On those grounds,

THE COURT

in answer to the questions referred to it by the Sozialgericht Gelsenkirchen by order of 25 March 1976 hereby rules:

Articles 67 to 70 of Regulation No 1408/71 have only one main purpose, namely the coordination of the rights to unemployment benefits provided by virtue of the national legislation of the Member States for employed persons who are nationals of a Member State.

The members of the family of such workers are entitled only to the benefits provided by such legislation for the members of the family of unemployed workers, and it is to be understood that the nationality of those members of the family does not matter for this purpose.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 23 November 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The plaintiff in the proceedings giving rise to the reference for a preliminary ruling before us today is a national of Yugoslavia. She was first engaged as a paid worker in her country of origin, subsequently from November 1971 until December 1973 in the Netherlands,

1 – Translated from the German.

thereafter from January 1974 until June 1974 in Switzerland and finally once again in the Netherlands from July 1974 until October 1975. On 19 September 1975 she married a German national. In order to be able to live with her husband she terminated her employment in the Netherlands and before it came to an end, as she had some leave in hand, she transferred her residence to the Federal Republic of Germany. On 7 October 1975 she registered at the Arbeitsamt (Labour Exchange), Gelsenkirchen, as an unemployed person and claimed payment of unemployment benefit. This application was rejected. The reason given was that the qualifying period under German law had not been completed. The periods of employment completed in the Netherlands and in Switzerland could not be taken into consideration either under the Convention between Germany and Yugoslavia of 1968 or under the law of the European Economic Community.

As the plaintiff was of the opinion that she should be assimilated to a German worker she commenced legal proceedings in the Sozialgericht (Social Court) Gelsenkirchen.

Having examined the facts of the case the court concluded that under the German Arbeitsförderungsgesetz (Law on the promotion of employment) of 25 June 1969 the plaintiff indeed had no entitlement. The decisive factor in this respect was that in the three years preceding the first day of unemployment she had not remained for at least 26 weeks or 6 months in employment which entailed an obligation to make contributions to the Bundesanstalt für Arbeit (Federal Department of Employment) as her employment had always been outside the scope of the abovementioned Law.

Furthermore the court found that the plaintiff could derive no entitlement from any international convention. Under the abovementioned Convention between Germany and Yugoslavia insurance periods completed in Yugoslavia can only be taken into account if they fall within the two years immediately preceding the commencement of unemployment. The Social Security Convention between Germany and Switzerland of 1964 does not include unemployment insurance and a Convention between Germany and Switzerland of 1928 only applies to frontier workers. Finally the Convention of 1964 between Germany and the Netherlands concerning unemployment insurance only applies to nationals of either State.

However, the court thought that a provision which might give rise to entitlement was Regulation No 1408/71 '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). It took the view that it could be assumed that the plaintiff did fall within the class of persons to whom the regulation applies. The regulation does in fact apply not only to the nationals of a Member State but also to members of their families. Under the Arbeitsförderungsgesetz in conjunction with the Leistungsverordnung (regulation concerning benefits) of 1975, that is, the legislation to which reference is made in the definition in Article 1 (f) of Regulation No 1408/71 the wife of a worker is to be regarded as a member of his family. Of the provisions of Regulation No 1408/71, in the view of the Sozialgericht, Article 67, which governs the aggregation of periods of insurance or employment, is not applicable. Article 67 provides for the taking into account of periods which have been completed in another Member State only when the unemployed person completed directly before the commencement of unemployment periods capable of being taken into account under the legislation under which benefits, are sought, that is to say,

foreign periods of employment are in principle only taken into account in the last country of employment.

However the court does believe that a claim under Article 69, that is, the transfer of the right to benefit in the Netherlands to the Federal Republic of Germany is possible. In this respect the decisive factor is that such a right is retained if the conditions for a right do exist under the legislation of a Member State and the person entitled moves to another Member State in order to seek employment there. However it must be borne in mind that before his departure the unemployed person must have been registered with the employment services of the competent State as a person seeking work and must have remained available for at least four weeks after becoming unemployed. In addition the right to benefit only exists for a maximum period of three months from the date when he ceased to be available to the employment services of the State which he left, that is to say, in principle the right is lost if before the expiry of the abovementioned period the person entitled does not return to the competent State.

