application of Regulation No 3, and this is so even if such supplementary allowance is by national legislation limited to persons residing within the national territory.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 9 October 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 17 SEPTEMBER 1974 [1]

Mr President,
Members of the Court,

The 'Fonds National de Solidarité' was established in France by Law of 30 June 1956. It has the purpose of granting persons in need, i.e. persons whose income does not exceed certain limits, supplementary benefits for the purpose of supplementing various benefits paid in respect of old-age that are sufficient. Such supplements are paid to French citizens having their residence in France, if they are legally entitled to an old-age pension and are at least sixty-five years of age, or sixty in the case of incapacity to work. Pursuant to a Law of 2 August 1957 the supplement is also granted to those entitled to an invalidity pension for life, if their inability to work or earn is reduced by two-thirds or more and they have not yet attained the age of sixty. However, it is expressly laid down in Article L 699 of the Code de la Sécurité sociale that the supplement is withdrawn if a beneficiary transfers his residence outside the territory of the French Republic.

After the Law of 2 August 1957 had been passed, a supplementary agreement to the Franco-Italian Protocol on Social Security of 11 January 1957, was concluded on 6 February 1960. Under its provisions Italian nationals also are entitled to claim payment of the supplement where in case of invalidity they draw benefits pursuant to a French system of social security. Here too however, it is expressly laid down that only persons having their residence in metropolitan France are entitled to claim and that payment will cease upon the person entitled transferring his residence

1 — Translated from the German.

outside the territory of metropolitan France.

This provision is of importance for Miss Giuseppina Biason, the defendant in the national proceedings that have led to the reference before the Court today. Miss Biason, an Italian national was for a time in paid employment in France, where she also had her residence. Since 15 June 1971 she has been in receipt of the French invalidity pension. As from that date and having regard to the small amount of the invalidity pension as well as her financial need, she has also received a supplement from the Fonds National de Solidarité Français. However, with effect from 1 April 1972, after Miss Biason had transferred her residence to Italy and had informed the French social security insurance of this fact, the supplement was stopped.

This cessation resulted in proceedings, instituted by Miss Biason before the Commission de Première Instance du Contentieux de la Sécurité Sociale, of Paris. On 21 March 1973 that court made an order staying the proceedings and referring to the Court of Justice of the European Communities for a preliminary ruling the question whether payment of the said supplementary allowance ought to be continued, notwithstanding the change of residence, especially having regard to the provisions of the Franco-Italian Convention on Social security of 31 March 1948 and the Convention of 19 January 1951 between France, Belgium and Italy.

It did not however get as far as proceedings for a preliminary ruling, since the Caisse Régionale d'Assurance Maladie de Paris, the defendant in proceedings at first instance, appealed to the Cour d'Appel of Paris against the said decision.

The Cour d'Appel considered that in judging the case a distinction could be drawn between the time before 1 October 1972, when Regulation No 3 on social security for migrant workers was still in force, and the period after 1 October 1972, as from which date Regulation No 1408/71 of the Council had replaced Regulation No 3. As regards the last-mentioned period it arrived at the view that the provisions of Regulation No 1408/71 are quite clear and not in need of interpretation. Since under Article 4 (1) (b) thereof, the Regulation applies to 'invalidity benefits', and since Article 1 (t) states that benefits and pensions within the meaning of the Regulation mean all benefits and pensions including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, therefore the French supplementary allowance mentioned, which is linked with invalidity, falls within the area of application of the Regulation. From Article 6 of the Regulation one can further deduce that it has replaced certain social security conventions, i.e. also the Franco-Italian Convention on Social Security of 31 March 1948, the Convention between Belgium, France and Italy of 19 January 1951 and the supplementary agreement of 6 February 1960 to the Franco-Italian Protocol of 11 January 1957. Since Article 10 of the Regulations moreover lays down that 'save as otherwise provided in this Regulation invalidity 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', the Caisse Régionale must be considered bound to continue paying Miss Biason the supplementary allowance after 1 October 1972.

