1. The provisions of Regulation No 1408/71 must be interpreted in the light of the objective of Articles 48 to 51 of the EEC Treaty, namely the establishment of the greatest possible freedom of movement for workers. That objective would not be attained if, as a consequence of the exercise of their right to freedom of movement and to transfer their residence to another Member State, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State.

2. It cannot be justified that the rules of Community law in the field of social security, by refusing, under a general old-age insurance scheme in which residence is the sole qualification for insurance, to take periods of residence into account as insurance periods in the case of a married woman when they are so treated in the case of a man and an unmarried woman, give rise to discrimination and are contrary to the fundamental principle of freedom of movement since they create an obstacle capable of dissuading a married woman from accompanying her husband when he moves to another Member State.

3. Point 2 (a) of Part I of Annex VI to Regulation No 1408/71 applies to a married woman so that, subject to the provisions of Point 2 (b), (d) and (f), periods before 1 January 1957 during which a married woman, who does not satisfy the conditions permitting her to have such periods treated as periods of insurance, resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, she pursued an activity as an employed person in the Netherlands for an employer established in that country, must be considered as periods of insurance completed in application of Netherlands legislation on general old-age insurance.

OPINION OF MR ADVOCATE GENERAL MANCINI
Delivered on 21 January 1986 *

Mr President,
Members of the Court,

1. By orders dated 24 January and 25 September 1984, which were received at the Court on 29 November 1984, the Centrale Raad van Beroep requests the Court to interpret certain provisions of the Community rules on social security as they apply to the Netherlands old-age insurance scheme. The orders were made in proceedings between the Sociale Verzekeringsbank [hereinafter referred to as 'the Verzekeringsbank'], the national insurance authority, and Mr L. A. Spruyt, a Netherlands national, concerning the amount of the old-age pension to which Mr Spruyt is entitled.

2. In the first place an outline should be given of all the legislation concerned in the main proceedings. According to the national

* Translated from the Italian.

provisions contained in the Algemene Ouderdomswet [General Law on Old-Age, hereinafter referred to as 'the Old-Age Law'], any person who resides in the Netherlands is entitled to a pension, whether or not he pursues an activity as an employed person. The amount of the pension is calculated by reference to the number of years during which the person concerned was insured; the full pension is payable on completion of 50 years' insurance between the ages of 15 and 65.

That simple scheme is complicated by two factors. In the first place, on marriage a woman forfeits her right to a pension. Only the husband may, on attaining the age of 65, claim a pension on behalf of himself and his wife, on the basis of the insurance periods which they have completed. In addition, a married man is entitled to a full pension whereas the pension payable to an unmarried man or woman is reduced to 70% (Article 8). Finally, the pension is reduced by 1% for each year in which either spouse was uninsured, whereas a reduction of 2% is made in respect of unmarried persons (Article 10).

The second factor to be taken into acount is the date on which the Old-Age Law entered into force, namely 1 January 1957. Since, as has already been stated, the full pension is payable after 50 years' insurance calculated from a person's 15th birthday, it is clear that nobody could claim the full amount before the year 2007. However, the Old-Age Law provides that a claimant who fulfils certain requirements is entitled to have the years between his 15th birthday and 1 January 1957 treated as a period of insurance completed thereunder. One of those requirements is that since his 59th birthday he has resided in the Netherlands for an uninterrupted period of six years or periods totalling six years (Article 43). The same concession is granted, on the same conditions, to the husband and the wife. However, if the wife is younger than her husband, the period of six years runs from the completion of her husband's 59th year; that rule assists the Verzekeringsbank in calculating the amount of the pension, because it is able in a single calculation to determine the insurance period completed or deemed to have been completed by a married couple. Finally, Article 44 provides that the concession in question applies only to Netherlands nationals who are habitually resident in the Netherlands.

Those are therefore the transitional provisions contained in the Old-Age Law. For present purposes, it is important to emphasize that in order to benefit from those provisions the person concerned, whether male or female, does not have to prove that he lived and worked in the Netherlands during the period from his 15th birthday until 1 January 1957. Instead, he is required to show that he has resided there for six years after his 59th birthday, so that, on attaining pensionable age, he has established lasting ties with the Netherlands such as to justify recognition of the years between his 15th birthday and the beginning of 1957 as an insurance period.

3. It is clear that since the aforementioned benefits are based on the criteria of nationality and residence they are not available to migrant workers. In order to avoid such discrimination the Council included in the Community social security scheme *ad hoc* provisions which also take account of the particular changes in the pension scheme brought about by marriage under Netherlands law.

