OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 7 February 1990 *

Mr President,
Members of the Court,

1. The Raad van Beroep (Social Security Court), Amsterdam, has referred to the Court for a preliminary ruling a question on the interpretation of the provisions of Regulation (EEC) No 1408/71 of the Council, [1] in the field of social security, in the context of proceedings concerning the application of the Algemene Ouderdomswet, the Netherlands Law on old-age insurance (hereinafter referred to as 'the AOW'), to a German national.

2. The person in question, Mrs Winter-Lutzins, was born on 15 February 1922 and left the Federal Republic of Germany for the Netherlands in December 1965, together with her husband, who was born on 16 September 1917. She was employed part-time in various posts in the Netherlands from 1973 to 1980, when she was granted an invalidity allowance. Her husband reached retirement age in 1982. In 1983, Mr and Mrs Winter-Lutzins returned to the Federal Republic of Germany. From 1983 to 15 February 1987, the date of her 65th birthday, Mrs Winter-Lutzins continued to be insured under the AOW even though she was no longer resident in the Netherlands, because she was receiving an invalidity allowance from a Netherlands social security institution.

3. When she reached the age of 65, Mrs Winter-Lutzins became entitled to an old-age pension under the AOW. But the amount of that pension was calculated on the basis of her number of years of insurance, that is to say the years between December 1965, when she took up residence in the Netherlands, and February 1987, when she ceased to receive an invalidity allowance. Mrs Winter-Lutzins then brought proceedings in the national courts to challenge the refusal of the Sociale Verzekeringsbank (hereinafter referred to as 'the SVB'), the Netherlands social security institution which pays benefits under the AOW, to grant her the 'transitional concessions' provided for in the AOW. Those concessions make it possible to treat periods prior to 1 January 1957, when the AOW entered into force, as periods of insurance for the purposes of old-age insurance. In the absence of such concessions it would have been impossible for anyone to claim an AOW pension at the full rate of 100% until the year 2007, because the pension is equivalent to 2% of a minimum salary *per year of insurance.*

4. It is necessary to provide certain details of the legal structure of the transitional concessions under the AOW. The arrangements are a 'benefit' because they allow periods which elapsed between a person's 15th birthday and 1 January 1957 to be treated as periods of insurance provided that the person concerned meets three requirements.

5. The first, known as 'the six-year requirement', makes it a condition that the claimant must have resided in the Netherlands for at least six years after reaching the age of 59. That requirement,

* Original language: French.

1 — Of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

which is laid down in Article 59(1) of the AOW, is, however, mitigated by Article 2 of a Royal Decree of 3 December 1985 which provides that a person who has left the Netherlands but remains insured under the AOW is treated as residing in the Netherlands for the purpose of the six-year requirement.

6. The second requirement is that the claimant must be a Netherlands national or a person treated as such. It cannot apply so as to disqualify Community nationals.

7. Under the third condition, which is laid down in Article 56 of the AOW, the claimant must reside in the Netherlands. That requirement, referred to as the 'continuing-residence' requirement, which is also relaxed by a provision in a Royal Decree, does not apply to persons who were continuously insured under the AOW from 1 January 1957 until their 65th birthday.

8. Mrs Winter-Lutzins's case raises no problems with regard to the first two requirements. As regards the first, she is covered by the mitigating rule because she remained insured under the AOW after leaving the Netherlands and until her 65th birthday as a result of the invalidity allowance which she received. And her German nationality means that, as a Community national, she satisfies the second requirement.

9. Mrs Winter-Lutzins was unable, however, to meet the 'continuing-residence' requirement because on the date of her 65th birthday, when her entitlement to the transitional concessions fell to be determined, she was no longer resident in the Netherlands. Nor could she claim the benefit of the mitigating rule, since from 1 January 1957 until the end of December 1965 she was still resident in the Federal Republic of Germany and was not insured under the AOW.

10. Before the national court, Mrs Winter-Lutzins argued that, in so far as it made entitlement to the 'transitional concessions' dependent on residence in the Netherlands, the Netherlands legislation was incompatible with Article 10(1) of Regulation No 1408/71. That paragraph provides: 'Save as otherwise provided in this regulation, ... old-age ... 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'. The question referred to the Court by the national court for a preliminary ruling concerns the compatibility of the Netherlands legislation with Article 10(1) of the regulation.

11. The consequences of the possibility that the continuing-residence requirement might be incompatible with Regulation No 1408/71 are clearly illustrated in Mrs Winter-Lutzins's situation. Because she can neither meet that requirement nor benefit from the mitigating rule, the period which elapsed between 15 February 1937, the date of her 15th birthday, and 1 January 1957 cannot be treated as a period of insurance for the purpose of the 'transitional concessions'. That means that, under the AOW, Mrs Winter-Lutzins is entitled only to benefits calculated on the basis of the period between the end of December 1965 and her 65th birthday, that is to say, in round figures, approximately 44% of the reference salary, whereas had the residence requirement not been applicable that percentage would have been approximately 84%.

