**Opinion of Advocate General Kokott delivered on 29 March 2007**

**D. P. W. Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen**

**Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands**

**Social security for migrant workers -Articles 12 EC, 17 EC, 18 EC and 39 EC -Regulation (EEC) No 1408/71 - Article 4(2a), Article 10a and Annex IIa - Regulation (EEC) No 1612/68 - Article 7(1) - Non-contributory benefits - Netherlands benefit for disabled young people - Non-exportability**

**Case C-287/05**

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## I – Introduction

**1.** Disabled young people resident in the Netherlands who are totally or partially incapable of work receive a cash benefit in accordance with the Wet arbeidsongeschiktheidsvoorziening jonggehandicapten (Law on the provision of incapacity benefit to disabled young people, 'the Wajong'). The benefit replaces income from employment or supplements such earnings up to the amount of a minimum wage.

**2.** In *Kersbergen-Lap and Dams-Schipper*, (2) which was delivered after the order for reference was made in the present case, the Court has already held that the Wajong benefit constitutes a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71, (3) which in accordance with Article 10a of that regulation does not have to be paid to non-residents. The applicants in those proceedings were not in employment, however, so that the benefit in their case constituted a complete replacement for employment earnings.

**3.** By way of contrast, Mr Hendrix, the appellant in the main proceedings, is a worker. As his earnings were below the level of the statutory minimum wage, he received the Wajong cash benefit as a wage supplement as long as he continued to reside in the Netherlands. Following his transfer of residence to Belgium, payment of the benefit was terminated.

**4.** In addition to seeking an assessment of the benefit's nature in accordance with the criteria of Regulation No 1408/71, the Centrale Raad van Beroep asks, therefore, whether a worker can rely on freedom of movement for workers against the Member State of which he is a national where he is employed in that State and has transferred only his place of residence to another Member State. Should freedom of movement for workers be applicable in that situation, the question arises to what extent the provisions of Regulation No 1408/71 on special non-contributory benefits are compatible with that principle. The referring court questions also the compatibility of such rules with the freedom of movement of Union citizens under Article 18 EC.

## II – Legal framework

### A – Community law

**5.** Article 7(1) and (2) of Regulation No 1612/68 (4) is worded as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.'

**6.** Article 42(2) of Regulation No 1612/68 provides:

'This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty.'

**7.** Article 4 of Regulation No 1408/71 provides:

'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 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.

2b. This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.

...

4. This Regulation shall not apply to social … assistance … .'

**8.** Article 10a(1) of Regulation No 1408/71 makes provision for special non-contributory benefits according to Article 4(2a) as follows:

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

**9.** Section Q of Annex IIa to Regulation No 1408/71 lists the Netherlands law on the provision of incapacity benefit to disabled young people.

**10.** Article 95b(8) of Regulation No 1408/71 provides:

'The application of Article 1 of Regulation (EEC) No 1247/92 may not result in the withdrawal of benefits which are awarded before 1 June 1992 by the competent institutions of the Member State under Title III of Regulation (EEC) No 1408/71 to which Article 10 of the latter Regulation is applicable.'

**B – National law**

**11.** As of their first day at work, persons employed in the Netherlands are insured against incapacity for work under the Wet op de arbeitsongeschiktheidsverzekering (Law on insurance against incapacity for work, 'the WAO'). If persons by reason of disability are wholly incapable of work or from the outset are only partially capable of work, to that extent they receive no benefits under the WAO.

**12.** Until the beginning of 1998 the Algemene Arbeidsongeschiktheidswet (Law providing for general insurance against incapacity for work, 'the AAW') was in force in the Netherlands and provided for insurance against incapacity for work for all residents of the Netherlands who were not insured under the WAO. Under the AAW, persons, inter alia, who were already incapacitated for work at the time of their 17th birthday could claim a minimum benefit for disabled young persons from the age of 18. Benefits under the AAW were funded by contributions paid by insured persons, the level of which depended on their taxable income.

**13.** As of 1 January 1998, in so far as is relevant here, the AAW was replaced by the Wet arbeidsongeschiktheidsvoorziening jonggehandicapten (Law on provision of incapacity benefit to disabled young people, 'the Wajong') of 24 April 1997. For the specific group of disabled young people the Wajong provides for a benefit which corresponds to the assumed minimum means of subsistence needed in the Netherlands.

**14.** Entitlement to benefits under the Wajong, which are almost entirely financed through public funds, does not depend on personal needs. Benefits are reduced, however, if the claimant earns income from employment.

**15.** Unlike the earlier AAW, benefits under the Wajong are granted only to disabled persons resident in the Netherlands. Since 1 September 2002 the Wajong has contained a hardship clause, according to which the residence requirement can be dispensed with to the extent that loss of benefit results in unreasonable hardship. Such hardship is assumed to exist, for example, if the disabled young person has to undergo medical treatment abroad, if he can take up employment abroad offering a certain prospect of reintegration, or if the person on whom he depends for care is forced to live outside the Netherlands.

**16.** Under the Wet op de (re)integratie arbeidsgehandicapten (Law on the (re)integration of disabled workers, 'the REA') employers can be exempted from the requirement to pay the statutory minimum wage to disabled workers whose performance falls substantially below the normal level.