Point 2 (a) of Part I of Annex VI to Council Regulation (EEC) No 1408/71, as amended (Official Journal 1983, L 230, p. 8), provides that 'Periods of insurance

before 1 January 1957 during which a recipient, not satisfying the conditions [laid down in Articles 43 and 44 of the Old-Age Law], resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country, shall also be considered as periods of insurance, completed in application of Netherlands legislation for general old-age insurance'.

Point 2 (c) provides that

'As regards a married woman whose husband is entitled to a pension under Netherlands legislation on general old-age insurance, periods of the marriage preceding the date when she reached the age of 65 years and during which she resided in the territory of one or more Member States shall also be taken into account as insurance periods, in so far as those periods coincide with periods of insurance completed by her husband under that legislation and with those to be taken into account in pursuance of subparagraph (a)'.

Finally, Point 2 (f) provides that the periods referred to in Subparagraphs (a) and (c) are only to be taken into account or calculation of the pension '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 those Member States'.

Let us examine those provisions. It should first be noted that, unlike Article 43 of the Old-Age Law, Point 2 (a) provides that the recipient of a Netherlands pension may benefit from the transitional provisions under the national scheme only if he resided in the Netherlands *after the age of 15* or if he pursued an activity as an employed person in the Netherlands. The reason for that requirement is simple. Point 2 (f) provides that, in order to have the years prior to 1957 recognized as insurance periods for pension purposes, the person concerned must have resided for at least six years, after the age of 59, 'in the territory of one or more Member States' (and not therefore solely in the Netherlands as is required by Article 43). In conjunction with the other conditions of the national scheme, that provision means that any person who is entitled to a Netherlands pension — because, for example, he has worked in the Netherlands at some time — may benefit from that concession even if he has never resided there. That is clearly unacceptable, and Point 2 (a) therefore provides that the years prior to 1957 may only be taken into account provided that the recipient resided in the Netherlands during that period.

It follows that the conditions laid down by Community law for benefiting from the concession appear to be almost the opposite of those laid down by national law: under the Old-Age Law, the crucial factor is whether a person *resided in the Netherlands during the six years* before he reached pensionable age (Article 43); under Annex VI, by contrast, that condition may be satisfied by *residence in the territory of another Member State* (Point 2 (f)), provided that the person concerned resided or worked in the Netherlands *during the initial years* in which he was insured, namely between his 15th birthday and 1 January 1957.

In my opinion that distinction reveals that, in adjusting the national provisions to the needs of the Community, the Council was more concerned with the case of a foreign worker moving to the Netherlands than

with the reverse situation. That approach is confirmed in the remainder of Point 2 (c). Unlike the other two provisions, Point 2 (c) does not relate to the transitional provisions of the Old-Age Law; on the contrary, it seeks to ensure that a worker who moves to the Netherlands and whose wife remains in their country of origin is not placed at a disadvantage as compared with a married man in the same position whose wife accompanies him. It must be remembered that under Article 10 of the Old-Age Law the husband's pension is reduced by 1% for each year in which the wife was uninsured, which is precisely the case where she resides in another State; consequently, in order to avoid such a loss of entitlement, Point 2 (c) provides that periods subsequent to the marriage during which the wife was not resident in the Netherlands are also to be regarded as insurance periods.

However, only periods of the marriage are to be taken into account; periods between the wife's 15th birthday and the date of the marriage are disregarded, unless the requirements of Articles 43 and 44 of the Old-Age Law (namely, residence in the Netherlands for at least six years since the 49th birthday of the person in question and Netherlands nationality) are satisfied. In other words, the annex does not confer any retroactive benefit on a woman who did not reside in the Netherlands before her marriage; as will be seen, that choice — obviously due the the fact that no question of discrimination arises before the marriage — leads to consequences which are inconsistent with certain fundamental principles of Community law.

4. I turn now to the facts of the case. On 15 November 1979 Mr Spruyt, a Netherlands national, attained the age of 65 and therefore became entitled to an old-age pension. His wife, who is also of Netherlands nationality and who was born on 19 October 1920, has never pursued an activity as an employed person. They were married on 16 November 1944 and resided in the Netherlands until 4 November 1973, since which time they have been living in Belgium.

