OPINION OF ADVOCATE GENERAL LÉGER

delivered on 6 May 1997 *

1. This reference for a preliminary ruling from the Social Security Commissioner is concerned with the question whether the entitlement of the applicant in the main proceedings to a social benefit for handicapped persons must cease with effect from the date when he left the United Kingdom once and for all in order to establish himself in another Member State.

2. The Court is therefore asked to interpret and appraise the validity of Community provisions on the application of social security schemes to workers moving within the Community, specifically in regard to 'special non-contributory benefits', in force since 1 June 1992. [1]

National legislation

3. According to the order for reference, Disability Living Allowance (hereinafter 'DLA') is a non-contributory, [2] non-means-tested benefit payable, without a prior finding of incapacity for work, to persons who are invalids as a result of a physical or mental disablement. [3]

4. The DLA has two components:

— a care component payable to persons with care needs (which is payable at three different rates depending on the nature of the person's disablement and the extent of the care needed);

— a mobility component, payable to persons whose ability to walk is impaired (which is payable at two different rates depending on the nature and extent of the impairment of the ability to walk).

5. Prior to its introduction on 1 April 1992 [4] there were two non-contributory non-

* Original language: French.

1 — 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as subsequently amended by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1), hereinafter 'Regulation No 1408/71' or 'the Regulation'.

2 — I. e. its award is not subject to payment of social security contributions.

3 — It is provided for by sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 and the Social Security (Disability Living Allowance) Regulations 1991.

4 — Pursuant to the Disability Living Allowance and Disability Working Allowance Act 1991.

-means-tested benefits under national law, covering the same subject-matter as the two components of DLA: attendance allowance (hereinafter 'AA'), payable at two rates, equivalent to the two highest rates of the care component of DLA, and mobility allowance (hereinafter 'MA'), payable at a rate equivalent to the higher rate of the mobility component of DLA. [5]

6. The conditions under which the two components of DLA are awarded are identical to those laid down for AA and MA — in particular there is no nationality requirement. National legislation provides, *inter alia*, that every claimant must satisfy conditions as to residence and presence in Great Britain. [6] That residence requirement can be waived, essentially, only in the case of a 'temporary' absence from Great Britain. [7]

Community legislation

Regulation No 1408/71 prior to the 1992 reform

7. Although Regulation No 1408/71 does not establish an autonomous social security scheme for workers and members of their families moving within the Community, nor aim to harmonize — still less to unify — the various national laws applicable in that area, it does *coordinate* those laws by superimposing a set of rules, with the overall aim of removing any situation liable to discourage the exercise of the right of freedom of movement conferred by the Treaty.

8. The *substantive scope* of Regulation No 1408/71 is defined in Article 4 as covering all legislation concerning 'branches of social security' relating to one of the risks listed in Article 4(1) — or of the 'invalidity benefits' referred to in Article 4(1)(b) — but not 'social and medical assistance' (Article 4(4)), although it makes no distinction between contributory and non-contributory schemes (Article 4(2)).

9. In accordance with Article 5, the national legislation and schemes referred to in Article 4(1) and (2) are to be specified by the Member States in declarations to be notified and published. Accordingly, in Section L (11) of Annex VI to the Regulation, AA was (and still is) specified by the United Kingdom as being an invalidity benefit within the meaning of Article 4(1)(b).

10. Article 10(1) of the Regulation lays down the *principle of the waiver of residence*

5 — No new award of AA or MA has been made since 1 April 1992, other than AA for recipients over the age of 65.

6 — Section 71(6) of the Social Security Contributions and Benefits Act 1992 and Section 2(1) of the Social Security (Disability Living Allowance) Regulations 1991.

7 — Section 2(2) of the Social Security (Disability Living Allowance) Regulations 1991.

clauses for the benefits covered by the Regulation:

'1. 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 a Member State other than that in which the institution responsible for payment is situated.'

The amendments made by Regulation No 1247/92

The reasons for the amendments

11. Article 4 of Regulation No 1408/71, as originally drafted, limited the scope of the Regulation solely to social security in the strict sense and excluded benefits in the nature of social assistance. Consequently, only the former benefits could be exported to another Member State in accordance with Article 10(1), whereas the latter benefits could not. However, the Regulation did not define those two concepts.

12. Basing itself on the consideration that '... the distinction between benefits which are excluded from the scope of Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant', [8] the Court adopted a wide interpretation of the legislation and schemes referred to in Article 4(1), which was independent of national classifications and included benefits which 'because of the classes of persons to which they apply, their objectives and the detailed rules for their application', [9] simultaneously contain elements of social assistance [10] and of social security. [11]

13. The Court has held that such a 'mixed' or 'hybrid' benefit should be 'regarded as a social security benefit [where] it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and

8 — Judgment in Case 249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, paragraph 11. See also, for example, the judgments in Case 9/78 *Gillard* v *Directeur Regional de la Securité Sociale* [1978] ECR 1661, paragraph 12; Case 139/82 *Piscitello* [1983] ECR 1427, paragraph 10; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 28, and Case C-66/92 *Acciardi* v *Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland* [1993] ECR I-4567, paragraph 13).

