OPINION OF ADVOCATE GENERAL TESAURO
delivered on 14 May 1996 *

1. The question referred for a preliminary ruling which forms the subject-matter of these proceedings concerns the interpretation of Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 27 April 1976 and concluded on behalf of the Community by Council Regulation (EEC) No 2211/78 [1] of 26 September 1978 ('the Agreement').

The Centrale Raad van Beroep (Higher Social Security Court) asks, more specifically, whether, for the purpose of Article 41(1) of the Agreement, the non-working spouse of a Moroccan worker is also entitled to the transitional benefits in the field of old-age pensions provided for in the relevant national legislation for Netherlands nationals.

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

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

As regards the present case, the important provisions are those in Title III, concerning the field of labour. In particular, Article 41(1), which the Court is asked to interpret, provides that, subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them are to enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. The following paragraphs confer on Moroccan workers the right to aggregation of periods of insurance, employment or residence completed in the various Member States, as far as certain benefits are concerned (Article 41(2)); the right to receipt of family allowances for members of the family resident in the Community (Article 41(3)) and the right to transfer to Morocco pensions or annuities in respect of old age (Article 41(4)). The scheme under Article 41(1), (3) and (4) is subject to the

* Original language: Italian.

1 — OJ 1978 L 264, p. 1.

condition of similar treatment for nationals of a Member State employed in Morocco (Article 41(5)). Article 42(1) entrusts to the Cooperation Council the task of adopting provisions to implement the principles set out in Article 41 before the end of the first year following the entry into force of the Agreement. Lastly, among the General and Final Provisions (Title IV), Articles 44 and 45 establish the Cooperation Council which is to be composed, on the one hand, of members of the Council and the Commission of the European Communities and, on the other hand, of members of the Government of Morocco and which is to have the power to take decisions binding on the Contracting Parties for the purposes of attaining the objectives set out in the Agreement.

3. With regard to the relevant national legislation, I would observe that the Algemene Ouderdomswet (General Law on Old-Age Insurance, hereinafter 'the AOW'), which was brought into force on 1 January 1957, established a pension system under which the amount of the old-age pension is, as a rule, calculated solely on the basis of accrued insurance years. Under the AOW all nationals of the Netherlands residing there are subject to compulsory insurance, including those who are liable to pay income tax because they are employed in that State.

Persons insured in accordance with the AOW are entitled to an old-age pension on attaining 65 years of age. The maximum amount of the pension is payable after a period of 50 years, from the 15th to the 65th year of age; a reduction of 2% is applied, pursuant to Article 13 of the AOW, for every year without insurance.

As the AOW was brought into force on 1 January 1957, it was clearly impossible to be insured before that date, with the further consequence that no one could have received a full old-age pension before the year 2007. The Netherlands legislature found a solution by making transitional arrangements, contained in Articles 55 and 56 of the AOW, which allow those periods accruing between the insured person's 15th birthday and 1 January 1957 to be regarded as periods of insurance within the meaning of the AOW. These are notional periods of insurance, granted to any person who: (a) has lived in the Netherlands between his 59th and 65th birthdays (the 'six years' condition); [2] (b) is a Netherlands national or regarded as such (a condition which may not of course be relied on as against Community nationals availing themselves of freedom of movement for the purposes of Regulation No 1408/71);

2 — This condition is mitigated, however, by Article 2 of a Royal Decree of 3 December 1985, according to which a person who has left the Netherlands but continues to be insured under the AOW is to be considered resident there for the purposes of the six years condition.

(c) continues to live in the Netherlands after attaining 65 years of age (the 'present residence' condition). [3]

In the present case, I would emphasize in particular that Article 1 of the Royal Decree of 15 November 1985 provides for the treatment of foreigners as Netherlands nationals for both persons exercising freedom of movement within the meaning of the above-mentioned regulation and persons who have resided in the Netherlands for a period of 15 years, with or without interruptions, after their 20th birthday, provided that they have resided there without interruption during the five years immediately preceding their 65th birthday.

4. Finally, I would observe that Regulation (EEC) No 1408/71 of the Council 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 [4] ('the Regulation') applies, according to Article 2(1), 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors'. The matters covered by that regulation are restricted by Article 4 thereof. For our purposes, I would recall that old-age benefits are listed among the branches of social security to which the Regulation is to apply at Article 4(1)(c).