In calculating Mr Spruyt's pension the Verzekeringsbank reduced the full amount of the pension by 21%. It based its decision on the fact that Mr Spruyt was insured from 1 January 1957 to 4 November 1973, but not, as a result of his removal to Belgium, during the six years between the latter date and his 65th birthday. In other words, he failed to qualify for the concession provided for in the Old-Age Law. However, Point 2 (a) and (f) of Part I of Annex VI were applicable to him and therefore the period between his 15th birthday and 1 January 1957 could be treated as an insurance period. Accordingly, since Mr Spruyt was uninsured for six years, his pension entitlement was reduced by 6%.

Mrs Spruyt also had to be regarded as uninsured from 4 November 1973 to 15 November 1979; but under Point 2 (c) of Part I of Annex VI, the period from her marriage (16 November 1944) to 1 January 1957 could be treated as an insurance period. It was not, however, possible to take account of the period of approximately nine years between her 15th birthday and the date of her marriage even though she had lived in the Netherlands during that period. Mrs Spruyt was therefore uninsured for a total of 15 years, which, together with the reduction in respect of the period in which her husband was uninsured, resulted in a total reduction of 21%.

Mr Spruyt objected to that decision, claiming that the period between his wife's

15th birthday and the date of their marriage should have been taken into account, as it was in his case, on the basis of Point 2 (a). At first instance his application was dismissed, on 12 March 1981. On appeal, however, the Centrale Raad van Beroep considered it appropriate to stay the proceedings in order to ask the Court of Justice whether a woman who was married to a migrant worker of Netherlands nationality might be regarded as a member of the family of that worker within the meaning of Article 1 (f) of Regulation No 1408/71 since, according to the Old-Age Law, her insurance record helped to determine the amount of the pension to which her husband was entitled. If that question was answered in the affirmative, the Centrale Raad van Beroep sought to ascertain whether Annex VI, Part I, Point 2 (a) of that regulation was applicable to such a married woman.

5. In the procedure before the Court, written observations were submitted by Mr Spruyt, the Government of the Kingdom of the Netherlands, the Verzekeringsbank and the Commission of the European Communities. Instead of summarizing those submissions (which for the most part, agree that both questions should be answered in the negative), it seems to me more useful to consider the doubts expressed by the Centrale Raad van Beroep. Those doubts relate to the fact that Mrs Spruyt, merely by accompanying her husband to Belgium before she reached pensionable age, lost the benefit of having the period between her 15th birthday and the date of her marriage taken into account although she was resident in the Netherlands during that time. It is true that the same does not apply to Mr Spruyt because, by virtue of Point 2 (a) and (f) of Part I of Annex VI, he retains the benefits accorded by the national scheme even if he moves to another State, since he is an 'employed person' within the meaning of Article 1 of Regulation No 1408/71 and a 'recipient' of an old-age pension. However, since *his* pension is reduced by 1% in respect of each year during which his wife was not insured, he can be said to suffer in reality from such an interpretation of the provisions of the annex.

That interpretation, which was accepted by the Centrale Raad van Beroep, is certainly the literal interpretation of the provision. The Verzekeringsbank, however, interprets Point 2 (a) widely so as to apply to a woman who, before her marriage, resided in the Netherlands and pursued an activity as an employed person and was therefore an 'employed person' within the meaning of Regulation No 1408/71. The reason for that is clear. If such a woman decides to move to another Member State her years of entitlement will depend, as a result of Annex VI, upon whether she is unmarried or married. If she is unmarried, the years between her 15th birthday and 1 January 1957 will be taken into account by virtue of Point 2 (a) and (f). If she is married, she is no longer a recipient of a pension and will lose the benefit of those years and, according to Point 2 (c), only the period between the date of her marriage and the beginning of 1957 will be taken into account. There is therefore an inconsistency which the Verzekeringsbank seeks to remedy by granting to a married woman who is an 'employed person' the same benefits as she would have obtained under Point 2 (a) and (f).

In its observations the Verzekeringsbank confirms that it follows that practice but adds that it does not apply to Mrs Spruyt because she was not an 'employed person' and, consequently, is not covered by Regulation No 1408/71. That is, in fact, the very problem to be resolved by the Court. The Centrale Raad van Beroep asks whether, since Mrs Spruyt is not an 'employed person', she might be regarded as 'a member of the family of an employed

person'. If she were, her problem would be resolved; the regulation would apply to her in its entirety and there would be nothing to prevent her from relying on Point 2 (a).

6. I would state immediately that I share the conclusion reached by the Centrale Raad van Beroep; I am, however, doubtful about the way in which it arrived at that conclusion.

