OPINION OF ADVOCATE GENERAL TESAURO
delivered on 23 February 1995 *

1. The question referred for a preliminary ruling which forms the subject-matter of these proceedings concerns the interpretation of Article 39(1) of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Algiers on 26 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978 [1] (hereinafter 'the Agreement').

The Tribunal des Affaires de Sécurité Sociale (Social Security Court), Nanterre, asks more specifically whether the supplementary allowances paid by the Fonds National de Solidarité (National Solidarity Fund, hereinafter 'the FNS') fall within the material scope of Article 39(1) of the Agreement and whether, in accordance with that provision, the non-working spouse of a deceased Algerian worker may also claim them.

2. First of all, I shall outline the essential terms of the Agreement and the relevant Community legislation, in addition to the relevant provisions of national law.

The object of the Agreement is to promote overall cooperation between the contracting parties with a view to helping to strengthen relations between them and contributing to the economic and social development of Algeria (Article 1). That cooperation is to be instituted and regulated in the economic, technical and financial areas (Title I), in the field of trade (Title II) and in the field of labour (Title III).

As regards the present case, the important provisions are those in Title III, concerning the field of labour. In particular, Article 39(1), which the Court is asked to interpret, provides that subject to the provisions of the following paragraphs, workers of Algerian nationality and any members of their families living with them are to enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. The following paragraphs confer on Algerian workers the right to aggregation of periods of insurance, employment or residence completed in the various Member States, as far as certain benefits are concerned (Article 39(2)); the right to receipt of family allowances for members of the family resident in the Community (Article 39(3)) and the right to transfer to

* Original language: Italian.
1 — OJ 1978 L 263, p. 1.

Algeria pensions or annuities in respect of old age (Article 39(4)). The scheme under Article 39(1), (3) and (4) is subject to the condition of similar treatment for nationals of a Member State employed in Algeria (Article 39(5)). Article 40(1) entrusts to the Cooperation Council the task of adopting provisions to implement the principles set out in Article 39 before the end of the first year following the entry into force of the Agreement. Lastly, among the General and Final Provisions (Title IV), Articles 42 and 43 establish the Cooperation Council which is to be composed, on the one hand, of members of the Council and the Commission of the European Communities and, on the other hand, of members of the Government of Algeria and which is to have the power to take decisions binding on the Contracting Parties for the purposes of attaining the objectives set out in the Agreement.

3. Having dealt with the Agreement, I would point out that according to Article 2(1) 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: [2] 'This regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.' In defining the matters covered by that regulation, Article 4 first lists the branches of social security to which it is to apply, including for our purposes old-age benefits (at paragraph (1)(c)), and goes on to add in paragraph (2) that it is to 'apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer (...) in respect of the benefits referred to in paragraph 1'. In accordance with Article 4(4), the regulation does not apply *inter alia* to social and medical assistance.

As a result of the entry into force of Council Regulation (EEC) No 1247/92 of 30 April 1992 [3] amending Regulation No 1408/71, special non-contributory benefits are expressly provided for by that regulation and are therefore included in social security, provided that certain conditions are met. Regulation No 1247/92 adds paragraph 2a to Article 4(2) of Regulation No 1408/71, extending the regulation '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

2 — As consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

3 — OJ 1992 L 136, p. 1.

the risks covered by the branches of social security referred to in paragraphs 1(a) to (h), or (b) solely as specific protection for the disabled'.

Finally, Article 10a of Regulation No 1408/71, also inserted by Regulation No 1247/92, provides that such benefits may not be exported, in that the persons to whom the regulation applies 'shall be granted the special non-contributory cash benefits referred to in Article 4(2)(a) 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.' Annex IIa E (France) mentions *inter alia*: '(a) Supplementary allowance from the National Solidarity Fund (Law of 30 June 1956)'.

4. As regards the national provisions relevant to this case, it should first be noted that the FNS was set up in France under the Law of 30 June 1956 for the purpose of promoting as a general policy the welfare of old people. In particular, the FNS grants a supplementary allowance to the recipients of old-age or invalidity pensions where the persons concerned have insufficient means of their own. The allowance in question is provided for in Articles L.815-1 to L.815-11 of Title I, Section 5, concerning allowances for the elderly, of Book VIII of the new French Social Security Code; those provisions lay down *inter alia* the conditions for granting the allowance.

In particular, persons of French nationality resident in France may be entitled to the supplementary allowance (Article L.815-2 of the Social Security Code). The supplementary allowance is payable to foreigners as well, but only where an international convention based on reciprocity has been signed (Article L.815-5 of that code). [4]

5. I now turn to the facts of the case. Mrs Krid is an Algerian national who resides in France where she has never worked. As the widow of an Algerian national who spent all his working life in France, Mrs Krid has since 1 November 1992 been in receipt of a survivor's pension paid to her by the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (National Old-Age Insurance Fund for Employed Persons, hereinafter 'the CNAVTS'), the same body as had formerly paid Mr Krid an old-age pension until the date of his death.

