OPINION OF ADVOCATE GENERAL ALBER

delivered on 26 June 2001 [1]

I — Introduction

1. This reference for a preliminary ruling from the Sozialgericht Trier (Social Court, Trier) concerns the application of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [2] in particular Articles 67 to 71 thereof, to a national of a non-member country who is married to a citizen of the European Union and lives with him in his State of origin. She has brought an action to obtain unemployment benefit in the State of employment, Luxembourg.

II — Facts and procedure

2. The plaintiff in the main proceedings (hereinafter 'the plaintiff') is a Polish national who is married to a German national and has been living in Germany since April 1998.

3. From 1 July 1998 to 22 December 1999, she worked as a housekeeper in the Grand Duchy of Luxembourg. In January 2000, she registered as unemployed with the Trier unemployment office and applied for unemployment benefit.

4. After the Luxembourg employment authorities had stated that an E 301 certificate [3] could not be issued because the plaintiff was a Polish national, the defendant in the main proceedings rejected the plaintiff's application because she had not completed the qualifying period. That is to say that she had not been in employment subject to compulsory insurance for at least 12 months within the period of three years preceding her application. Furthermore, she could not rely, either in her

1 — Original language: German.

2 — See Regulation No 1408/71 in the version contained in Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1).

3 — The form is intended to certify 'the periods to be taken into account for the granting of unemployment benefits' for the purposes of Articles 67, 68, 71(1)(a)(ii) and 71(1)(b)(ii); see Decision No 154 of 8 February 1994 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 301, E 302, E 303), OJ 1994 L 244, p. 123.

capacity as a national of a non-member country or on the basis of provisions of Community law, on the exceptional provision for frontier workers.

5. After her objection was dismissed, the plaintiff challenged that decision before the Sozialgericht Trier, on the ground that she could not obtain unemployment benefit in the Grand Duchy of Luxembourg, although she had been in employment subject to compulsory insurance there for more than a year, because she had not lived there. Moreover, in Germany, she could not rely on the relevant provisions of Regulation No 1408/71 because of her nationality. The contested decision also adversely affected her husband's right to freedom of movement in the Community, since, in order to preserve the benefit entitlements of the plaintiff in the main proceedings, he could not continue to live in Germany but would be forced to move his place of residence to another Member State.

6. The national court shares the plaintiff's view and has decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling.

Is the interpretation of Article 2(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1971 L 149, p. 2), given by the Court of Justice in its judgment in Case 40/76 *Slavika Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669, still authoritative even when it also indirectly affects the freedom of movement of a Member State national?

7. The Governments of Austria and the United Kingdom and the Commission have taken part in the proceedings. The Court will give judgment without a hearing.

III — Relevant legislation

(a) *Relevant provisions of Regulation No 1408/71*

8. Paragraphs 1 and 2 of Article 2, which governs the persons covered by the regulation, read as follows:

'This regulation shall apply 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. [4]

In addition, this regulation shall apply to the survivors of employed or self-employed persons who are or have been subject to the legislation of one or more Member States, irrespective of the nationality of such employed or self-employed persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.'

9. Article 71(1)(a)(ii) reads as follows:

'A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense.'

4 — The text of this provision was extended by Council Regulation (EC) No 307/1999 of 8 February 1999, which incorporated into the first phrase the words 'and to students'; see OJ 1999 L 38, p. 1.

(b) *Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part* [5]

10. Articles 37 and 38 of the Agreement read:

'Article 37

(1) Subject to the conditions and modalities applicable in each Member State:

— the treatment accorded to workers of Polish nationality, legally employed in the territory of a Member State, shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals;

— the legally resident spouse and children of a worker legally employed in the

5 — See Decision of the Council of 13 December 1993 on the conclusion of the Europe Agreement (OJ 1993 L 348, p. 1).

territory of a Member State, with the exception of seasonal workers coming under bilateral agreements within the meaning of Article 41, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.

(2) Poland shall ... accord ...

