquiring the right to the benefit of the transitional provisions which it lays down merely because he is not resident in the territory of the State.

REPORT FOR THE HEARING
delivered in Case C-293/88 *

I — Facts

A — *Legal background*

1. *The national legislation*

1. The Netherlands law on general old-age insurance, the Algemene Ouderdomswet ('the AOW'), provides for a pension scheme in which the amount of the old-age pension is, in principle, dependent exclusively on the number of years of insurance completed.

Under the AOW, insurance is compulsory for all Netherlands residents and also those persons who, by reason of their being employed in the Netherlands, are subject to tax on earned income. Insurance under the AOW is also compulsory for those non-residents who receive an allowance under the Wet op de Arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work — 'the WAO') because they are at least 45% incapacitated for work.

Any person insured under the AOW must pay contributions. Persons who have been insured under the AOW may claim an old-age pension at the age of 65. The full old-age pension is based on an insurance period of 50 years; if the period of insurance is less than 50 years, a reduction is applied of 2% for each year not covered.

* Language of the case: Dutch.

The AOW entered into force on 1 January 1957. It was not possible to be insured before that date. The Netherlands legislature adopted provisional measures, since otherwise nobody would have been able to receive a full old-age pension until 2007.

2. Those transitional provisions (hereinafter referred to as 'the transitional concessions'), contained in Articles 55 and 56 of the AOW, treat as insured years, on certain conditions, the years comprised between the insured's 15th birthday and 1 January 1957 (the date of adoption of the AOW). Under those provisions, no reduction is applied to the old-age pension for uninsured years before 1957 where the person concerned, being entitled to claim a pension, fulfils three conditions: (a) he must have lived in the Netherlands between his 59th and 65th birthdays (Article 55(1) of the AOW, hereinafter referred to as 'the six-year condition'); (b) the insured must be of Netherlands nationality; and (c) he must continue to reside in the Netherlands after his 65th birthday (Article 56(6) of the AOW, hereinafter referred to as 'the continuing-residence condition').

For the application of the six-year condition, the Royal Decree of 3 December 1985 (*Staatsblaad* 632) states that an insured person 'who resided outside the Netherlands' during the period when he was insured under the AOW is deemed to have 'resided in the Netherlands'.

Under Article 3 of Regulation (EEC) No 1408/71, nationals of other Member States are to be treated as Netherlands nationals.

The continuing-residence condition was qualified by the abovementioned Royal Decree of 3 December 1985. An insured person is deemed to 'reside in the Netherlands' even though he has 'resided outside the Netherlands' provided that he was insured without interruption between 1 January 1957 and the date on which he attained 65 years.

2. *The Community legislation*

The first subparagraph of Article 10(1) of Regulation 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 (Official Journal, English Special Edition 1971 (II), p. 416, as amended), is worded as follows:

'Save as otherwise provided in this regulation, old-age . . . benefits . . . acquired under the legislation of one or more Member States shall not be subject to any reduction . . . 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.'

4. Point 2(a) and (f) of Annex VI, Part J (hereinafter referred to merely as 'Annex VI') provides as follows:

'(a) Periods of insurance before 1 January 1957, during which a recipient, not satisfying the conditions to have such periods treated as periods of insurance, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an

employer established in that country, shall also be considered as periods of insurance completed in application of Netherlands legislation for general old-age insurance.

...

(f) The periods referred to in subparagraphs (a) and (c) shall only be taken into account for calculation of the old-age pension if the person concerned has resided for six years in the territory of one or more Member States after the age of 59 years and for so long as that person is residing in the territory of one of those Member States'.

B — *Background to the main proceedings*

5. Mrs Winter-Lutzins (hereinafter referred to as 'the plaintiff') was born in the Federal Republic of Germany on 15 February 1922. She lived there with her husband, who was born on 16 September 1917, until December 1965. From 1 January 1966 to 30 November 1983 the couple, both of German nationality, lived in the Netherlands, where the plaintiff's husband was employed until the age of 65. In December 1982 an old-age pension was granted to him under the AOW. From 1973 to 1980, the plaintiff too was employed in the Netherlands. In 1980 she was granted an invalidity allowance under the WAO. On that basis, the plaintiff continued to be insured under the AOW, until she reached the age of 65. On 1 December 1983 the plaintiff and her husband returned to live in the Federal Republic of Germany.

When, on 15 February 1987, the plaintiff attained the age of 65 she became entitled to claim an old-age pension under the AOW. The Sociale Verzekeringsbank (Social Insurance Bank, hereinafter referred to as 'the defendant') fixed the amount of her pension as 44% of the full pension. The 56% reduction reflected 28 uninsured years, from 15 February 1937 (the plaintiff's 15th birthday) to 1 January 1966 (the date on which she and her husband went to live in the Netherlands).