12. The very wording of the question referred to the Court draws attention to a particular point. It asks whether a requirement such as the continuing-residence requirement in the AOW is incompatible with Article 10(1) of Regulation No 1408/71 *'in particular when'* another provision in that regulation, Point 2(a) and (f) of the Netherlands section of Annex VI, provides that a recipient of benefits under the AOW who does not satisfy the conditions permitting him to have periods of his life prior to 1 January 1957 treated as insurance periods is nevertheless entitled to have periods before 1 January 1957 during which he resided in the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country treated as insurance periods provided that he has resided for six years in the territory of one or more Member States after the age of 59 years. This may be thought of as a 'second chance' provision because its effect is that recipients of benefits under the AOW who do not meet the requirements, in particular the continuing-residence requirement, which would entitle them to the transitional concessions, may nevertheless have certain periods prior to 1 January 1957 treated as insurance periods. That 'second chance' is, however, only partial, since it can affect only periods which provide, as the Court put it in its judgment of 25 February 1986 in Case 284/84 *Spruyt* v *Sociale Verzekeringsbank*,[2] a 'link', through residence or employment, between the claimant and the Netherlands pension scheme.

13. It may be observed at this point that the material provision of Annex VI to Regulation No 1408/71 could not enable Mrs Winter-Lutzins to obtain by virtue of Community rules what she had been refused because she did not meet the requirements of the AOW. She had indeed resided for six years in the territory of one or more Member States after her 59th birthday, but there was no period which could be treated as an insurance period because she had had no 'link', prior to 1 January 1957, with the Netherlands. This leads me to point out that, depending on whether or not they are met, the requirements in the AOW which determine a claimant's entitlement to the transitional concessions give rise to the application of one or the other of two systems of rules which differ markedly in terms of the advantages which they entail. If those requirements, and in particular the continuing-residence requirement, are met or are deemed to be met under the mitigating rules, a recipient of benefits under the AOW will be entitled to have the whole of the period between his 15th birthday and 1 January 1957 treated as an insurance period *regardless of whether or not there was a link* with the Netherlands during that period. If the requirements of the AOW are neither met nor deemed to be met, the only periods which the recipient may be entitled to have treated as insurance periods are those, between his 15th birthday and 1 January 1957, during which *there was an actual link* with the Netherlands.

14. The difference in treatment depending on whether or not the requirements in the AOW for entitlement to the transitional concessions are met may be illustrated in another manner. Let us imagine that another German national had moved to the Netherlands in exactly the same circumstances as Mrs Winter-Lutzins, and had there pursued the same activities at the same periods but, unlike Mrs Winter-Lutzins, had remained in the Netherlands until her 65th birthday. Although, like Mrs Winter-Lutzins, she would have had *no link* with

2 — Case 284/84 [1986] ECR 685, paragraph 22 of the judgment.

the Netherlands before 1 January 1957, she would nevertheless be entitled to have the period which elapsed between her 15th birthday and that date treated as an insurance period. Years during which there was no link with the Netherlands scheme are gold or dross — if I may so express myself — depending on whether or not the 'continuing-residence' requirement is met at the age of 65 years, when entitlement to benefits under the AOW commences.

15. An analysis of Mrs Winter-Lutzins's situation with regard to the provisions of the AOW relating to the 'transitional concessions' and the abovementioned provisions of Annex VI of Regulation No 1408/71 highlights the decisive consequences of the operation of the 'continuing-residence' clause. It may even be said that the differences in treatment which the application of such a clause may entail have the appearance of discrimination. Does that mean that the residence requirement must be regarded as incompatible with Article 10(1) of Regulation No 1408/71? I do not think so. In that regard I agree with the SVB, the Netherlands Government and the Commission in considering that an analysis of the provisions in the light of the Court's judgment in the *Spruyt* case leads to the conclusion that a condition such as the continuing-residence requirement is not incompatible with Regulation No 1408/71. It is clear that the abovementioned provisions of Annex VI, whilst revealing certain differences in treatment, do indicate unequivocally the intention of the Community legislative authority to accept the operation of the residence requirements for the purposes of the transitional concessions of the AOW to quite a large extent. Let me expand on that point of view.

16. Let us first consider the actual system set up by Point 2(a) and (f) of the Netherlands section of Annex VI. Its aim is to create legal means whereby certain periods prior to 1 January 1957 may be treated as periods of insurance for persons who *do not meet the requirements* for entitlement to such treatment under the AOW. It thus appears that these provisions of Annex VI have a twofold significance in relation to those requirements, and in particular to the 'continuing-residence' requirement.