It should be specified at this point that, taking into account the fact that the advantages of the transitional scheme, which was based on conditions of nationality and residence, were not available to all migrant workers, the Council inserted *ad hoc* provisions in the Regulation in order to prevent discrimination. Point 2 of Annex VI (J) (Netherlands) to Regulation No 1408/71, concerning precisely the 'application of Netherlands legislation on general old-age insurance', provides:

'(a) The reduction referred to in Article 13(1) of the AOW shall not be applied for calendar years or parts thereof before 1 January 1957 during which a recipient, not satisfying the conditions permitting him to have such years treated as periods of insurance, resided in the territory of the Netherlands between the ages of 15 and 65 years, or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country.

3 — This condition, also mitigated by a provision of the Royal Decree of 3 December 1985, does not apply to persons who were continuously insured under the AOW between 1 January 1957 and their 65th birthday.

4 — See the consolidated version in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

By way of derogation from Article 7 of the AOW, persons who resided or worked in accordance with the abovementioned conditions only prior to 1 January 1957 shall also be regarded as being entitled to a pension.

(...)

(b) The reduction referred to in Article 13(1) of the AOW shall likewise not be applied to calendar years or parts thereof before 2 August 1989 during which a married woman or woman who had been previously married between the ages of 15 years and 65 years, residing in a Member State other than the Netherlands, was not insured under the abovementioned law in so far as the calendar years or parts thereof coincide with periods of insurance completed by her husband under that legislation or with calendar years or parts thereof as referred to in (a).

By way of derogation from Article 7 of the AOW, the said woman shall be considered as being entitled to a pension.

(...)

(e) The provisions referred to in (a), (b), (c) and (d) shall be applied only if the person concerned has resided for six years in the territory of one or more Member States after the age of 59 years and for as long as that person is residing in the territory of one of these Member States.

(...)

(h) The provisions referred to in (a), (b), (c) and (d) shall not be applicable to periods coinciding with periods which may be taken into account for the calculation of pension rights under the legislation governing old-age pensions in a Member State other than the Netherlands, or for periods during which the person concerned received an old-age pension under such legislation'.

In short, according to the provisions I have set out above, a recipient under the AOW who does not satisfy the conditions permitting him to have periods before 1 January 1957 treated as periods of insurance is nevertheless entitled — if the person resided for six years in the territory of one or more Member States after the age of 59 years — to have treated as periods of insurance periods prior to 1 January 1957 during which he resided in the Netherlands after the age of 15 or during which, whilst residing within the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country. These provisions thus allow entitlement to the transitional benefits to be obtained, albeit only in part, since recognition of periods prior to 1 January 1957 is only possible in respect of periods in which, by means of residence or employment, there has been a particular link between the person

concerned and the Netherlands social security system. By accepting that entitlement to the benefit of the transitional arrangements should be subject to specific residence conditions, the scheme laid down in the annex in question thus permits — and this must be emphasized — an exception to be made to the obligation to waive residence clauses under Article 10 of the Regulation.

5. I now come to the facts of the case. Mrs Hallouzi-Choho, a Moroccan national, lives in the Netherlands with her husband, a Moroccan national who was employed there and receives an old-age pension under the AOW. By decision of 5 July 1991, the Bestuur van de Sociale Verzekeringsbank (Board of the Social Insurance Bank, hereinafter 'the SVB') awarded Mrs Hallouzi-Choho, who has never worked in the Netherlands, an old-age pension under the AOW with effect from 1 July 1991 (her 65th birthday), which amounts to 22% of the maximum pension for a married person. That pension, which was awarded to her in her capacity as an independently insured person, was based on the periods during which she was insured under the AOW as a Netherlands resident, namely from 12 December 1977 to 1 January 1982 and from 26 February 1985 to 1 July 1991.

In the decision of 5 July 1991, the SVB refused, however, to take account, for the purposes of calculating Mrs Hallouzi-Choho's pension, of the notional period of insurance between her 15th birthday and 1 January 1957, when the AOW entered into force, on the ground that she was a Moroccan national. Since it is not disputed that Mrs Hallouzi-Choho fulfils the 'six years' and the 'present residence' conditions, the failure to take into account periods prior to 1 January 1957 is therefore exclusively due to the fact that the claimant is not of Netherlands nationality.

