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Title and reference

Advocate General's Opinion - 17 March 2011

Stewart

Case C-503/09

Advocate General: Cruz Villalón

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Opinion of the Advocate-General

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1. The present case affords the Court an opportunity to consider the question whether, put very simply, Regulation (EEC) No 1408/71 (2) allows the legislature of a Member State to make entitlement to a social benefit conditional upon the claimant residing and being present in the territory of that Member State on the date of the claim, and on having resided in that Member State for a given period of time, where the structure of that benefit is quite peculiar. In this case, the short-term incapacity benefit in youth at issue in the main proceedings is defined by national law as a derogation from the system of ordinary incapacity benefit. The condition of residence, thus reinforced by a condition requiring actual presence, on which entitlement to the benefit is dependent, is purely and simply substituted for the condition of having contributed to the general social security scheme, to which entitlement to the ordinary benefit is instead subject. Short-term incapacity benefit in youth is thus in fact a non-contributory benefit, subject to a condition of entitlement relating to residence and presence that derogates from the ordinary conditions governing benefits with all the characteristics of a contributory benefit.

2. I shall proceed by a two-stage argument in my examination of this somewhat paradoxical situation. First of all, I shall endeavour to address this condition of residence, reinforced by the condition of presence, in the 'ordinary' fashion by considering its compatibility with the relevant provisions of Regulation No 1408/71. Could such a condition be permissible in light of the principle of the waiving of residence clauses, as established by Article 10 of Regulation No 1408/71, and the principle of the 'exportability' of certain social benefits which may be gleaned from the case-law of the Court? Secondly, I shall attempt to suggest to the Court a 'modified' reading of the case-law, adjusted to the specific nature of the conditions of residence and presence and the unusual situation at issue in the main proceedings.

I – Legal context

A – European Union law

3. Article 4 of Regulation No 1408/71 defines the material scope of that regulation in the following terms:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

...

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

2a. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned; or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned, and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone; and

(c) which are listed in Annex IIa.'

4. Article 5 of Regulation No 1408/71 states that it is for the Member States to specify the special non-contributory benefits referred to in Article 4(2a) of the regulation.

5. Article 10 of Regulation No 1408/71 lays down the principle of the waiving of residence clauses, in particular, for invalidity benefits. Paragraph 1 thereof provides:

'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.'

6. Chapter I of Title III of Regulation No 1408/71 contains the special provisions relating to sickness and maternity benefits. Article 19 thereof provides:

'1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered

by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.

Where the members of the family reside in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, benefits in kind which they receive shall be considered as being on behalf of the institution with which the employed or self-employed person is insured, unless the spouse or the person looking after the children pursues a professional or trade activity in the territory of the said Member State.′

7. Article 28 of Regulation No 1408/71 is worded as follows:

‘1. A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

(a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;

(b) cash benefits shall, where appropriate, be provided by the competent institution as determined by the rules of paragraph 2, in accordance with the legislation which it administers. However, upon agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.′

B – National law

8. The Social Security Contributions and Benefits Act 1992 (3) introduced an incapacity benefit to provide compensatory income to people under pensionable age who are unable to work because of sickness or incapacity. Defined as a contributory social benefit in section 20(1)(c) of the Benefits Act, this incapacity benefit is paid, in accordance with section 163 of the Social Security Administration Act 1992, from the National Insurance Fund (section 1(1) of the Benefits Act), whose budget funds are sourced from contributions paid by earners, employers and others.

9. Incapacity benefit comprises both a short-term benefit under section 30A(4) of the Benefits Act, which may be paid for a maximum of 364 days, and a long-term benefit, under section 30A(5) thereof.

10. The short-term incapacity benefit is paid at a lower rate for the first 196 days, and then at a higher rate, which nevertheless remains below the level of long-term incapacity benefit. Under Schedule 12, paragraph 1, to the Benefits Act a claimant will not be entitled to short-term incapacity benefit if he is in receipt of statutory sick pay, which may be paid for a maximum of 28 weeks (196 days). The amount of any incapacity benefit may also be reduced by the amount of any pension benefits to which the claimant is entitled.

11. Entitlement to short-term incapacity benefit is essentially conditional on the claimant's record of contributions.

12. Claimants who do not satisfy the contribution conditions but who are unable to work may qualify for income support, which is an income-related benefit.

13. It is clear from the order for reference, moreover, and from the observations presented to the Court that, under section 30A(1) of the Benefits Act, persons who are unable to work but who fail to satisfy the contribution conditions, in particular because, since they suffered from a disability before reaching the legal working age of 16, they were never able to pay social security contributions such as would entitle them to receive short-term incapacity benefit, are nevertheless entitled to that benefit provided they satisfy the conditions laid down in section 30A(2A) of the Benefits Act, which entered into force on 6 April 2001. (4)

14. Section 30A(1) of the Benefits Act provides:

'Subject to the following provisions of this section, a person who satisfies

(a) either of the conditions mentioned in subsection (2) below; or

(b) if he satisfies neither of those conditions, each of the conditions mentioned in subsection (2A) below

is entitled to short-term incapacity benefit in respect of any day of incapacity for work ... wh ich forms part of a period of incapacity for work.'

