JUDGMENT OF THE COURT (Grand Chamber)

16 January 2007 *

In Case C-265/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 21 June 2005, received at the Court on 27 June 2005, in the proceedings

José Perez Naranjo

v

Caisse régionale d'assurance maladie (CRAM) Nord-Picardie,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Schintgen, P. Kūris, E. Juhász (Rapporteur) and J. Klučka, Presidents of the Chambers, J.N. Cunha Rodrigues, U. Lõhmus, E. Levits, A. Ó Caoimh and L. Bay Larsen, Judges,

* Language of the case: French.

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2006,

after considering the observations submitted on behalf of:

— José Perez Naranjo, by the SCP Thomas-Raquin and Benabent, avocat,

— the Caisse régionale d'assurance maladie (CRAM) Nord-Picardie, by J.-A. Blanc, avocat,

— the French Government, by G. de Bergues and O. Christmann, acting as Agents,

— the Spanish Government, by I. del Cuvillo Contreras and A. Sampol Pucurull, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the United Kingdom Government, by C. White, acting as Agent, and T. de la Mare, Barrister,

— the Commission of the European Communities, by D. Martin and M.-J. Jonczy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4(2a), 10a, 19(1), 95b and Annex IIa to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p.1) ('Regulation No 1408/71').

2 The reference was made in the course of proceedings between Mr Perez Naranjo and the Caisse régionale d'assurance maladie (CRAM) Nord-Picardie concerning Mr Perez Naranjo's application for the payment of a supplementary allowance by the Fonds national de solidarité (National Solidarity Fund) which, on 1 January 1994, became the Fonds de solidarité de viellesse (Old-age Solidarity Fund) ('the FSV').

Legal background

Community legislation

3 Article 4(1) of Regulation No 1408/71 provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(c) old-age benefits;

...'

4 Article 4(2a) of Regulation No 1408/71 provides:

'This Regulation shall also apply to special non-contributory benefits which are provided under a 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.'

5 The first subparagraph of Article 10(1) of Regulation No 1408/71 on waiving of residence clauses provides:

'Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension 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.'

6 The first subparagraph of Article 10a of Regulation No 1408/71 provides:

'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.'

7 Under Article 19(1) of Regulation No 1408/71:

'An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers ...'.

8 The third and fourth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 1) whose Article 1 inserted Articles 4(2a) and 10(a) in Regulation No 1408/71 are worded as follows:

'Whereas it is also necessary to take account of the case law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

Whereas the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries'.

9 Article 95b of Regulation No 1408/71, entitled, 'Transitional provisions for application of Regulation (EEC) No 1247/92', contains paragraph 9 which is worded as follows:

'The application of Article 1 of Regulation (EEC) No 1247/92 may not result in the rejection of an application for a special non-contributory benefit awarded as a

supplement to a pension, which was submitted by the person concerned who had satisfied the conditions for the award of this benefit before 1 June 1992, even where the person concerned resides on the territory of a Member State other than the competent Member State, provided that the application for the benefit is submitted within a period of five years starting from 1 June 1992.'

10 Annex IIa to Regulation No 1408/71, under the heading 'France' provides as follows:

'(a) Supplementary allowance from the National Solidarity Funds (Law of 30 June 1956).'

National law

11 The first subparagraph of Article L. 815-2 of the French Social Security Code, in the version applicable to the facts at issue in the main proceedings, provided that 'any French national who resides in metropolitan France or in one of the departments mentioned in Article L. 715-1 ... who has reached a minimum age, which shall be reduced where the claimant is unfit for work, and who is a recipient of one or more old-age benefits under legislative provisions or regulations ... shall be entitled to a supplementary allowance' under the conditions laid down by the code.

12 The first subparagraph of Article R. 815-2 of the Social Security Code sets the minimum age at 65 as a general rule and at 60 where the claimant is unfit for work.

13 According to Articles L. 815-2-1, L. 815-7 and L. 815-8 of the Social Security Code, the supplementary allowance is paid by the FSV to bodies or departments responsible for payment, is provided on express request of the persons concerned and is payable only where the total of the allowance and the personal resources of the claimant do not exceed certain ceilings laid down by decree.

14 It is clear from the additional information, received at the Court Registry on 8 May 2006, in response to a request to the national court for clarification pursuant to Article 104(5) of the Rules of Procedure, that the supplementary allowance, which is the responsibility of the FSV established by Law No 93-936 of 22 July 1993, supplements a principal benefit within the limits of a guaranteed minimum old age, and that eligibility for that allowance is means tested in accordance with Articles R. 815-21 to R. 815-32 of the Social Security Code.

