OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 25 February 1986 *

Mr President,
Members of the Court,

1. In the course of proceedings between Emir Gül and the Regierungspräsident Düsseldorf, the Verwaltungsgericht Gelsenkirchen has asked the Court to rule on the interpretation of a number of provisions of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475). The national court wishes to know in particular whether a national of a non-member country may claim to be entitled to authorization to practise medicine in the Member State in which he resides with his wife, an employed person who is a national of another Member State.

2. Mr Gül is a Cypriot national of Turkish origin; since 1971 he has been married to a British national who has the right of abode in the United Kingdom under the British Nationality Act 1971. The three children of the marriage are also of British nationality. Mr Gül obtained a degree in medicine from the University of Istanbul, and on 1 October 1977 he obtained temporary authorization to practise medicine in the Federal Republic of Germany in order to permit him to specialize in anaesthesiology. Before that authorization was issued, he formally undertook to return to his country of origin or, should that be impossible, to go to another developing country after completing or discontinuing his training as a specialist.

The authorization was extended three times (20 June 1979, 8 July 1981 and 6 July 1982) and on each time Mr Gül was informed that he could not rely on further extensions. On 25 October 1982 the Ärztekammer [Medical Society] Nordrhein granted him a certificate of specialization as an anaesthetist. He then applied for permanent authorization to practise, stating that he intended to remain with his family in Germany and acquire German nationality. The Regierungspräsident Düsseldorf extended his provisional authorization until 31 March 1983. A further request for an extension, in which Mr Gül gave an assurance that he would not seek further extensions, was at first rejected by the authorities on 1 February; he was then granted an extension until 31 December 1983, either because the Marienhospital Altenessen still had need of his services or because Mrs Gül was undergoing a difficult pregnancy.

By letters of 5 July and 3 September 1983 Mr Gül again requested permanent authorization; this time he pointed out that since his wife and children were British nationals and his wife was employed he was entitled under Article 11 of Regulation No 1612/68 to take up employment in Germany. In both letters Mr Gül also pointed out that his own residence permit expired on 30 September

* Translated from the Italian.

1986, that his wife's earnings as a hairdresser were not sufficient to provide a decent living for his family and that if authorization was not granted he would be obliged to return to Turkey or Cyprus.

By letter of 19 October 1983 the Regierungspräsident informed Mr Gül that his application was regarded as an application for a licence to practice; since the laws in force did not permit the issue of a licence, it asked whether he intended to maintain that application. On 19 October 1983 Mr Gül replied that his application should be taken as requesting an extension of his authorization for two years. By a decision of 2 November 1983 the application was rejected on the grounds that the requirements laid down in Paragraph 10 (2) and (3) of the Bundesärzteordnung [Federal Regulation on the Practice of Medicine] 1977. The Regierungspräsident stated that the usual practice was to grant authorization under Paragraph 10 (3) of the Bundesärzteordnung to foreign doctors who were married to German nationals and were engaged in employment, since such persons had a right of residence. Such authorization was not however granted to foreign doctors married to nationals of a Member State of the EEC, since it could be expected that such a person would practise in the country of which his spouse was a national and that the spouse would ultimately return to his country of origin in spite of his right of establishment in Germany.

Mr Gül's administrative appeal against that decision was rejected, and he brought proceedings before the Verwaltungsgericht Gelsenkirchen for the annulment of the decision of 2 November 1983 and for an order requiring the authorities to grant him an authorization for an unlimited period or for a period of two years. By order of 6 March 1984 that court upheld Mr Gül's application for interim relief, brought at the same time as the main action; holding that Community law was applicable, it ordered the Regierungspräsident to issue a provisional authorization for a period of two years, subject to the condition that Mrs Gül continued to work in Germany as an employed person.

On appeal by the authorities the Third Chamber of the Oberverwaltungsgericht Münster took the view that the interim order was based on an erroneous application of Community law and therefore quashed it by a decision of 19 September 1984. In the main action, however, on 28 March 1985 the Seventh Chamber of the Verwaltungsgericht Gelsenkirchen stayed the proceedings and referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

(1) Does the right of a person who is a national of a non-member country to take up any activity as an employed person throughout the territory of a Member State, pursuant to Article 11 of Regulation (EEC) No 1612/68 of 15 October 1968, also entitle that person to the grant of a special authorization for the exercise of a particular occupation (in this case, the medical profession) which under national law may only be taken up and pursued in accordance with an authorization issued by the authorities pursuant to special legal provisions regarding occupations, where that person fulfils the other applicable conditions?

(2) If the answer to Question 1 is in the affirmative:

Can the national of a non-member country so entitled under Article 11 of that regulation rely on the first indent of Article 3 (1) of the regulation?