15. Section 30A(2A) of the Benefits Act provides:

'(2A) The conditions mentioned in subsection (1)(b) above are that—

(a) [the claimant] is aged 16 or over on the relevant day;

(b) he is under the age of 20 or, in prescribed cases, 25 on a day which forms part of the period of incapacity for work;

(c) he was incapable of work throughout a period of 196 consecutive days immediately preceding the relevant day, or an earlier day in the period of incapacity for work on which he was aged 16 or over;

(d) on the relevant day he satisfies the prescribed conditions as to residence in Great Britain, or as to presence there; and

(e) he is not, on that day, a person who is receiving full-time education.'

16. Incapacity benefit awarded on these conditions, replacing severe disablement allowance, is thus generally referred to as 'incapacity benefit in youth'.

17. Under section 30A(5) of the Benefits Act a recipient of short-term incapacity benefit

may receive long-term incapacity benefit if his illness or disability persists. The provision is worded as follows:

'Where a person ceases by virtue of [section 30A(4) of the Benefits Act] to be entitled to short-term incapacity benefit, he is entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age.'

18. The conditions as to residence or presence referred to in section 30A(2A)(d) of the Benefits Act are prescribed by regulation 16(1) of the Social Security (Incapacity Benefit) Regulations 1994, (5) which is worded as follows:

'16. Conditions relating to residence or presence

(1) The prescribed conditions for the purposes of section 30A(2A)(d) of the [Benefits Act] as to residence or presence in Great Britain in relation to any person on the relevant day shall be that on that day:

(a) he is ordinarily resident in Great Britain;

(b) he is not a person subject to immigration control within the meaning of section 115 (9) of the Immigration and Asylum Act 1999 ...;

(c) he is present in Great Britain; and

d) he has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding that day.'

II – The facts which gave rise to the dispute in the main proceedings

19. Lucy Stewart, the appellant in the main proceedings, is a British national born on 20 November 1989 who has lived with her parents in Spain since August 2000. Afflicted with Down's Syndrome, she has never worked and it is common ground that, in all likelihood, she will never be able to work, at least not in any normal job.

20. Since its inception in April 1992, Lucy Stewart has received a disability living allowance. (6) It is apparent from the order for reference that, before that, she probably received an attendance allowance. Those allowances were paid to her in Spain under Article 95b of Regulation No 1408/71. According to information provided by the national tribunal, DLA may be awarded indefinitely, that is to say, for as long as the circumstances giving rise to entitlement remain unchanged.

21. The appellant's mother has been receiving a retirement pension since 25 July 2005 and previously received incapacity benefit.

22. Her father, who last worked in the United Kingdom of Great Britain and Northern Ireland in the 2000/01 tax year, receives an occupational pension and, since October 2009, has been receiving a United Kingdom State retirement pension.

23. On 31 October 2005, the appellant, represented by her mother, made a claim for short-term incapacity benefit in youth under section 30A(2A) of the Benefits Act, with effect from her 16th birthday.

24. On 24 November 2005, the Secretary of State for Work and Pensions, the respondent in the main proceedings, refused the claim on the ground that the appellant '[was] not present in Great Britain'.

25. It is common ground that the appellant satisfies neither the residence condition,

nor the presence condition, nor the past presence condition provided for, respectively, by regulation 16(1)(a), (c) and (d) of the Incapacity Benefit Regulations.

26. The appellant in the main proceedings, still represented by her mother, brought an appeal before the Secretary of State for Work and Pensions, who reconsidered and confirmed his decision of 24 November 2005. Noting that the appellant had lived in Spain for the five years preceding her claim, the Secretary of State for Work and Pensions stated that she did not satisfy the condition of being present in Great Britain on the first day from which she claimed to be entitled to incapacity benefit. He went on to say that European Union ('EU') law could not assist her in satisfying that condition.

III – The questions referred for a preliminary ruling

27. It was in those circumstances that the Upper Tribunal (Administrative Appeals Chamber), on an appeal brought before it against that last decision, decided, on 16 November 2009, to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a benefit with the characteristics of short-term incapacity benefit in youth a sickness benefit or an invalidity benefit for the purposes of Regulation [(EEC) No] 1408/71 [of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community ("Regulation No 1408/71")]?

2. If the answer to question 1 is that such a benefit is to be treated as a sickness benefit:

(a) Is a person, such as the claimant's mother, who has definitively ceased all employed or self-employed activity by virtue of retirement nevertheless an "employed person" for the purposes of Article 19 by reason of their former employed or self-employed activity, or do Articles 27 to 34 (pensioners) contain the applicable rules?

(b) Is a person, such as the claimant's father, who has not undertaken an employed or self-employed activity since 2001, nevertheless an "employed person" for the purposes of Article 19 by reason of their former employed or self-employed activity?