**III – Facts and procedure**

**17.** Mr Hendrix, a Netherlands national, was born on 26 September 1975. He has a mental disability which results in him being regarded as 80% to 100% incapacitated for work. With effect from 26 September 1993 he was granted a benefit under the AAW.

**18.** Commencing on 1 February 1994 Mr Hendrix was employed at a DIY retail store in the Netherlands. Under the REA, his employer was exempted from its obligation to pay Mr Hendrix the statutory minimum wage. As a result, Mr Hendrix earned only 70% of the statutory minimum wage and accordingly received Wajong benefit as if he were 25% to 35% incapacitated for work.

**19.** On 1 June 1999 Mr Hendrix moved to Belgium, retaining, however, his employment in the Netherlands. By decision of 28 June 1999 the Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen ('the defendant') terminated Mr Hendrix's Wajong benefit as from 1 July 1999. Since the minimum pay exemption granted to Mr Hendrix's employer remained in force and the employer declined to increase Mr Hendrix's wages, his employment was terminated. Since 5 July 1999 Mr Hendrix has been employed by a different DIY retail store, where he receives the statutory minimum wage. (5) In 2001 Mr Hendrix moved back to the Netherlands.

**20.** Following an unsuccessful administrative appeal, Mr Hendrix brought proceedings challenging the termination of his Wajong benefit before the Rechtbank Amsterdam (Amsterdam District Court), which by judgment of 16 March 2001 dismissed the action. On appeal to the Centrale Raad van Beroep, the latter court, by order of 15 July 2005, referred the following questions to the Court of Justice for a preliminary ruling in accordance with Article 234 EC:

'(1) Must a benefit under the Wajong, listed in Annex IIa to Regulation No 1408/71, be regarded as a special non-contributory benefit, as referred to in Article 4(2a) of Regulation No 1408/71, with the result that only the coordinating provision introduced by Article 10a of Regulation No 1408/71 must be applied to persons such as the appellant in the main proceedings? In answering this question does it make any difference whether the person concerned originally received a benefit (funded by contributions) for disabled young persons under the AAW which was converted by operation of law into a Wajong benefit as of 1 January 1998?

(2) If the answer to Question 1 is in the affirmative: can a worker rely on Article 39 EC, as implemented by Article 7 of Regulation No 1612/68, against the Member State of which he is a national where he has worked only in that Member State but is resident in the territory of another Member State?

(3) If the answers to Questions 1 and 2 are in the affirmative: must Article 39 EC, as implemented by Article 7(2) of Regulation No 1612/68, be understood as meaning that a provision of legislation which makes the grant or continuation of a benefit conditional on the person concerned being resident in the territory of the Member State whose legislation is at issue is always compatible therewith where that legislation provides for a special non-contributory benefit, as referred to in Article 4(2a) of Regulation No 1408/71, and is listed in Annex IIa to that regulation?

(4) If the answers to Questions 1 and 2 are in the affirmative and the answer to Question 3 is in the negative: must Community law (in particular Article 7(2) of Regulation No 1612/68 and Article 39 EC and Articles 12 and 18 EC) be understood as meaning that sufficient justification can be found in the nature of the Wajong to invoke the residence condition against a citizen of the Union who is in full-time employment in the Netherlands and in that regard is subject solely to Netherlands legislation?'

## IV – Legal appraisal

### A – The first question – classification of the benefit as a special non-contributory benefit within the meaning of Regulation No 1408/71

**21.** The first question of the Raad van Beroep seeks to ascertain whether a Wajong benefit must be regarded as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71 to which the coordinating provision of Article 10a of that regulation must be applied.

**22.** That question has already been answered by the Court in *Kersbergen* in the affirmative, since the benefit in question is listed in Annex IIa to Regulation No 1408/71, is non-contributory and has the characteristics of a special benefit. (6) It constitutes a special benefit because it displays features both of a social security benefit in the event of infirmity in accordance with Article 4(1)(b) of Regulation No 1408/71 and of social assistance. The aim of the benefit is to guarantee a minimum income to a socially disadvantaged group (disabled young people). (7)

**23.** According to the Court, the fact that grant of the Wajong benefit does not depend on a means test (8) does not contradict the benefit's affinity to social assistance. Instead, it suffices to that extent to observe that the beneficiary group of disabled young people do not in general dispose of adequate means of subsistence. (9)

**24.** Within the framework of the first question the Centrale Raad van Beroep also wishes to know whether it makes a difference that the applicant originally received an AAW benefit for disabled young people, financed through contributions, which was not subject to a residence condition which was converted, however, into a benefit under the Wajong with effect from 1 January 1998.

**25.** On that point, likewise, the Court already held in *Kersbergen* that reliance on the principle that acquired rights are preserved is precluded in a situation where the beneficiary moves abroad after the AAW benefit has been replaced by the Wajong benefit. (10) Since Mr Hendrix moved to Belgium on 1 June 1999, he cannot rely, therefore, on that principle. In the absence of alternatively-worded transitional provisions the consequences of a transfer of residence must be determined, therefore, in accordance with the legal position prevailing at that time.