(3) If the answer to Question 2 is in the affirmative:

Does the first paragraph of Article 3 (1) of the regulation give the national of a non-member country so entitled under Article 11 the right to be treated in the same way as a national of the Member State concerned in regard to the taking up and pursuit of an occupation? If not, what is the legal significance of that provision?

(4) If Questions 1 to 3 are answered in the affirmative:

In deciding whether the provisions laid down by law, regulation or administrative action or the administrative practices regarding admission to a particular occupation have the effect of discriminating against foreigners, is it sufficient to examine in isolation the provisions whose application is in question in the specific case (here, Paragraph 10 of the Bundesärzteordnung, as last amended on 16 August 1977, BGBl. I p. 1581), or is it necessary to assess as a whole the cumulative effect of all the provisions governing admission to that occupation (here, in particular Paragraphs 2, 3 and 10 of the Bundesärzteordnung in conjunction with Article 12 of the Grundgesetz [Basic Law] of the Federal Republic of Germany)?

(5) If Questions 1 to 3 are answered in the affirmative:

Does the right to be treated in the same way as a national of the Member State concerned, with regard to the taking up and pursuit of the activities of a doctor, apply even where the national of a non-member country entitled under Article 11 of the regulation to take up employment has only 'other evidence of formal qualifications' as referred to in Article 1 (5) in conjunction with Article 6 of Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities as doctors (Official Journal, L 167, p. 14), on the basis of which the Member State, under its own rules, authorizes its own nationals and those of other Member States to take up and pursue the activities of a doctor?

(6) If Question 5 is answered in the negative:

In regard to the national of a non-member country entitled to take up employment under Article 11 of Regulation No 1612/68 who, on the basis of a medical qualification from a non-member country, has practised medicine in a Member State with an authorization issued by that State for more than six years and has obtained a certificate in specialized medicine in that State corresponding to the provisions of Article 2 of Directive 75/363/EEC, can that Member State still rely on the fact that he does not satisfy the conditions for taking up and pursuing the activities of a doctor laid down in Article 1 (1) of that directive?

3. For the purposes of a better understanding of the questions referred it is appropriate to undertake a summary review of the German law regarding access to the medical profession and the relevant Community law. The German rules on the matter are contained in the Bundesärzteordnung. Under Paragraph 2 (1) any person wishing to practise medicine must possess a licence. However, only three categories of persons, if they fulfil certain

conditions, are entitled to such a licence: German nationals (within the meaning of Article 116 of the Grundgesetz), nationals of other Member States of the Community and stateless persons. Nationals of non-member countries may obtain a licence only in particular circumstances (for example, in the interests of public health: Paragraph 3 (3)).

It is possible, however, to practise medicine without a licence on the basis of a temporary authorization (Paragraph 10 of the Bundesärzteordnung). Such an authorization is granted for a maximum period of four years, but it may be extended at the discretion of the authority, which determines whether its extension would contribute to improving the ratio of doctors to the general population (where appropriate, in a particular region). Following an amendment of Paragraph 10 (3) in March 1985 the granting of political asylum to the applicant or his marriage to a German national are also grounds for extension. Even before that amendment, however, marriage to a German national was considered a ground for extension pursuant to a circular of the Ministry of Labour, Health and Social Affairs of Nordrhein Westfalen (*Ministerialblatt*, No 78, 6 April 1980, p. 1751).

It should be emphasized that there are significant differences between a licence and an authorization, even leaving aside the discretionary nature of the latter. For the grant of an authorization it is sufficient that the applicant should have a 'complete' medical training; in order to qualify for a licence, on the other hand, the applicant's training must be equivalent to German training.

From the point of view of Community law the most important provisions are those of Regulation No 1612/68. As we know, according to the fifth recital in the preamble to that regulation, the right of freedom of movement 'requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons . . . and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'. In that spirit the first indent of Article 3 (1) provides that 'provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply . . . where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals'. For the purposes of this case, however, the most important provision is Article 11. It provides that 'where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State'.

4. Let us turn, then, to the questions referred to the Court. In the first question the national court asks whether the right granted by the provision just cited to a national of a non-member country entails the right to be authorized to pursue an occupation, where under the law of a Member State that occupation may only be pursued by persons holding an authorization granted by the authorities. The reply

depends on the interpretation to be given to the words 'shall have the right to take up any activity as an employed person' in Article 11. It is necessary in particular to determine whether the distinction discerned by the Regierungspräsident between access to the general labour market and access to employment requiring specific authorization is justified.