(c) Is a claimant to be treated as a "pensioner" for the purposes of Article 28 by virtue of the award of a benefit acquired pursuant to Article 95b of Regulation [No] 1408/71, notwithstanding the facts that: (i) the claimant in question has never been an employed person under Article 1(a) of Regulation [No] 1408/71; (ii) the claimant has not reached State retirement age; and (iii) the claimant only comes within the personal scope of Regulation [No] 1408/71 as a family member?

(d) Where a pensioner falls within Article 28 of Regulation [No] 1408/71, can a family member of that pensioner who has at all times resided with and in the same State as the pensioner claim, pursuant to Article 28(1), as read with Article 29, a cash sickness benefit from the competent institution determined by Article 28(2) where such benefit is (if due) payable to the family member (and not payable to the pensioner)?

(e) If applicable (by reason of the answers to (a) to (d) above), is the application of a condition of national social security law limiting the initial acquisition of entitlement to a sickness benefit to those having completed a requisite period of past presence within the competent Member State within a defined prior period compatible with the provisions of Articles 19 and/or 28 of Regulation [No] 1408/71?

3. If the answer to question 1 is that such a benefit is to be treated as an invalidity benefit, does the wording in Article 10 of Regulation [No] 1408/71 referring to benefits

"acquired under the legislation of one or more Member States" mean that Member States remain entitled under Regulation [No] 1408/71 to set conditions of initial acquisition to such invalidity benefits that are based upon residence in the Member State or upon demonstration of requisite periods of past presence in the Member State, such that a claimant cannot first claim entitlement to such benefit from another Member State?' (7)

IV – Treatment of the structure and specific content of the questions referred by the national tribunal

28. The present case is unusual in the sense that, in the course of giving its reply, the Court will be compelled to consider both the structure and the relevance of the various questions referred, which will require a certain slimming down. Put simply, I shall endeavour to show why the distinction between sickness benefits and invalidity benefits, which is the point of the first question and affects the structure of the remaining questions, is of practically no consequence. I shall attempt to show how difficult it is to deal with the conditions of residence and presence in isolation. Finally, I shall try to show that the crucial question raised by this case is that of 'ordinary residence' and that it is only in that context that it will really be possible to consider, at the appropriate time, the appellant's position and her status as a member of the family of a pensioner entitled to a pension within the meaning of Regulation No 1408/71. The difficulty is that this 'reconstruction' of the questions referred by the national tribunal cannot simply be done at the beginning of the answer which the Court proposes to give. It can only follow on from the reasoning which I shall now set out. To that end, it will be necessary to illustrate at the outset the singular nature of what is herein referred to as 'short-term incapacity benefit in youth'.

A – Short-term incapacity benefit in youth

29. Short-term incapacity benefit in youth, introduced in 2001, (8) is peculiar in the sense that it is in point of fact a non-contributory benefit (9) provided for in the midst of a more general provision concerning ordinary incapacity benefit, which has all the characteristics of a contributory benefit.

30. Ordinary incapacity benefit is, in fact, awarded on the principal condition of contribution to the general social security scheme, whereas short-term incapacity benefit in youth is, by way of derogation from that condition, awarded, irrespectively of any contribution but subject to the proviso that the claimant satisfies three conditions (10) relating to residence and presence in the territory of the Member State.

31. It may, indeed, be awarded on a personal basis as replacement income for any person who, aged 16 or over, cannot work because of sickness or disability and cannot receive ordinary incapacity benefit because he or she has not made any contributions. That is the situation of the appellant in the main proceedings, a young disabled woman who had never worked and who claimed to be entitled to short-term incapacity benefit in youth with effect from her 16th birthday.

B – The triple conditions relating to residence and presence

32. More specifically, the award of short-term incapacity benefit in youth is conditional upon fulfilment of the triple condition that the claimant is ordinarily resident in the Member State (the condition of ordinary residence), is present in that State on the date of the claim (the condition of actual presence) and has been present in that State for at least 26 weeks during the 52 weeks preceding the date of the claim (the condition of past presence). It is, therefore, an ordinary residence condition 'reinforced', so to speak, by a dual condition of presence.

33. It is important to note in this connection that, as the Upper Tribunal emphasised, whilst the appellant's claim was refused because she failed to satisfy the condition of presence in the territory of the Member State on the date of her claim, it could equally well have been refused because she failed to satisfy the condition of residence or the condition of past presence. Moreover, it seems from question 2(e), which refers only to the condition of past presence, and from question 3, which mentions both the condition of residence and that of past presence, that the Upper Tribunal considers those conditions to be independent and of autonomous effect, and that they must, as a consequence, be addressed independently.

34. I must, however, insist that the two conditions relating to presence make sense, within the system as a whole, only in relation to the condition of residence. Indeed, I find it impossible to imagine that the national legislature could have envisaged the award of short-term incapacity benefit in youth solely on the basis of the past and/or actual presence of the claimant, that is to say, in a case where the claimant, whilst not being ordinarily resident in the territory of the Member State, satisfies the other two conditions. That amounts to saying that, whilst it may be argued that the condition of past presence is compatible with EU law, by excluding consistently that the condition of ordinary residence is, in any event, not compatible with it, it is clear that the condition of past presence has, within the general scheme of short-term incapacity benefit in youth, no chance of existing independently.