9 — Judgment in *Hoeckx*, cited above, paragraph 12. See also, for example, the judgments in Case 1/72 *Frilli* [1972] ECR 457, paragraph 13; Case 187/73 *Callemeyn* [1974] ECR 553, paragraph 6; Case 24/74 *Biason* [1974] ECR 999, paragraph 9; Joined Cases 379/85, 380/85, 381/85 and 93/86 *Giletti and Others* [1987] ECR 955, paragraph 9, and Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 12.

10 — Essentially, because those benefits are intended to alleviate a person's obvious state of need and, although their award entails verification of that person's means and specific circumstances, there are no requirements relating to employment or payment of contributions.

11 — Essentially, because the persons concerned have a legally protected right to the award of such benefits, which is not subject to any discretion where the statutory conditions for their award are fulfilled.

provided that it concerns one of the risks expressly listed in Article 4(1) ...'. [12]

The new provisions

14. In view of that case-law, [13] Council Regulation No 1247/92, adopted on the basis of Articles 51 and 235 of the EC Treaty, inserted into Regulation No 1408/71 specific coordinating rules applicable to certain non-contributory benefits which have since then been expressly included within the scope of the Regulation. The benefits concerned are non-contributory benefits intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Regulation No 1408/71 and those intended as specific protection for the disabled.

15. It sets out the new Article 4(2a) of Regulation No 1408/71 in the following terms:

'2 a.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.'

16. Article 5 was amended so as to provide that the Member States are to specify in their declarations also the legislation and schemes referred to in Article 4(2a). It should be noted that the United Kingdom has not made such a declaration.

17. The coordinating scheme instituted for those benefits is the subject of a new article, Artice 10a, paragraph 1 of which authorizes a derogation from the principle of the waiver of residence requirements for such of those benefits as have previously been the subject-matter of a declaration to that effect by the Member State which introduced them:

'1. Notwithstanding the provisions of Article 10 and Title III, persons to whom

12 — Judgment in *Acciardi*, cited above, paragraph 14. See also, for example, the judgment in Case C-78/91 *Hughes* v *Chief Adjudication Officer* [1992] ECR I-4839, paragraph 15.

13 — See the express reference made to it in the third and fourth recitals in the preamble to Regulation No 1247/92, set out in point 47 below.

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.'

18. DLA is included in the special benefits listed in Annex IIa, in point (f) of section L (United Kingdom).

19. Article 10a(2), (3) and (4) are intended to bring about the recognition of periods completed or events that have occurred in another Member State, so as to permit the award of those benefits in the State 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.

3. Where entitlement to a benefit covered by paragraph 1 but granted in the form of a supplement is subject, under the legislation of a Member State, to receipt of a benefit covered by Article 4(1)(a) to (h), and no such benefit is due under that legislation, any corresponding benefit granted under the legislation of any other Member State shall be treated as a benefit granted under the legislation of the first Member State for the purposes of entitlement to the supplement.

4. Where the granting of a disability or invalidity benefit covered by paragraph 1 is subject, under the legislation of a Member State, to the condition that the disability or invalidity should be diagnosed for the first time in the territory of that Member State, this condition shall be deemed to be fulfilled where such diagnosis is made for the first time in the territory of another Member State.'

20. The application of that reform, which entered into force on 1 June 1992, is subject to transitional measures which are intended in particular to preserve rights which existed prior to its adoption (Article 2 of Regulation No 1247/92).

Facts and procedure

21. Mr Snares ('the applicant in the main proceedings'), a British national, worked as

an employee and paid contributions to the United Kingdom social security scheme for almost 25 years.

22. After suffering a serious accident in April 1993, he applied for and obtained DLA for life — at the middle rate of the care component and at the higher rate of the mobility component — with effect from 1 September 1993. [14]

23. Informed of Mr Snares' departure once and for all from the United Kingdom, on 13 November 1993, in order to settle permanently in Tenerife, Spain, where his mother was living, the competent national authority took the view that, since he no longer satisfied the residence requirement laid down by United Kingdom legislation, Mr Snares ceased to be entitled to DLA with effect from that date.

24. The Salisbury Social Security Appeal Tribunal, hearing the appeal, confirmed that decision, taking the view in particular that, with effect from 1 June 1992, the date of the entry into force of Regulation No 1247/92, the amendments made by that regulation to Regulation No 1408/71 allowed United Kingdom legislation to make the payment of DLA conditional on residence.

25. Mr Snares then appealed to the Social Security Commissioner, claiming, *inter alia*, that DLA is an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71, as were AA [15] and MA [16] which it replaces, and that that allowance must therefore continue to be awarded to him in Spain, in accordance with Article 10(1) of the Regulation.

26. Without seeking at this stage 'to express ... opinions on the merits of the competing arguments', [17] the Social Security Commissioner has referred the following questions to the Court for a preliminary ruling:

'1. Is the effect of the terms of Article 4(2a) and 10a of Council Regulation (EEC) 1408/71, as inserted by Council Regulation (EEC) 1247/92 with effect from 1 June 1992, to remove from the scope of Article 4(1) of Regulation 1408/71 a benefit which prior to 1 June 1992 would have been accepted, in the case of a person who by reason of previous occupational activity was or had been covered by the social security legislation of the relevant Member State, as falling within the

14 — The United Kingdom Government points out (paragraphs 1.1, 1.2 and 1.5 of its observations) that since his accident Mr Snares has also been in receipt of a contributory benefit ('invalid benefit', which has been replaced since 13 April 1995 by 'incapacity benefit', governed by sections 30A to 30E of the Social Security Contributions and Benefits Act 1992).