Article 38

1. With a view to coordinating social security systems for workers of Polish nationality, legally employed in the territory of a Member State, and for the members of their family legally resident there, and subject to the conditions and modalities applicable in each Member State:

— all periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care for such workers and such family members;

— ....

(2) Poland shall accord ...'.

IV — Arguments of the parties

(a) *Austrian Government*

11. The *Austrian Government* points out that a Polish national can be included among the persons covered by the regulation, as laid down in Article 2(1) of Regulation No 1408/71, only in his capacity as a member of the family or a survivor of a worker who is himself a national of a Member State. However, it follows from the judgment in *Kermaschek* [6] that the provisions of Regulation No 1408/71 concerning unemployment benefits, in particular Article 71 thereof, are not applicable to nationals of non-member countries who are members of the family of a Community worker.

12. The Austrian Government stresses that the findings of that judgment were con-

6 — Case 40/76 *Kermaschek* [1976] ECR 1669.

firmed by the judgment in Case C-308/93, [7] in which the Court fundamentally revised the view it had expressed in *Kermaschek* to the effect that family members can claim only derived rights under Regulation No 1408/71 and held that

'... the spouse of a Community worker cannot rely on his or her status as a member of the worker's family in order to claim application of Articles 67 to 71 of Regulation No 1408/71 ...'. [8]

13. However, even from the perspective adopted by the referring court of a possible restriction of freedom of movement, there is no reason, in the Austrian Government's view, to revise the judgment in *Cabanis-Issarte*. After all, it is clear from the order for reference that the husband of the plaintiff in the main proceedings lives in Germany and has not exercised his right to freedom of movement. There can therefore be no question of a restriction of freedom of movement.

14. In this case, it submits, the fact that Article 71 of Regulation No 1408/71 is not applicable to the plaintiff in the main proceedings does not result in a restriction on the freedom of movement of her spouse but amounts to recognition of the existence of such freedom of movement for a national of a non-member country.

7 — Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, paragraph 23.

8 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 23).

15. The Austrian Government therefore proposes that the question referred be answered as follows:

Members of the family of a worker covered by Regulation (EEC) No 1408/71 may not rely on Article 39 EC or that regulation in order to claim social security benefits which are linked to their own employment, such as unemployment benefit, if they themselves do not fulfil the criteria applicable to the status of worker under that regulation.

(b) *The United Kingdom Government*

16. The *United Kingdom Government* points out first of all that the factual situation that has given rise to this case is not one involving the exercise by either spouse of any rights conferred by Community law. In particular, as a national of a non-member country, the plaintiff does not have a right to freedom of movement pursuant to Article 39 EC. Article 38 of the Europe Agreement between the European Communities and their Member States, of the one part, and Poland, of the other part, [9] provides for the aggregation of periods of employment or insurance com-

9 — OJ 1993 L 348, p. 2

pleted by Polish nationals lawfully employed or resident in more than one Member State, but only for the purpose of old age, invalidity, death and medical care benefits and not unemployment benefit. The right to work or reside in a Member State remains a matter for each Member State.

17. In the alternative, the United Kingdom submits that the referring court suggests to the Court that Article 2 of Regulation No 1408/71 be interpreted as meaning that the rights of members of the family of a worker, irrespective of their nationality, are identical to the rights of a worker who is a Community national.

18. That interpretation, it submits, is impossible to reconcile with the wording of Article 2 of the regulation, which clearly relates to two distinct categories of persons (workers on the one hand and family members and survivors on the other), and is not necessary in order to facilitate the free movement of workers within the meaning of the Treaty.

19. In the opinion of the United Kingdom Government, it is also clear from the case-law of the Court that the two categories of persons described in Article 2(1) of Regulation No 1408/71 have different rights. Only persons in the first category (workers who are nationals of a Member State) have 'primary' rights of their own under Article 39 EC, while the secondary legislation has given certain rights to members of workers' families, but these are 'secondary' rights which exist principally to facilitate the movement within the Community of the worker himself. [10]

20. In *Cabanis-Issarte*, it contends, the Court amended the decision in *Kermaschek*. It preserved the distinction between the rights of workers under the regulation and the rights of members of the worker's family, but based the distinction not upon whether the benefit at issue was the subject of 'derived rights' in *national* law but upon whether the relevant *provisions of Regulation No 1408/71* were ones which applied only to workers or to both the categories covered by Article 2(1).