6. The dispute turns on whether the defendant was legally entitled to make that reduction.

C — *The question referred to the Court*

7. By order of 17 August 1988 the Raad van Beroep stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Must Article 10(1) of Regulation (EEC) No 1408/71 be interpreted as precluding national legislation from preventing a person from acquiring the right to the benefit of the transitional provisions laid down in national legislation merely because he is not resident in the territory of the State in which the institution responsible for payment is situated, in particular when Annex VI of the regulation lays down a specific rule enabling periods before 1 January 1957 to be treated as periods of insurance in the case of persons satisfying the prescribed conditions?'

8. The Raad van Beroep considers that it may be concluded from the judgments of

the Court of 7 November 1983 in Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, of 10 June 1982 in Case 92/81 *Camera* v *Inami* [1982] ECR 2213, of 23 October 1986 in Case 300/84 *Van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1986] ECR 3097, and of 24 February 1987 in Case 379/85 *CRAM Rhône-Alpes* v *Giletti* [1987] ECR 955, that Article 10(1) of Regulation No 1408/71 implies in general that the right to benefit from the transitional concessions cannot be withheld merely because, on his 65th birthday, a person did not reside in the Netherlands, unless the case falls within an exception to that rule for which express provision is made in the Community legislation.

9. The Raad van Beroep goes on to say that although Annex VI lays down detailed arrangements for the application of Regulation No 1408/71 to the Netherlands legislation on old-age insurance, it confines itself to setting out provisions on the basis of which periods prior to 1 January 1957 may be treated as insurance periods in the case of persons who do not satisfy the conditions laid down in Articles 55 and 56 of the AOW for the grant of the transitional benefits.

10. The issue is whether, by application of Article 10 of Regulation No 1408/71, the plaintiff meets the conditions for entitlement to the transitional concessions.

Only if it is decided that such a person does not meet those conditions does the question arise whether periods prior to 1 January 1957 may still, where appropriate, be regarded as periods of insurance on the basis of Annex VI.

The Raad van Beroep appears to suggest that Annex VI does not constitute an express derogation from the principle laid down in Article 10(1) of Regulation No 1401/71.

The national court also considers that the transitional concessions and the rules laid down in Annex VI are two independent sets of rules.

In any event, even if the provisions of Annex VI do constitute a set of special rules distinct from the transitional concessions, the question arises whether the effect of Article 10(1) of Regulation No 1408/71 is not simply that the plaintiff should be granted the benefit of the transitional concessions.

II — Procedure

11. The order for reference was received at the Court Registry on 7 October 1988.

12. Pursuant to Article 20 of the Protocol on the Court of Justice of the European Communities, written observations were submitted by:

the Sociale Verzekeringsbank, the defendant in the main proceedings, represented by B. H. ter Kuile and E. H. Pijnacker Hordijk, of the Hague and Brussels Bars respectively;

the Government of the Kingdom of the Netherlands, represented by H. J. Heinemann, Deputy Secretary-General in the Ministry of Foreign Affairs;

the Commission of the European Communities, represented by its Legal Adviser, D. Gouloussis and by J. Drijber, a member of its Legal Department.

13. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

14. By decision of 21 June 1989, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Second Chamber.

III — Summary of the written observations submitted to the Court

15. The Sociale Verzekeringsbank proposes that the Court reply in the negative to the question submitted.

It states in the first place that the periods prior to 1 January 1957 in respect of which an old-age pension is granted under Articles 55 and 56 of the AOW are not actual insurance periods but notional insurance periods, since the person concerned is not liable for any contribution. The pension rights in respect of those periods are 'free' rights for which a special connection with the Netherlands is required. The same applies to the 'periods of insurance' referred to in Annex VI. The conditions laid down in paragraph (f) are merely the counterpart to the six-year condition and the continuing-residence condition laid down in the AOW.

The defendant goes on to say that the Raad van Beroep's suggestion that Annex VI does not derogate from Article 10 of the regulation is incorrect. It cannot be said that the transitional concessions are rights which are withheld from the person concerned merely because he does not reside in the territory of the State where the institution responsible for payment is situated. The case-law of the Court (see in particular *Camera* and *Giletti*, *supra*) on Article 10 of Regulation No 1408/71 does not apply to the transitional concessions.

In any event, the inapplicability of Article 10 of Regulation No 1408/71 follows from the judgment of the Court of 25 February 1986 in Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, in which the Court held that Article 10 of Regulation No 1408/71 cannot be applied without restriction to the AOW. That applies *a fortiori* to the transitional concessions.