17. The first, explicit, consequence is to weaken the effects of the residence requirements. It becomes possible for a person who does not meet the requirements entitling him to have periods prior to 1957 treated as insured periods as provided for in the AOW not to lose all such entitlement. This is undoubtedly a weakening, a relaxation of the residence requirements in the AOW. Were it not for the 'second chance' rule in Annex VI, a person who did not meet the requirements of the AOW would lose all entitlement whatever to such treatment.

18. The second implication of the relevant provisions of Annex VI is an implicit one, inasmuch as the requirements laid down by the AOW, in particular the residence requirement, will normally be applicable to the full extent to which they have not been weakened or relaxed by the Community regulation. Put simply, that means that while Annex VI stops the requirements laid down in the AOW from having the effect of preventing a person who does not meet them from having any periods prior to 1957 during which he had a link with the Netherlands, through residence or employment, treated as insured periods, it allows the *other effects* of those requirements

to operate freely. It is in that way that Annex VI limits the scope of Article 10(1) of Regulation No 1408/71, which prohibits residence clauses.

19. That interpretation is the one which the Court enshrined in its judgment in the *Spruyt* case. In that decision, it first pointed out that the aim of Articles 48 to 51 of the EEC Treaty

'would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'. [3]

With that concern in mind, the Court went on to state that

'the purpose of Article 10(1) of Regulation No 1408/71 concerning the waiving of residence clauses is to guarantee the person concerned his right to social security benefits even after taking up residence in a different Member State and to promote the free movement of workers, by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another', [4]

and added that if that objective was to be attained,

'the protection given must necessarily extend to cover benefits which, while created within the confines of a particular scheme, such as that of the AOW, are given effect by increasing the value of the pension which would otherwise accrue to the recipient'. [5]

The Court thus pointed out, as it had already stated in its judgment of 7 November 1973 in Case 51/73 *Sociale Verzekeringsbank* v *Smieja*, [5] that the protection afforded by the 'waiving' of residence clauses in Article 10(1) of Regulation No 1408/71 should in principle apply to the 'transitional concessions' in the AOW. But it immediately went on to provide, in paragraph 21 of the judgment, important details with regard to the way in which that principle is to be applied to such transitional arrangements:

'Special procedures for giving effect to that principle in the application of the Netherlands legislation on general old-age insurance are laid down in Annex VI, Part I, Point 2 of Regulation No 1408/71. The rule contained in Article 10, whereby the application of residence clauses is set aside, cannot be applied without restriction to a general old-age insurance scheme in which the mere fact of residence in the Netherlands is sufficient qualification for insurance purposes'. [6]

20. The Court considers, then, that the provisions of Article 10(1) of Regulation No 1408/71 apply to the transitional concessions in the AOW in accordance with the procedures laid down in Point 2 of the Netherlands section of Annex VI to that regulation, which are stated to *restrict* the rule in Article 10(1) whereby residence clauses are waived. That is a clear statement that Article 10(1) cannot be interpreted as regards its effects on the transitional concessions in the AOW, without reference to Annex VI which is in fact its necessary vehicle. It also implies, in my view, that the

3 — Case 284/84, cited above, paragraph 19 of the judgment.

4 — Case 284/84, cited above, paragraph 20 of the judgment.

5 — [1973] ECR 1213.

6 — The 'Part I' referred to in this passage from the judgment is the Netherlands section of Annex VI; in the version of Regulation No 1408/71 currently in force, it is 'Part J'.

principle whereby residence clauses are waived may not normally produce any effects with regard to the transitional concessions under the AOW other than those provided for in the procedures defined in Annex VI. The principle thus means that residence clauses may not have the effect of denying a claimant the right to have periods prior to 1957 during which he was over 15 years of age and had a 'link' with the Netherlands treated as insurance periods. But the other effects of residence clauses, in so far as the transitional concessions under the AOW are concerned, appear to be permitted by Annex VI as the Court has interpreted it, and the scope of Article 10(1) is therefore affected by a 'restriction', to adopt the term used by the Court.