21. The United Kingdom Government takes the view that there are no reasons for changing that case-law. The only reason given by the Sozialgericht for departing from the existing case-law is that this is necessary in order to facilitate the freedom of movement of a Community national who is the spouse of a person such as the plaintiff. However, that is not the case. As far as Mr Ruhr is concerned, there is no reason to assume that the inapplicability of Article 71 to his wife would have affected his decision on his own employment or self-employment in Germany.

10 — See judgment in *Kermaschek* (cited in footnote 6, paragraphs 7 and 9) and the Opinion of Advocate General Reischl in that case, delivered on 11 November 1976 ([1976] ECR 1682 to 1683).

22. Finally, the United Kingdom Government submits that, if the Court were to change the law as it has been understood for more than a quarter of a century, it should place a temporal limitation on its judgment, as it did in *Cabanis-Issarte*.

23. In conclusion, the United Kingdom proposes that the Court answer the question referred as follows:

The spouse of a Community national cannot rely on his or her status as a member of the worker's family in order to claim application of Articles 67 to 71 of Regulation No 1408/71.

(c) *The Commission*

24. The Commission submits that the dispute in the main proceedings is essentially the same as that which gave rise to the *Kermaschek* case, and that the relevant provisions of Regulation No 1408/71 have remained largely unchanged since 1976. A decision by the Court which departed from the judgment in *Kermaschek* would therefore be conceivable only if the arguments adduced in favour of such a change were very compelling.

25. The referring court, it submits, puts forward two arguments: in the judgment in *Kermaschek*, the Court did not take sufficient account of the effects its decision might have on spouses who are nationals of a Member State and on their right to freedom of movement in the Community; furthermore, the development of Community law in the last twenty years may call for a change to the case-law relating to nationals of non-member countries.

26. In this connection, the Commission proceeds on the assumption that the plaintiff's husband is not a migrant worker within the meaning of Regulation No 1408/71 and does not appear to have any intention of exercising his right to freedom of movement in the Community in the near future.

27. The present case, it contends, concerns whether or not nationals of non-member countries have a personal right to freedom of movement which necessarily results in the corresponding application of Articles 67 to 71 of Regulation No 1408/71. However, no such general right exists at present. In cases where the rights of Community citizens are not affected, the fact that a national of a non-member country is married to a Community citizen is in principle immaterial and such cases are not to be treated any differently from ones in which the national of the non-member country is single. The Commission points out in this respect that it submitted to the Council a proposal aimed at including nationals of non-member countries legally resident in a Member State within the

social provisions safeguarding freedom of movement for employed and self-employed workers within the Community. [11] However, this is a matter for the discretion of the legislature of each Member State, since the EC Treaty merely provides for the possibility of such a measure rather than making it a mandatory requirement.

28. The Commission also takes account of Articles 37(1), first indent, 38(1), 39(1) and 42 of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part.

29. Article 37(1), first indent, prohibits discrimination based on nationality, 'as regards working conditions, remuneration or dismissal, ... subject to the conditions and modalities applicable in each Member State'.

30. In the Commission's submission, since the requirement or possibility of insurance against the risk of unemployment is one of the working conditions applicable to every worker, it would clearly have been contrary to Article 37 for unemployment insurance benefits to be withheld from the plaintiff, if she had lived in Luxembourg and claimed benefit there. However, the question in this case is whether the fact that she lives in Germany, where she has never worked, leads to a different conclusion, since she is claiming benefit not from the Luxembourg but from the German unemployment insurance scheme.