I agree with the point of view of Mr Gül and the Commission of the European Communities that there are insurmountable arguments based on the wording and intent of Article 11 against the argument of the German authorities to the effect that that article concerns only access to the general labour market. The first are well known. The Regierungspräsident may rely on the wording of the German version of Article 11, which does distinguish between 'eine Tätigkeit im Lohn- oder Gehaltsverhältnis'. However, the other versions (French: '*toute* activité'; English: '*any* activity'; Italian: '*qualsiasi* attività') make it quite clear that no distinction can be made between the two types of access. The same approach, moreover, is taken in the judgment of the Court of 13 February 1985 in Case 267/83 *Diatta* v *Land Berlin* [1985] ECR 567, at paragraph 19.

That conclusion is strongly supported by the purpose of the measure in which Article 11 is included. Based on Article 49 of the Treaty, Regulation No 1612/68 is intended to provide complete freedom of movement for workers and ensure that migrant workers are treated in the same way as nationals of the host State. That equal treatment is not confined to the employment relationship. As Advocate General Trabucchi said in his Opinion in Case 7/75 *Mr and Mrs F* v *Belgium* [1975] ECR 679 at 696, 'the migrant worker is not regarded by Community law — nor is he by the internal legal systems — as a mere source of labour but is viewed as a human being. In this context the Community legislature is not concerned solely to guarantee him the right to equal pay and social benefits in connection with the employer-employee relationship, it also emphasized the need to eliminate obstacles to the mobility of the worker, *inter alia* with regard to the "conditions for the integration of his family into the host country" (see the fifth recital in the preamble to Regulation No 1612/68).

That being the case, the function of Article 11 would be called in question if a national of a non-member country, married to a national of a Member State, were not permitted to take up an employment of his choice appropriate to his training. If he is in fact prohibited from taking such employment, the integration of the family in the State to which his spouse has moved will be made at least more difficult and the freedom of movement guaranteed to the spouse under Article 48 of the Treaty will be impaired. In other words, an obstacle of the very kind which the adoption of Regulation No 1612/68 was intended to remove will be created.

On this issue I therefore conclude that the expression 'any activity as an employed person' must mean all occupational activities pursued in the context of an employment relationship, including those in respect of which the rules governing a particular occupation require an administrative authorization. It is clear that if such occupations were excluded, if the rules governing them were exempted from the principles of Community law, the Member States could

deprive the right to freedom of movement laid down in Article 48 of all practical effect in relation to large sectors of employment.

Nor let it be objected that in the case of access to the medical profession the recognition of such a right is subject to exceptions justified on grounds of public health. The Regierungspräsident, who raised that argument, did not bother to provide a proper logical basis for it; in particular, he did not explain why, according to the administrative practice in Nordrhein Westfalen, the exception should apply to nationals of non-member countries married to a national of a Member State other than the Federal Republic of Germany but not to their compatriots who have had the good fortune to marry a German national.

5. The second question concerns the relationship between Article 11 and the first indent of Article 3 (1) of Regulation No 1612/68. In particular, the national court wishes to know whether a national of a non-member country entitled to take up employment under the first provision may also rely on the second, according to which, as I have already pointed out, 'provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply where they limit [access to employment] or subject it to conditions not applicable in respect of their own nationals'. I think the reply to that question must be in the affirmative. The plaintiff in the main proceedings and the Commission also propose an affirmative reply. Although they concur in the result, their arguments differ, however, as to the basis for it.

According to the Commission, Title I (Articles 1 to 6) of the regulation, on eligibility for employment, concerns only Community nationals: the first indent of Article 3 (1) therefore does not apply to nationals of non-member countries. They are covered instead by Article 11, which comes under another Title — III — on workers' families. According to the system established by the regulation, however, the spouse of a worker who is a national of a Member State, whatever that spouse's nationality, has a secondary right identical in extent to the primary right granted to the worker. In the light of that general rule, and taking into account its relation to Article 48 of the Treaty, Article 11 therefore means, although it is not stated explicitly, that nationals of non-member countries married to a worker who is a national of a Member State also have a right to equal treatment and access to employment.

Mr Gül has followed another path, one which seems to me less complicated and more persuasive. If it is true that Article 3 is included in the title concerning access to employment and that Article 11 appears in the title on workers' families, it is none the less undeniable that the second provision expressly mentions the right to 'take up' any activity. It should also be noted that Article 3 provides for equal treatment between the nationals of a Member State and 'foreign nationals'; in the scheme of the regulation the latter category includes both nationals of Member States and nationals of non-member countries referred to in Article 11. It follows that since the regulation must be taken as a coherent and rational whole, Article 3 must also apply to a national of a non-member country who is married to a national of a non-member State.