15 — Because of its inclusion in the declaration made by the United Kingdom under Article 5 of the Regulation, concerning the schemes referred to in Article 4(1) and (2) (see point 9 above).

16 — This allowance is not included in the United Kingdom's declaration, but in the judgment in *Newton*, cited above, the Court held that it was a 'social security benefit' within the meaning of Article 4(1)(b) of the Regulation.

17 — Paragraph 25 of the order for reference.

scope of Article 4(1), with the consequence that a person who after 1 June 1992 becomes entitled to such a benefit under the legislation of one Member State may not rely on the provisions of Article 10(1) of Regulation 1408/71 in order to challenge a withdrawal of entitlement on the sole ground that the person resides in the territory of another Member State?

2. If the answer to Question 1 is yes, is Council Regulation (EEC) 1247/92 made within the powers granted by the Treaty of Rome, and in particular by Articles 51 and 235 of that Treaty?'

As to the replies to the questions

27. I will deal with the scope and validity of Article 4(2a) and 10a of Regulation No 1408/71 in turn, as the Social Security Commissioner has requested.

28. Let me point out, first of all, that Mr Snares does indeed fall within the scope *ratione personae* of Regulation No 1408/71, which is defined by Article 2(1) as follows:

'1. 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 ...'.

29. As the Social Security Commissioner points out, there is scarcely any doubt in that regard, 'since [Mr Snares] had been subject to the legislation of the United Kingdom as an employed person and was a national of the United Kingdom'. [18]

30. Indeed, for the purposes of Article 1(a) of the Regulation, 'worker' is defined exclusively on the basis of a person's insurance under an insurance scheme, and not of the actual pursuit of an activity. The Court has held that this concept '... has a general scope and ... covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, *whether or not he pursues a professional or trade activity*'. [19]

18 — Paragraph 12 of the order for reference.

19 — Judgment in Case 182/78 *Pierik* [1979] ECR 1977, paragraph 4, emphasis added. See also the judgment in Case C-215/90 *Twomey* [1992] ECR I-1823, paragraph 13.

31. It follows that in order to fall within the scope of the regulation *ratione personae*, it is sufficient for a national of a Member State to be or to have been subject to a social security scheme of one or more Member States. [20]

32. That is precisely the position of Mr Snares, who may therefore rely on the provisions of the Regulation.

The scope of Articles 4(2a) and 10a of Regulation No 1408/71

33. The purpose of the first question is to ascertain whether DLA falls within the scope *ratione materiae* of Article 4(1)(b) of Regulation No 1408/71, in that it is an invalidity benefit, to which, as such, the principle of the waiver of residence clauses laid down in Article 10(1) applies, or whether it must be regarded as a 'special non-contributory benefit' intended 'as specific protection for the disabled', within the meaning of Article 4(2a)(b) of the Regulation, which may be awarded subject to a residence requirement, in conformity with Article 10a.

34. All the Member States which have intervened in the proceedings (the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain, the French Republic, the Federal Republic of Germany and the Republic of Austria), and the Council and the Commission argue, with some slight differences of opinion, against Mr Snares' contention that DLA falls under Article 4(1)(b) of the Regulation.

35. I propose to take the same approach, the only one which, in my view, is capable of being adopted, having regard to the rules applicable at the time when the events at issue in the main proceedings occurred.

36. Let me point out, first of all, that two periods must be clearly distinguished.

37. *Before 1 June 1992*, the date of the entry into force of Regulation No 1247/92, there were three types of scheme arising from the application of the relevant provisions of Community law.

38. To begin with, let us disregard social and medical assistance benefits, which, since they were expressly excluded from the scope of Regulation No 1408/71, could not be covered by the measures coordinating social

20 — Let me point out in passing, as does S. Van Raepenbusch in: 'La sécurité sociale des personnes qui se déplacent à l'intérieur de la Communauté', *Joly Communautaire*, Vol 2, Paris 1995, paragraph 20 *in fine*, that the scope *ratione personae* of the regulation, as so defined, goes quite considerably beyond the strict framework of the free movement of persons guaranteed by the Treaty.

security schemes instituted by Community law. Article 10(1) did not therefore concern them.

39. In contrast, social security benefits, and therefore the sole benefits at which Article 4 of Regulation No 1408/71 is expressly directed, are covered by the principle of the waiver of residence clauses laid down in Article 10(1), which '... ensures for the recipient full entitlement to various cash benefits, pensions, and other grants acquired under the legislation of one or more Member States, even while he resides in the territory of a Member State other than that in which the institution responsible for payment is situated', [21] and whose purpose is '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'. [22]

AA thus fell within that category, on account of the declaration made by the United Kingdom under Article 5.

40. Moreover, although Regulation No 1408/71 did not expressly provide for it in those terms, the category of benefits known as 'mixed' or 'hybrid', because of the fact that it may 'at one and the same time, have links to both ... categories' [23] of benefits, was taken into account by the Court in its case-law. In the absence of specific provisions relating to them, and provided that they displayed the essential characteristics, the Court treated them in the same way as social security benefits for the purposes of Article 4(1) of the Regulation.