31. The wording of Article 37(1) of the Europe Agreement does not necessarily preclude an interpretation which, in certain circumstances, would impose obligations on the Member State of residence too, since it states that 'the treatment accorded to workers of Polish nationality ... shall be free from any discrimination ...'. It does not therefore say who is to accord such treatment as a national. It certainly is not to be accorded exclusively by the Member State of employment, much as that may be the general rule. In the Commission's view, the only decisive criterion is whether the claims in question relate to working conditions, remuneration or dismissal, rather than, say, to the place of residence (such as claims for social assistance).

32. The fact that, under Article 71(1)(a)(ii) or (b)(ii), as the case may be, of Regulation No 1408/71, a German national in the same situation can assert against the German unemployment insurance scheme claims based on his employment in Luxembourg must, in accordance with the

11 — OJ 1998 C 6, p. 15.

principle of treatment as a national under Article 37(1) of the Europe Agreement, mean that such a possibility is also provided for a Polish national.

33. However, in view of the scheme of the chapter on freedom of movement and the wording of Article 38(1), first indent, of the Europe Agreement, which lays down the rule on the aggregation of periods of insurance, employment and residence but does not refer to unemployment insurance, that point of view cannot be upheld. Unemployment insurance cannot therefore be covered by Article 37 of the Europe Agreement either.

34. Consequently, despite its looser wording, Article 37 in fact covers only claims against the Member State of employment, while Article 38 governs situations which require 'coordination' between Member States precisely because they involve not just one but several Member States as the State of employment. Coordination between Member States is necessary not only for cases, expressly referred to in Article 38, in which rights acquired in the individual Member States are added together but also, and primarily, in cases, such as that in Article 71(1)(a)(ii) or (b)(ii) of Regulation No 1408/71, in which claims against one Member State are replaced by the creation of claims against another Member State. The idea that Polish workers have no right to freedom of movement within the EC and that the provisions of Regulation No 1408/71 cannot be applied to them or extended to them through Article 37 of the Europe Agreement, unless expressly so decided, is entirely consistent with that interpretation of Articles 37 and 38 of the Europe Agreement. Since unemployment insurance is not referred to in Article 38, Polish nationals at present have no rights under Article 71(1)(a)(ii) or (b)(ii) of Regulation No 1408/71.

35. The Commission emphasises that the plaintiff's perfectly legitimate claim can be resolved only under Luxembourg national law, by way, if necessary, of a reference to the European Court of Human Rights in Strasbourg.

36. In conclusion, the Commission proposes that the Court's answer to the question referred should be as follows:

As Community law now stands, Polish nationals, including those married to Member State nationals, are not entitled to unemployment benefits from the Member State of residence under Article 71 of Regulation No 1408/71.

V — Assessment

37. The referring court would like to know whether the plaintiff in the main proceedings can successfully rely on Articles 67 to 71 of Regulation No 1408/71.

38. Article 2(1) of the regulation defines the persons covered by it as follows:

'This regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member State *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.' [12]

39. On the basis of the Court's case-law to date, it must be assumed that workers and members of their families are in principle two distinct categories of persons. In the judgment in *Kermaschek*, which concerned Article 2(1) of the regulation, the Court held:

'It is evident from the juxtaposition indicated by the use of the words "as also" [now rendered in the English version of the regulation as "as well as"] that this provision refers to two clearly distinct categories: workers on the one hand, and members of their family and their survivors on the other. Only the nationals of one of the Member States, stateless persons and refugees who are or have been subject to the social security scheme of one or more Member States are covered in their capacity as workers. Whereas the persons belonging to the first category can claim the right to benefits covered by the regulation as rights of their own, the persons belonging to the second category can only claim derived rights, acquired through their status as a member of the family or a survivor of a worker, that is to say of a person belonging to the first category.

This interpretation is confirmed by the text of Article 2(2), [13] which provides that workers who are not nationals of a Member State shall nevertheless be assimilated to those nationals as regards the rights of their survivors, provided that the latter are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States. The said interpretation receives added confirmation from the fact that Article 1 of the regulation also makes a clear dis-

12 — My emphasis.