4 — It should be pointed out that, as the national court stated in the order for reference, the provision in question was declared unconstitutional by the Constitutional Council because 'the exclusion from entitlement to the supplementary allowance of foreigners who are lawfully resident in France and who are unable to take advantage of international agreements or of any rules based thereon constitutes a failure to take account of the constitutional principle of equality' (*Revue de Droit Social*, 1990, p. 352).

When the CNAVTS refused to grant her the supplementary allowance from the FNS, as provided for in the abovementioned Law of 30 June 1956, on the ground that she was of Algerian nationality, Mrs Krid brought an action before the Tribunal des Affaires de Sécurité Sociale, Nanterre, claiming that by virtue of Article 39(1) of the Agreement she was entitled to the benefit claimed.

6. Since the national court took the view that the interpretation of Regulation No 1247/92 (which, as I have already said, expressly widened the definition of social security to encompass special non-contributory benefits, including precisely the one at issue here) was a matter of dispute, it made a reference to this Court. It asked: (a) whether it is only Community nationals who are entitled to the benefit in question, which is expressly mentioned in Regulation No 1247/92, or whether Algerian nationals are also entitled to it under Article 39(1) of the Agreement; (b) whether, by analogy, the allowance may also be granted to nationals of countries (Morocco, Tunisia and others) which have concluded with the EEC a cooperation agreement in relation to social security.

Leaving aside their somewhat heterodox wording, the questions referred seek essentially to ascertain whether the benefit at issue is a social security benefit and falls, consequently, within the scope of Article 39(1) of the Agreement with the result that it must also be payable to the widow of an Algerian worker still resident in the Member State in which her husband spent his working life.

7. Let me point out at the outset that in its judgments in *Kziber* [5] and *Yousfi*, [6] the Court has already ruled on the interpretation of Article 41(1) of the Cooperation Agreement with Morocco, [7] which is a provision couched in the same terms as Article 39(1) of the Agreement under discussion. In those judgments, after recalling the conditions to be satisfied if a provision in an agreement is to have direct effect, the Court very clearly stated that 'it followed from the terms of Article 41(1), as well as from the purpose and nature of the Agreement of which that article formed part, that that provision was capable of being applied directly'. [8]

In those same judgments, the Court stated in addition that 'the term "social security" used in Article 41(1) of the Cooperation Agreement must be deemed to be analogous with the identical term used in Regulation (EEC) No 1408/71'. [9]

5 — Case C-18/90 *Office National de l'Emploi* v *Kziber* [1991] ECR I-199.

6 — Case C-58/93 *Yousfi* v *Belgian State* [1994] ECR I-1353.

7 — Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1).

8 — Judgment in *Kziber*, cited above, paragraph 23; judgment in *Yousfi*, cited above, paragraph 17.

9 — *Kziber*, paragraph 25; *Yousfi*, paragraph 24.

8. Since, as I have already said, Article 41(1) of the Cooperation Agreement with Morocco and the provision at issue in this case are identical and are, furthermore, contained in parallel agreements, it is only too plain that the rulings of the Court quoted above apply to this case as well. The direct effect of Article 39(1) of the Agreement and the fact that the concept of social security which it contains should be interpreted with reference to the corresponding concept in Regulation No 1408/71 constitute, moreover, two factors which have never been called in question in these proceedings.

Nor is it disputed that Mrs Krid, as a member of the family of an Algerian worker, clearly falls within the personal scope of Article 39(1) of the Agreement, so that it remains only to ascertain whether the supplementary allowances paid by the FNS are covered by the definition of social security for the purposes of Regulation No 1408/71 and fall, consequently, within the material scope of Article 39(1) of the Agreement.

9. Although, as I have already pointed out, social assistance is expressly excluded from the scope of Regulation No 1408/71 by Article 4(4), the Court has consistently held that the payment of FNS benefits fulfils a dual function 'in so far as, in the first place, it guarantees a minimum means of subsistence to persons in need and, in the second place, it provides additional income for the recipients of social security benefits which are inadequate.' [10] According to the Court's earlier rulings on the subject of the FNS allowance, it follows that 'legislation such as that at issue, in so far as it confers a right to supplementary benefits designed to increase the amount of pensions paid by way of social security, without any assessment of individual needs or circumstances, which is a characteristic of assistance, comes within the social security scheme within the meaning of Regulation No 1408/71.' [11]

I would add here that, precisely in order to take account of the Court's case-law, Regulation No 1247/92 expressly extended the material scope of Regulation No 1408/71 to encompass 'special non-contributory benefits' where, as in this case, they are intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security expressly referred to in Article 4(1), which specifically include old-age benefits.