Mrs Hallouzi-Choho contested the decision of 5 July 1991 before the Raad van Beroep (Social Security Court), Amsterdam. That court dismissed the action as unfounded by judgment of 21 April 1992. Mrs Hallouzi-Choho appealed against that judgment before the Centrale Raad van Beroep (court of last instance in social security matters), claiming that Article 41(1) of the Agreement, inasmuch as it provided for freedom from any discrimination based on nationality against Moroccan migrant workers and members of their families living with them in relation to nationals of the Member States in which they are employed, precluded reliance on a nationality requirement as a ground for refusing them entitlement to benefit from the transitional arrangements under the AOW.

6. Since the national court had doubts as to whether the principle of non-discrimination laid down in Article 41(1) extended to the

transitional arrangements provided for by the AOW, it considered it appropriate to make a reference to the Court for a preliminary ruling.

It asks whether Article 41(1) of the Cooperation Agreement between the EC and Morocco is to be interpreted as precluding the requirement of Netherlands nationality as a condition of eligibility for transitional benefits under the Netherlands Algemene Ouderdomswet in the case of the spouse (a member of the family within the meaning of Article 41(1) of the Agreement) of a Moroccan worker.

The question referred therefore seeks to ascertain whether the non-working spouse of a Moroccan worker is also entitled to the transitional arrangements provided for by the AOW by virtue of the principle prohibiting discrimination based on nationality under Article 41(1) of the Agreement.

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

In the same judgments, the Court stated in addition that 'the term "social security" used in Article 41(1) of the Cooperation Agreement must be deemed to be analogous with the identical term used in Regulation No 1408/71'. [8]

8. The direct effect of Article 41(1) of the Agreement and the fact that the concept of social security which it contains should be interpreted with reference to the corresponding concept in the Regulation constitute, moreover, two factors which only the French Government has called in question at the hearing, overlooking the consistent case-law of the Court.

Similarly, it is not disputed that Mrs Hallouzi-Choho, as a member of the family

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

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

7 — *Kziber*, paragraph 23; *Yousfi*, paragraph 17.

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

of a Moroccan worker, clearly falls within the scope *ratione personae* of Article 41(1) of the Agreement, so that it remains only to ascertain whether the transitional arrangements provided for in Articles 55 and 56 of the AOW are covered by the definition of social security for the purposes of the Regulation and fall, consequently, within the material scope of Article 41(1) of the Agreement.

9. It suffices to point out that Article 4(1) of the Regulation, which mentions the various social security branches to which it applies, expressly refers to 'old-age benefits' in subparagraph (c). It follows that the transitional arrangements under the AOW, which have the effect of increasing the old-age pension paid to the recipient, fall wholly within the scope of Regulation No 1408/71 and, therefore, of Article 41(1) of the Agreement.

It therefore follows, for the purposes of this case, that claimants who are Moroccan nationals and who are workers or members of the family of a worker within the meaning and for the purposes of the relevant provisions of the Agreement must also be able to claim the benefit of the transitional arrangements provided for by the AOW.

10. Nevertheless, the court making the reference has expressed doubts in this regard, observing, first, that the Agreement contains no express provision in this respect and, secondly, that the Court itself, referring to the special nature of the transitional arrangements, acknowledged that the residence requirements provided for by the AOW, attenuated by Point 2 of Annex VI (J) of the Regulation, which, as I said above, enables an exception to be made to the obligation to waive residence clauses under Article 10 of the Regulation, are lawful. On the basis of that premiss, the Netherlands Government and the SVB then maintained, in the course of proceedings, that Article 41(1) could not be interpreted more extensively than as provided for in the annex in question. In other words, they invite the Court to apply by analogy the provisions of the annex to the present case.

It is true that the Court, referring to the special procedures under the AOW, as governed and amended by Point 2 of Annex VI (J) of the Regulation, has held that 'the rule contained in Article 10, whereby the application of residence clauses is set aside, cannot be applied without restriction to a general old-age insurance scheme in which the mere fact of residence in the Netherlands is sufficient qualification for insurance purposes'.[9] It concluded, therefore, that 'the ... effects of the residence clauses, as far as the transitional arrangements under the Algemene Ouderdomswet are concerned, are authorized by the provisions of Annex VI, which limit the

9 — Case C-293/88 *Winter-Lutzms* [1990] ECR I-1623, paragraph 16. See, moreover, Case 284/84 *Spruyt* [1986] ECR 685.

scope of Article 10 in that regard'. [10] In other words, bearing in mind that residence is the sole basic criterion for insurance under the AOW and that the transitional arrangements do not apply to actual insurance periods, since claimants do not have to contribute, the Court has held that the relevant provisions of the annex in question authorize the residence requirements imposed in that respect by the AOW.