In view of the abovementioned conditions and restrictions, a particularly important factor is that before becoming unemployed the plaintiff left the Netherlands and has therefore acquired no rights there, the question arises for the court whether this is compatible with legal principles of a higher order which, as for example Article 6 of the Grundgesetz (Basic Law) of the Federal Republic of Germany, provide for protection of marriage and family if the unemployment arose through man and wife setting up home together. A further problem for the Court is whether the plaintiff was wholly integrated into the social security system of the Communities by acquiring membership of the family of an employed person in such a way that periods of insurance and employment completed before the marriage can give rise to a right.

Therefore by order of 25 March 1976 the court stayed proceedings and referred the following two questions to the Court of Justice for a preliminary ruling:

'(1) Are rights under Article 67 *et seq.* of Regulation (EEC) No 1408/71 of the Council allowed for the spouse of a national of a Member State, even if the spouse is not a national of a Member State and right to the benefit was acquired before marriage?

(2) If the answer to the first question is in the affirmative:
Is the rule under Article 67 *et seq.* of Regulation (EEC) No 1408/71 — whereby a claim by a worker, who is wholly unemployed, for benefit, must have arisen in the country where he was employed and have been transferred to the country where he is temporarily resident — compatible with the legal concept of the protection of marriage and the family, as expressed in Article 6 of the Basic Law of the Federal Republic of Germany, in a case where a person who has hitherto been insured in one Member State ceases to be employed by reason of marriage and joins his or her spouse in another Member State?'

In my view the following observations should be made with regard to the problems which have arisen before the German court:

Clearly we are primarily concerned with determining the class of person to whom Regulation No 1408/71 applies. The fundamental question is whether members of the family of a national of a Member State who do not themselves possess the nationality of a Member State are also covered by the regulation and themselves receive the status of migrant workers inasmuch as they can claim rights of their own.

Before undertaking an examination of this question two preliminary observations must be made.

The first relates to Article 1 (f) of Regulation No 1408/71 which, in defining members of the family, refers to the legislation under which benefits are provided. In this respect the Commission rightly points out that the court making the reference erroneously referred to German legal provisions and to the fact that under those provisions a wife is regarded as a member of the family. In fact however the court is solely concerned with a right under Article 69 of Regulation No 1408/71, that is, a right under the law of the Netherlands which can be transferred for a specified period and may possibly be claimed against a German insurance institution. By this transfer and the possibility of enforcement against a German institution the right is not transformed into a right under German law. The court should therefore properly have concerned itself with the question whether a wife is regarded as a member of the family under the legal provisions of the Netherlands.

The second preliminary remark concerns Article 2 of Regulation No 1408/71 which specifies the class of persons to whom that regulation is applicable. It is certainly correct that this does not require members of the family to possess the nationality of a Member State. Moreover this is made particularly clear from a comparison of paragraph (1) and paragraph (2) in the latter of which reference is only made to survivors possessing the nationality of a Member State if they are the survivors of a worker who did not possess the nationality of a Member State. However it is important that the persons concerned must be members of the families of workers 'who are or have been subject to the legislation of one or more Member States'. From the sense and purpose of the regulation — in this respect its title to which I referred above is characteristic — this means that the persons concerned must be members of the family of *migrant workers,* that is, workers who have left their State of origin. This is not opposed by the circumstance that Article 2 (1) also makes reference to the legislation of *one* Member State. As the Commission pointed out, the aim of this provision is to cover also cases in which young workers have left their State of origin immediately after completing their training and obtained their first employment in another Member State.

With regard to the facts of the main proceedings it does not appear that the plaintiff's husband is in fact a migrant worker in this sense. If he is not then for this reason alone Regulation No 1408/71 cannot be applied to the rights claimed by the plaintiff.

As I stated above, however, these observations are not fully sufficient. I shall further examine what I regard as the principal problem of the proceedings, namely the question whether Article 2 of Regulation No 1408/71 is to be interpreted with regard to members of the family of a migrant worker in such a way that irrespective of nationality they are to be assimilated to migrant workers if they make claims based on their own entitlement or whether Article 2 is only intended to make it clear that the regulation covers such members of a family in so far as they are claiming rights *derived* from migrant workers.

The Commission made detailed observations on this point and developed the view that the only possible answer is in favour of the latter interpretation. I may say at once that in my opinion it produced convincing evidence of this.

The text itself of Article 2 (1) is significant in providing that:

'This regulation shall apply to workers 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

also to the members of their families and their survivors.'