It must first be decided on the basis of Dutch national law whether a person has fulfilled the conditions for entitlement to the transitional concessions. In the event of a negative reply, it must be considered whether the Community provisions allow the person concerned to benefit from those concessions. In that context, Annex VI applies by derogation from Article 10 of Regulation No 1408/71. The basic premise of the rules contained in Annex VI is that a person who is not entitled to the transitional concessions must still qualify for pension rights for those periods before 1 January 1957 in respect of which there is a connection with the Netherlands based on the person's residence or on his employment.

There is no reason to grant a migrant worker pension rights for periods prior to 1 January 1957 during which he had no connection with the Netherlands.

The Netherlands Government considers that in *Spruyt* the Court expressly recognized that the residence conditions under the transitional concessions in the AOW, in conjunction with the rules contained in Annex VI, are in conformity with Community law.

If, for the sake of argument, Article 10 of Regulation No 1408/71 did apply without restriction to the AOW, virtually anyone who had been insured under the AOW at any time after 1 January 1957 would be able to claim the transitional (free) benefits.

Annex VI would have no sense if, under Article 10 of Regulation No 1408/71, any person residing in one of the Member States were entitled to the transitional concessions.

Nor can such a result be arrived at by virtue of the principle of freedom of movement for workers. In its judgments of 25 February 1986 in Case 254/84 *De Jong* v *Sociale Verzekeringsbank* [1986] ECR 671 and in *Spruyt, supra*, the Court held that it was sufficient, having regard to that principle, for the periods before 1 January 1957 to be taken into account for the calculation of pension rights under the AOW only to the extent to which the persons concerned resided and were employed in the Netherlands.

The Netherlands Government proposes that the answer to be given to the question submitted is that Article 10(1) of Regulation No 1408/71 must not be interpreted as precluding a provision of national law such as the provision at issue in this case, which provides that entitlement to transitional concessions under national legislation may be refused to a person merely because he does not reside in the territory of the State where the institution responsible for payment is situated, since under the scheme of the AOW it is sufficient to be a resident in order to be insured and Annex VI contains specific rules whereby periods prior to 1 January 1957 are treated as insured years in the case of people who fulfil certain conditions.

16. The Government of the Netherlands considers that neither the principle of free movement of persons nor Article 10(1) of Regulation No 1408/71 has the effect of preventing the imposition of a residence condition in respect of benefits which are granted without any contribution from the person concerned. Article 10(1) of Regulation No 1408/71 concerns rights acquired or claims which may be recognized when the risk involved materializes. The transitional concessions may not be deemed to come within the scope of Article 10(1) of Regulation No 1408/71.

17. The Commission considers that neither Article 51 of the EEC Treaty nor any provision of Regulation No 1408/71 prevents a continuing-residence condition from being imposed.

It refers to the Court's judgments in *Smieja, Giuliani, Camera, De Jong, Spruyt, Van*

Roosmalen and *Giletti*, *supra*, and in the judgment of 23 September 1987 in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, and concludes from them that it cannot be stated that a person has been refused an 'acquired right' to a benefit 'merely because he is not resident in the territory of the State in which the institution responsible for paying the benefit is situated', as was true in the cases cited. In fact, the judgment in *Spruyt* contains the answer to the question submitted.

According to the Commission it is necessary to determine first, on the basis of the applicable national law, whether a right has arisen. It is undisputed that the plaintiff does not satisfy the conditions laid down in Articles 55 and 56 of the AOW for entitlement to the transitional concessions. There is no question therefore of an 'acquired right' under national law.

It must then be considered whether Regulation No 1408/71, supplementing national law, gives rise to a right to the transitional concessions. In the Commission's view, that is not the case. It adds that if Article 10(1) of Regulation No 1408/71 precluded a continuing residence condition Annex VI would be devoid of purpose.

The rules are designed to promote the free movement of workers by eliminating any obstacles stemming from national social security schemes and do not require the award of benefits in respect of periods during which a person neither resided nor was employed in the Netherlands. The consequences of the opposite view would be extremely far-reaching. Nationals of the Member States who had been insured for at least one day under the AOW would then be able, provided that they had resided for six years after their 59th birthday in one of the Member States and continued to reside there, to claim free entitlement to an old-age pension for the years between their 15th birthday and 1 January 1957.

The Commission proposes that the Court reply as follows to the question submitted:

'Neither Article 51 of the EEC Treaty nor any provision of Regulation (EEC) No 1408/71, in particular Article 10(1) thereof, prevents a Member State, when applying a statutory system such as the Netherlands AOW that provides general old-age insurance for all nationals and persons treated as nationals, from not granting to insured persons who do not satisfy the preconditions laid down by that system for the treatment of periods prior to its entry into force as insurance periods old-age pensions for those periods, where those persons neither resided nor worked in the Member State during the periods in question.'

G. F. Mancini
Judge-Rapporteur