15 Under the first subparagraph of Article L. 135-1 of the Social Security Code, the FSV is to assume responsibility for non-contributory old-age benefits covered by national solidarity. It is apparent from Article L. 135-3 of the Code and the written observations of the French Government that the revenue of the FSV allocated to finance the expenditure for which it is responsible pursuant to Article L. 135-1, include or included between 1994 and 2003 all or part of the general social contribution and the social solidarity contribution levied on companies and, to a lesser extent, the social security levy of 2%, tax on beverages and the retirement tax.

16 The general social contribution is charged on earned income and substitute income of natural persons as well as income from property, investment products and gaming. The social solidarity contribution levied on companies and the social levy of 2% are based respectively on the turnover of companies subject to corporation tax and income from assets and investments of natural persons residing in France.

The facts of the case in the main proceedings and the question referred for a preliminary ruling

17 Mr Perez Naranjo, the applicant in the main proceedings, who was born on 27 September 1931, is a Spanish national. He worked in France from 1957 until 1964 and then returned to Spain. Since 1 November 1991 he has received a French old-age pension.

18 On 28 May 1997, Mr Perez Naranjo claimed the supplementary allowance from the Caisse régional d'assurance maladie (CRAM) Nord-Picardie. As his claim was refused, he brought an action before the Tribunal des affaires de sécurité sociale de Lille (Social Security Court, Lille), which was dismissed by judgment of 13 December 2001.

19 Mr Perez Naranjo appealed against that judgment to the Cour d'appel de Douai (Court of Appeal, Douai) which also dismissed the appeal by judgment of 28 February 2003 on the ground that the supplementary allowance, expressly mentioned in Annex IIa to Regulation No 1408/71, constitutes a special category of benefits called 'special non-contributory benefits' covered by Article 10a of that regulation, and which have not been exportable since 1 June 1992, at which date Mr Perez Naranjo did not satisfy the age condition laid down by the French law.

20 Mr Perez Naranjo appealed to the Cour de cassation (Court of Cassation) and submitted, in support of his appeal, that the supplementary allowance does not constitute either a special or a non-contributory benefit and that by taking the opposite view merely because that allowance is expressly referred to in Annex IIa to Regulation No 1408/71, without undertaking any examination of the nature of that allowance, the Cour d'appel Douai has infringed Articles 4(2a) and 10a of that regulation.

21 In those circumstances the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Community law to be interpreted as meaning that the supplementary allowance at issue, listed in Annex IIa to Regulation No 1408/71, is of a special and non-contributory character, thereby excluding, pursuant to Articles 10a and 95b of Regulation No 1408/71, its award to a non-resident who did not satisfy the age condition on 1 June 1992, or as meaning that it constitutes a social security benefit and must therefore, pursuant to Article 19(1) of that regulation, be provided to the person concerned who satisfies the conditions for its award, irrespective of the Member State in which that person is resident?'

Admissibility

22 The Finnish Government doubts the admissibility of the question referred on the ground that the order for reference does not adequately describe the legal background of the dispute, and that the information provided is so incomplete that it does not consider that it is in a position to submit observations on that question.

23 However, at the Court's request, the national court has provided clarifications as regards the national legislative framework. Furthermore, the Member States and the Community institutions have had the opportunity to enlarge upon their observations during the hearing. In those circumstances, the Court considers that it has sufficient information in order to provide a useful reply to the question referred.

24 It follows that the question referred is admissible.

The question referred for a preliminary ruling

25 By its question the national court asks, essentially, whether a benefit such as the supplementary allowance mentioned in Annex IIa, under the heading 'France', to Regulation No 1408/71, is a special non-contributory benefit within the meaning of Article 4(2a) of that regulation in the version applicable at the material time in the main proceedings. If that allowance is so categorised, it follows that, in accordance with Articles 10a and 95(b) of Regulation No 1408/71, a non-resident applicant who

did not satisfy the age condition on 1 June 1992 is not entitled to that allowance; however, if that allowance cannot be classified as a special non-contributory benefit, it must be provided to persons who satisfied the age condition on that date, in accordance with Article 19(1) of that regulation, regardless of the Member State in which they reside.

26 The Court has already examined the exportability of the supplementary allowance and has ruled that to make its payment conditional on residence within French territory is incompatible with Article 10(1) of Regulation No 1408/71 (see Joined Cases 379/85 to 381/85 and 93/86 *Giletti and Others* [1987] ECR I-955, paragraph 17, and Case C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraphs 14 and 20).

27 However, following those judgments, Regulation No 1247/92 amended Regulation No 1408/71 by inserting, inter alia, Articles 4(2a) and 10a. Under the first paragraph of Article 10a only persons who reside on the territory of the Member State competent to provide them are entitled to special non-contributory benefits.