**26.** In that situation, Article 95b(8) of Regulation No 1408/71 cannot be of assistance in any event since Mr Hendrix was not in receipt of any benefits prior to 1 June 1992 whose continued payment is required by virtue of that provision.

**27.** By way of provisional conclusion, it must be held, therefore, that a benefit under the Wajong must be regarded as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71 to which the coordinating provision of Article 10a of that regulation must be applied. The same conclusion applies even if the person concerned originally received a benefit financed by contributions which with effect from 1 January 1998 was converted to a benefit under the Wajong.

**28.** It must be determined below, however, whether in the circumstances of the present case the residence condition of Article 10a of Regulation No 1408/71 is compatible with the provisions on free movement of workers.

### B – The second question – reliance on freedom of movement for workers against the Member State of nationality

**29.** By its second question the Centrale Raad van Beroep wishes to know whether a worker may rely on Article 39 EC as implemented by Article 7 of Regulation No 1612/68 against the Member State of which he is a national where he has worked only in that Member State and continues still to work there, but is resident in another Member State.

**30.** The Wajong benefit falls within the material scope of Article 7(2) of Regulation No 1612/68, since it is generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. (11)

**31.** Article 7(2) of Regulation No 1612/68 is a specific expression of the prohibition on discrimination already set out in Article 39 EC as regards the grant of social advantages. (12) According to its wording, Article 7(2) of Regulation No 1612/68 precludes the host Member State from treating a worker from another Member State differently from national workers by reason of his nationality. Seemingly, therefore, that provision falls short of the guarantee provided by Article 39 EC on which any Community national, irrespective of his place of residence and his nationality, who has exercised the right of freedom of movement for workers may rely. (13) The Court applies the two provisions in parallel, however, and interprets Article 7 of Regulation No 1612/68 in the same manner as it does Article 39 EC. (14) Accordingly, in the present case, too, both provisions can be applied alongside one another.

**32.** The Treaty rules governing freedom of movement and the measures adopted to implement them cannot be applied, however, to situations all the elements of which are purely internal to a single Member State. (15) In a situation where no discrimination directly related to nationality is present and a worker seeks to rely on freedom of movement for workers against his own Member State, some other cross-border factor is therefore required to bring the matter within the scope of that freedom.

**33.** The cross-border element in the present case is supplied by the fact that Mr Hendrix is resident in Belgium and pursues an activity as an employed person in the Netherlands. As a frontier worker (16) he moves, on a daily basis, therefore, from one Member State to another, in order to pursue his employment there.

**34.** The defendant, the Netherlands Government and the United Kingdom Government contest that view, arguing that a worker can rely on Article 39 EC against the Member State of which he is a national only after he has exercised his right of freedom of movement as a worker. (17) According to *Werner*, (18) that is not considered to be the case where the person concerned has consistently worked in his home State and has transferred only his residence to another Member State.

**35.** Subsequently in *Van Pommeren-Bourgondiën*, (19) however, the Court held that freedom of movement for workers could be relied on in a comparable situation. The applicant in that case, a Netherlands national, was resident in Belgium and had worked in the Netherlands for her entire working life. By reason of her place of residence, she was treated by the Netherlands social security authorities as a person insured on a voluntary and not a compulsory basis and had to pay greater contributions than Netherlands residents. Regulation No 1408/71 did not preclude that practice.

**36.** The Court held that it infringes Article 39 EC, however, if the insurance conditions for non-residents are less favourable than the conditions relating to compulsory insurance, for the same branches of social security, which residents obtain. (20) The fact that Mrs Van Pommeren-Bourgondiën had always worked in the Netherlands and had moved to Belgium only for residence purposes apparently did not preclude application of freedom of movement for workers.

**37.** In *Ritter-Coulais* (21) the Court confirmed very clearly that view, holding

'... that any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 48 of the Treaty.

It follows that the situation of the appellants in the main proceedings, who worked in a Member State other than that of their actual place of residence, falls within the scope of Article 48 of the Treaty [now, after amendment, Article 39 EC].'

**38.** It must be added also that Mr and Mrs Ritter-Coulais both (at least on an additional basis) (22) held German nationality, that is to say were nationals of the State in which they worked and against which they sought to rely on freedom of movement for workers. The cross-border element was provided solely by their residence in another Member State. (23)

**39.** In *N* the Court subsequently applied that formula to freedom of establishment. In that case, too, the applicant transferred his residence from his State of nationality, in which he pursued his economic activities, to another Member State without taking up employment in the latter State. The Court considered those circumstances as bringing the case within the scope of freedom of establishment. (24)

**40.** The objection that the observations in *Ritter-Coulais* should be interpreted with regard to the fact that the general freedom of movement for citizens of the Union and the free movement of capital which would in principle have been of assistance to the applicants did not apply *ratione temporis* to the facts of that case is unconvincing. (25) First, *Van Pommeren-Bourgondiën* demonstrates that the corresponding interpretation of freedom of movement for workers claims validity in situations wholly removed from the particular circumstances of *Ritter-Coulais*. Second, it would be legally untenable to adopt a broader or narrower interpretation of freedom of movement for workers depending on whether the facts of the case are also covered by another fundamental freedom.