If the intention had been to refer to members of families in their capacity as workers rather than as persons in receipt of benefits by virtue of a right derived from the worker then presumably at the end of Article 2 (1) instead of the words 'as also to the members of their families and their survivors' the expression 'or in so far as they (that is the workers) are members of the family or survivors of such a national, stateless person or refugee' would have been used.

Further the definition of 'members of the family' contained in Article 1 (f) is important and illuminating. As the Court is aware, reference is made to national law with the result that the status may vary from Member State to Member State. As the Commission correctly pointed out here too, this method would presumably not have been chosen if it had been intended to assign to members of the family the status of migrant workers; instead a definition under *Community law* would have been provided as was done in Regulation No 1612/68 (OJ, English Special Edition, 1968 (II), p. 475).

Further support for the view that the expression 'worker' within the meaning of Regulation No 1408/71 only covers nationals of the Member States or stateless persons or refugees who live in the territory of a Member State but in the absence of the appropriate nationality not members of the family of a worker may also be derived from an argument *a contrario* which may be deduced from Article 2 (2) of that regulation.

With regard to the rights of survivors Article 2 (2) assimilates workers who do not possess the nationality of a Member State to nationals of a Member State if the survivors possess such nationality or live in the territory of a Member State as stateless persons or refugees. It is thus clear that it was thought necessary to include in the regulation express provision for workers who were not nationals of one of the Member States. However, such workers are not covered by the regulation generally and are not included in the scope of the regulation by virtue of their own person; they are assimilated to migrant workers for the purposes of the regulation only in so far as the interests of survivors are concerned.

Finally the Commission also pointed out that the view advocated by it concerning the sense and purpose of Regulation No 1408/71 may also be supported by Articles 48 to 51 of the EEC Treaty. Under those provisions free movement is to be ensured for workers *of the Member States* and it is only to this extent that the Community possesses powers in the sector of social security.

Of course this does not exclude more extensive ancillary measures without which the free movement of workers of the Member States would be impeded. Thus it appears justifiable for Article 10 of Regulation No 1612/68 to establish a right of residence for members of the family irrespective of their nationality, that is, in cases where a migrant worker moves to another Member State a right of access to the Member State concerned derived from him. Seen in this light it is also understandable that Article 11 of Regulation No 1612/68 creates a corresponding right for spouses and children to take up any activity as employed persons in the Member State chosen by the migrant worker. The principle that any hindrance to the free movement of workers of the Member States is to be avoided can however not be extended any further and in the absence of Community powers, it cannot lead to members of a family who do not even possess the nationality of a Member State having an independent right to freedom of movement with protection in the field of social security which corresponds to that of migrant workers possessing the nationality of a Member State.

All the above, that is, a logical interpretation of Regulation No 1408/71 in the light of the provisions of the Treaty, leads accordingly to the conclusion that under Article 2 of Regulation No 1408/71 members of the family of a migrant worker who do not possess the nationality of a Member State are not accorded the status of migrant workers. Properly interpreted Article 2 does not relate to the rights under their *own* entitlement of working members, it only covers rights of the members of the family *derived* from the migrant worker, that is, in so far as they draw family benefits in their capacity as members of the family of a migrant worker. It is thus also clear that in so far as she is pursuing her own claims under the Netherlands unemployment insurance, which are the sole object of the main proceeding, the plaintiff does not fall within the scope of Regulation No 1408/71 and that, contrary to the view of the court making the reference, it is not possible for her to rely on Article 69 of the regulation.

In my opinion the Court of Justice has no need to examine the matter further. It is therefore not necessary to clarify the further questions raised by the court making the order for reference such as whether it is important that the conditions for the acquisition of rights to benefits were fulfilled before the marriage or whether the formulation of Article 69 infringes a legal principle of a higher order namely the protection of marriage and family; for these questions presuppose that the plaintiff and her own claims are covered by the scope of the regulation. I shall at any event not conceal, and I need say no more than this, that the statements made by the Commission with regard to these further questions too appear thoroughly convincing.

In the light of all these considerations I suggest that the following answer should be given in reply to the request for a preliminary ruling submitted by the Sozialgericht Gelsenkirchen:

Article 67 *et seq.* of Regulation No 1408/71 relate to rights derived from the national law of the Member States to unemployment benefits for migrant workers who bear the nationality of a Member State. Members of the family of such migrant workers have a right, by virtue of their membership of the family, to benefits if the national law of the Member State provides family benefits for the members of the family of unemployed workers. In such a case the nationality of the members of the family is not relevant.