28 The issue of exportability of the supplementary allowance must, therefore, be considered in the light of Article 10a.

29 It is clear from the case-law of the Court that the provisions in Article 10a of Regulation No 1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. That provision can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation No 1408/71, that is, benefits which are both special and non-contributory, and are listed in Annex IIa to that regulation (see, to that effect, Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 19, and Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2005] ECR I-6249, paragraph 25).

30 As stated in paragraph 10 of this judgment, the supplementary allowance is mentioned in Annex IIa to Regulation No 1408/71.

31 Therefore, it is appropriate to examine, first, whether that allowance has a special character and, second, whether it is non-contributory.

The special character of the supplementary allowance

32 The Court has already held that a special benefit, within the meaning of Article 4(2a) of Regulation No 1408/71, is defined by its purpose. It must either replace or supplement a social security benefit and be in the nature of social assistance justified on economic and social grounds and fixed by legislation setting objective criteria (see *Skalka*, paragraph 25, and *Kersbergen-Lap and Dams-Schipper*, paragraph 30).

33 As regards the link between the supplementary allowance and social security, it is common ground that that allowance, which is granted in order to increase social security retirement pensions, is similar to it. Therefore, the supplementary

allowance, which augments an old-age pension covered by Article 4(1)(c) of Regulation No 1408/71, has the same scope *ratione personae* as the latter and requires the same minimum age for the purpose of acquiring rights.

34 As regards the relationship between the supplementary allowance and social assistance, as the Advocate General stated in point 36 of his Opinion, the supplementary allowance is intended to ensure a minimum means of subsistence for its recipient where the retirement pension is insufficient. It is paid to persons who have reached pensionable age and whose total income falls below a statutory threshold. The amount of that allowance, which supplements the income of recipients up to the statutory threshold, therefore varies according to that income. Personal needs, that is to say the individual financial circumstances of each recipient, are of fundamental importance. Furthermore, it is clear from the information provided by the national court that the grant of the supplementary allowance is not linked to any condition relating to periods of employment or to the payment of contributions.

35 It follows that the supplementary allowance, which is similar to both social security and social assistance, has a mixed character and must be regarded as a special benefit.

The non-contributory character of the supplementary allowance

36 As regards whether the supplementary allowance is contributory, it is clear from the case-law that the determining criterion in that respect is how the benefit concerned is actually financed. The Court must consider whether that financing comes directly

or indirectly from social contributions or from public resources (see, to that effect, *Skalka*, paragraph 28, and *Kersbergen-Lap and Dams-Schipper*, paragraph 36). However, such an examination may require an analysis of the national regulations and practices in such detail and depth that it would exceed the Court's role in the framework of the preliminary ruling procedure and, therefore, in order to produce a conclusive result, the subsequent cooperation of the national court may be necessary.

37 In that connection, it should be observed, first of all, as the Commission rightly submits, that, although the supplementary allowance is paid by the health insurance funds, they are then reimbursed by the FSV, so that the burden of that allowance falls on it.

38 Next it should be observed that, as it is clear from paragraph 15 of this judgment, the FSV's income derives essentially from the general social contribution and the social solidarity contribution levied on companies.

39 Finally, as regards the nature of the FSV's resources, only the classification of the general social contribution as taxation is challenged before the Court by the applicant in the main proceedings and the Spanish Government. Referring to the judgment in Case C-169/98 *Commission* v *France* [2000] ECR I-1049, the applicant in the main proceedings submits that the general social contribution constitutes a social security contribution and, therefore, that the supplementary allowance is a contributory benefit.

40 Therefore, it is appropriate to determine whether a contribution such as the general social contribution must be regarded as a social security contribution, or as public resources which do not have the characteristics of such a contribution.

41 First of all, it must be observed that, in the case giving rise to the judgment in *Commission* v *France*, the specific issue of the classification of the general social contribution for the purposes of Article 4(2a) of Regulation No 1408/71 was not raised, the only issue being the Member State in which the person concerned could be taxed on the payment of that contribution for the purposes of Article 13 of Regulation No 1408/71.

42 The question regarding the nature of the general social contribution arises specifically in relation to that contribution in respect of earned income and substitute income to which employed and self-employed workers are liable, which, as is apparent from the file submitted to the Court, is an important resource for the FSV which finances the supplementary allowance.

43 First of all, the general social contribution on earned income and substitute income share certain similarities with general social security contributions, particularly as regards its basis of assessment and the procedure for its collection.

44 Furthermore, in paragraph 35 of the judgment in *Commission* v *France*, the Court held that that contribution, unlike levies designed to meet general public charges, is allocated specifically and directly to financing social security in France.

45 In determining whether the supplementary allowance is contributory or non-contributory, the allocation of the general social contribution to the financing of social security is not sufficient to show that the supplementary allowance, as such, constitutes a contributory benefit.

46 In that regard, it is appropriate to consider whether there is an identifiable link between the supplementary allowance, on the one hand, and the general social contribution on earned income and substitute income, on the other.