41. The Court's interpretation of Article 4(1) therefore allowed the recipient of such benefits to retain them if he transferred his residence to another Member State, even when the legislation providing for them reserved those benefits solely for persons resident on the national territory, as a result of the application of Article 10(1).

42. The Court has, for example, taken the view that the following benefits fell within the scope of the Regulation: guaranteed income for old persons in Belgium [24] and in France; [25] United Kingdom 'family credit'; [26] the social benefit accorded by Netherlands law to certain unemployed persons [27] and

21 — Judgment in Case 51/73 *Smieja* [1973] ECR 1213, paragraph 14.

22 — Ibid., paragraph 20. See also the judgments in Case 92/81 *Camera* [1982] ECR 2213, paragraph 14, and C-293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 15.

23 — Judgment in *Newton*, cited above, paragraph 12.

24 — Judgments in *Frilli*, cited above, and in Case 261/83 *Castelli* [1984] ECR 3199.

25 — Judgments in *Biason* and *Giletti and Others*, cited above; Case C-236/88 *Commission* v *France* [1990] ECR I-3163 and Case C-307/89 *Commission* v *France* [1991] ECR I-2903.

26 — Judgment in Case 78/91 *Hughes*, cited above.

27 — Judgment in *Acciardi*, cited above.

disabled persons' allowances provided for by Belgian, [28] French [29] and United Kingdom [30] legislation.

43. It was against the background of that case-law that the Court was asked, in the judgment in *Newton*, cited above, to appraise the characteristics of MA.

Pointing out that:

'although by virtue of certain of its characteristics legislation of the kind in issue in the main proceedings has much in common with social assistance, particularly since the grant of the benefit provided for is not dependent on the completion of periods of employment, insurance or contribution, nevertheless in certain circumstances it is more similar to social security', [31]

the Court classified MA amongst the so-called 'mixed' benefits.

44. However, the Court stated that such a benefit could be treated in the same way as an invalidity benefit within the meaning of Article 4(1)(b) only in the case of 'an employed or self-employed person who by reason of his previous occupational activity is already covered by the social security system of the State whose legislation is invoked, ... although in the case of other categories of beneficiaries it may be deemed not to [be]'. [32]

The Court illustrated the latter point as follows:

'In particular, [MA] cannot be regarded as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation No 1408/71 in the case of persons who have been subject as employed or self-employed persons exclusively to the legislation of other Member States', [33] otherwise 'the stability of the system instituted by national legislation whereby Member States manifest their concern for the handicapped persons residing in their territory could be seriously affected'. [34]

45. Consequently, and pursuant to that judgment, MA had to be regarded, prior to the amendment of Regulation No 1408/71,

28 — Judgments in Case 39/74 *Costa* [1974] ECR 1251; Case 7/75 *Mr and Mrs F.* v *Belgian State* [1975] ECR 679, and *Callemeyn*, cited above.

29 — Judgment in Case 63/76 *Inzirillo* [1976] ECR 2057.

30 — Judgment in *Newton*, cited above.

31 — Paragraph 13.

32 — Paragraph 15.

33 — Paragraph 16.

34 — Paragraph 17.

as a 'mixed' benefit equivalent to an invalidity benefit within the meaning of Article 4(1)(b) of the Regulation in regard to those recipients who were or who had been insured under the United Kingdom legislation. Only those persons could, therefore, claim to be entitled to export that benefit, in accordance with the principle laid down in Article 10(1) of the Regulation. Other recipients of that benefit could not rely on the Regulation, since for them MA was a benefit falling under Article 4(4).

46. Since *1 June 1992*, the date on which Regulation No 1247/92 entered into force, the situation has been modified somewhat, in the interests of clarity and certainty.

47. A reading of the third and fourth recitals in the preamble to Regulation No 1247/92 shows that the reason for the adoption of those amendments to Regulation No 1408/71 was in essence the need to take account of the abovementioned case-law on 'hybrid' benefits which the rules had hitherto disregarded:

'whereas it is also necessary 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;

whereas the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries'.

48. Since that reform, the following classifications should essentially be made.

49. The 'social security benefits' scheme is unchanged: such benefits are still covered in particular by the principle of the waiver of residence clauses laid down in Article 10(1). Likewise, benefits in the nature of 'social and medical assistance' within the meaning of Article 4(4) remain outside the coordination system established.

50. On the other hand, the difference is that the first two categories now cover a narrower range of benefits, since the 'mixed' benefits which could previously fall within one or other of those provisions are henceforth subject to their own scheme. They are expressly included in Article 4(2a) of Regulation No 1408/71.

51. Two types of 'special non-contributory benefits' must be distinguished in that regard.

52. The new Article 10a applies to such of those benefits as have been specified by a Member State in Annex IIa to the Regulation, and they may be awarded subject to a residence requirement. However, for benefits of that type which have not been so specified, it is necessary to refer to the 'basic' scheme laid down in Article 10(1) and, like social security benefits, their award cannot be made conditional on residence.

53. DLA is specified by the United Kingdom in Annex IIa to Regulation No 1408/71. [35]

35 — Section L(f).

54. Does that reference in practice entail its classification within the category of 'special non-contributory benefits' to which Article 10a applies?

55. The Court has already been called upon to rule on the status of such declarations, in particular those provided for in Article 5 of Regulation No 1408/71.

