1. The distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.

A benefit intended to meet family expenses which is granted or refused on the basis of objective, legally-defined criteria, namely the claimant's assets, income, and the number and age of his dependent children, without any individual and discretionary assessment of personal needs, must be considered a family benefit for the purposes of Article 4(1)(h) of Regulation No 1408/71.

The fact that the grant of the benefit is not subject to any contribution requirement is immaterial, since classification of a benefit as a social security benefit covered by Regulation No 1408/71 does not depend on the method by which it is financed.

2. Where an employed person is subject to the legislation of a Member State and lives with his family in another Member State, his spouse who has never been resident or employed in the State in which the worker is employed may rely on Article 73 of Regulation No 1408/71 in order to claim a derived right to receive family benefits for the members of the worker's family from the competent institution of that State, provided that the worker fulfils the conditions laid down in Article 73 and provided also that under national legislation the family benefits concerned are provided for family members.

REPORT FOR THE HEARING
in Case C-78/91 *

I — Facts and procedure

1. Mrs Rose Hughes, the appellant in the main proceedings ('the appellant'), is a married woman living with her husband and three children in Ireland. She is not an employed or self-employed person. Her husband, a United Kingdom citizen, works in Northern Ireland at the Ministry of Agriculture and has never worked outside Northern Ireland.

2. On 30 March 1988, Mrs Hughes applied in Northern Ireland for Family Credit.

* Language of the case: English.

3. Family Credit is a weekly non-contributory cash benefit provided for by the Social Security (Northern Ireland) Order 1986 and the Family Credit (General) Regulations (Northern Ireland) 1987.

Article 21(5) of the Social Security (Northern Ireland) Order 1986 provides:

'Subject to regulations under Article 52(1)(a), a person in Northern Ireland is entitled to Family Credit if, when the claim for it is made or is treated as made —

(a) his income

(i) does not exceed the applicable amount; or

(ii) exceeds it, but only by such an amount that there is an amount remaining if the deduction for which Article 22(3) provides is made;

(b) he, or if he is a member of a married or unmarried couple, he or the other member of the couple, is engaged and normally engaged in remunerative work; and

(c) he, or if he is a member of a married or unmarried couple, he or the other member, is responsible for a member of the same household who is a child or a person of a prescribed description'.

Regulation 3(1) of the Family Credit (General) Regulations (Northern Ireland) 1987 lays down the following conditions concerning residence and presence in Northern Ireland:

'A person shall be treated as being in Northern Ireland if, on the date of claim -

(a) he is present and ordinarily resident in Northern Ireland;

(b) his partner, if any, is ordinarily resident in the United Kingdom;

(c) his earnings or the earnings of his partner, if any, derive at least in part from remunerative work in the United Kingdom or the Republic of Ireland; and

(d) his earnings do not wholly derive from remunerative work outside the United Kingdom or the Republic of Ireland nor do the earnings of his partner, if any'.

4. Mrs Hughes's application was refused, first by the Adjudication Officer and then, on appeal, by the Enniskillen Social Security Appeal Tribunal by judgment of 8 June 1988 because she failed to satisfy the residence requirement in Article 21(5) of the

Social Security (Northern Ireland) Order 1986 and Regulation 3(1) of the Family Credit (General) Regulations (Northern Ireland) 1987.

5. In the proceedings before the national court, Mrs Hughes sought to rely on Article 73 of Regulation No 1408/71, which provides that 'an employed person subject to the legislation of a Member State ... shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State'. She maintains that Family Credit is a social security benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 and that that regulation applies to her as a member of a worker's family. In the alternative, Mrs Hughes claims that Family Credit is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and that a residence requirement constitutes indirect discrimination prohibited by Article 7(2) of that regulation.

6. The Adjudication Officer contends that Family Credit is not a social security benefit within the meaning of Article 4(1) of Regulation No 1408/71 and therefore falls outside the scope of Regulation No 1408/71. It is, in his view, a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, but it can be claimed only by a national of a Member State other than that in which the person concerned is employed.

