JUDGMENT OF THE COURT (Fifth Chamber)
25 February 1999 *

In Case C-90/97,

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

Robin Swaddling

and

Adjudication Officer,

on the interpretation of Article 48 of the EC Treaty,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann, L. Sevón and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

* Language of the case: English.

after considering the written observations submitted on behalf of:

— Mr Swaddling, by Richard Drabble QC, instructed by David Thomas, Solicitor,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, with Nicholas Paines QC,

— the Commission of the European Communities, by Claire Bury and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Swaddling, the United Kingdom Government and the Commission at the hearing on 24 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 29 September 1998,

gives the following

Judgment

1 By order of 25 February 1997, received at the Court on 3 March 1997, the Social Security Commissioner referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 48 of that Treaty.

2 That question was raised in proceedings between Mr Swaddling, a British national, and the Adjudication Officer concerning the grant of income support, as provided for by British legislation, in respect of the period from 5 January 1995 to 3 March 1995.

National legislation

3 Section 124(1) of the Social Security Contributions and Benefits Act 1992 (hereinafter 'the Act') provides:

'(1) A person in Great Britain is entitled to income support if —

(a) he is of or over the age of 18 or, in prescribed circumstances and for a prescribed period, of or over the age of 16 or he is a person to whom section 125(1) below applies;

(b) he has no income or his income does not exceed the applicable amount;

(c) he is not engaged in remunerative work and, if he is a member of a married or unmarried couple, the other member is not so engaged; and

(d) except in such circumstances as may be prescribed —

(i) he is available for, and actively seeking, employment;

(ii) he is not receiving relevant education.'

Under section 134(1) of the Act, a person is not entitled to income support if his capital exceeds a prescribed level.

5 The Income Support (General) Regulations 1987, in the version applicable in relation to the main proceedings (hereinafter 'the Income Support Regulations'), define *inter alia* income and capital, the method of calculating 'the applicable amount' and the circumstances in which persons are to be regarded as satisfying the conditions laid down in section 124(1) of the Act, which govern entitlement to the benefit in question.

6 As regards 'persons from abroad', regulation 21(1) of the Income Support Regulations prescribes an 'applicable amount' of nil. The term 'person from abroad' is defined in regulation 21(3). With effect from 1 August 1994, the following definition has been added:

'"person from abroad" also means a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man, but for this purpose no claimant shall be treated as not habitually resident in the United Kingdom who is —

(a) a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No 68/360/EEC or No 73/148/EEC; or

(b) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31 January 1967; or

(c) a person who has been granted exceptional leave to remain in the United Kingdom by the Secretary of State.'

Community legislation

7 Article 4(2a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1; hereinafter 'Regulation No 1408/71'), provides:

'This regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h), or

(b) solely as specific protection for the disabled.'

8 Under Article 10a(1) and (2) of Regulation No 1408/71:

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

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

9 Income support is mentioned in Annex IIa to Regulation No 1408/71.

10 Lastly, under Article 1(h) of Regulation No 1408/71, the term 'residence' means habitual residence.

The main proceedings

11 According to the order for reference, from 1980 to 1988 Mr Swaddling worked for the tourist industry in France, but continued to pay United Kingdom National Insurance contributions. His work entailed frequent visits to France and latterly he returned to the United Kingdom only occasionally.

12 On being made redundant in 1988, Mr Swaddling worked for six months in the United Kingdom, then returned to France where he held various media-related jobs on a fixed-term basis, the majority of which had been advertised in the British press, and one of which entailed a period of training in the United Kingdom.

13 Mr Swaddling was made redundant in late 1994 following the collapse of his employer's business as a result of the latter's failure to pay National Insurance contributions for his employees.

14 In January 1995, after an unsuccessful attempt to find work in France, Mr Swaddling returned to the United Kingdom, where he lives with his brother. He has declared that he no longer wishes to take a job which entails spending long periods of time abroad and, on 9 January 1995, he applied to the Adjudication Officer for income support.

15 The Adjudication Officer accepted that, as of 9 January 1995, Mr Swaddling satisfied the conditions of entitlement to income support, laid down in section 124(1) of the Act. However, in so far as Mr Swaddling did not meet the habitual residence requirement prescribed by the national legislation, he was to be classed as a 'person from abroad', as defined in regulation 21(3) of the Income Support Regulations, and accordingly was not entitled to any income support. Mr Swaddling thereupon appealed to the Cwmbran Social Security Appeal Tribunal.

16 The Appeal Tribunal allowed Mr Swaddling's appeal on the ground that he had shown the necessary intention to establish habitual residence in the United Kingdom as of 9 January 1995, the date on which he had applied for income support. However, the Chairman of the Appeal Tribunal granted the Adjudication Officer leave to appeal against that decision to the Social Security Commissioner.

17 According to the Social Security Commissioner, the Appeal Tribunal should have considered not only the question whether Mr Swaddling had the settled intention of residing in the United Kingdom but also whether he had completed an appreciable period of residence there. He emphasised that, for the purposes of the national legislation, 'habitual residence' presupposed an appreciable period of residence in the United Kingdom in addition to the settled intention of residing there. He reached the conclusion that Mr Swaddling had become habitually resident in the United Kingdom eight weeks after his return there, that is to say, with effect from 4 March 1995, hence excluding the period from 9 January 1995 to 3 March 1995.