13 — For the wording of this provision, see point 8 above.

tinction between workers on the one hand and members of their family on the other, inasmuch as it defines, at subparagraphs (a), (b) and (c), the concepts of "worker", "frontier worker" and "seasonal worker", but refers back, at subparagraphs (f) and (g), to the national legislation indicated for the definition of the terms "member of the family" and survivor.' [14]

40. Although the first category of persons was extended by Regulation No 307/1999 amending Regulation No 1408/71, [15] that basic distinction between the first category and members of the family as the second category of persons covered by the provision must nevertheless be maintained. This assessment is borne out by the judgment in *Cabanis-Issarte*, [16] in which the Court held:

'Article 2(1) of Regulation No 1408/71, which defines the persons covered by the regulation, refers to two clearly distinct categories of persons: workers, on the one hand, and members of their family and their survivors on the other. In order to fall within the scope of the regulation, the former must be nationals of a Member State, or stateless person or refugees residing within the territory of one of the Member States. There is on the other hand no nationality requirement for application of the regulation to the family members or survivors of workers who are themselves Community nationals.' [17]

41. In view of her Polish nationality, there is no doubt that the plaintiff does not fall into the first category of persons defined in Article 2(1) of the regulation. As the spouse of a citizen of the Union, she may, however, fall into the second category of persons referred to in Article 2(1) of the regulation. It is not clear from the order for reference whether and in what capacity (employed person, self-employed person, etc.) the plaintiff's German husband falls within the scope of Article 2(1) of the regulation. However, since the national court refers in its reasoning to a direct restriction of the husband's freedom of movement, it must be assumed for the purposes of the line of argument that follows that he satisfies in his own right the conditions for falling within the scope of Article 2(1) of the regulation, and consequently that the plaintiff, as a member of his family, is to be classified under the second category referred to in Article 2(1) of the regulation.

42. The question now is whether, by virtue of the fact that she might fall within the scope of Regulation No 1408/71 as a family member within the meaning of Article 2(1) thereof, she might be able to rely on Articles 67 to 71 of that regulation, in other words whether she could seek

14 — See judgment in *Kermaschek* (cited in footnote 6, paragraphs 7 and 8).

15 — Regulation No 307/1999 brought students within the scope of Regulation No 1408/71.

16 — Judgment in *Cabanis-Issarte* (cited in footnote 7).

17 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 21).

application of the special rules adopted for frontier workers in Article 71(1)(a)(ii), which designates the employment authority of the State of residence as the institution responsible for granting unemployment benefit.

43. In the light of the Court's case-law to date, [18] and in the unanimous view of the parties, this question is relatively unambiguous and should be answered in the negative.

44. In terms of the material provisions of Regulation No 1408/71, the facts underlying the judgment in *Kermaschek* were similar to those of this case.

'... Mrs Kermaschek, a Yugoslav national, sought application to her case of the provisions of Regulation No 1408/71 relating to the aggregation of periods of insurance or employment in order to acquire entitlement to employment benefits. She could not rely on her status of worker in Germany since she was a national of a non-member country. Nor could she rely on her status of spouse of a German national since the provisions of Community law at issue applied exclusively to workers.' [19]

45. In the judgment in *Kermaschek*, the Court drew a distinction between rights in person and the derived rights which could be asserted respectively by the first or the second categories of persons referred to in Article 2(1) of Regulation No 1408/71. [20] The Court reached the following conclusion with regard to reliance on Articles 67 et seq. of Regulation No 1408/71:

'It follows that 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.' [21]

46. If those findings are transposed to this case, this means that Article 71 of the regulation confers on the plaintiff no right

18 — See judgments in *Kermaschek* (cited in footnote 6), *Cabanis-Issarte* (cited in footnote 7), and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.

19 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 24).

20 — See paragraph 7 of the judgment in *Kermaschek* (cited in point 39 above).