7. The matter was brought by way of appeal before the Social Security Commissioner who, by decision of 14 January 1991, which was received at the Court Registry on 26 February 1991, stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Is Family Credit a social security benefit within the meaning of Article 4(1) of Regulation No 1408/71?

(2) If so, where an employed person is subject to the legislation of one Member State (Member State A), is such person's spouse entitled under Article 73 of Regulation (EEC) No 1408/71 to receive in respect of members of that employed person's family residing in another Member State (Member State B) family benefits provided by the legislation of Member State A where such a spouse is and has been neither resident nor employed in Member State A?

(3) If Family Credit is not a social security benefit, is it a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?

(4) If so, can that regulation apply where the worker is a national of the Member State in which he is and always has been employed?

(5) If so, does that regulation confer rights upon the spouse of such a worker in her

own right when such spouse does not reside in the Member State in which the worker is employed?'

8. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted:

— on 13 June 1991 for Mrs Rose Hughes, by John O'Neill, Solicitor at the Belfast Law Centre;

— on 1 June 1991 for the United Kingdom, by Rosemary Caudwell, Treasury Solicitor's Department, acting as Agent, assisted by Brian Ken QC and David Pannick, Barrister;

— on 10 June 1991, for the German Government, by Ernst Röder and Joachim Karl, acting as Agents;

— on 4 June 1991, for the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent.

9. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case to the Fifth Chamber, pursuant to Article 95(1) of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. *The first question*

10. *Mrs Hughes* and the *Commission* consider that it follows from, in particular, the judgments of the Court in Case 1/72 *Frilli* [1972] ECR 457, Case 187/73 *Callemeyn* [1974] ECR 553, Case 24/74 *Biason* [1974] ECR 999, Case 63/76 *Inzirillo* [1976] ECR 2057, Case 139/82 *Piscitello* [1983] ECR 1427, Case 249/83 *Hoeckx* [1985] ECR 973, Case 122/84 *Scrivner* [1985] ECR 1027 and Joined Cases 379/85 to 381/85 *Giletti and Others* [1987] ECR 955, that a benefit falls within social security within the meaning of Article 4(1) of Regulation No 1408/71 and is not excluded from that regulation by Article 4(4) thereof when the two following conditions are satisfied: on the one hand, the allowance in question must be payable to the beneficiaries by reason of a legally defined position, without any individual and discretionary assessment of their personal needs, and, on the other, it must fall within the scope of one of the branches of social security enumerated in Article 4(1) of the regulation.

11. According to Mrs Hughes and the Commission, Family Credit fulfils those conditions and does therefore possess the character of a social security benefit covered by Regulation No 1408/71.

12. As far as the first condition is concerned, namely the existence of a legally defined right to the benefit, they observe that, in all circumstances in which it might be claimed,

Family Credit is granted as of right to those who satisfy certain objective criteria as to their income and responsibility for a child, and the competent authorities may not undertake a discretionary individual assessment of personal circumstances or lack of means.

13. As regards the second condition, namely inclusion within a branch of social security, Mrs Hughes and the Commission consider that Family Credit is a benefit intended to meet family expenses, which is thus covered by Article 4(1)(h) of Regulation No 1408/71 as constituting a family benefit, as defined in Article 1(u)(i) of that regulation. The Commission emphasises in that regard that Family Credit is paid only where a family unit includes one or more children and that it is paid in addition to child benefit. Family Credit in principle fulfils the same functions as child benefit since its amount varies according to the age of the children.

14. The Commission adds that the fact that Family Credit is not dependent on the payment of contributions does not change the fact that it is a social security benefit since the right to Family Credit can be claimed under Article 73 of Regulation No 1408/71 only for the members of the family of a person who is compulsorily insured under the social legislation of the State from which the benefit is claimed.

15. The Commission therefore proposes that the Court give the following answer to the first question:

'A benefit paid on the basis of objective criteria relating *inter alia* to the size of the family unit and its income and capital resources and which is available as of right to families meeting those criteria is a social security benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71.'