**41.** The judgments cited are based on an understanding of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured as described in Article 14(2) EC. Article 39 EC implements the elementary principle contained in Article 3(1)(c) EC, according to which for the purposes set out in Article 2 EC the activities of the Community are to include the abolition as between Member States of obstacles to free movement. (26) In that context, it is of no consequence whether those obstacles emanate from the State of origin or the host State. (27)

**42.** The restrictive interpretation of freedom of movement for workers argued for by the defendant and the governments submitting observations contradicts the principle underpinning the internal market. In an area without internal frontiers, a person who travels from his State of residence in order to work in the State of which he is a national may be no more subject to impediment than a person who commutes from his State of nationality in order to work in another Member State.

**43.** The restrictive approach to the scope of freedom of movement for workers focuses too closely on the nationality of the person concerned rather than on the activity's cross-border nature. That approach leads to a distinction being drawn depending on whether a State's own national or a foreign national crosses the border in order to come and work. If following his move to Belgium Mr Hendrix had taken up employment in Germany and had travelled from Belgium to work there on a daily basis, without a doubt he would have been able to rely on freedom of movement for workers. I fail to see why he should be treated differently on commuting to his State of origin, the Netherlands.

**44.** Advocate General Geelhoed in his Opinion in *Hartmann* proposed a restrictive interpretation to Article 39 EC, as the defendant and the governments submitting observations also call for in the present case. In support of that view he emphasised that the aim of that provision is solely to permit the factor of labour to move, there being no such movement in the case of a mere transfer of residence. (28)

**45.** To the extent that a rule of national law is directly linked to the transfer of a private residence, and thus for instance creates tax or administrative obstacles to that move, the question must indeed be asked whether such measures are not to be categorised primarily as affecting the freedom of movement for Union citizens provided for by Article 18 EC. If, however, transfer of the residence has already been effected and the less favourable treatment results from the fact that workplace and residence are now to be found in different locations, freedom of movement for workers takes precedence: from that moment onwards, the factor of labour is impeded in its movement from the (new) State of residence to the State of employment.

**46.** For the purposes of applying Article 39 EC it cannot be decisive whether the cross-border situation arises through a transfer in the place of residence or in the place of employment. Otherwise, this runs the risk of entirely chance results. It would mean, for example, that Mr Hendrix, who has worked continuously in the Netherlands and transferred his place of residence to another Member State, at first would not be able to rely on freedom of movement for workers. If, however, after transferring his residence he were to lose his job and following that break he were to take up new employment in the Netherlands, the principle of the freedom of movement for workers would apply, because he would now be moving from Belgium to the Netherlands in order to take up an activity as an employed person.

**47.** Admittedly, in numerous cases the Court has held that a worker may rely on Article 39 EC against the Member State of which he is a national after he has exercised his freedom of movement as a worker. (29) It treated those circumstances as equivalent to the situation in which an individual acquired a diploma or vocational qualification abroad. (30)

**48.** In those cases, however, the individuals concerned had mostly reassumed residence in their State of origin and sought to rely against that State on freedom of movement for workers. Since workplace and residence – unlike in the case of Mr Hendrix – were thereby no longer in separate locations a previous cross-border movement giving rise to migrant worker status was required. Those judgments do not permit the conclusion to be reached, however, that migrant worker status cannot be acquired by way of a transfer of residence.

**49.** The answer to the second question must therefore be that a worker can rely on Article 39 EC and Article 7 of Regulation No 1612/68 against the Member State of which he is a national, if he has worked solely in that Member State and continues to work there, but is resident in another Member State.

**C – The third question – relationship between Regulation No 1408/71 and both Regulation No 1612/68 and Article 39 EC**

**50.** By its third question the Centrale Raad van Beroep wishes to know whether a provision of national law which makes the grant or continuation of a benefit conditional on the person concerned being resident in the territory of the Member State is always compatible with Article 39 EC and Article 7(2) of Regulation No 1612/68 on the ground that the benefit constitutes a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71 which in accordance with Article 10a of that regulation is only granted at the place of residence.

**51.** On that issue, the defendant, the Netherlands Government and the United Kingdom Government take the view that Regulation No 1408/71 – in comparison with Regulation No 1612/68 – is the more specific provision and that, therefore, within its scope of application it applies exclusively. (31) They submit that Regulation No 1612/68 cannot result in a situation that benefits whose export is excluded under Article 10a of Regulation No 1408/71 may, after all, be claimed.