6. The third question is designed to ascertain whether a national of a non-member country entitled to take up employment under Article 11 has the right under Article 3 (1) to be treated in the same way as a national of the Member State concerned with regard to the taking up and pursuit of an occupation.

I have stated above that Article 3 is fully applicable to persons entitled to take up employment under Article 11. With regard to such persons provisions and practices which limit the access to and pursuit of employment, or subject them to conditions not applicable in respect of a State's own nationals, are therefore inappropriate. To that obvious conclusion it must be added that:

(a) the list of such provisions and practices contained in Article 3 (2) must be regarded as illustrative, not exhaustive, as is shown by the phrase 'in particular' in the introductory sentence of that provision;

(b) under the second paragraph of Article 3 (1), only restrictions relating to the linguistic knowledge required by reason of the nature of the employment are permissible.

7. In the fourth question the Verwaltungsgericht asks how far it is necessary to take the examination of national law in order to determine whether the rules regarding admission to an occupation discriminate against foreigners. In the order of that court it is pointed out that in spite of its apparent neutrality Paragraph 10 of the Bundesärzteordnung is a means of control specifically intended to work to the advantage of doctors who are German nationals.

It is obvious that under Article 177 of the EEC Treaty this Court has no power to interpret provisions of national law or to rule on their compatibility with Community law. It will be for the national court, therefore, to ascertain whether national provisions governing access to the medical profession discriminate, openly or in a disguised manner, against persons to whom Article 11 of Regulation No 1612/68 applies. As the Commission has pointed out, in carrying out that examination the national court must compare the legal situations of nationals of the State concerned and of persons to whom Article 11 applies, and the application of national rules to nationals of non-member countries married to nationals of that State or to nationals of other Member States. In doing so it will be helpful to determine whether in support of a refusal to grant authorization to practise medicine to persons to whom Article 11 applies reference is made to such considerations as the number of doctors needed by the population.

It should be pointed out, again for the guidance of the national court, that the rights guaranteed by the Treaty and by measures implementing it cannot be waived by the persons in whom they are vested.

8. The fifth question is intended to ascertain whether the right to be treated in the same way as a national of the Member State concerned applies even where the national of a non-member country entitled to take up employment under Article 11 has only 'other evidence of formal qualifications' as referred to in Article 1 (5) and Article 6 of Council Directive 75/363 of 16 June 1975.

On this issue I need merely point out that:

(a) the directive referred to by the national court is part of a set of measures intended mainly to provide for recognition of diplomas issued in Member States with a view to coordinating the provisions governing the activities of doctors; (b) it does not apply directly to diplomas issued by non-member countries; Article 1 (5), however, allows Member States to grant access to the medical profession to holders

of diplomas obtained in a non-member country; (c) the directive does not create rights in the area of freedom of movement. The right to be treated in the same way as a national of the State concerned and hence the rule that no obstacles may be raised to the recognition of evidence of formal qualifications must therefore flow directly from Article 48 (2) of the Treaty (see section 4 of this Opinion), especially when that State has taken advantage of the possibility offered by Article 1 (5) of Directive 75/363.

In view of the replies to the preceding questions, the sixth question appears to me to be redundant.

9. On the basis of the foregoing considerations I propose that the Court give the following replies to the questions referred to it by the order of 28 May 1985 of the Seventh Chamber of the Verwaltungsgericht Gelsenkirchen in the proceedings pending before it between Emir Gül and the Regierungspräsident Düsseldorf:

(1) Article 11 of Regulation No 1612/68 must be interpreted as meaning that where a national of a Member State resides in another Member State and carries on an activity as an employed or self-employed person there his spouse is entitled to take up and pursue any activity whatever as an employed person in that State. That right extends to activities which under national law may be pursued only in accordance with an administrative authorization issued pursuant to special rules governing the profession, so long as the person concerned fulfils all the applicable conditions.

(2) A national of a non-member country to whom Article 11 of Regulation No 1612/68 applies may rely on the first indent of Article 3 (1) of that regulation.

(3) Under the first indent of Article 3 (1) of Regulation No 1612/68 persons to whom Article 11 of that regulation applies are entitled to be treated in the same way as nationals of the State concerned.

(4) It is for the national court to undertake a comprehensive examination of all the provisions regarding access to the medical profession in order to determine whether they have the effect of discriminating against foreign nationals.

(5) The right to be treated in the same way as a national of the State concerned implies that no obstacles may be raised to the recognition of the formal medical qualifications of persons to whom Article 11 of Regulation No 1612/68 applies, especially where a Member State has taken advantage of the possibility offered by Article 1 (5) of Directive 75/363.