11. That having been said, I would observe that such precedents are absolutely irrelevant to the present case. As I stated above, Mrs Hallouzi-Choho fulfils the 'six years' condition (residence in the Netherlands for six years after the age of 59) and the 'present residence' condition (continued residence in the Netherlands after the age of 65 years). The SVB's refusal to allow her to benefit from the transitional arrangements is therefore not due to the residence requirement, but to the fact that she is neither a Netherlands national nor can she be treated, on the basis of the abovementioned Royal Decree of 15 November 1985, as a Netherlands national.

As regards the latter aspect, I consider to be likewise irrelevant the fact, referred to by the SVB and the Netherlands Government during the proceedings, that provided Mrs Hallouzi-Choho continued in the meantime to reside in the Netherlands, she was entitled from February 1996, on the basis of the November 1985 royal decree, to be treated as a Netherlands national and could thus benefit from the transitional arrangements at issue. This is, in fact, an additional residence clause in relation to those imposed on nationals which thus breaches the principle prohibiting discrimination based on nationality in Article 41(1) of the Agreement.

12. Admittedly, the SVB itself does not deny that the spouse of a Moroccan worker falls within the scope *ratione personae* of Article 41(1) of the Agreement and that the benefit in question falls within its material scope. As stated by the SVB during the proceedings, the refusal to allow Mrs Hallouzi-Choho to benefit from the transitional arrangements was in fact based on the assumption that the benefits in question could not be extended to the wife of a Moroccan worker. The SVB referred, in substance, to the distinction between personal rights and derived rights drawn by the Court in certain judgments in which it ruled on the class of persons covered by the Regulation [11] ('the *Kermaschek* rules'). In those judgments

10 — *Winter-Lutzins*, paragraph 18.

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

the Court stated that, while persons belonging to the category of workers can lay claim to the benefits provided for by the Regulation *in their own right*, the members of a worker's family can claim *derived rights* only, that is to say rights acquired through their status as members of the family.

However, since all persons residing in the Netherlands are covered directly and individually by the AOW, from the 15th to the 65th year of age, irrespective of sex and marital status, it is clear that entitlement to a pension, and thus to the transitional arrangements, far from constituting a derived right acquired through status as a member of a worker's family, is a personal right to which every person satisfying the conditions laid down by the national legislation in question is entitled. If the *Kermaschek* rules were to be applied to the present case, it would mean that Mrs Hallouzi-Choho, as a Moroccan national who has never worked in the Netherlands, would not be entitled to transitional arrangements under the AOW.

13. In this regard I would first of all observe that in its oft-quoted judgment in *Kziber*, the Court, ruling on the scope of the rights of a member of the family of a Moroccan worker as regards unemployment allowances for young persons, held that 'the principle of freedom from all discrimination based on nationality in the field of social security, which is laid down in Article 41(1), means that such a person, who satisfies all the conditions laid down by national legislation for the purposes of entitlement to the unemployment allowances provided for the benefit of young persons in search of employment, may not be refused those benefits on the ground of his nationality'. [12]

The same approach was subsequently confirmed and clarified in the judgment in *Krid*, [13] which concerned Article 39(1) of the Cooperation Agreement with Algeria [14] whose content is identical with that of the provision at issue here. On that occasion the Court, invited to extend the *Kermaschek* rules also to members of families of workers from non-member countries with which the Community had concluded cooperation agreements, declined to do so because the persons covered by the agreement 'are not the same as those covered by Article 2 of Regulation No 1408/71'.

14. The same considerations clearly apply in the present case. The Netherlands Government and the SVB claim, however, that a spouse, who is not a Netherlands national, of a worker who is a national of a Member State is not entitled, even under Annex VI to the Regulation, to the transitional benefits. They maintain, therefore, that, if the Court were to confirm that the *Kermaschek* rules

12 — *Kziber*, paragraph 28.

13 — Case C-103/94 *Krid* v *CNAVTS* [1995] ECR I-719.

14 — Agreement signed in Algiers on 26 April 1976 and agreed on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978 (OJ 1978 L 263, p. 1).

did not apply to the family members of workers from non-member countries who fall within the scope *ratione personae* of the cooperation agreements, the result would be unacceptable and certainly unintended by the drafters of such agreements.