**52.** The Court has held, however, that Article 7(2) of Regulation No 1612/68 can apply to social advantages which at the same time fall within the particular scope of Regulation No 1408/71. (32) The two provisions are applicable in parallel because of the difference in their personal scope, (33) because the notion of a social advantage in Article 7(2) of Regulation No 1612/68 is broader than the notion of a social security benefit under Regulation No 1408/71, (34) and because of the general significance of Regulation No 1612/68 for freedom of movement of workers. (35) Consequently, the fact that a benefit falls wholly or partially outside the scope of Regulation No 1408/71 and accordingly that that regulation does not require the benefit to be exported says nothing about the requirements laid down in Regulation No 1612/68 concerning grant of the benefit. (36)

**53.** Analysis of the judgments in *Commission* v *France* (37) and *Scrivner*, (38) cited by the defendant and the Netherlands Government does not lead to an alternative conclusion. Namely, in those cases the possibility of Regulation No 1408/71 taking precedence was not even at issue for the simple reason that their facts failed already to fall within the Regulation's scope. (39)

**54.** Nor, in so far as Article 42(2) of Regulation No 1612/68 ('[t]his Regulation shall not affect measures taken in accordance with Article 51 of the Treaty [now, after amendment, Article 42 EC]') is interpreted as subordinating Regulation No 1612/68 to the provisions of Regulation No 1408/71, does that argument presume to convince. (40) Article 42(2) of Regulation No 1612/68 does not mention any precedence for measures taken in accordance with Article 51 of the Treaty, rather it requires merely that the former regulation must not 'affect' those measures. That wording precisely does not support the argument that Regulation No 1612/68 should give way, instead it supports the argument that the regulations should apply independently of one another, that is to say, in parallel. (41)

**55.** Nor, likewise, does the fact that Article 7(2) of Regulation No 1612/68 is formulated in general terms whereas Regulation No 1408/71 contains specific provisions for the field of social security permit the conclusion that Regulation No 1408/71 as *lex specialis* takes precedence over Regulation No 1612/68. The regulatory technique utilised within each of the regulations does not of itself shed any light on the regulations' hierarchy.

**56.** Above all, the following consideration militates against Regulation No 1408/71 having general priority over Article 7 of Regulation No 1612/68. Ultimately, Article 7 of Regulation No 1612/68 constitutes merely a specific formulation of the guarantee set out in Article 39 EC and must be interpreted in the same manner as that latter provision. (42) In all cases involving the interpretation and application of Regulation No 1408/71, however, the requirements of the Treaty as a superior source of law must be observed. The fact that a national measure may be consistent with a provision of secondary legislation, in this case Article 10a of Regulation No 1408/71, does not have the effect of removing that measure from the scope of the Treaty's provisions. (43)

**57.** Thus, a restriction on the fundamental freedoms must be justified by overriding reasons in the general interest even where that restriction derives from a Community regulation or a national measure which is in accordance with secondary law. Admittedly, Community and national legislatures enjoy a discretion when adopting measures in the general interest which affect the fundamental freedoms. The Court retains the right, however, to examine whether legislatures have exceeded the scope of that discretion and infringed thereby the fundamental freedoms.

**58.** The answer to the third question must therefore be that a provision of national law which makes the grant or continuation of a benefit conditional on the person concerned being resident in the territory of the Member State is not always compatible with Article 39 EC and Article 7(2) of Regulation No 1612/68 on the ground that the benefit constitutes a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71 which in accordance with Article 10a of that regulation is granted only at the place of residence.

**D – The fourth question – compatibility of the residence requirement with Article 7(2) of Regulation No 1612/68, Article 39 EC and Articles 12 EC and 18 EC**

**59.** By its fourth question, the Centrale Raad van Beroep in substance wishes to know whether Article 39 EC and Article 7(2) of Regulation No 1612/68 and Articles 12 EC and 18 EC preclude a provision of national law such as the Wajong, under which a citizen of the Union who is in full-time employment in the Netherlands and in that regard is subject exclusively to Netherlands legislation may be granted a particular social benefit only if he is also resident in that Member State.

**1. Compatibility with Article 39 EC and Article 7 of Regulation No 1612/68**

**60.** It is settled case-law that all of the Treaty provisions relating to freedom of movement are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. (44)

61. In accordance with Article 10a of Regulation No 1408/71, the Wajong benefit is granted only to such persons as are resident in the Netherlands. That criterion disadvantages workers who work in the Netherlands but are not resident there. That less favourable treatment resulting from the residence requirement might be justified, however, by objective considerations in the public interest independent of the nationality of the persons concerned. (45)

**62.** The residence requirement in Article 10a of Regulation No 1408/71 serves to delineate the competences of the Member States in the provision of special non-contributory benefits which are not only connected to social security benefits but which also contain elements of social assistance. The Court already held that the place of residence constitutes an appropriate criterion for that purpose.

**63.** First, in *Snares* it held that Article 10a of Regulation No 1408/71 is compatible with the provisions on freedom of movement for workers because special benefits are closely linked to the social environment. (46) Since the centre of gravity of a person's life is generally to be found at his place of residence, it is primarily for the State of residence, taking into account the social environment there (for example, the cost of living), to determine whether and to what extent a special benefit must be granted to guarantee a minimum means of subsistence.

