OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 March 1991 *

Mr President,
Members of the Court,

1. The questions referred to the Court in these proceedings for a preliminary ruling by a Social Security Commissioner require the Court once again to define the scope of Articles 4 and 10 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.[1]

2. The appellant in the main proceedings is a British citizen who paid contributions to the French social security system as a self-employed person. He suffers from complete tetraplegia as a result of injuries sustained in a car accident. On returning to the United Kingdom he was granted a mobility allowance by the British authorities with effect from 4 March 1981, the date of his claim, until, in principle, 21 August 2023, the day before his 75th birthday.

3. Section 37A of the Social Security Act 1975 confers entitlement to a mobility allowance for any period throughout which the victim 'is suffering from physical disablement such that he is either unable to walk or virtually unable to do so'. The Mobility Allowance Regulations 1975 determine in greater detail the medical preconditions for entitlement to such an allowance. They are not in issue in this case.

4. The difficulty here is created by the requirement of residence or presence in Great Britain laid down by those Regulations. According to the Social Security Commissioner,[2] Mr Newton settled permanently in France on 4 April 1984 and ceased from that date to be entitled to the mobility allowance. His appeal to the Social Security Appeal Tribunal was unsuccessful. He then appealed to a Social Security Commissioner, who has made this reference for a preliminary ruling on the following questions:

'In the case of an employed or self-employed person who has acquired under United Kingdom legislation alone a right to a mobility allowance under Section 37A of the Social Security Act 1975 but who is not entitled to any other benefit under United Kingdom legislation:

(a) is mobility allowance a benefit within the scope of Article 4(1)(b) of Council

* Original language: French.

1 — OJ 1983 L 230, p 6.

2 — Paragraph 2 of the reference for a preliminary ruling.

Regulation (EEC) No 1408/71 without being excluded under Article 4(4): and

(b) if so, may that person continue to receive mobility allowance by virtue of Article 10 of Council Regulation (EEC) No 1408/71 while residing in another Member State?'

5. In relation to such a specific question I should point out first of all that, as the Commission has rightly stated,[3] the Court has already held with regard to requests for rulings on provisions of national law in the light of Regulation No 1408/71 that,

'whilst the Court, acting within the framework of Article 177, has no jurisdiction to apply the Community rule to a specific case, nor, consequently, to pronounce on a provision of national law with regard to such rule, it can however provide the national court with the factors of interpretation depending on Community law which could be useful to it in evaluating the effects of such provision'.[4]

6. The Social Security Commissioner's first question is therefore whether such a benefit falls within the sphere of Article 4(1) of Regulation No 1408/71 and is not excluded by Article 4(4). Under Article 4(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'. Conversely, Article 4(4) of Regulation No 1408/71 provides that the regulation is not to apply to social and medical assistance.

7. It is therefore essential to determine, for the purposes of applying Regulation No 1408/71, whether the benefit falls within the category of invalidity benefits or that of social assistance.

8. The United Kingdom[5] observes that the mobility allowance has not been included in the United Kingdom's declaration pursuant to Article 5 of Regulation No 1408/71. According to that provision, 'the Member States shall specify the legislation and schemes referred to in Articles 4(1) and (2) ... in declarations to be notified and published in accordance with Article 96'.

9. Although the Court considers[6] that the fact that a Member State has *specified* a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of the regulation, the Court has also held[7] that

'the fact that a domestic law is not mentioned in the declaration made by a Member State does not mean that that law must be deemed to lie outside the scope of the regulation',

3 — Written observations, paragraph 6.

4 — Judgment of 17 June 1975 in Case 7/75 *Mr and Mrs F.* v *Belgian State* [1975] ECR 679, at paragraph 10.

5 — Written observations, paragraph 4.6.

6 — Judgment of 29 November 1977 in Case 35/77 *Beerens* v *Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249, at p. 2255 (operative part).

7 — Judgment of 27 January 1981 in Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, at paragraph 15.

and that

'that circumstance is not decisive'.