As for the period prior to 1 October 1972 on the other hand, the Cour d'Appel arrived at the view that the Franco-Italian Convention of 31 March 1948 and the supplementary agreement of 6 February 1960 to the Franco-Italian Protocol of 11 January 1957 do not apply, since the provisions thereof which are of interest in the present case are not

mentioned in Annex D to Regulation No 3. As for this period, the Cour d'Appel takes the view that a decision in the present case therefore depends on an interpretation of Article 2 (1) (b) of Regulation No 3, pursuant to which the Regulation shall apply to legislation governing invalidity benefits, including benefits granted for the purpose of maintaining or improving earning capacity. Accordingly, by a judgment of 2 March 1974 the Court, besides granting the application for the supplementary allowance for the period subsequent to 1 October 1972, stayed the proceedings and referred the following question for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

'Is an insured person who is in receipt of an invalidity pension acquired under a sickness insurance scheme by reason of her employment in a single Member State wherein she was resident, and who receives a supplementary allowance by virtue of that pension, entitled to rely, in Italy, on the provisions of Article 2 (1) (b) of Regulation No 3, at that time in force, for the period from 1. 4. 1972 to 1. 10. 1972, in the course of which she took up residence in Italy, and to continue to receive the allowance there in addition to her invalidity pension?'

On this question, in relation to which the Government of the French Republic, the Government of the Italian Republic and the Commission of the European Communities have expressed their views, I will state my position as follows:

1. From the pleading of the French Government it appears that an appeal in cassation was lodged against the judgment of the Cour d'Appel for a preliminary reference. This appeal in cassation may result in the judgment of the Cour d'Appel being quashed and the decision of the Court of Justice of the European Communities on the request for a preliminary ruling becoming pointless. Thus we have the questions whether the proceedings before this Court ought not to be allowed to remain in abeyance until after the appeal in cassation has been decided.

In the light of the most recent case law, this question can however without difficulty be answered in the negative.

For if in Case 31/68 *(S.A. Chanel v Cepeha Handelsmaatschappij NV,* Judgment of 16. 6. 1970, Rec. 1970, p. 404 the Court still tended in favour of adjourning the proceedings for a preliminary ruling having regard to the fact that the proceedings brought against the judgment for a reference, involved in that case, had an adjourning effect, it is now clear that as a matter of principle appeals against judgments for a preliminary reference as such, have no real effect upon proceedings before this Court. In this connection I would remind you of Case 127/73 *(Belgische Radio en Televisie and others v SV SABAM and NV Fonior,* Judgment of 30. 1. 1972, Rec. 1974, p. 51) in which it was laid down that proceedings for a preliminary ruling are to be continued for as long as the reference has not been withdrawn or quashed.

This therefore is also the way in which to proceed in this case, i.e. for as long as the order for a preliminary reference on the part of the Paris Cour d'Appel has not been withdrawn or quashed, there is no ground for interrupting the proceedings for a preliminary ruling.

2. As I have just explained, the Cour d'Appel wishes to know whether in respect of the period before the coming into force of Regulation No 1408/71, i.e. on the basis of the provisions of Regulation No 3 on social security for migrant workers, it must be assumed that an insured person who receives an invalidity pension in one Member State by reason of paid employment, and who in that Member State is also entitled to a supplementary allowance based on that pension, retains this entitlement even where he transfers his residence to another Member State.

(a) In this respect the Commission has rightly stated that this question requires

in the first place an examination of the nature of the supplementary allowance payable in France out of the solidarity fund, in addition to the invalidity pension. One will therefore have to find out — and I might add that will be of equal importance for Regulation No 3 and for Regulation No 1408/71 — whether the French supplement in question amounts to a social assistance benefit (this is the French view) which under their respective Articles 2 (3) and 4 (4) do not come at all under Regulation No 3 and Regulation No 1408/71, or whether the supplement — as is thought by the Italian Government and the Commission — can at least under certain circumstances be considered an invalidity benefit, which for that reason belongs to the field of social security and pursuant to Article 2 (1) (b) of Regulation No 3, or Article 4 (1) (b) of Regulation No 1408/71 comes within the area of application of these regulations.

As has rightly been emphasized by the Italian Government and by the Commission, the answer to this first question is clearly indicated in the Court's case law. Of particular importance is what the Court has in Case 1/72 *(Frilli v Belgian State,* Judgment of 22. 6. 1972, Rec. 1972, p. 457) said on the interpretation of Regulation No 3 in relation to a Belgian law that ensures a guaranteed minimum income to aged persons in need.