It has held that:

'... whilst the fact that a national law or regulation has not been mentioned in the declarations referred to in Article 5 of Regulation No 1408/71 is not of itself proof that that law or regulation does not fall within the field of application of the regulation, the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No 1408/71'. [36]

36 — Judgment in Joined Cases C-88/95, C-102/85 and C-103/85 *Martínez Losada and Others* [1997] ECR I-869, paragraph 21, which refers to the judgment in Case 35/77 *Beerens* [1977] ECR 2249, paragraph 9. See also, more generally, the judgments in Case 100/63 *Kalsbeek* [1964] ECR 565, and Case 24/64 *Dingemans* [1964] ECR 647.

56. That case-law is wholly capable of being applied to the matters specified in Annex IIa. Just as the specification of a national law in the declarations referred to in Article 5 establishes that the benefits granted under that law are social security benefits for the purposes of the Regulation, the specification of a benefit, such as DLA, in Annex IIa as being a special non-contributory benefit to which Article 10a applies, is, in my view, sufficient to bring it unambiguously within the scope of Article 4(2a).

57. The fact that the United Kingdom did not specify it pursuant to Article 5 '... is not decisive' [37] and does not thereby exclude it from that category, as is clear from the same case-law.

58. Moreover, although that reference by itself seems to me sufficient to establish that DLA is a 'special non-contributory benefit', other arguments would seem to support the view that DLA falls within that category of benefits.

59. First, reference may usefully be made to the benefits which DLA replaced in national law, since, as all the parties agree, those benefits displayed the same characteristics as each of the two components of DLA which replaced them, with the exception of one of the rates at which each component may be paid.

60. Under the rules applicable before 1992, AA fell within the scope of Article 4(1) of Regulation No 1408/71 because the United Kingdom specified it in its declaration under Article 5. However, the conditions for the award of that benefit and its nature did not differ from those for the MA which supplemented it and which, on account of its characteristics, was held by the Court in its judgment in *Newton* to be a 'mixed' benefit.

61. Although the Court then deemed that benefit to fall under Article 4(1) of the Regulation in classifying it as a 'social security benefit' and so covered by the principle of the waiver of residence clauses laid down in Article 10(1), it did so, as we have seen, because, in the absence of specific rules, at the time only Article 10(1) was capable of bringing 'mixed benefits' within the scope of the Regulation where they displayed the essential characteristics of such benefits. I have pointed out, moreover, that this classification was not systematic and was contingent on the fact that the recipient of MA was covered by the United Kingdom social security scheme.

37 — Judgment in Case 70/80 *Vigier* [1981] ECR 229, paragraph 15.

62. The 'ancestors' of DLA were 'mixed' benefits and DLA should logically be classified in the same way.

63. Secondly, let me add, for the sake of completeness, that the characteristics of DLA reveal its 'mixed' nature. First, it is in the nature of social assistance in that it is not based on periods of employment or insurance and is intended to alleviate a person's obvious state of need, the degree of which is taken into account by the application of variable rates. Second, it is in the nature of social security, in so far as it is awarded as of right to those who fulfil the conditions for its award, without an individual and discretionary appraisal of their circumstances.

64. Although, in my view, there is therefore no doubt that DLA is indeed a 'special non-contributory benefit', there is also no question but that it should be governed by the specific scheme for that category of benefits, as instituted with effect from 1 June 1992, upon the entry into force of Regulation No 1247/92.

65. It is of little importance that, prior to the adoption of the amending regulation, benefits in the nature of DLA were governed by a different scheme — subject to an examination of the validity of those new provisions, which I shall carry out in due course.

66. In accordance with the principle of *the immediate temporal application of the law*, [38] it is necessary to refer to the Community rules in force at the material time. That consideration is justified '... in order to satisfy the principle of legal certainty, one of the requirements of which is that any factual situation should normally, in the absence of any contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained'. [39]

67. Mr Snares cannot validly claim to be entitled under a scheme which no longer existed at the time when he applied for DLA. The rights of a claimant whose disablement occurred after Article 4(2a) and Article 10a were inserted into Regulation No 1408/71 are governed exclusively by those new provisions. In the present case, it is irrelevant whether, before 1 June 1992, DLA could, as Mr Snares suggests, be regarded as a social security benefit in certain circumstances.

68. Let me observe that, for the same reason, it is not possible to plead observance of the principle of the *retention of acquired rights*, as laid down in Article 51(b) of the Treaty, in order to claim entitlement under the scheme applicable to benefits comparable to DLA before the 1992 reform. Although Article 2

38 — Articles 94 and 95 of Regulation No 1408/71 and Article 2 of Regulation No 1247/92.

39 — Judgment in Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 7.

of Regulation No 1247/92 [40] gives the holder of a right that arose prior to the reform a guarantee that he will retain that right, Mr Snares cannot rely on it, since his entitlement to DLA arose after the entry into force of Regulation No 1247/92.

69. It must therefore be concluded that since 1 June 1992, the date of the entry into force of Regulation No 1247/92, DLA has been a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71 the grant of which, subject to the retention of acquired rights by the claimant, may, because it is specified in Annex IIa to that Regulation, validly be made conditional on residence in the territory of the State which provides it.