**64.** Second, the restriction on the exportability of special non-contributory benefits contained in Article 10a of Regulation No 1408/71 is based – as the Commission correctly observes – on the consideration that such benefits constitute an expression of solidarity within a Member State. The State to whose community of solidarity a person belongs should also bear the responsibility for guaranteeing a minimum means of subsistence. In *Tas-Hagen and Tas* the Court recently reaffirmed that entitlement to a social benefit may, as a matter of principle, be determined by reference to the degree of connection to the society of a Member State, expressed by residence in the State concerned. (47)

**65.** As regards the lawfulness of the residence condition, Articles 10 and 10a of Regulation No 1408/71 distinguish for good reason between social security benefits and special non-contributory benefits. Competence for classic social security benefits lies, as a rule, with the State of employment in which the worker is affiliated to the social security system and pays his contributions. In the case of special non-contributory benefits, membership – in a corresponding sense – of a specific community solidarity of insured persons is absent. Its place is taken by integration in the solidarity system of all national residents. Only those latter persons need to be granted special benefits, whereas social security benefits can be claimed independently of the place of residence.

**66.** By linking the award of special benefits to the place of residence a similar connection is achieved between benefit entitlement and funding responsibility as arises through payment of social security contributions. Special benefits are financed, in fact, through taxes. Residents are liable to unlimited taxation in their State of residence. Moreover, through private consumption in that State they contribute considerably to the generation of tax revenue.

**67.** The significance of the residence criterion diminishes, however, with regard to frontier workers who generally have close connections also to the economic and social environment at their place of work. In that connection, the Commission stresses the fact that Mr Hendrix moved to a Belgian locality directly on the frontier with the Netherlands and, in principle, (48) according to the Belgium-Netherlands double tax convention was subject to Netherlands income tax on his income earned in the Netherlands.

**68.** As regards frontier workers the question arises, therefore, whether place of residence alone constitutes a suitable criterion to establish membership of a community of solidarity. Instead, it might be considered whether it is appropriate in such cases on a supplementary basis to have recourse to additional criteria which characterise the degree of integration in an economic and social environment, for example, place of employment, distance to the frontier from the place of residence, place of consumption expenditure or primary location for social contacts.

**69.** In cases such as the present, however, a link to the place of employment may be ruled out. That is because the Wajong benefit functions as a job subsidy which permits a disabled worker to be hired in the first place. If an employer hires a disabled worker, it is exempted from paying the statutory minimum wage, with the disabled person receiving the difference between his actual wage and the minimum wage by way of the Wajong benefit. Without that State benefit disabled people who are not fully capable of performing would hardly have a chance in the labour market at the level of the minimum wage. The fact that a person in receipt of a Wajong benefit is in employment results, therefore, from the State's provision of that solidarity benefit. If employment

on the domestic labour market were at the same time to constitute the condition for entitlement to that benefit, that would be a case of circular reasoning.

**70.** In contrast to the place of residence, the remaining criteria are characterised by the fact that they do not permit a definite allocation to an economic and social environment, but rather constitute merely more or less specific features which only within the framework of a global assessment may lead to the relevant economic and social environment being determined.

**71.** Coordination of the Member States' responsibilities with regard to the grant of solidarity benefits must be determined, however, in accordance with clear criteria which in the context of mass administration enable swift assessments with sufficiently unambiguous results to be reached. It is permissible, therefore, to establish an allocation to the Member States' social systems by way of abstract criteria, which do not take all the circumstances of an individual case into account but, using a generalised approach, demonstrate a predominant link to a Member State. Detailed examination of all the factors characterising an individual case does not constitute an appropriate means to determine clearly and at reasonable expense the allocation of competence.

**72.** Moreover, it must be observed that in the absence of harmonisation in social security matters, Member States remain competent to define the conditions for granting social security benefits (49) and enjoy, therefore, a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to the society of a Member State. (50) In particular, as regards residence conditions for special non-contributory benefits the Community legislature intentionally has not limited that discretion. Rather, in Article 10a of Regulation No 1408/71 it has expressly permitted the use of residence conditions.

**73.** Having regard to this freedom enjoyed by Member States on allocating competence to adopt a generalised approach in determining the conditions for granting special benefits, it must be considered legitimate to rely solely on the criterion of place of residence even if in individual cases, for example with regard to frontier workers, other factors might also play a role.

**74.** This conclusion appears at first sight to contradict the Court's finding in *Meeusen* (51) that, in accordance with Article 7(2) of Regulation No 1612/68, frontier workers (52) too are entitled to claim social advantages in their State of employment independent of their place of residence. (53)

**75.** The Member States had argued, on the contrary, that the provision did not confer on frontier workers any right to export social benefits from the State of employment to that of residence. (54) The regulation's purpose was to encourage social integration of migrant workers in the host State. However, it was argued, frontier workers were not socially integrated there, but at their place of residence.

**76.** The Court rejected that argument because the scope of Regulation No 1612/68 also includes frontier workers. (55) It held further that the equal treatment principle contained in Article 7(2) of Regulation No 1612/68 prohibits the host State from treating migrant workers less favourably than national workers by subjecting the grant of benefits to a requirement of residence on the national territory.

**77.** The Court's findings in *Meeusen*, however, concerned study finance for the children of migrant workers and cannot be transposed to the situation in the present case. Contrary to the position applicable in respect of study financing, the situations of persons resident abroad and those resident on the national territory who need benefits to guarantee a minimum means of subsistence are not simply comparable. Such benefits are much more closely connected with the social environment of the claimant.