35. In conclusion, as regards the compatibility of the conditions respectively referred to the Court's review, namely the condition of ordinary residence in one question and the conditions of ordinary residence and past presence in the other, the distinction drawn by the Upper Tribunal between sickness benefits and invalidity benefits is of no consequence, at least if the condition of ordinary residence proves to be unlawful in one case as in the other, as I shall initially maintain.

V – Residence, regarded by EU law as an immediately suspect condition for the award of social security benefits

36. Conditions relating to residence are, as a matter of principle, 'suspect' under EU law. They are, generally speaking, considered incompatible with the provisions of Regulation No 1408/71 that apply to sickness benefits and invalidity benefits alike, at least where they apply 'additionally', that is to say, where they are additions to the conditions of entitlement which the Member States may lawfully impose. To begin with, I shall endeavour, as I have already mentioned, to illustrate the applicable law as if the present case concerned a condition of ordinary residence.

A – Invalidity benefits

37. The aim of Article 10(1) of Regulation No 1408/71, which lays down the principle of the waiving of residence clauses (11) and guarantees the 'exportability' of invalidity benefits in particular, is to promote, in accordance with Article 42 EC, the freedom of movement of workers by protecting them against any adverse consequences that might arise from the transfer of their residence from one Member State to another. (12)

38. That provision means not only that people concerned retain the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also – and this is particularly important in the present case – that they may not be prevented from acquiring such a right merely because they do not reside in the territory of the State in which the institution responsible for payment is situated. (13) As Advocate General Darmon emphasised in his Opinion in Stanton Newton , (14) if such a distinction were

accepted, it would be very easy to circumvent the prohibition laid down in Article 10 of Regulation No 1408/71: 'The legislature would merely have to include the residence condition amongst the conditions for entitlement in order to allow it to evade that prohibition.'

B – Sickness benefits

39. For its part, Article 19(1)(b) of Regulation No 1408/71 requires that employed and self-employed persons residing in the territory of a Member State other than the competent Member State are to receive, in the Member State in which they reside, cash benefits provided by the competent Member State, provided that they satisfy all the other conditions of the legislation of the competent Member State for entitlement to such benefits.

40. That provision also prohibits any provision by a Member State which makes payment of a sickness benefit conditional upon residence. (15)

41. Similarly, members of the family of a worker may, under Article 19(2) of Regulation No 1408/71, claim from the Member State of employment of the worker payment of sickness benefits in another Member State in which they reside, provided that they satisfy all the entitlement conditions and in so far as they are not entitled to such benefits under the legislation of the Member State in whose territory they reside. (16)

42. The Court stated, in its judgment in Hosse , that the intention of Article 19(2) of Regulation No 1408/71 was in particular that the award of sickness benefits should not be conditional on the residence of the members of the worker's family in the competent Member State, so as not to deter Community workers from exercising their right to freedom of movement. It would, the Court held, 'be contrary to Article 19(2) of Regulation No 1408/71 to deprive the daughter of a worker of a benefit she would be entitled to if she were resident in the competent State'. (17)

43. Lastly, the Court of Justice has also acknowledged that pensioners have the right, under Article 28 of Regulation No 1408/71, to export sickness benefits. (18)

44. Given the logic of the case-law just mentioned, it can, in the end, be accepted that this right to export sickness benefits must also be accorded to the members of a pensioner's family.

45. In this connection, whilst it is true that, as the United Kingdom Government has pointed out, the Court did initially hold that a dependent child of a migrant worker could not, as a member of the worker's family, claim, in her own right, an invalidity allowance provided for by national legislation, (19) it nevertheless subsequently circumscribed the effect of that case-law to a great extent. (20)

46. Indeed, the Court has held that the distinction between the personal rights of a worker and the derived rights of members of his family was only relevant where a member of the family relied on provisions of Regulation No 1408/71 which apply solely to workers and not to members of their families. (21)

47. Consequently, if the principle of the waiving of residence clauses laid down in Article 10 of Regulation No 1408/71 or the principle of the 'exportability' of sickness benefits as expressed in the case-law relating to Articles 19 and 28 of the regulation were applied rigorously and mechanically, so to speak, to the situation at issue in the main proceedings, short-term incapacity benefit in youth ought to be paid to the appellant in those proceedings.

48. In conclusion, the Court could, following all that case-law, hold that Article 10 or

Articles 19 and 28 of Regulation No 1408/71 are to be interpreted as precluding the application to a person in the situation of the appellant in the main proceedings of a reinforced condition of residence such as that at issue therein, or even that Regulation No 1408/71 is to be interpreted as precluding the law of a Member State from making the award of a social benefit such as short-term incapacity benefit in youth conditional on the claimant satisfying conditions of residence and past presence in the territory of that Member State.