The validity of the provisions relating to special non-contributory benefits

70. According to Mr Snares, since the purpose of Regulation No 1408/71 and Regulation No 1247/92 is to facilitate the free movement of workers in the Community, Articles 51 and 235 of the Treaty may be used only in order to further its achievement. However, Regulation No 1247/92 lowers, rather than raises, the standard of living and the quality of life of workers seeking to exercise their right of freedom of movement as citizens of the Union. It hinders and weakens economic and social cohesion instead of promoting and reinforcing it, since it makes it more difficult for citizens to live and work in countries other than their country of origin. Consequently, the amendment in question goes beyond the scope of the powers given to the legislature by Article 235 and Article 51 of the Treaty.

71. In examining this issue I propose to disregard any specific reference to Article 235, which is clearly in itself not relevant to the present case. Regulation No 1408/71 and all the regulations amending or supplementing it essentially had Article 51 of the Treaty as their legal basis. The additional reference to Article 235 was needed only as from the adoption of Regulation No 1390/81, [41] which extends Regulation No 1408/71 to self-employed persons, since the Treaty did not provide any specific powers to take action to that end. The reference, suggested in particular by Mr Snares, to Article 8a of the Treaty which lays down, in terms broader than those of Article 51, 'the right to move and reside freely within the territory of the Member States' of every 'citizen of the Union' need not detain us either. The reference to those provisions makes it possible essentially to circumvent the obstacle arising from the fact that Mr Snares' situation is wholly unconnected with Article 51 of the

40 — That article has now been incorporated in Article 95b of Regulation No 1408/71, as amended by Council Regulation (EC) No 3095/95 of 22 December 1995 (OJ 1995 L 335, p. 1).

41 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and to members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1981 L 143, p. 1).

Treaty, taken in isolation, which merely guarantees the free movement of *workers*. We have seen that, while the Community rules at issue aim to implement the objectives assigned to Article 51 of the Treaty, the scope of those rules *ratione personae* is wider. [42]

72. I will therefore consider the question of compatibility in the light of the principles laid down in Article 51 of the Treaty, which is worded as follows:

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependents:

a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

b) payment of benefits to persons resident in the territories of Member States.'

73. It should be borne in mind that the amending rules were adopted to take account of the Court's case-law, which, having adopted a broad interpretation of the concept of 'social security benefit' within the meaning of Article 4(1) of Regulation No 1408/71, allowed certain 'mixed' benefits to come within the scope of the Community coordinating scheme established.

74. The problem raised in the present case is therefore not so much to ascertain whether the Council was entitled to bring benefits of that type within the scope of Regulation No 1408/71, since that was already apparent from the Court's case-law, but to ascertain whether it was entitled to allow such of those benefits as are specified in Annex IIa to be awarded subject to a residence requirement in derogation from the principle laid down in Article 10(1).

75. Essentially, therefore, it is necessary to ascertain the validity of the new article, Article 10a, which establishes a scheme that is specific to certain benefits referred to in Article 4(2a).

42 — Points 28 to 31 of this Opinion. See also the Opinion of Advocate General Mancini in Case 238/83 *Meade* [1984] ECR 2631, points 2 and 3.

76. The possibility of providing for derogations from the principle of the waiver of residence requirements was already 'embryonic' even before the adoption of Regulation No 1247/92.

77. First of all, the very wording of Article 10(1), which states that the principle is applicable '*save as otherwise provided in this Regulation*,' could not be clearer.

78. Consequently, even before the amendments made in 1992, Regulation No 1408/71 contained provisions allowing the grant of certain benefits to be made conditional on residence.

79. Let me quote, for example, Article 69 of the Regulation — under which the requirement concerning the export of unemployment benefits is imposed only for a limited period of three months — whose validity was upheld by the Court in its judgment in Case C-272/90 *Van Noorden* [43] in the following terms: '... the relevant Community legislation, in particular Articles 67(3), 69 and 70 of [Regulation No 1408/71] does not preclude a Member State from refusing to grant a worker unemployment benefit for more than the maximum period of three months laid down in Article 69 of that Regulation when the worker has not completed lastly periods of insurance or employment in that Member State'. [44]

80. Let me also refer to Annex E to Regulation No 3 [45] which, in derogation from Article 10(1), lists the benefits which are not payable abroad and whose validity the Court has not called in question either. [46]

81. Moreover, the Court itself did not exclude that possibility of derogation when holding that the principle in Article 10(1) applied '... in the absence of express provisions to the contrary'. [47] The Court therefore implicitly acknowledged the right of the Community legislature to adopt specific provisions of that kind when it held, this time more explicitly, arguing *a contrario*, that '... in the absence of specific rules applicable to the non-contributory benefits in question, the solution to the problems raised ... must be found in the existing provisions of the regulations concerned, as interpreted by the Court.' [48]

43 — Case C-272/90 [1991] ECR I-2543.

44 — Paragraph 12.

45 — Regulation of the Council of 25 September 1958 on social security for migrant workers (JO 1958, 30, p. 561), which Regulation No 1408/71 replaced with effect from 1 October 1972.

46 — Judgment in *Biason*, cited above, paragraphs 18 to 20.

47 — Judgment in Case 87/76 *Bozzone* [1977] ECR 687, paragraph 21. See also the judgments in *Piscitello*, cited above, paragraph 16, and *Giletti and Others*, cited above, paragraph 16.

48 — Judgment in Case C-236/88 *Commission* v *France*, cited above, paragraph 16.