16. On the other hand, the *United Kingdom* and the *German Government* contend that Family Credit, being a social assistance benefit within the meaning of Article 4(4) of Regulation No 1408/71, falls outside the scope of that regulation.

17. They maintain that Family Credit, although conferring on recipients a legally defined position carrying entitlement to a benefit, retains the needs and individual situation of the persons concerned as the essential criterion for its availability, as is apparent in particular from the fact that the applicant's income is a decisive factor in the calculation of the benefit and that entitlement to benefit does not depend upon fulfilling requirements as to contribution periods. The German Government also indicates that the applicant's capital must not exceed £6 000.

18. The United Kingdom also states that Family Credit is not supplementary to any other social security benefit and has no such link with the social security system. The distinction between Family Credit and

social security benefits is emphasised by the fact that Article 21(5)(b) of the Social Security (Northern Ireland) Order 1986 requires the applicant to show that he (or his partner in a married or unmarried couple) is engaged and normally engaged in remunerative work.

2. *The second question*

19. (a) *Mrs Hughes* and the *Commission* maintain that, in view of the terms of Article 2(1) of Regulation No 1408/71, a person may base a claim on Article 73 of that regulation even if it is his spouse and not he who fulfils the conditions laid down by Article 73 where that person can claim entitlement to the benefits as a derived right acquired as a result of being a member of the family.

20. Under the rules concerning the grant of Family Credit, Mrs Hughes is entitled to that benefit as the holder of a derived right, that is to say as a member of the family of a worker insured under the law of the United Kingdom. Those rules operate by reference to the family as a single entity, since Family Credit is available if a member of the family is responsible for a child, if a member of the family is engaged in remunerative work and if the income of the family is below the applicable amount. The fact that Family Credit is normally paid to the female member of the family also shows that it is intended that a woman may derive a right to claim the benefit through qualifying conditions met by her husband.

21. The Commission therefore suggests the following answer to the second question:

'Where an employed person is subject to the legislation of one Member State (Member State A) and lives with his family in another Member State (Member State B), his spouse is entitled under Article 73 of Regulation (EEC) No 1408/71 to receive family benefits in respect of members of that employed persons's family from the competent institution of Member State A where such a spouse is and has been neither resident nor employed in Member State A.'

22. (b) The *German Government* submits that, pursuant to Article 73 of Regulation No 1408/71, only an employee (or self-employed person) is entitled to receive the benefits in question since the spouse of the employed (or self-employed) person is not mentioned in the provision in question. It therefore proposes that the second question be answered in the negative.

23. (c) The *United Kingdom* does not comment on the application of Article 73 of Regulation No 1408/71.

3. *The third question*

24. (a) *Mrs Hughes* and the *Commission*, referring in particular to the judgments of the Court in Case 207/78 *Even* [1979] ECR 2019 and Case 261/83 *Castelli* [1984] ECR 3199, consider, in the alternative, that Family Credit is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

It is a benefit paid to workers by reason of their objective status as workers. The Commission, again referring to the cases cited above, adds that the fact that a benefit is reserved to people with low income does not prevent it from being a social advantage.

25. (b) The *United Kingdom* submits no observations on this question but is prepared to consider that Family Credit is a social advantage.

26. (c) The *German Government* considers that this question does not call for an answer since, in its view, Regulation No 1612/68 is not applicable to the present case (see the answer suggested for the fourth question).

4. *The fourth question*

27. (a) *Mrs Hughes* considers that it would not be consonant with the spirit of Community law on freedom of movement for workers to limit the concept of 'worker' to workers required to move for the purposes of their employment. Community law requires workers and their families not to be placed at a disadvantage as a result of moving within the Community. That would be the result arrived at by applying the residence requirement for the grant of Family Credit.