49. Having said that, and before developing my arguments further, I must insist on the fact that the reinforced condition of residence at issue in the main proceedings does not play an 'additional' role. On the contrary, it has quite a different function. That being so, if the Court were to reply thus to the referring tribunal's questions, the consequences would not be insignificant. In order to understand the full measure of that option, it is necessary to bear in mind that, in the absence of the reinforced condition of residence, any national of a Member State finding themselves in the same situation as the appellant in the main proceedings, that is to say, being between the ages of 16 and 20 (or, at most, 25) and unable to work during the 196 days preceding their 16th birthday, and not being in full-time education, would be able to claim, and to obtain, short-term incapacity benefit in youth, without, however, ever having been affiliated to the social security system of that Member State.

50. That raises the question whether EU law is to be interpreted in such a way that it can constrain a Member State to choose between the withdrawal of a social benefit so conceived, the conditions of entitlement to which go beyond what is reasonable, and altering that social benefit in such a way that it may be treated, in accordance with the case-law of the Court of Justice, as a special non-contributory benefit. I am not of the opinion that EU law does impose such a choice.

VI – The reinforced residence condition as a condition 'creating' a connection for the purposes of the requirements of EU law

51. It is clear from all the case-law just mentioned that in every case in which conditions of residence were held to be incompatible with the requirements of EU law they applied essentially as 'additional' or complementary conditions to the conditions for entitlement to social benefits, those generally being conditions of contribution to the social security scheme, and thus essentially served to exclude beneficiaries exercising their right of freedom of movement. In those circumstances the case-law quite rightly showed itself to be particularly stringent in applying the principle of the waiving of residence clauses or the principle of 'exportability' of social benefits.

52. However, the reinforced residence condition with which the Court is confronted in the present case arises in quite a different context and that must be taken into account when assessing the United Kingdom Government's argument that the reinforced residence condition is a condition of entitlement to short-term incapacity benefit in youth that, in the interests of beneficiaries, replaces the ordinary condition of contribution.

53. In this connection I should first of all say that the Court has repeatedly held that the Member States have retained their powers to organise their social security systems, provided that they comply with EU law when exercising those powers. (22) That retention of powers means that it is for the Member States to define both the extent of their social security systems and the conditions of entitlement to social benefits paid out under them, provided that such conditions comply with EU law and, most importantly, provided that they are not discriminatory. It is for the Member States alone to define their degree of national solidarity and the conditions under which it is to be given expression. In particular, it is for the Member States to distinguish among the

benefits which they provide, those that are contributory in nature from those that have the characteristics of special non-contributory benefits, always in compliance with EU law. (23)

54. In accordance with Article 42 EC, Regulation No 1408/71 in fact only pursues the objective of coordinating the social security laws of the Member States, not their harmonisation. In accordance with extensive case-law, it is for the national legislatures alone when enacting social security law to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme, provided that such conditions do not discriminate between nationals of the home State and nationals of other Member States. (24)

55. It is in the light of that case-law that the present reinforced condition of residence, to which entitlement to short-term incapacity benefit in youth is subject, must be examined, in that it replaces the ordinary condition of contribution and fulfils, consequently, the function of connection usually placed on that condition. Against that background, I shall first endeavour to examine whether it is possible, in principle, to allow such a condition of residence and then attempt to identify the conditions to which it should be subject.

A – Analysis of the theoretical possibilities

56. It is important to observe, first of all, that Regulation No 1408/71 does not absolutely prohibit residence from constituting, under certain conditions, a criterion of connection to the social security system of a Member State, in the same way as might a period of employment. That is evidenced, in particular, by Article 18 of the regulation, which contemplates the possibility of national legislatures making 'the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance, employment or residence'. (25)

57. Moreover, Article 10a of Regulation No 1408/71 expressly provides that the Member States may make the award of special non-contributory benefits conditional upon residence.

58. On another note, whilst conditions of residence are generally regarded as restrictions on the freedom of movement under Article 18 EC in particular, it is also accepted that they may be justified (26) under EU law provided that they are based on objective considerations of public interest independent of the nationality of the persons concerned and are proportionate to the legitimate objective of the national provisions. (27)

59. The Court has thus accepted that the use, in national legislation, of residence as a criterion for restricting the number and type of beneficiaries of a social benefit, and thus the extent of the obligation of solidarity of which such a benefit is an expression, might, as a manifestation of the extent to which the persons thus covered are connected to the society making that commitment to solidarity, constitute an objective consideration of public interest (28) such as to justify a restriction on the freedom of movement of persons.

60. It is in the light of those considerations that the significance of the essentially non-contributory nature of short-term incapacity benefit in youth reveals itself.

61. Indeed, in many respects, the conditions of entitlement to short-term incapacity benefit in youth, which derogate from the ordinary conditions of entitlement to incapacity benefit based on the principle of prior contribution, are the expression of a commitment to solidarity and are indisputably based on objective considerations of

public interest, in this case the need to protect young workers who are not able to work and who are not covered by the ordinary sickness insurance scheme.