82. These references to legislation and case-law thus point to the fact that neither the Treaty nor the coordinating scheme established contain any general principle concerning the exportability of social benefits.

83. Although it must be assumed on the basis which I have set out that certain benefits cannot be exported, it is still necessary to ascertain whether the Council was able to lay down a rule of that kind for certain 'mixed' benefits.

84. The highly specific nature of the benefits at issue seems to me to remove any doubt in that regard.

85. As the French Government points out, [49] the residence requirement in this case is justified from two points of view. First, the benefits at issue are awarded in a specific Member State and are closely linked to the standard and the cost of living in that State. Second, the non-exportation of those benefits takes account of the fact that beneficiaries may apply for benefits of the same kind in the Member State to which they transfer their residence.

86. Having regard to the special nature of benefits which, like DLA, are of a composite nature, straddling the usual type of social security benefits and the social assistance benefits excluded from the relevant rules, a mechanism for coordinating derogations seems to me to be justified. Those benefits are intended to ensure a certain standard of living, assessed by the Member State concerned against the average standard in its territory, which may vary from one State to another by means of a minimum benefit. The benefits are granted, having regard to the recipients thereof, in particular circumstances.

87. The socio-economic, even the cultural or domestic, context of each State of residence underlies the conditions for the award of such benefits. For example, apart from average earnings and the cost of living, the existence of other need-related benefits or allowances is essential when determining the rules for awarding benefits of that kind. Those benefits or allowances may, for example, take the form of housing assistance, financial or practical assistance to disabled persons, a suitable hospital network, or even public or community infrastructures satisfying the needs of disabled persons.

88. Taking into account the context in which they came into being, when such benefits are awarded to a recipient residing in another Member State they may, in view of the social, economic or cultural environment in that Member State, prove to be wholly unsuitable, extravagant or insufficient. It is fanciful to believe in harmonization throughout all the Member States in that regard. A disabled person will not necessarily have the same financial needs in Spain as in the United Kingdom.

49 — Point 8 of its observations.

89. That limitation on the exportation of benefits may, moreover, properly find support in the principles laid down by the Court in its judgment in Case 313/86 *Lenoir* [1988] ECR 5391, given in regard to allowances linked to a specific 'social environment' peculiar to one Member State.

In so doing the Court took the view that that provision was not contrary to Articles 48 and 51 of the Treaty, since it 'is a rule of general scope which applies without distinction to all nationals of the Member States and is based on objective criteria concerning the nature of the benefits in question and the conditions for granting them.' [52]

90. The main proceedings concerned the question whether the competent French institution was entitled to cease payment of the 'rentrée scolaire' (school expenses) allowance and the 'salaire unique' (single wage or salary) allowance to the plaintiff in the main proceedings, on account of the transfer of his residence from France to the United Kingdom. The national court therefore referred to the Court a question on the interpretation of Article 77 [50] of Regulation No 1408/71.

The court drew a distinction between benefits paid exclusively by reference to the number and, where appropriate, the age of the members of the family, the grant of which '... continues to be justified wherever the recipient and his family reside', and 'benefits of another kind or subject to other conditions, as in the case, for example, of a benefit intended to cover certain costs incurred at the beginning of the school year [which] are in most cases *closely linked with the social environment and therefore with the place where the persons concerned reside*'. [53]

The Court stated: '... [that provision] must be interpreted as giving a person entitled to family benefits who is a national of a Member State and resides in the territory of another Member State entitlement to payment by the social security institutions of his country of origin only of "family allowances", to the exclusion of other family benefits such as the "rentrée scolaire" allowance and the "salaire unique" allowance provided for by French legislation.' [51]

91. In my view, the special non-contributory benefits referred to in Annex IIa, such as DLA, are those which are 'closely linked with the social environment and therefore with the place where the persons concerned reside'.

92. Furthermore, the rule against the exportation of the benefits referred to in Annex IIa was adopted by the Community legisla-

50 — This article confers on a person entitled to a pension or annuity or on orphans resident in the territory of a Member State other than the competent State entitlement to payment only of 'family allowances', excluding 'family benefits' within the meaning of Article 1(u) of the Regulation.

51 — Paragraph 11.

52 — Paragraph 16.

53 — Paragraph 16, emphasis added.

ture in parallel to the rule that the legislation of the State of residence applies.

93. In accordance with that rule, the Member States are required to grant the special non-contributory benefits provided for by their legislation to all their residents who fall within the scope of the Regulation, whatever their nationality, provided they fulfil the conditions for entitlement laid down by national legislation and the benefits in question are specified in Annex IIa.

94. The fact that, in the present case, the benefit equivalent to DLA offered to Mr Snares in Spain is smaller, or that he is denied the grant of a corresponding Spanish benefit because he does not fulfil the necessary conditions, is not of itself of such a kind as to justify a finding that the residence requirement laid down in Article 10a of the Regulation is invalid. In the absence of harmonization in this field at Community level to date, it is settled law that 'the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between Community workers'. [54]

95. In the present case, reference should therefore be made to the relevant provisions of Spanish legislation, the State of residence, without referring to the United Kingdom provisions, even if the latter provisions are more advantageous for Mr Snares. Otherwise the *principle that the legislation of a single Member State only is applicable,* which underlies the relevant Community rules, would be impaired. [55] The binding force of the rules on connecting factors contained in the Regulation undoutedly flows from the primacy of Community law. It follows from this that the persons concerned cannot have freedom of choice as regards the national legislation applicable where they fulfil the qualifying conditions under several national schemes, just as '... the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable' since '... the application of national legislation is determined by reference to criteria drawn from the rules of Community law'. [56]

96. Furthermore, although the 1992 reform cannot be invalidated, as we have seen, on the ground that it allows the award of certain special non-contributory benefits to be made subject to a residence requirement, it may nevertheless be declared invalid in so far as it fails to comply with the relevant require-

54 — Judgment in *Martínez Losada and Others*, cited above, paragraph 43, which refers to the judgment in Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 27.