10. It has, moreover, been clearly affirmed by the Court that the distinction between benefits which are excluded from the field of application of Regulation No 1408/71 and benefits which come within it

'rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant'. [8]

11. At the same time, it has been consistently held that,

'whilst it may seem desirable from the point of view of applying the Community regulations on social security to establish a clear distinction between legislative schemes that fall respectively within social security and assistance, the possibility cannot be excluded that by reason of the persons covered, its objectives and its methods of application, national legislation may, at one and the same time, have links to both those categories'. [9]

12. Does the mobility allowance provided for in the Social Security Act have links with both those categories of schemes? The Commission considers it to be a hybrid benefit. [10] On the one hand, it appertains to social assistance inasmuch as it is not based on periods of employment or insurance. On the other hand, it appertains to social security, inasmuch as no criterion of need is applied and it is granted as of right to those who fulfil the conditions, without any individual or discretionary assessment of the situation of the person concerned.

13. In ruling on the grant of certain allowances to handicapped persons the Court has already alluded to these two categories of benefits. [11] The legislative provisions at issue in those cases were even more closely linked to social assistance, since they took account of personal need. However, the key point in the Court's view was that since they had not opted for a system of individual assessment, a characteristic feature of assistance, the provisions in question conferred upon beneficiaries a *legally defined position.* The Court held that since the legislation in question granted a legally protected right to benefit for handicapped persons it fell, as regards the persons referred to by Regulation No 3, the predecessor of Regulation No 1408/71, within the ambit of social security. In the case of the mobility allowance the criterion of need does not feature amongst the conditions for obtaining such a benefit, which should *a fortiori* mean that it can be regarded as falling within the sphere of social security. As the Social Security Commissioner points out, the *basic statutory test* of entitlement to benefit contained in Section 37A of the

8 — Judgment of 6 July 1978 in Case 9/78 *Directeur Régional de la Securité Sociale de Nancy* v *Gillard* [1978] ECR 1661, at paragraph 12; and judgment of 5 May 1983 in Case 139/82 *Piscitello* v *INPS* [1983] ECR 1427, at paragraph 10

9 — Judgment of 24 February 1987 in Joined Cases 379 to 381/85 and 93/86 *CRAM Rhône-Alpes* v *Giletti* [1987] ECR 955, at paragraph 9; see also the judgment of 22 June 1972 in Case 1/72 *Frilli* v *Belgium* [1972] ECR 457, at paragraph 13; judgment of 28 May 1974 in Case 187/73 *Callemeyn* v *Belgium* [1974] ECR 553, at paragraph 6; judgment of 9 October 1974 in Case 24/74 *CRAM* v *Biason* [1974] ECR 999, at paragraph 9.

10 — Written observations, paragraph 9.

11 — See the *Callemeyn* judgment, cited above, at paragraph 7, and the judgment of 13 November 1974 in Case 39/74 *Costa* v *Belgium* [1974] ECR 1251, at paragraph 7.

Social Security Act 1975 is that the claimant is 'suffering from physical disablement such that he is either unable or virtually unable to walk'. [12]

14. Accordingly, it remains to be examined whether the other features characterizing such an allowance may nullify its primary nature which enables it to be classified amongst the invalidity benefits referred to in Article 4(1) of Regulation No 1408/71.

15. First of all, it is not based on contributions, but that factor is not significant, since Article 4(2) of Regulation No 1408/71 provides that non-contributory benefits are not excluded from its scope. The Court has held in that respect that

'the classification of an allowance as a social security benefit covered by the regulation does not depend upon the manner in which the allowance is financed'. [13]

16. The United Kingdom has stated that the mobility allowance may not be regarded as an invalidity benefit since its purpose is not to provide compensation for any reduced earning capacity as a result of a disability. [14] It is true that it may be granted to persons aged from 5 to 75 years irrespective of any incapacity for work. However, it should be pointed out that Article 4(1)(b) of Regulation No 1408/71 refers to 'invalidity benefits, *including* those intended for the maintenance or improvement of earning capacity'. The word emphasized confirms that such benefits, which must be 'interpreted in the widest possible sense', [15] are not confined to cases of incapacity for work.