62. As the United Kingdom Government argued, whilst the reinforced condition of residence acts, in effect, as a condition of entitlement to short-term incapacity benefit in youth, that is only so in order to counter the fact that its recipients will not have made any prior contributions.

63. What matters is not so much the fact that short-term incapacity benefit in youth is, as a matter of fact, a non-contributory benefit, but rather the role that the reinforced condition of residence is called upon to play in the absence of contributions, that is to say, in a situation where there is no connection between the benefit and its recipient or even between the Member State regarded as competent and the claimant.

64. In other words, the reinforced condition of residence replaces contribution to the social security scheme. (29) It provides a necessary connection and that is how it must be assessed, that is to say, as a connection between short-term incapacity benefit in youth and its recipients. It is not, therefore, in any sense 'additional' to the conditions of entitlement to the benefit but 'creates' a connection between the social security scheme of which the benefit forms part and its recipients who do not meet the condition of contribution.

65. Seen thus, this reinforced condition of residence was conceived with the objective of including, within the circle of recipients of incapacity benefit in general, young disabled people who do not meet the condition of contribution, not with a view to excluding young disabled people residing in another Member State.

66. Nevertheless, the simple fact that the reinforced condition of residence has no discriminatory purpose does not mean that it is automatically to be regarded as compatible with EU law. It is still necessary to ensure that it produces no discriminatory effects and that its application is perfectly compatible with the provisions of Regulation No 1408/71 and with the provisions of the Treaty and with general principles of EU law. Thus, the inevitable question arises as to its conditions of lawfulness.

B – Analysis of the conditions of lawfulness

67. A reinforced condition of residence such as that imposed by the United Kingdom legislation at issue in the main proceedings can be justified, where appropriate, only on the dual condition that it serves to provide a connection and that it only comes into play in the absence of any other connection.

68. The Court has held in this connection that a condition of residence cannot be considered a satisfactory indicator of the degree of connection of claimants to the Member State awarding the benefit when it is liable to lead to different results for persons resident in another Member State whose degree of integration into the society of the Member State awarding the benefit is in all respects comparable. (30)

69. It is against that background that question 2(e) referred by the Upper Tribunal must be examined. That question asks, in fact, whether the condition of past presence, which it addresses in isolation, leaving the other conditions, in particular the condition of ordinary residence, aside, is compatible with the provisions of Article 19 and/or Article 28 of Regulation No 1408/71. However, even if the condition of past presence could apply independently of the condition of ordinary residence, (31) it would be for the Upper Tribunal to consider whether and to what extent it can serve to provide a connection and be regarded as sufficient to establish the requisite degree of integration.

70. Moreover, if it is accepted that the condition of residence does serve to provide a

connection, it cannot, without contradicting the case-law on the principles of the waiving of residence clauses and of the 'exportability' of the benefits mentioned, be used to exclude a person who is already entitled to a sickness or invalidity benefit.

71. A residence condition that 'creates' a connection will be lawful as a condition of entitlement to the benefit only if it serves to include people. Once it has served as a connection it should no longer come into play.

72. Finally, the circumstances of this case lead me to consider the question whether indirect affiliation may be regarded as a connection sufficient to preclude a residence condition from being enforceable in the present case.

73. Might it be possible to accept that the reinforced condition of residence at issue in the main proceedings is unenforceable against the appellant because her family relationship with a person within the scope of Regulation No 1408/71 amounts to an indirect connection with the United Kingdom's social security system?

74. It is easy to see that, from this point of view, the question of the appellant's status under Regulation No 1408/71 and that of her parents under the United Kingdom's social security system becomes particularly pressing. The status of each of them must be considered in light of the characteristics of short-term incapacity benefit in youth.

75. Can the appellant claim the 'export' of a benefit to which she is personally entitled by relying on her status as a member of the family of a person entitled to a pension within the scope of Article 28 of Regulation No 1408/71 and by exploiting the connection between that person and the dispensing social security scheme?

76. It must be recalled that, in principle, the Member States may, as we have just seen, in organising their social security systems, make the award of a social benefit, be it a sickness benefit or an invalidity benefit, dependent on the claimant satisfying a condition of residence, provided that the sole purpose of that condition is to establish a connection between the claimant and the social security system and is enforceable only in the absence of any other comparable connection.

77. The Member States are, likewise and a fortiori , free to decide how close and of what type that connection must be. As I have already noted, since they retain power to establish the conditions of affiliation to their national social security schemes and lay down the conditions of entitlement to benefits, provided that they comply with EU law, it may be inferred that it is, in a broader sense, usually for the national legislature to identify, where necessary, any connection that might replace the traditional connections of employment or contribution. (32)

78. Consequently, in the absence of any stipulation in this regard in the national legislation, it is for the Upper Tribunal to determine whether the family relationship of the appellant in the main proceedings could constitute such a connection and consequently be considered sufficient to prevent application of the reinforced condition of residence and replace it. In the circumstances of the case in the main proceedings, the Court cannot, in fact, substitute its own assessment for that of the Upper Tribunal for the purposes of deciding whether, having regard to the fact that short-term incapacity benefit in youth is paid personally to those who are not able to work, it may or must be paid to someone in the situation of the appellant in the main proceedings simply because that person is a member of the family of people who are affiliated to the social security system of the Member State in question and is dependent upon them.