10. In the light of the foregoing, I am intrigued, to say the least, by the United Kingdom's argument to the effect that the amendments made by Regulation No

10 — Judgment in Joined Cases 379/85 to 381/85 and 93/86 *CRAM Rhône-Alpes* v *Giletti and Others* [1987] ECR 955, paragraph 10.

11 — *Giletti and Others*, cited above, paragraph 11; also the judgment in Case C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraph 10.

1247/92 make it even clearer that special non-contributory benefits fall outside the scope of social security, with the result, first, that they do not come within the scope of Article 39(1) of the Agreement and, secondly, that the Court should review its own case-law on the subject.

I shall therefore confine myself to pointing out that, as Regulation No 1247/92 itself explains, it was necessary to add Article 4(2)a in order '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'. [12]

11. In short, I do not think that it is possible to entertain any doubts with regard to the fact that a national benefit such as that at issue in the main proceedings, even if it may be categorized as assistance on account of some of its features (non-contributory nature), falls within the field of social security by virtue of Article 4(2)a(a) of Regulation No 1408/71, inasmuch as it is intended to supplement the old-age pension mentioned in Article 4(1)(c).

Since the concept of social security contained in Article 39(1) of the Agreement must be interpreted in the same way as that referred to in Regulation No 1408/71, it follows that the same holds true in principle for applicants of Algerian nationality who are workers or members of a worker's family within the meaning, and for the purposes, of the relevant provisions of the Agreement.

12. With regard to that last point, the argument put forward by the French Government during the proceedings calls for some comment. While the French Government does not dispute that the spouse of an Algerian worker falls within the personal scope of Article 39(1) of the Agreement and that the benefit in question falls within its material scope, it maintains that that benefit cannot be extended to the widow of an Algerian worker, on the ground that, far from constituting a derived right, acquired through status as a member of a worker's family, the allowance is a personal right to which every person satisfying the conditions laid down by the national legislation in question is entitled. It follows that Mrs Krid, being an Algerian national who has never worked in the Member State concerned and whose husband (who was a worker) is now deceased, is not

12 — Third recital of the preamble.

entitled to the supplementary allowance in question, taking account moreover of the fact that the 1980 convention between France and Algeria contains no clause providing for reciprocity in that field.

In support of its argument, the French Government relies on the distinction between personal rights and derived rights drawn by the Court in certain judgments in which it ruled on the class of persons covered by Regulation No 1408/71. [13] In those judgments the Court stated that, while persons belonging to the category of workers can lay claim to the benefits provided for by Regulation No 1408/71 *in their own right*, the members of a worker's family can claim *derived rights* only, that is to say rights acquired through their status as members of the family.

13. Those decisions are not material. In practice, Article 39(1) of the Agreement merely establishes the principle of non-discrimination between Algerian workers and members of their families on the one hand, and French citizens on the other. This means, quite simply, that the personal scope of Article 39 of the Agreement differs from that of Regulation No 1408/71, which is hardly surprising, considering the difference in scope and objectives of the Agreement in question.

Moreover, the Court has already said as much in its oft-quoted judgment in *Kziber*, where, in ruling on the scope of the rights of a member of the family of a Moroccan worker with regard to an unemployment allowance for young persons, it stated that 'the principle of freedom from all discrimination based on nationality in the field of social security, which is laid down in Article 41(1), means that such a person, who satisfies all the conditions laid down by national legislation for the purposes of entitlement to the unemployment allowances provided for the benefit of young persons in search of employment, may not be refused those benefits on the ground of his nationality.' [14]

14. Clearly, the same considerations apply, by virtue of Article 39(1) of the Agreement, to members of the family of an Algerian worker. It follows that, since it is undisputed that the French spouse of a French worker, in receipt of a survivor's pension, would, if she satisfied the other conditions laid down, be entitled to the supplementary allowance from the FNS, the widow of an Algerian worker must be accorded the same treatment.

13 — See the judgment in Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669, paragraph 8. To the same effect, more recently, see Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 12.

14 — Judgment in *Kziber*, cited above, paragraph 28.

15. In the light of the foregoing considerations, therefore, I propose that the Court reply to the questions submitted by the Tribunal des Affaires de Sécurité Sociale, Nanterre, as follows:

'Article 39(1) of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Algiers on 26 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978, must be interpreted as precluding a Member State from refusing to grant a supplementary allowance from the Fonds National de Solidarité, which is provided for under its legislation for its own nationals who are resident in that State, to the widow of an Algerian worker, who is resident in that Member State and is the recipient of a survivor's pension, on the ground that she is of Algerian nationality.'