**78.** Moreover, as I have already argued, it is the Wajong benefit itself that creates the conditions for the employment of disabled workers, and, as a result, employment on the national territory cannot at the same time establish an entitlement to benefit. Study finance, however, constitutes more of an ancillary advantage for which employment and the concomitant tax liability are more suitable linking elements in determining benefit entitlement.

**79.** Accordingly, it is compatible with Article 39 EC and Article 7(2) of Regulation No 1612/68 to restrict the grant of benefits such as those under the Wajong to persons resident in the Netherlands.

### 2. Compatibility with Articles 12 EC and 18 EC

**80.** Since the general right to freedom of movement under Article 18 EC is of a subsidiary nature vis-à-vis freedom of movement for workers under Article 39 EC, (56) it is unnecessary to examine the compatibility of the residence condition with Articles 12 EC and 18 EC.

## V – Conclusion

**81.** In conclusion, I propose that the questions referred by the Centrale Raad van Beroep be answered as follows:

(1) A benefit under the Netherlands Law on the provision of incapacity benefit to disabled young people of 24 April 1997 (Wet arbeidsongeschiktheidsvoorziening jonggehandicapten) must be regarded as a special non-contributory benefit within the meaning of Article 4(2a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999, to which the coordinating provision of Article 10a of that regulation must be applied. The same conclusion applies even if the person concerned originally received a benefit financed by contributions which with effect from 1 January 1998 was converted to a benefit under the Wajong.

(2) A worker can rely on Article 39 EC and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992, against the Member State of which he is a national, if he has worked solely in that Member State and continues to work there, but is resident in another Member State.

(3) A provision of national law which makes the grant or continuation of a benefit conditional on the person concerned being resident in the territory of the Member State is not always compatible with Article 39 EC and Article 7(2) of Regulation No 1612/68 on the ground that the benefit constitutes a special non-contributory benefit within the

meaning of Article 4(2a) of Regulation No 1408/71 which in accordance with Article 10a of that regulation is granted only at the place of residence.

(4) Article 39 EC and Article 7(2) of Regulation No 1612/68 do not preclude national legislation such as the Wajong, under which a citizen of the Union who is in full-time employment in the Netherlands and in that regard is subject exclusively to Netherlands legislation may be granted a particular social benefit only if he is also resident in that Member State.

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1 – Original language: German.

2 – Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249 (‘*Kersbergen’)*.

3 – 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 (OJ, English Special Edition 1971 (II), p. 416) as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1).

4 – Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1).

5 – Accordingly, as the Netherlands Government correctly stresses, the entire legal dispute relates only to an entitlement to Wajong benefits for the four days from 1 to 4 July 1999.

6 – On the requirement for those conditions to be satisfied cumulatively, see Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 21, and *Kersbergen*, cited in footnote 2, paragraph 25.

7 – *Kersbergen*, cited in footnote 2, paragraphs 30 and 31. On the conditions for classification as a special benefit see in general also Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 33, and Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 25.

8 – On that requirement see, in particular, my Opinion in Case C-286/03 *Hosse* [2006] ECR I-1771, points 66 to 69.

9 – That argument is at first glance surprising. For an application for classic social assistance to succeed it surely ought not to be sufficient for a person to demonstrate to the relevant authority the mere fact of belonging to a socially disadvantaged group without providing evidence of his own financial situation. At best, the Court’s finding can be explained by the fact that to categorise a benefit as a special benefit merely a certain affinity to social assistance must exist, sufficient to demonstrate its hybrid nature, but that it does not have to correspond fully to a social assistance benefit.

10 – *Kersbergen*, cited in footnote 2, paragraph 41 et seq.

11 – Case 32/75 *Cristini* [1975] ECR 1085, paragraphs 10 to 13, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 22, and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 35.

12 – Case C-205/04 *Commission* v *Spain* [2006] ECR I-31*, paragraph 15.

13 – Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 76, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 23, and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31.

14 – See, for example, Case C-237/94 *O’Flynn* [1996] ECR I-2617, paragraph 19; Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 29; Case C-224/01 *Köbler* [2003] ECR I-10239, paragraphs 77 and 88; and *Commission* v *Spain*, cited in footnote 12, paragraph 15. For a contrasting view see the Opinion of Advocate General Geelhoed in Case C-406/04 *De Cuyper* [2006] ECR I-6947, points 34 to 37, and that of Advocate General Jacobs in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, points 93 to 100.

15 – See Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16; *Terhoeve*, cited in footnote 14, paragraph 26; Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraph 69; and Case C-208/05 *ITC* [2007] ECR I-0000, paragraph 29.

16 – That expression is defined in Article 1(b) of Regulation No 1408/71.

17 – On that point see Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 23; Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9; *Terhoeve*, cited in footnote 14, paragraph 27; and *de Groot*, cited in footnote 13, paragraph 76.

18 – Case C-112/91 [1993] ECR I-429, paragraphs 16 and 17, concerning freedom of establishment. The restrictive approach taken in *Werner* has recently found support also with Advocate General Geelhoed in his Opinion in Case C-212/05 *Hartmann* [2007] ECR I-000, points 32 to 42.

19 – Case C-227/03 [2005] ECR I-6101.

20 – *Van Pommeren-Bourgondiën*, cited in footnote 19, paragraph 40.