VII – Conclusion

79. I therefore propose that the Court answer the questions referred by the Upper Tribunal (Administrative Appeals Chamber) as follows:

(1) European Union law is to be interpreted as not precluding national legislation from making the award of a social benefit, such as short-term incapacity benefit in youth at issue in the main proceedings, subject to a condition of residence, irrespective of whether that benefit is classed as an invalidity benefit or as a sickness benefit under Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, provided that such condition, applied by way of derogation from, and replacing, a condition of prior contribution, first, serves only to provide a connection between the claimant and the social security scheme of which the benefit forms part and, secondly, is unenforceable against persons having a comparable connection.

(2) In the circumstances of the case in the main proceedings, and in the absence of any stipulation in that regard in the national legislation, it is for the Upper Tribunal to determine whether the situation of the appellant in the main proceedings, and in particular her status as a member of the family of a person who is a pensioner entitled to a pension within the meaning of Article 28 of Regulation No 1408/71, as amended by Regulation No 647/2005, can support the conclusion that there is a connection sufficient to preclude that condition of residence from being enforceable against her.

(1) .

(2) – Council Regulation of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1; 'Regulation No 1408/71').

(3) – As amended by section 1(1) of the Social Security (Incapacity for Work) Act 1994 and section 64 of the Welfare Reform and Pensions Act 1999; 'the Benefits Act'.

(4) – Welfare Reform and Pensions Act 1999, section 64.

(5) – 'The Incapacity Benefit Regulations'.

(6) – 'DLA'.

(7) – In its order for reference, the Upper Tribunal also stated that the Commission had brought infringement proceedings against the United Kingdom concerning the condition of past presence to which the award of invalidity benefits classed as sickness benefits is subject. However, it expressly stated that it did not regard it as necessary to amend the questions it was referring in order to take account of those proceedings. Indeed, it is clear from a press release ('Social security: EU takes action to guarantee care benefits for Britons abroad', Press release IP/10/7999, 24 June 2010) that the Commission has sent a formal request to the United Kingdom to pay certain social security benefits to its own nationals residing in another Member State. The Commission regards as contrary to EU law, including Regulations Nos 1408/71 and 883/2004 and also the rules on European citizenship and freedom of movement of persons, the past presence condition to which the award of DLA, attendance allowance and carer's allowance is subject. Treated as sickness cash benefits designed to help people in need of special care and those who care for them, these three benefits were classed as special non-contributory benefits and as such were included in Annex IIa to Regulation No 1408/71 until they were reclassified by the Court of Justice in its judgment in Case C-299/05 Commission v

Parliament and Council [2007] ECR I-8695.

(8) – Short-term incapacity benefit in youth, introduced by section 64 of the Welfare Reform and Pensions Act 1999, amending section 30A of the Benefits Act, entered into force on 6 April 2001.

(9) – The benefit is, however, classed as a contributory benefit under United Kingdom legislation and, consequently, by the Upper Tribunal. Equally it cannot be regarded as a special non-contributory benefit falling within the scope of Article 10a of Regulation No 1408/71 since it is not included in the list in Annex IIa to that regulation and since it cannot be included without the regulation being amended by the EU legislature, as is clear from Articles 5 and 97 of the regulation. It seems, however, that the fact that no contributions are made has no effect on how short-term incapacity benefit in youth is funded or the precise way in which it is paid out of the National Insurance Fund.

(10) – Subject to what I shall say further on.

(11) – In the absence, however, of special procedures for the application of legislation within the meaning of Annex VI to Regulation No 1408/71, see, in particular, Case C-293/88 Winter-Lutzins [1990] ECR I-1623 and Case 284/84 Spruyt [1986] ECR 685. In this case, Annex VI to the regulation contains no special procedures relating to the benefit at issue in the main proceedings, or even the situation of the appellant in the main proceedings.

(12) – This was already the case under Council Regulation No 3 of 25 September 1958 on social security for migran t workers (OJ, English Special Edition 1952-1958(I), p. 63): see Case 51/73 Smieja [1973] ECR 1213, paragraphs 14 and 15. For old age benefits, see Case 139/82 Piscitello [1983] ECR 1427, paragraph 15; Winter-Lutzins , paragraph 15; and Case C-282/91 de Wit [1993] ECR I-1221, paragraph 18.

(13) – For rulings under Regulation No 3, see Case 92/81 Camera [1982] ECR 2213, paragraph 14. For invalidity benefits, see Case 300/84 van Roosmalen [1986] ECR 3097, paragraph 39, and Case C-356/89 Stanton Newton [1991] ECR I-3017, paragraphs 23 and 24. For a specific benefit comparable to an old age pension or invalidity benefit, see Joined Cases 379/85 to 381/85 and 93/86 Giletti and Others [1987] ECR 955, paragraphs 14 to 16; Case C-236/88 Commission v France [1990] ECR I-3163, paragraph 11; and Case C-73/99 Movrin [2000] ECR I-5625, paragraph 33.