As we know, it was found in that case that certain legal provisions are equally close to both categories, assistance and social security. The Belgian Law in question comes close to assistance in that it makes benefits dependent upon need and does not require any periods of employment of affiliation or of contributions. The relevant legal provision is nevertheless close to social security in that it does not consider each case on its merits, and it gives the beneficiaries a legally defined position, giving them a right to a benefit similar to the old-age pensions mentioned in Article 2 of Regulation No 3. Since however — the judgment continues — Regulation No 3 applies to all old-age benefits and under Article 1 (s) of the same regulation the term benefit should be understood in its widest meaning as covering all benefits and pensions, including all fractions thereof chargeable to public funds, increments, revaluation allowances and supplementary allowances, it may be assumed that 'in relation to an employed person or a person treated as such, who has performed periods of work in a Member State, permanently resides there and is entitled to a pension, the legislative provision conferring on all elderly inhabitants a right to a legally protected minimum pension, falls, so far as these persons are concerned, within the field of social security, within the meaning of Article 51 of the Treaty and of the Regulations made for the purpose of carrying the same into effect'.

In fact, these findings can — as also can those in Case 187/73 *(Callemeyn v Belgian State,* Judgment of 28. 5. 1974) in relation to the grant of benefits for the handicapped to persons entitled to invalidity pensions — be applied, *mutatis mutandis,* to the case of the French supplementary allowance, which is granted to needy, elderly persons not having a sufficient old-age pension and to persons with an insufficient invalidity pension.

In this case one can on the one hand find an approximation to assistance, since need is a factor — the income must not exceed a certain level —, since the benefits are not dependent upon periods of employment, affiliation or contributions and since there is a right of recourse on the part of the paying institution — in the first instance against relatives under a duty to maintain, but as from 1 January 1974 only against the beneficiary's estate. An approximation to social security, on the other hand, can be found in the fact that it does not involve consideration of the circumstance in the individual case with an element of

discretion, but rather that one has a legal entitlement to benefits similar to old-age pensions and invalidity pensions within the meaning of Regulation No 3. Since moreover — limiting ourselves to the particular facts of the case involved in the national proceedings — Article 2 (b) of Regulation No 3, as indeed Article 4 (b) of Regulation No 1408/71, refers to 'invalidity benefits' and since pursuant to Article 1 (s) of Regulation No 3, just as in Article 1 (t) of Regulation No 1408/71, 'the terms "benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorization increases and supplementary allowances' one can classify the French provisions as to supplementary allowance payable from the national solidarity fund, — at any rate to the extent that they apply to workers who have for a time been employed in France and for that reason have a claim to an invalidity pension — under the heading of social security.

A further argument in favour of this view — though admittedly it is not decisive — is the fact that the relevant provisions were included in the Code de la Sécurité sociale. Equally interesting is the fact that the system in question evidently has to be included in the system of social security within the meaning of the European Interim Agreements on systems of social security and the European Convention on Social Security.

For the sake of completeness allow me to add that the definition of social security cited by the French Government and derived from French textbooks, and the arguments from the wording of French laws with relevant definitions and decisions on the organization of social security which it adduces, cannot on the other hand be of any significance, nor can the fact that the granting and financing of the supplementary allowance is different from those of basic benefits which it supplements, nor the fact that the supplementary allowance is not covered by bilateral agreements on social security. Such national peculiarities cannot be relevant for the purposes of the consideration by this Court. Rather is it the elements of definition that can be derived from the system of Community law, and which allow a similar delimitation of the area of application of the Regulations on social security for all Member States, which are decisive.

(b) If it proved comparatively easy to answer the first part of the question referred, this is only apparently so in the case of the second part, that is as regards the question whether benefits in the nature of the French supplementary allowance can be 'exported', i.e. whether a change of residence to beyond the borders of the Member State granting the benefit has any effect upon the grant of the supplementary allowance.

In this respect Article 10 of Regulation No 3 provides that pensions or death benefits payable under the legislation of one or more Member States shall not suffer reduction, modification, suspension, termination or confiscation by reason of the fact that the beneficiary is permanently resident in the territory of a Member State other than that in which the institution liable for payment is situated. This — Article 10 (2) goes on to say — shall not apply to the benefits set out in Annex E to the Regulations. Since the French supplement now in question is not mentioned in Annex E, the problem of its exportability thus seems to present no problem. Similar considerations apply to Article 10 of Regulation No 1408/71. This reads: '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 the Member State other than

that in which the institution responsible for payment is situated'. Since here too, nothing can be found that makes a different provision for the French supplementary allowance, therefore under Regulation No 1408/71 too, the situation seems to be clear.

However, as the Commission has demonstrated, the assessment of the matter does not in reality seem quite so easy.