21 — Judgment in *Kermaschek* (cited in footnote 6, paragraph 9).

to unemployment benefit from the German institution, since the main purpose of that article is 'coordination of 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 and not for members of their families.' [22]

47. In its case-law following the judgment in *Kermaschek*, the Court at first maintained the distinction between rights in person and derived rights for the purposes of determining the scope of application of the provisions of the regulation to the two distinct categories of persons under Article 2(1) of the regulation. [23]

48. In the judgment in *Cabanis-Issarte*, however, it fundamentally called that distinction into question, since it 'may undermine the fundamental Community law requirement that its rules should be applied uniformly, by making 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 derived rights, in the light of specific features of the domestic social security scheme'. [24]

49. The Court therefore had to restrict the scope of its case-law following from the judgment in *Kermaschek* with respect to the distinction between rights in person and derived rights to the aforementioned circumstances of the *Kermaschek* case. [25]

50. Even though, strictly speaking, it must be assumed that the Court considerably qualified the distinction between rights in person and derived rights in the judgment in *Cabanis-Issarte*, an assumption borne out, moreover, by the fact that, in its judgment in *Hoever and Zachow* concerning family benefits, the Court held that 'the distinction between personal rights and derived rights does not in principle apply to family benefits,' [26] in cases involving facts similar to those at issue in *Kermaschek*, it has none the less expressly adhered to the conclusion reached in the judgment in that case. This follows from the judgments in both *Cabanis-Issarte* [27] and *Hoever and Zachow*. [28]

51. As the facts in this case are similar to those in *Kermaschek*, it must be assumed, on the basis of the case-law to date, that the plaintiff cannot rely in her capacity as a family member on Articles 67 to 71 of Regulation No 1408/71 in order to claim

22 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 23).

23 — See judgments in Case 157/84 *Frascogna* [1985] ECR 1739, Case 94/84 *Deak* [1985] ECR 1873, Case 147/87 *Zaoui* [1987] ECR 5511, Case C-243/91 *Taghavi* [1992] ECR I-4401, and Case C-310/91 *Schmid* [1993] ECR I-3011.

24 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 31).

25 — See judgment in *Cabanis-Issarte* (cited in footnote 7, paragraph 34).

26 — See judgment in *Hoever and Zachow* (cited in footnote 18, paragraph 33).

27 — See paragraphs 23 and 24 of the judgment (cited in footnote 7).

28 — See paragraph 32 of the judgment (cited in footnote 18).

unemployment benefits in her State of residence without having completed the qualifying period provided for by the law of that State.

52. The only question now, therefore, is whether there are any factors which significantly call the existing case-law into question and indicate that it should be amended.

53. Regard should be had, first of all, to the reference by the national court to the temporal aspect [29] of the case-law established by the judgment in *Kermaschek*. There are several reasons for this. The case-law established nearly 25 years ago has in fact been significantly called into question, [30] as explained above.

54. In purely abstract terms, it is fair to say that the dynamic nature of Community law is certainly a potential reason for questioning a concept established by case-law 25 years ago, especially if the fundamental freedoms of the Community, which include freedom of movement, could be better secured some other way, as the referring court seems to assume.

55. Lastly, in that time, a number of legislative changes have also occurred, ranging from amendments to primary law to the extension of Article 2(1) of Regulation No 1408/71 itself.

56. However, these considerations are not in themselves capable of causing the judgment in *Kermaschek* to be regarded as no longer relevant. After all, the Court expressly confirmed the validity of that judgment on two occasions in 1996. [31]

57. More significant is the substantive argument concerning the direct restriction on the freedom of movement of a spouse who is a Community national, as put forward by the referring court. However, no indication has been given as to what extent the plaintiff's German husband, who lives in Germany, has in fact ever exercised his right to freedom of movement under the Treaty. It is therefore not at all clear whether he is to be regarded as a migrant worker and whether he falls within the scope *ratione materiae* of Regulation No 1408/71. The abstract possibility that he might exercise that freedom one day, which potentially exists for all Community nationals, is not sufficient to justify a legal consequence as far-reaching as *de facto* freedom of movement within the Community for a spouse who is a national of a non-member country. The particular circumstances of the dispute in the main proceedings may therefore not be such as to prompt the Court to reverse its previous case-law.

29 — The national court states at the end of the order for reference: '[s]ince, against that background, it has therefore become doubtful whether the Court of Justice still adheres today to the principles of the decision of 1976 referred to under paragraph 2 above, another reference is necessary'.

30 — See judgments in *Cabanis-Issarte* (cited in footnote 7) and *Hoever and Zachow* (cited in footnote 18).

31 — See judgments in *Cabanis-Issarte* (cited in footnote 7) and *Hoever and Zachow* (cited in footnote 18).

58. However, it is reasonable to ask whether the plaintiff may be eligible for the unemployment benefits for which she has applied on any other legal basis. Both the United Kingdom Government and the Commission have referred in this respect to the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. Article 37 of the Agreement establishes the principle of equal treatment for Polish workers, while Article 38 provides for the coordination of social security schemes in certain areas of social security.

59. It is notable that unemployment benefits are not referred to in Article 38 of the Agreement, only pensions and annuities in respect of old age, invalidity and death, and medical care. The Commission has indicated that the coordination of unemployment insurance could, if appropriate, form the subject of a future decision of the Association Council on the adoption of provisions to coordinate social security schemes. This means, however, that, as the law stands, no such coordination exists at present.

60. With regard to the principle of equal treatment established in Article 37 of the Agreement, the Commission's conclusion that that provision is directed at the State of employment is to be endorsed. Consequently, that provision likewise cannot serve to support a right to unemployment benefit from the State of residence, Germany. However, that view is based on the State of employment and [not], therefore, on what is really at issue in this case, namely that the plaintiff had been in employment subject to compulsory insurance in Luxembourg, had most probably paid contributions to the unemployment insurance scheme in that country, but, on becoming unemployed, was refused benefit on the ground that she was resident in another country. This is typical of the kind of unfair situation that is regularly to be encountered in relation to frontier workers.

61. In my view, the issue here is equal treatment of the worker by the State of employment. Depending on the circumstances, refusal of benefit on the ground that a frontier worker is resident in another country can constitute direct discrimination for which there may be no justification if the frontier worker is still available to the employment authority of the State of employment, which can be assumed *prima facie* to be the case, since the worker has already been in employment in the State concerned.

62. Faced with a comparable issue arising under German law, the Bundesverfassungsgericht (Federal Constitutional Court) held that foreigners from non-Union States living near the border are entitled to State unemployment benefits from the Federal Republic if they lost their jobs in Germany and had been compulsorily insured against unemployment. [32] The referring court has expressly referred to this fact.

32 — See the decision of 30 December 1999 of the Bundesverfassungsgericht (Federal Constitutional Court), 1 BvR (Bundesverfassungsrichter) 809/95, RIW (Recht der Internationalen Wirtschaft) 2000, p. 299.

63. The referring court will scarcely be able to adopt a comparable solution in this case, since that would entail reconciliation with the Luxembourg legal system.

64. As it stands at present, Community law cannot, however, bridge the gap between the Luxembourg legal system and the German legal system (however desirable that may seem in a case such as this).

65. The answer to the question from the referring court should therefore be that, as Community law stands at present, the interpretation of Article 2(1) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in particular for the purposes of Articles 67 to 71 thereof, given by the Court of Justice in its judgment in Case 40/76 *Slavika Kermaschek* v *Bundesanstalt für Arbeit*, remains authoritative.

VI — Conclusion

66. In the light of the foregoing considerations, I propose that the question referred for a preliminary ruling be answered as follows:

As Community law stands at present, the interpretation of Article 2(1) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in particular for the purposes of Articles 67 to 71 thereof, given by the Court of Justice in its judgment in Case 40/76 *Slavika Kermaschek* v *Bundesanstalt für Arbeit*, remains authoritative.