55 — Article 13(1) of Regulation No 1408/71.

56 — Judgment in Case 276/81 *Kuijpers* [1982] ECR 3027, paragraph 14.

ments laid down by the Treaty and the basic regulation in order to ensure the free movement of persons falling within its scope.

97. It is worth noting that the supplementary provisions inserted by Regulation No 1247/92 into Regulation No 1408/71 are not restricted to Article 10a(1), the provision at issue, but constitute a coherent whole which allows the objective pursued to be achieved.

98. The new coordinating rules laid down thus expressly take into account facts or circumstances occurring in a Member State other than the State of residence. Article 10a(2) to (4) require the State of residence:

— to have regard to periods completed in other Member States, in conformity with Article 51(a) of the Treaty (Article 10a(2));

— to treat benefits due under the legislation of other Member States as if they had been granted under the legislation applicable, so far as concerns the right to supplementary benefits (Article 10a(3)) and;

— to recognize a diagnosis of invalidity or disability made in another Member State (Article 10a(4)).

99. Article 4(2a) moreover increased the rights of persons falling within the scope of the Regulation in respect of special non-contributory benefits, since it provides that those benefits *all* fall within the scope of the Regulation and not merely, as had previously been the case, pursuant to the case-law of the Court of Justice, solely in cases where those benefits displayed the essential characteristics of social security.

100. The protection given by the new legislation is, moreover, in certain respects wider than that afforded by the case-law of the Court. Thus, entitlement to a benefit is no longer conditional, as it was following the judgment in *Newton*, on the claimant having previously been subject to the social security legislation of the State from which the benefit is sought.

101. Consequently, contrary to the view taken by Mr Snares, by adopting the amending regulation, No 1247/92, the Council does not seem to me to have breached its obligation under Article 51 of the Treaty to take 'such measures ... as are necessary to provide freedom of movement for workers'. More-

over, it is worth pointing out that Article 51 does not lay down the detailed measures to be adopted by the Council but leaves it a '... wide discretion regarding the choice of the most appropriate measures for attaining the objective of Article 51 of the Treaty'. [57]

102. For the sake of completeness, allow me to deal with two other points discussed at the hearing, which, according to Mr Snares, cast doubt on the validity of the new rules laid down.

103. Mr Snares has raised the spectre of Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [58] in arguing that, in his view, the impossibility of exporting the award of DLA to Spain, where his mother lives, might infringe his right to the respect for family life guaranteed by that provision.

I would merely point out, quite apart from any doubts as to the relevance of that argument which is based on a provision whose '... scope ... is concerned with the development of man's personal freedom ...', [59] that the system introduced, far from constituting a brake on the establishment of the person concerned in another Member State where a member of his family resides, marks an advance in relation to the previous rules which, it should be borne in mind, in no way guaranteed the inclusion of 'mixed' benefits within their substantive sphere and did not therefore systematically confer on him entitlement to the benefit of the coordinating scheme established.

104. Mr Snares also indicated that, by preventing the export of the benefits at issue, the new provisions might constitute an obstacle to a person's right of residence in another Member State where that State can make that right conditional on possession of sufficient resources. [60]

Let me point out, first of all, that there is no such problem in the present case, since Mr Snares continues to be entitled in Spain, where he has now been living for more than three years, to the award of 'incapacity benefit', a benefit that is contributory in nature, [61] in accordance with Article 10(1) of Regulation No 1408/71. Furtheremore, even before the adoption of Regulation No 1247/92 it was accepted that certain benefits would be granted subject to a residence requirement. [62]

57 — Judgment in Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraph 35.

58 — The first paragraph of which provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

59 — Judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 18.

60 — Council Directive 90/364/EEC on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

61 — See footnote 14 above.

62 — See points 76 to 81 of this Opinion.

Conclusion

105. For the foregoing reasons, I propose that the Court should reply as follows to the questions submitted by the Social Security Commissioner:

(1) After 1 June 1992, the date of the entry into force of Council Regulation (EEC) No 1247/92 of 30 April 1992 amending 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, the award of a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71 as amended, specified in Annex IIa to that Regulation, may — subject to the retention of acquired rights by the claimant — validly be made conditional on residence in the territory of the State which provides it, in accordance with Article 10a(1) of Regulation No 1408/71, as amended, even if, before that date, an equivalent benefit could be regarded in certain cases as falling under Article 4(1) of Regulation No 1408/71, and the grant of which could not at the time, pursuant to Article 10(1) of that Regulation, be made subject to a residence requirement.

(2) Consideration of Regulation No 1247/92, which was adopted within the framework of the powers conferred on the Council by the EC Treaty, in particular Articles 51 and 235 thereof, has not revealed any factors of such a kind as to call its validity into question.