47 As it is clear from the information submitted to the Court, the relationship between the supplementary allowance and the general social contribution on earned income and substitute income does not appear to fulfil that condition.

48 First, it is apparent that the FSV, which makes available the resources necessary for the supplementary allowance, has the task, according to the relevant national legislation, of assuming responsibility for non-contributory old-age benefits covered by national solidarity, of which the supplementary allowance is only a limited part.

49 Second, while it is true that the general social contribution in respect of earned income and substitute income constitutes a substantial part of the FSV's revenue, the fact remains that that revenue also comes from other contributions and levies, whose classification as fiscal in nature is not challenged before the Court.

50 Third, the general social contribution in respect of earned income and substitute income serves to finance not only the FSV but also other social schemes.

51 Fourth, the conditions for grant and the methods of calculating the supplementary allowance are not fixed by reference to any contribution as regards its recipients.

52 Having regard to all those considerations it is apparent that, even if the part of the general social contribution based on earned income and substitute income must be regarded as a contribution rather than financing from public resources, the link between that contribution and the supplementary allowance is not sufficiently identifiable for that allowance to be classified as a contributory benefit.

53 It is for the national court to confirm the accuracy of the considerations set out in paragraphs 48 to 52 of this judgment, in order to establish conclusively whether the allowance at issue is contributory or non-contributory.

The possible application of transitional measures

54 As a general rule, social security benefits within the meaning of Regulation No 1408/71 are exportable, that is to say that entitlement to them cannot be limited to persons who reside in the competent Member State. However, as stated in paragraph 27 of this judgment, Article 10a of that regulation provides for an exception as regards the special non-contributory benefits referred to in Article 4 (2a) of that regulation, by limiting entitlement to that benefit to persons who reside on the territory of that State, in so far as those benefits are mentioned in Annex IIa.

55 However, the Community legislature, when it inserted Article 10a into Regulation No 1408/71 by Regulation No 1247/92, provided for transitional measures in Article 2 of the latter regulation. Article 2(2), whose wording is reproduced in substance in Article 95b(9) of Regulation No 1408/71 by Council Regulation (EC) No 3095/95 of 22 December 1995 (OJ 1995 L 335, p. 1), concerns the situation of a person who, residing on the territory of a Member State other than the competent State, had not submitted a claim for a special benefit even though he satisfied the conditions for grant of that benefit prior to 1 June 1992, the date of entry into force of Regulation No 1247/92, and provides that that person has a period of five years from that date to make a claim for the special benefit concerned.

56 It follows that, under that transitional provision, the residence condition must be disregarded where a person who fulfilled the conditions for grant of a benefit such as the supplementary allowance before 1 June 1992 made a claim within that period.

57 According to the order for reference, the applicant in the main proceedings, although he had been receiving a French old-age pension since 1 November 1991, did not satisfy the legal conditions for grant of the supplementary allowance on 1 June 1992. As it is clear from paragraph 12 of this judgment, that benefit may be paid only to recipients of an old-age pension who have reached 65, or 60 in the case of unfitness for work.

58 The Commission submits that Mr Perez Naranjo could have benefited from the transitional provisions in question if it had been proved that he was unfit for work before 1 June 1992.

59 It is common ground that, first, as he was born on 27 September 1931, the applicant in the main proceedings had not reached 65 on 1 June 1992 and that, second, he received a French old-age pension calculated on the normal basis and not the basis that he was unfit for work.

60 Since the national court has not referred any questions to the Court in that regard, there is no need to consider the situation put forward by the Commission.

61 Having regard to the foregoing considerations, the answer to the question referred must be that a benefit such as the supplementary allowance mentioned under the heading, 'France' in Annex IIa to Regulation No 1408/71 constitutes a special benefit. Examination of the method of financing the supplementary allowance, on the basis of the information in the file submitted to the Court, shows that there is no sufficiently identifiable link between the general social contribution and the benefit concerned, which leads to the conclusion that the supplementary allowance is non-contributory. However, it is for the national court to confirm the accuracy of the factors set out in paragraphs 48 to 52 of this judgment in order to determine conclusively whether that benefit is contributory or non-contributory.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court hereby rules:

A benefit such as the supplementary allowance mentioned, under the heading 'France' in Annex IIa to Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, constitutes a special benefit. Examination of the method of financing the supplementary allowance, on the basis of the information in the file submitted to the Court, shows that there is no sufficiently identifiable link between the general social contribution and the benefit concerned, which leads to the conclusion that the supplementary allowance is non-contributory. However, it is for the national court to confirm the accuracy of the factors set out in paragraphs 48 to 52 of this judgment in order to determine conclusively whether that benefit is contributory or non-contributory.

[Signatures]