With regard to the first question I note in the first place that according to Article 1 (f) of Regulation No 1408/71 the term 'member of the family' is to be defined in the light of the national legislation applicable in each case; it must therefore be defined by the courts of the Member States. According to the Court's established case-law, moreover, the members of a worker's family may only claim 'derived' rights, acquired through their status as such, and not rights which national law grants to the worker (judgment of 23 November 1976 in Case 40/76, *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669). Although the Old-Age Law provides that insurance periods completed by the wife are to be taken into account in the calculation of the pension, it confers the right to a pension solely upon the husband; in her capacity as a member of her husband's family, a wife therefore has no 'derived' rights to assert. For the same reason she cannot be regarded as a 'recipient' of a pension within the meaning of Point 2 (a).

The aim of the Centrale Raad van Beroep may, however, be achieved by replying to the question which the Court of Justice put to the parties in the course of the proceedings. It asked whether the treatment accorded to persons in Mr Spruyt's position is compatible with the principle of free movement of persons and in particular with Articles 48 and 51 of the EEC Treaty. Although its approach was mistaken that is what the Centrale Raad van Beroep sought to ascertain; it recognized that, in the case of Mr and Mrs Spruyt, a literal interpretation of Annex VI led to a situation which was probably contrary to the objectives of Regulation No 1408/71.

The question raised by the Court must be answered in the negative. When I considered the relevant Community provisions in Section 3 of this opinion, I observed that the provision contained in Point 2 (c) seeks to protect the freedom of movement of a foreign married worker who goes to the Netherlands. It must be added that in the reverse situation — where a married Netherlands worker moves to another Member State — the same provision has the opposite effect: far from affording protection, it constitutes an obstacle to freedom of movement. What is the reason for that difference? It must be recalled that, according to Point 2 (a), the years spent in the Netherlands by a married man as an employed person between his 15th birthday and 1 January 1957 may be treated as insurance periods. In the case of a married woman, however, such treatment is limited, by virtue of Point 2 (c), to periods after the date of her marriage; in her case, the years preceding her marriage cannot be treated as insurance periods, even if she resided in the Netherlands during that period. It follows that if a Netherlands married couple leave the Netherlands before attaining the age of 65, the amount of the pension payable to the husband will vary, as a result of the operation of the Community provisions, according to the number of years between the date of their marriage and 1 January 1957.

It is quite clear that that state of affairs does not arise directly from the husband's circumstances (because, as the recipient of the pension, he may rely upon Point 2 (a)),

but from the position of his wife who, because she decides to accompany him, is entitled only to the partial benefit provided for in Point 2 (c). In that respect, Annex VI is incompatible with the principle of the free movement of persons. It is not valid to argue that it is not the employed person, but his wife, who is affected. We have seen that under the Old-Age Law only the husband is entitled to a pension; consequently, as I have already observed, in the final analysis Point 2 (c) places him at a disadvantage.

Having reached that conclusion, I do not consider it necessary to consider — as the Court does in its question to the parties — whether Mr and Mrs Spruyt could have avoided loss of benefits by contracting voluntary insurance for the period between their move to Belgium and the husband's 65th birthday. Even if they could have done so, the provisions which govern the calculation of the pension would remain incompatible with the principles set out in Articles 48 and 51.

7. On the basis of the foregoing considerations, I propose that the questions referred to the Court of Justice by the Centrale Raad van Beroep by orders of 24 January and 25 September 1984 in the proceedings before that court between Mr L. A. Spruyt and the Sociale Verzekeringsbank should be answered as follows:

A member of the family of an employed person within the meaning of Regulation No 1408/71 may only claim the benefits granted to that person by the law of each Member State. Since under the Netherlands General Law on Old-Age a married woman has no independent right to a pension, she cannot claim a pension in her capacity as 'a member of the family' of an employed person. For the same reason, a married woman cannot be regarded as the 'recipient' of a pension within the meaning of Point 2 (a) to Part I of Annex VI to that regulation. However, the fact that the combined effect of Articles 43 and 44 of the Old-Age Law and the provisions of the aforementioned annex is to deprive a married worker who has moved with his wife from the Netherlands to another Member State of certain advantages provided for in respect of the calculation of his old-age pension is incompatible with Articles 48 and 51 of the EEC Treaty. In the light of those articles, Point 2 (a) of Part I of Annex VI must be interpreted as meaning that the benefit provided for therein includes recognition of the years between the wife's 15th birthday and the date of the marriage where she resided in the Netherlands during that period.