21 – Cited in footnote 13, paragraphs 31 and 32.

22 – Mrs Ritter-Coulais was also a French national. However, as Advocate General Léger correctly emphasised, in his Opinion in Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, point 36, the couple were subject to joint tax assessment in Germany, and thus to have taken the wife's French nationality into account separately would have been an artificial exercise.

23 – It would have been a welcome step, however, if in *Ritter-Coulais* the Court had expressly stated that it was abandoning the *Werner* case-law, on which Advocate General Léger had essentially relied (see his Opinion in *Ritter-Coulais*, cited in footnote 22, point 5 et seq.). Instead the Court fails to mention *Werner* at any point.

24 – Case C-470/04 *N* [2006] ECR I-0000, paragraph 28.

25 – Advocate General Geelhoed hints at this interpretation in his Opinion in *Hartmann*, cited in footnote 18, point 37.

26 – *Terhoeve*, cited in footnote 14, paragraph 36, *Singh*, cited in footnote 17, paragraph 15, and Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 31.

27 – See *Terhoeve*, cited in footnote 14, paragraphs 37 and 39, *Sehrer*, cited in footnote 26, paragraphs 32 and 33, and Case C-520/04 *Turpeinen* [2006] ECR I-0000, paragraphs 14 and 15.

28 – Opinion in *Hartmann*, cited in footnote 18, point 41. Advocate General Darmon took the same view earlier in his Opinion in Case C-112/91 *Werner* [1993] ECR I-429, point 30.

29 – See, for example, the judgments cited in footnote 17.

30 – *Knoors*, cited in footnote 17, paragraph 24, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16.

31 – That view is also taken by Advocate General Geelhoed in his Opinion in *Hartmann*, cited in footnote 18, point 50.

32 – Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 21, and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 27.

33 – See *Commission* v *Luxembourg*, cited in footnote 32, paragraph 20.

34 – See the Opinion in *Hosse*, cited in footnote 8, point 104.

35 – See *Commission* v *Luxembourg*, cited in footnote 32, paragraph 21.

36 – See the Opinion in *Hosse*, cited in footnote 8, point 104.

37 – Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 47.

38 – Case 122/84 *Scrivner and Cole* [1985] ECR 1027.

39 – *Commission* v *France*, cited in footnote 37, paragraph 35. *Scrivner*, cited in footnote 38, paragraph 21. For the same reason the EFTA Court in Case E-3/05 *EFTA Surveillance Authority* v *Norway* [2006] EFTA Court Report, p. 102, paragraph 63, also errs in citing *Scrivner* as alleged authority for the precedence of Regulation No 1408/71 over Regulation No 1612/68.

40 – That is the view, however, taken by Advocate General Geelhoed in his Opinion in *Hartmann*, cited in footnote 18, point 50, and the EFTA Court in *EFTA Surveilance Authority* v *Norway*, cited in footnote 39, paragraph 63.

41 – Accordingly the French version of Article 42(2) of Regulation No 1612/68 also provides: 'Le présent règlement ne porte pas atteinte aux dispositions prises conformément à l'article 51 du traité.'

42 – See above, point 30 of this Opinion, including the references cited in footnote 14.

43 – Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 25, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 47.

44 – *Singh*, cited in footnote 17, paragraph 16; *Terhoeve*, cited in footnote 14, paragraph 37; *Sehrer*, cited in footnote 26, paragraph 32; and *Ritter-Coulais,* cited in footnote 13, paragraph 33.

45 – See Case C-346/05 *Chateignier* [2006] ECR I-0000, paragraph 32, referring to *O'Flynn*, cited in footnote 14, paragraph 19, and to Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 66. Likewise on the relationship between Article 18 EC and Regulation No 1408/71 see Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 40.

46 – *Snares*, cited in footnote 7, paragraph 42. See on that point also Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 16, Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 32, and *Kersbergen*, cited in footnote 2, paragraph 33.

47 – Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraphs 34 and 35. Earlier judgments to the same effect: Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 38; *Collins*, cited in footnote 45, paragraph 67; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 57; and *Ioannidis*, cited in footnote 11, paragraph 30.

48 – In reality, at least as long as his wages fell below the level of the statutory minimum wage, Mr Hendrix will have hardly paid tax on them.

49 – *Snares*, cited in footnote 7, paragraph 45.

50 – Opinion in *Tas-Hagen*, cited in footnote 47, point 61.

51 – Cited in footnote 11.

52 – In contrast to Regulation No 1408/71, which uses the word 'Grenzgänger' to mean frontier worker, in the recitals to the German version of Regulation No 1612/68 the word 'Grenzarbeitnehmer' is used to express the same concept. In other language versions the same term is used in both regulations (for example, travailleur frontalier).

53 – To the same effect, see also *Commission* v *France*, cited in footnote 37, paragraph 40.

54 – *Meeusen*, cited in footnote 11, paragraph 20. See also Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 49.

55 – *Meeusen*, cited in footnote 11, paragraphs 21 and 22, and *Meints*, cited in footnote 54, paragraph 50.

56 – Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22; Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26; Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; Case C-293/03 *My* [2004] ECR I-12013, paragraph 33; and *Ioannidis*, cited in footnote 11, paragraph 37.