17. Finally, the United Kingdom submits that the mobility allowance is not a supplementary payment linked to any other benefit paid in the United Kingdom. [16] The Social Security Commissioner mentioned in her question that Mr Newton was not entitled, under United Kingdom legislation, to any benefit other than the mobility allowance. The Court has on several occasions given rulings in situations where the allowance in issue was supplementary to another benefit. [17] However, that factor does not appear to me to be in any way decisive. It does not appear in the regulation. Moreover, from a practical point of view, any such requirement would restrict the benefit of the rules on the coordination of social security schemes to persons already in receipt of a principal benefit, which would scarcely be compatible with the logic of the Community system. Finally, the Court has already held that allowances for handicapped persons which are not supplementary to other benefits fall within the scope of Regulation No 1408/71. [18]

18. I therefore consider that national legislation granting a legally protected right to the mobility allowance falls, as regards the persons covered by Regulation No 1408/71, within the ambit of social security as defined in Article 4(1)(b) of that regulation.

12 — Paragraph 8 of the reference for a preliminary ruling, emphasis added.

13 — See *Giletti*, cited above, at paragraph 7.

14 — Written observations, paragraph 4.6.

15 — See *Costa* v *Belgium*, cited above, at paragraph 10.

16 — Written observations, paragraph 4.6.

17 — See *Callemeyn* v *Belgium*, cited above, at paragraph 11; and *Giletti*, cited above, at paragraph 11.

18 — See *Costa* v *Belgium*, cited above, at paragraph 11.

19. Should the mobility allowance be held to be an invalidity benefit within the meaning of Article 4(1) of Regulation No 1408/71, the Social Security Commissioner asks the Court, in her second question, whether Article 10 of Regulation No 1408/71 permits a recipient to receive the mobility allowance even though he is resident in another Member State.

20. Article 10(1) of Regulation No 1408/71 provides: 'save as otherwise provided in this regulation, invalidity ... cash benefits ... 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'.

21. The aim of that provision, as the Court has confirmed on several occasions, is to 'promote freedom of movement for workers and members of their families by protecting them against any adverse consequences which might arise as a result of the transfer of their residence from one Member State to another'. [19]

22. The argument turns above all on the scope of that provision. The appellant in the main proceedings considers that Article 10(1) of the regulation should allow him to continue to receive the mobility allowance even though he resides in another Member State, since the words of that provision appear to him to be 'clear'. [20] The United Kingdom points out that the conditions as to residence and presence laid down in Article 37A of the Social Security Act are not intended merely as a restriction on the enjoyment of the benefit but are 'positive criteria for the acquisition of, and continuing entitlement to, the benefit'. Article 10(1), it says, is not concerned with the criteria for the award of benefit. [21]

23. Such a distinction does not appear to me to be well founded. First of all, it would enable the prohibition laid down in Article 10 of the regulation to be circumvented very easily, and thus diminish its usefulness considerably. The legislature would merely have to include the residence condition amongst the conditions for entitlement in order to allow it to evade that prohibition. Furthermore, the objections raised by the United Kingdom run counter to the Court's case-law, according to which Article 10(1) of the regulation implies that 'the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated'. [22]

24. In the Giletti judgment [23] the Court held that Article 10(1) imposed a prohibition 'in general terms' and that the only exceptions which it allowed had to be 'expressly

19 — See the *Piscitello* judgment, cited above, at paragraph 15; see also the judgment of 7 November 1973 in Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, at paragraph 20; and the *Giletti* judgment, cited above, at paragraph 14.

20 — Written observations, paragraph 10.

21 — Written observations, paragraphs 5.5 and 5.6.

22 — See the *Giletti* judgment, cited above, at paragraph 15; see also the judgment of 10 June 1982 in Case 92/81 *Camera* v *INAMI* [1982] ECR 2213, at paragraph 14; judgment of 23 October 1986 in Case 300/84 *Van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1986] ECR 3097, at paragraph 39.

23 — Cited above, at paragraph 16.

provided for in Community legislation'. No exception to that rule is so provided for at present. The Commission has issued a proposal for the amendment of the regulation in such a way as to prevent certain benefits, including the mobility allowance, from being paid in a Member State other than the Member State of the institution responsible for payment,[24] but that provision has not been adopted. In an action against a Member State for failure to fulfil its obligations the Court recently remarked, *obiter*, with regard to that proposal that the fact that the matter was before the Council did not alter the obligations laid down by the Community provisions in force.[25] It follows, as the Commission[26] indeed acknowledges, that the regulation must be interpreted in its current form in the light of the case-law of the Court.