28. In the first place, the claimant's husband, by choosing to work in his own country and to reside with his family in a neighbouring Member State, exercised his right as an employed person to move within the Community. He is then placed at a disadvantage by application of the residence requirement, which constitutes discrimination against certain workers and an obstacle to the freedom of movement for workers and their families. The residence requirement is discriminatory in so far as the nationals of other Member States (of Ireland in particular) and nationals of the United Kingdom who work in the United Kingdom (in Northern Ireland in particular) and who reside near the frontier in Ireland are refused Family Credit unless they transfer their residence to the United Kingdom. Finally, the residence clause is unreasonable, unjustified and unduly onerous. The worker contributes, as in the present case, to the economy of Northern Ireland by his labour. He receives a low wage which requires benefit and it is just and equitable that while he works in Northern Ireland that benefit should be paid to him.

29. (b) The *United Kingdom* contends in the first place that the relevant worker for the purposes of Regulation No 1612/68 is not Mrs Hughes herself, but her husband; and that a person may not challenge, under Article 7 of that Regulation, the treatment accorded to him by the Member State of which he is a national unless he has worked outside that State.

30. It then maintains that, in any event, the residence requirement of which the appellant complains does not amount to discrimination contrary to Article 7(2) of Regulation No 1612/68. As regards the allegation by the

appellant that the residence requirement constitutes indirect discrimination against workers whose nationality is other than British, the United Kingdom points out that the appellant's husband, as a United Kingdom national, is not a victim of any such discrimination. Moreover, the United Kingdom disputes that the residence requirement has a disparate impact on foreign nationals. Those working in Northern Ireland, whatever their nationality, are likely to be present and ordinarily resident in Northern Ireland.

31. Finally, it considers that the residence requirement is justifiable in so far as it is necessary for checking whether applicants for Family Credit meet the other criteria for receipt of the benefit and for preventing abuse of Family Credit. It would be very difficult to obtain and check information concerning a spouse and children, in particular information concerning their resources, if they were not present and ordinarily resident in Northern Ireland. Furthermore, the level of Family Credit is set according to social conditions in the United Kingdom and it would therefore be inappropriate to provide that benefit for families living elsewhere, especially when those other Member States do not themselves provide any benefit comparable to Family Credit.

32. The *German Government* states that Regulation No 1612/68 is intended — as is immediately apparent from its title — merely to guarantee 'freedom of movement for workers within the Community'. Consequently, that regulation does not apply to people who do not exercise their right of free movement. The German Government therefore suggests that the question should be answered in the negative.

33. (d) Since the decisive factors in this case concern two Member States, in so far as the Hughes family resides in Ireland but Mr Hughes works in the United Kingdom, the *Commission* considers that the present case is not a purely internal situation where Community law is inapplicable.

34. The Commission maintains, however, that the present situation is not within the scope of Regulation No 1612/68. For that regulation to be applicable, the Court would have to accept that the residence requirement for eligibility for Family Credit constituted indirect discrimination on grounds of nationality and that Mr Hughes's situation was to be assimilated to that of a national of another Member State. That is not the case, in the Commission's view, since Mr Hughes has not exercised his Community law right of free movement as a worker but has only exercised rights available to him under Irish law to reside in Ireland for personal reasons.

35. The Commission therefore suggests the following answer to the third and fourth questions:

'Article 7(2) of Regulation No 1612/68 must be interpreted as including within its scope

as social advantages such payments to workers and their families as Family Credit. The right to receive such payments under Article 7(2) of that regulation is however limited to those workers who have exercised their right of free movement and are employed in a Member State other than that of their own nationality.'

5. *The fifth question*

36. (a) *Mrs Hughes* claims that the spouse of a worker entitled to remain in a host country by virtue of Community law is entitled to equal 'social advantages' under Article 7(2) of Regulation No 1612/68. In the present case there is no doubt that the appellant is entitled to enter and reside in the Member State in which her husband is employed.

37. (b) The *United Kingdom*, the *German Government* and the *Commission* consider that in view of the answers suggested by them for the fourth question, there is no need to answer this question.

38. The *United Kingdom* adds, however, that the appellant cannot claim in her own right any social advantages under Article 7(2) of Regulation No 1612/68 because she is not a worker. As a dependent member of the family of a worker, she cannot rely on Article 7(2) unless she resides with the worker in the relevant Member State.

M. Zuleeg
Judge-Rapporteur