21. It is true that Annex VI cannot be held, in absolute terms, to define all the effects of the principle whereby residence clauses are waived in connection with the transitional concessions under the AOW. The dispute which gave rise to the Court's judgment in the *Spruyt* case illustrates the possibility that there may be gaps in the rules with the result that certain effects not explicitly provided for must be inferred, by analogy if necessary. But it does not appear to me to be possible to consider that such a gap exists with regard to the circumstances of the present case. On the contrary, I consider that by stating that Point 2(a) of Annex VI — which applies, it will be recalled, to persons who do not meet the requirements of the AOW — provides that

'periods before the entry into force of the Netherlands legislation are to be taken into account only if a supplementary condition is satisfied, namely that during the periods in question the person concerned resided in the Netherlands or pursued an activity as an employed person in that country',

and stressing that

'such periods provide a sufficient link with the Netherlands scheme', [2]

the Court *ruled out* the possibility that the principle embodied in Article 10(1) could have the effect of allowing persons not meeting the requirements of the AOW to have periods during which they *did not have a sufficient link* with the Netherlands scheme treated as insurance periods. According to the Court's judgment, there is no gap in the regulation in that regard — on the contrary, the regulation, and in particular Article 10(1) thereof, is applied in accordance with the procedures laid down in Annex VI.

22. Article 10(1) of Regulation No 1408/71 is thus to be interpreted, as regards the present case, subject to the restrictions which, as the Court has pointed out, Annex VI places upon it. Sufficient light appears to me to be cast on the justification for those restrictions by the Court's judgment in the *Spruyt* case. As regards principles, the principle whereby residence clauses are waived must by definition be restricted in relation to an old-age insurance scheme

'in which the mere fact of residence . . . is sufficient qualification for insurance purposes'. [7]

In such a scheme, where residence is not *a* condition but *the* condition, unrestricted application of a principle prohibiting residence clauses would in fact have the effect of destroying the Netherlands old-age insurance scheme. The rule of law must be interpreted strictly, but not in a manner so unbending as to verge on the absurd.

2 — Case 284/84 [1986] ECR 685, paragraph 22 of the judgment.

7 — Case 284/84, cited above, paragraph 21 of the judgment.

23. I would add that Regulation No 1408/71 must always be interpreted in the light of the fundamental principle which it is intended to implement, that of freedom of movement for workers. It may be recalled that the Court stated, in its judgment in the *Spruyt* case, that the principle

'would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'.[3]

In my view, it is not necessary, in order to comply with that principle, to invalidate the effects of residence clauses in order to enable a person to have periods during which he or she *had no link* with the Netherlands scheme treated as insurance periods for the purposes of that scheme. The problem would have been very different had the residence clauses had the effect of preventing periods during which a person *had* links with the Netherlands scheme from being treated as insurance periods. Annex VI of Regulation No 1408/71 precludes that very effect. It thus gives the principle whereby residence clauses are waived, with regard to the transitional concessions under the AOW, a scope which enables the requirements of the fundamental right to freedom of movement to be satisfied. In my view, those requirements would be disregarded if a residence clause prevented the recognition of a *reality* but are not if it denies the benefit of a *fiction*.

24. It is not, in my view, contrary to Regulation No 1408/71 to provide that periods during which the claimant had no link with the Netherlands scheme may not be treated as insurance periods. A certain impression of discrimination may arise because what is available to some, who meet the continuing-residence requirement, is not available to others, who do not. As I have demonstrated, fictions are unequal before the transitional arrangements of the AOW, depending on how the residence clause operates. There would have been no difference in treatment if the Netherlands legislation had allowed, in all cases, only periods which provided a link with the scheme to be treated as insurance periods. Restrictions involved in the management of the old-age insurance scheme were probably what led the Netherlands legislature to set up a presumption, as it were, that a person meeting the continuing-residence requirement had a link with the Netherlands between his 15th birthday and 1 January 1957. Perhaps that presumption may be used to dissipate the impression of discrimination. It might thus be said that the right to freedom of movement for workers makes it compulsory for arrangements such as the transitional concessions under the AOW to provide for periods during which a link existed to be treated as insurance periods, but that the national legislature is at liberty to allow persons meeting a continuing-residence requirement to benefit from the presumption that they had such a link.

25. But, however favourably or unfavourably the difference in treatment revealed in this case may be presented, it is in my view sufficient, in the final analysis, to find that it has been taken into consideration and accepted by the Community legislative authority in Annex VI of Regulation No 1408/71, and that it has been accepted also by the Court in its interpretation of Article 10(1) and Annex VI in its judgment in the *Spruyt* case, based on the need to reconcile the requirements of the right to freedom of movement for workers and the foundations of the AOW.

3 — Case 284/84, cited above, paragraph 19 of the judgment.

26. I therefore propose that the Court should rule as follows:

'Article 10(1) of Regulation (EEC) No 1408/71, as it applies to the transitional concessions under the Netherlands legislation on general old-age insurance in accordance with the procedures laid down in Point 2 of the Netherlands section of Annex VI of that regulation, does not preclude a rule which, for the purposes of that legislation, prevents persons not meeting a continuing-residence requirement from having periods prior to the entry into force of the old-age insurance scheme during which they had no link with the Netherlands treated as insurance periods.'