The national court itself points out that Community workers' families would receive treatment less favourable than that accorded to families of workers who were nationals of a non-member country with which the Community had concluded cooperation agreements, citing by way of example the *Cabanis-Issarte* case, which was pending before the Court when the order for reference was made, in which precisely the transitional arrangements provided for by the AOW were at issue. Briefly, the argument is that the principle of non-discrimination laid down in Article 41(1) of the Agreement cannot be applied irrespective of whether personal rights or derived rights are involved since the principle of equal treatment enshrined in Article 3(1) of the Regulation, 'subject to the special provisions of this regulation', applies to the members of workers' families only where they rely on derived rights.

15. However, it is certain that the application of the distinction between personal rights and derived rights only to members of the families of Community workers and not also to members of the families of workers who are nationals of States with which the Community has concluded cooperation agreements could give rise to discrimination which would be difficult to justify, bearing in mind, in particular, the scope of the Treaty compared with that of a mere cooperation agreement. It is also certain, over and above the legal significance of such differentiation, that the apparent anomaly should be corrected, but certainly not in the way proposed here. It is nevertheless the case that although Article 41(1) of the Agreement confirms the prohibition of discrimination based on nationality it contains no indication which could lend support to the arguments of the SVB and the Netherlands Government.

The anomaly I referred to above could be eliminated in fact only by looking afresh at the *Kermaschek* rules. This is precisely what occurred in the recent judgment in *Cabanis-Issarte*, [15] in which the Court confirmed that Article 3(1) of the Regulation grants 'the right to equal treatment as regards application of the social security legislation of the Member States, without drawing any distinction between workers, members of workers' families or their surviving spouses. Further and in any event, any derogation from equal treatment based on one of the provisions of the Regulation to which Article 3(1) refers must be objectively justified if the fundamental rule of non-discrimination laid down by Article 3(1) in the field of social security is not to be deprived of meaning' (paragraph 26). In that judgment, the Court also stated that 'the distinction between rights in person and derived rights which the Court drew ... may undermine the fundamental Community law requirement that its rules should be applied uniformly, by making

15 — Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097.

their applicability to individuals depend on whether the national law relating to the benefits in question treats the rights concerned as rights in person or as derived rights, in the light of specific features of the domestic social security scheme' (paragraph 31).

16. Following that judgment, therefore, both the members of Community workers' families (Mrs Cabanis-Issarte) and those of nationals of non-member countries with which the Community has concluded cooperation agreements (Mrs Hallouzi-Choho) are entitled to benefits under the AOW subject to the same conditions imposed on Netherlands nationals. This outcome can only be welcome since it eliminates a differentiation which created unease and which, moreover, was contrary to the very letter and spirit of Article 3(1) of the Regulation. [16]

This means that, for the purposes of this case, it is no longer relevant to argue that not to apply the *Kermaschek* rules to the present case would clearly discriminate against families of workers who were nationals of a Member State in relation to families of workers who were nationals of non-member countries with which the Community had concluded cooperation agreements of the kind at issue.

17. One final comment. The French Government requested the Court at the hearing to limit the temporal effects of the present judgment in the event that it should rule that the principle of non-discrimination enshrined in Article 41(1) of the Agreement is to be interpreted as meaning that the members of the family of a Moroccan worker living with him cannot be refused transitional benefits under the AOW. It justified that request on the basis of the serious or unforeseeable consequences for the Netherlands social security scheme.

I shall confine myself to pointing out, first, that neither the Netherlands Government nor the SVB have made such a request or in any event claimed that the Court's judgment might entail serious financial consequences for the Netherlands social security scheme and, secondly, that interpretation of Article 41(1) of the Agreement in the light of the case-law on the matter since *Kziber* should not have given rise to any uncertainty. Leaving aside the arguably routine nature of such a request, it follows that in the present case the strict conditions to which, according to the consistent case-law of the Court, [17] limiting the temporal effects of preliminary rulings is subject have not been met.

16 — These aspects were dealt with by me more fully in the Opinion in Case C-308/93. See, in particular, points 6 to 7 and 11 to 14.

17 — See Case 43/75 *Defrenne II* [1976] ECR 455, paragraphs 69 to 75, and, more recently, *Cabanis-Issarte*, paragraphs 46 to 48.

18. In the light of the foregoing considerations, therefore, I propose that the Court reply to the question submitted by the Centrale Raad van Beroep as follows:

Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 27 April 1976 and concluded on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978, is to be interpreted as precluding a Member State from refusing to grant transitional pension benefits, which are provided for under its legislation for its own nationals, to a member of the family of a Moroccan worker living with him, on the ground that the person concerned is of Moroccan nationality.