(14) – Opinion of 5 March 1991, point 23.

(15) – Case C-160/96 Molenaar [1998] ECR I-843, paragraphs 38 and 39, and Case C-215/99 Jauch [2001] ECR I-1901.

(16) – Case C-286/03 Hosse [2006] ECR I-1771, paragraphs 47 to 56.

(17) – Ibid., paragraph 55.

(18) – See Molenaar , paragraphs 38 and 39. See also the Opinion of Advocate General Bot in Case C-388/09 Silva Martins , pending before the Court, point 69 et seq.

(19) – Case 40/76 Kermaschek [1976] ECR 1669, paragraphs 6 to 9; Case 94/84 Deak [1985] ECR 1873, paragraphs 12 to 14; Case C-78/91 Hughes [1992] ECR I-4839, paragraph 25; and Case C-310/91 Schmid [1993] ECR I-3011, paragraphs 12 to 14. See, regarding a national of a third country married to a worker who is a national of a Member State, Case C-243/91 Taghavi [1992] ECR I-4401.

(20) – Case C-308/93 Cabanis-Issarte [1996] ECR I-2097, and Joined Cases C-245/94

and C-312/94 Hoever and Zachow [1996] ECR I-4895.

(21) – This principle does not apply in the case of family benefits. See, in addition to the two cases cited in the previous footnote, Case C-85/99 Offermanns [2001] ECR I-2261, paragraph 34. Nor does the principle apply in the case of sickness benefits: see Hosse , paragraph 53.

(22) – See, in particular, Case C-158/96 Kohll [1998] ECR I-1931, paragraphs 17 to 19; Case C-120/95 Decker [1998] ECR I-1831, paragraphs 21 to 23; Case C-18/95 Terhoeve [1999] ECR I-345, paragraphs 34 and 35; Case C-135/99 Elsen [2000] ECR I-10409, paragraph 33; Case C-227/03 van Pommeren-Bourgondiën [2005] ECR I-6101, paragraph 39; and Case C-212/06 Government of the French Community and Walloon Government [2008] ECR I-1683, paragraph 43.

(23) – On this point, the Court has both confirmed (see Case C-20/96 Snares [1997] ECR I-6057) and refuted, in the context of a reference for a preliminary ruling (Case C-43/99 Leclere and Deaconescu [2001] ECR I-4265), as in the context of an action for a declaration of failure to fulfil obligations (Case C-299/05 Commission v Parliament and Council [2007] ECR I-8695), the treatment of a benefit as a special non-contributory benefit.

(24) – See, in particular, Case 266/78 Brunori [1979] ECR 2705; Case 110/79 Coonan [1980] ECR 1445, paragraph 12; Case 43/86 de Rijke [1987] ECR 3611, paragraph 12; Case 368/87 Hartmann Troiani [1989] ECR 1333, paragraph 21; Case C-245/88 Daalmeijer [1991] ECR I-555, paragraph 15; Case C-297/92 Baglieri [1993] ECR I-5211, paragraph 13; and Case C-493/04 Piatkowski [2006] ECR I-2369, paragraph 32.

(25) – The reference to periods of 'employment or residence' already figured in the amendment of Article 18 introduced by Regulation (EEC) No 2864/72 of the Council of 19 December 1972 amending Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 15). That amendment was necessitated by the guidelines laid down in Part VII of Annex II to the Act concerning the conditions of accession and the adjustments to the Treaties annexed to the Act of Accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1972 L 73, p. 143).

(26) – Above and beyond the 'limitations and conditions laid down in [the] Treaty and by the measures adopted to give them effect' to borrow the wording of Article 18(1) EC.

(27) – Case C-406/04 De Cuyper [2006] ECR I-6947, paragraph 40, and Case C-221/07 Zablocka-Weyhermüller [2008] ECR I-9029, paragraph 37.

(28) – Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451, paragraph 34.

(29) – In this connection the United Kingdom Government makes a very telling reference to Case C-245/88 Daalmeijer [1991] ECR I-555.

(30) – Tas-Hagen and Tas , paragraph 38. In that case, entitlement to the benefit at issue was subject to the condition that the claimant resided in the territory of the Member State on the date of the claim, a condition which could not prove that the claimant was integrated into the society of that Member State and, therefore, really serve as a connection. See, on this point, the analysis of Advocate General Kokott in points 66 to 68 of her Opinion.

(31) – Such a hypothesis seems, as I have already noted, difficult to envisage but it is for the Upper Tribunal to decide the point, if necessary.

(32) – I must make the broader point here that it is for the Member States to decide on the configuration of their social security systems and to define the general policy of the social objectives they mean to pursue, in particular, by deciding, in compliance with EU law, how their striving for solidarity should be divided between social benefits, special non-contributory benefits and social assistance.

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