25. The representative of the United Kingdom further pointed out, at the hearing, that if the residence requirement were to be waived for such benefits surprising consequences would ensue, since Mr Newton, although resident in France, would be entitled to receive the mobility allowance under United Kingdom legislation and the handicapped person's allowance under French legislation. He added that Mr Newton would even be able to settle in a third Member State and receive three benefits cumulatively.

26. That argument, which reveals a legitimate preoccupation on the part of the Member States,[27] is not, however, sufficient to negate the significance of Article 10, which must apply unless there is any exception provided for in Community legislation.[28] However, if the Member States wish to prevent or reduce cases of overlapping, it is open to them, in appropriate cases, to apply their legislation to that effect, in accordance with the provisions of Article 12(2) of the regulation.

27. Finally, at the hearing the Commission submitted a closing argument to which the representative of the United Kingdom subscribed only in the alternative. According to the Commission, the mobility allowance, a non-contributory benefit, can be exported from the Member State in which the institution responsible for payment is situated only if the person concerned has worked in that Member State. That additional condition seems to be inspired by the concern that a Community national might apply for benefits from Member States in which he has never worked, or even lived, in order for them to be paid to him in another Member State in which he resides.

28. It is true that the Court's case-law,[29] according to which the person concerned

'may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated',

if taken literally, could suggest that no link is required between the person concerned and the Member State applied to. Such an interpretation would be excessive and would

24 — OJ 1985 C 240, p. 6.

25 — Judgment of 12 July 1990 in Case 236/88 *Commission* v *France* [1990] ECR 3163, at paragraph 19.

26 — Written observations, paragraph 18.

27 — See also the Belgian Government's position, in its written observations at paragraph 2.3.

28 — See the *Giletti* judgment, cited above, at paragraph 16.

29 — Cited in footnote 22.

go beyond the purpose attributed by the Court to Article 10 of the regulation, which is to 'promote *freedom of movement for workers and members of their families* by protecting them against any adverse consequences which might arise as a result of the *transfer of their residence* from one Member State to another'.[30] That provision is thus quite specific in its context, and cannot be applied in the improper situations described by the Commission.

29. It should also be recalled that Article 10 speaks of benefits 'acquired under the legislation of one or more Member States', not benefits acquired as an employed person under the legislation of one or more Member States. Indeed, the Court held in its *Piscitello* judgment of 5 May 1983[31] that a Community national was entitled to export a benefit acquired in Italy although she had never worked in that Member State. The key factor was that her status as a Community worker or member of the family of a Community worker was not disputed.[32]

30. Nobody appears to be disputing the fact that Mr Newton is a Community worker who did carry on activities in France.[33] Consequently, he is one of the persons covered by Article 2(1) of Regulation No 1408/71 to whom that Regulation applies. Moreover, the obstacle he has encountered seems clearly to be the result of a change of residence from one Member State to another. Those are the only two matters which the Social Security Commission must check.

31. It must therefore be acknowledged that the mobility allowance is covered by the elimination of residence requirements provided for in Article 10(1) of the regulation when the recipient *no longer* resides in the Member State where the institution responsible for payment is situated.

32. Consequently, I propose that the Court should rule that:

'(1) Article 4(1)(b) of Council Regulation No 1408/71/EEC of 14 June 1971 must be interpreted as applying to a mobility allowance, that is to say a benefit for handicapped persons paid under the legislation of a Member State to which an employed or self-employed national of a Member State has been subject, provided that such benefit confers on its recipient a legally protected position which is not dependent upon any individual and discretionary assessment of the needs or situation of the person concerned, the latter being a characteristic feature of the social assistance referred to in Article 4(4) of Regulation No 1408/71;

30 — See the *Piscitello* judgment, cited above, at paragraph 15, emphasis added.

31 — Cited above.

32 — See the Opinion of Mr Advocate General Mancini, at paragraph 7.

33 — Paragraph 7 of the reference for a preliminary ruling.

(2) Article 10 of Regulation No 1408/71/EEC must be interpreted as meaning that the payment of such a benefit may not be withdrawn from a Community worker on the sole ground that he no longer resides within the territory of the Member State in which the institution responsible for payment is situated.'