One might ask oneself whether the basic requirement of Article 51 of the EEC Treaty, pursuant to which the Council shall make arrangements to secure payment of benefits to persons resident in the territories of Member States, was in fact comprehensively dealt with in Regulations No 3 and No 1408/71, i.e. whether it includes special systems such as the French supplementary allowances from the solidarity fund. In my opinion there is something to be said for the view that in introducing exportability in the said provisions of the Regulations, account was taken of the fact that the social security systems of most of the original Member States had the purpose of assuring certain incomes that are in proportion to a previous income from employment, which therefore as it were represent a continuation of that salary. It is clearly otherwise in states where social security is intended to guarantee old and incapacitated inhabitants a minimum income. Such systems show characteristics of assistance legislations and here accordingly what is important is the concept in assistance legislation of the solidarity of a community, of the belonging to a community. For those, therefore, i.e. for systems which are becoming increasingly important, residence — since nationality must under Community law no longer be a factor — can be a crucial factor, with the possible consequence that in the absence of this obligatory factor, payments will no longer be made by a given Member State and instead an obligation to pay on the part of another Member State, that of the new residence, will arise.

Also not to be overlooked is the fact that applying the principle of exportability to benefits of the kind just mentioned will bring considerable practical difficulties in its wake. These result from the fact that it will become necessary to assess incomes in another Member State, which clearly assumes a far-reaching collaboration between the authorities, from the fact that recourse may have to be had to persons liable to maintain or to an estate in another Member State as well as the fact that where benefits are paid by several Member States a division according to certain principles may have to be undertaken. No provision is made for this in the Community Regulations in their hitherto applicable versions.

From this one can probably deduce at the very least that there can be no question of a *general* application of the possibility of exportation provided in Articles 10 of Community Regulations No 3 and No 1408/71 to *all* cases of supplementary social security payments or guaranteed minimum incomes. The Commission has shown us very clearly to what shocking results this could lead. The principle of Article 10 therefore requires a limitation, that is a limitation in respect of benefits of the kind involved in the present case.

There is a link here with a reservation which has already been emphasized in the *Frilli* judgement, 1/72, to which I have referred. It can be found after the statement that it is the right and the duty of courts of law 'to ensure the protection of important workers in all cases where such protection is possible under the principles of Community social legislation' and it is expressed in the provision 'without thereby upsetting the national legal systems'.

In the light of this one might perhaps consider attaching some importance to the fact that pursuant to Annex E of Regulation No 3 the French supplementary allowance for *aged* workers is classified with the benefits that are not payable abroad, and that it might therefore seem absurd if different

provisions were to apply to a supplementary allowance payable out of the solidarity fund which is added to such old-age benefit and which is intended to supplement it. In the final resort, since it has no relevance for the national proceedings, this might perhaps be left open. For, paying due regard to the special features of the national proceedings — which are concerned with a supplement to an *invalidity* pension — it must be remembered that the duration of the insurance or the duration of residence in a particular country does not have the same effect upon an entitlement to *invalidity* benefit as it has in the case of *old-age* pensions. Even bearing in mind the reservation contained in the *Frilli* judgment, this fact may at least allow the application of Article 10 of the Community Regulations, with their possibilities of exportation, to a case in which one is dealing with the grant of supplementary allowances to a worker *who in a Member State receives an invalidity pension based upon ealier paid employment and who had his residence in that Member State at the date when the invalidity took effect*. This would be the easiest way of meeting the objections that arose in the course of the proceedings, i. e. of avoiding upsetting the French system within the meaning of the *Frilli* judgment and at the same time of enabling a wide interpretation to be given to Regulations No 3 and No 1408/71 in the interest of protecting the migrant worker. The second part of the question raised ought therefore to be answered on these lines.

3. In the light of what I have said, I suggest the following answer to the request for a preliminary ruling on the part of the Cour d'Appel of Paris:

A supplementary allowance granted under the law of a Member State which secures to incapacitated inhabitants a minimum invalidity pension must, as regards workers within the meaning of Regulations No 3 and 1408/71, who are in the Member State in question in receipt of an invalidity pension, be regarded as an invalidity benefit within the meaning of Article 2 (1) (b) of Regulation No 3 and Article 4 (1) (b) of Regulation No 1408/71. If at the time the invalidity supervened, the person entitled was resident in the Member State in which the institution responsible for payment of the supplementary allowance is situated, then pursuant to Article 10 of Regulations No 3 and No 1408/71, the supplementary allowance cannot be withdrawn if subsequently he transfers his residence to another Member State.