18 With respect to the period from 9 January 1995 to 3 March 1995, it follows from the terms of the Income Support Regulations that Mr Swaddling is not entitled to income support. In the view of the Social Security Commissioner, however, it is none the less necessary to determine whether the arguments based on Community law lead to a different conclusion.

19 On that point, the Social Security Commissioner points out that income support does not fall within the scope of Article 4(1) of Regulation No 1408/71, since it is not sufficiently linked to any of the risks listed therein. A provision such as that at issue in the main proceedings — which denies a migrant worker advantages which are accorded to non-migrant workers — might, however, be contrary to Article 48 of the Treaty.

20 The Social Security Commissioner therefore decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In circumstances where a person has worked and been habitually resident in one Member State, has then exercised the right to freedom of movement for workers to move to another Member State, where the person has worked and become habitually resident, and finally returns to the first Member State in order to seek work, is it compatible with the requirements of Article 48 of the Treaty of Rome for the first Member State to impose a condition of habitual residence in that State (involv-

ing the existence of an appreciable period of residence in that State) on entitlement to a general non-contributory means-tested State benefit with the characteristics of British income support?'

21 While that question concerns the interpretation of Article 48 of the Treaty, it must first be determined — as the Commission, too, has pointed out — whether the provisions of Regulation No 1408/71 are sufficient to provide the national court with the guidance it needs in order to adjudicate in the case pending before it.

22 It should be noted that Mr Swaddling is a person covered by Regulation No 1408/71 since it is common ground that, as an employed person, he has been subject to both the British and the French social security schemes.

23 Pursuant to Article 10a of Regulation No 1408/71, persons to whom that regulation applies are granted the special non-contributory cash benefits referred to in Article 4(2a), in accordance with the coordination rules set out therein, provided that such benefits are listed in Annex IIa.

24 A benefit such as income support is, by reason of the fact that it is listed in Annex IIa, governed by the coordination rules of Article 10a and, consequently, constitutes a special non-contributory benefit within the meaning of Article 4(2a) (see, to that effect, Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 32, and Case C-297/96 *Partridge* [1998] ECR I-3467, paragraph 33).

25 Under Article 10a of Regulation No 1408/71, payment of a benefit such as income support is conditional upon the claimant residing in the territory of the Member State under whose legislation he is entitled to that benefit.

26 On that point, it should be noted that, according to the Income Support Regulations as interpreted in the national case-law, the habitual residence test is satisfied where the claimant has the settled intention of residing in the United Kingdom and where, moreover, he has resided there for an appreciable period, the duration of which varies according to the circumstances of each individual case.

27 It is common ground that it was Mr Swaddling's intention, when he applied for income support, to reside in the United Kingdom. The parties disagree, however, as regards the additional requirement of an appreciable period of residence which, in Mr Swaddling's case, was assessed as being of eight weeks' duration and in respect of which, therefore, he was unable to obtain income support on the basis of the British legislation alone.

28 Pursuant to Article 1(h) of Regulation No 1408/71, the term 'residence' for the purposes of that regulation 'means habitual residence' and therefore has a Community-wide meaning.

29 The phrase 'the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances (see, *mutatis mutandis*, concerning Article

71(1)(b)(ii) of Regulation No 1408/71, Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23).

30 For the purposes of that assessment, however, the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation No 1408/71. In particular, when, as in the present case, an employed person, on returning to his State of origin after exercising his right to freedom of movement, has made it clear at the time of applying for income support that he intends to remain in his State of origin, where his close relatives live — whilst expressing his readiness, should the need arise in the context of some future employment, to travel from time to time to other Member States — he cannot be deemed not to satisfy the condition concerning residence within the meaning of Article 10a merely because the period of residence completed in his State of origin is too short.

31 The United Kingdom Government, however, maintains that Mr Swaddling should have been able, pursuant to Article 69 of Regulation No 1408/71 and under the conditions listed therein, to obtain unemployment benefit under French legislation for a maximum period of three months as from the date of his departure from France, with the result that he could have received those benefits throughout the period considered necessary to establish habitual residence for the purposes of British legislation. The fact that his employer did not pay contributions to the competent institution should not have affected his rights in so far as Article 7 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 282, p. 23) requires Member States to take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect

employees' benefit entitlement in respect of those insurance institutions in so far as employees' contributions are deducted at source from the remuneration paid.

32 Suffice it to note in that respect that those provisions can have no bearing whatever on the interpretation of the concept of residence for the purposes of the coordination rules introduced by Article 10a of Regulation No 1408/71.

33 Consequently, without there being any need to consider the implications of Article 48 of the Treaty for the outcome of the case before the national court, the answer to the question referred must be that Article 10a of Regulation No 1408/71, read together with Article 1(h) thereof, precludes the Member State of origin — in the case of a person who has exercised his right to freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work — from making entitlement to one of the benefits referred to in Article 10a of Regulation No 1408/71 conditional upon habitual residence in that State, which presupposes not only an intention to reside there, but also completion of an appreciable period of residence there.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Social Security Commissioner by order of 25 February 1997, hereby rules:

Article 10a of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1247/92 of 30 April 1992, read together with Article 1(h) thereof, precludes the Member State of origin — in the case of a person who has exercised his right to freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work — from making entitlement to one of the benefits referred to in Article 10a of Regulation No 1408/71 conditional upon habitual residence in that State, which presupposes not only an intention to reside there, but also completion of an appreciable period of residence there.

Jann Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber