2. The field of application *ratione personae* of Article 71 (1) (b) (ii) of Regulation No 1408/71 is not limited to the categories of workers referred to in Decision No 94 of the Administrative Commission on Social Security for Migrant Workers. It applies, in particular, to a worker who, in the course of his last employment, transfers his residence to another Member State for family reasons and who, after that transfer, no longer returns to the State of employment to pursue an occupation there. The possibility of receiving unemployment benefits in the State of residence rather than the State of employment under this provision is justified for certain categories of workers with close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside and who must, as a result, be accorded the best conditions for obtaining new employment.

REPORT FOR THE HEARING
delivered in Case 236/87 *

I — Facts and procedure

1. Article 67, which is entitled 'Aggregation of insurance or employment periods', and which is part of Section 1, 'Common Provisions', of Chapter 6, 'Unemployment', of Regulation No 1408/71 is worded as follows:

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

...

3. Except in the cases referred to in Article 71 (1) (a) (ii) and (b) (ii), application of the provisions of paragraphs (1) and (2) shall be subject to the condition that the person concerned should have completed lastly:

in the case of paragraph (1), periods of insurance,

in the case of paragraph (2), periods of employment,

* Language of the Case: German.

in accordance with the provisions of the legislation under which the benefits are claimed.'

Section 3 of the same chapter, entitled 'Unemployed persons who, during their last employment, were residing in a Member State other than the competent State', provides in Article 71, as follows:

'1. An unemployed person who was formally employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) ...

(ii) A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member States 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;

(b) (i) ...

(ii) An unemployed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits as its own expense ...'

It follows from these provisions that the unemployment benefits accorded under the rule of aggregation referred to in Article 67 (1) are, in principle, provided at the expense of the State of last employment. A transfer of the obligation to pay these benefits from the State of last employment to the State of residence is justified, exceptionally, only for the two categories of workers designated in Article 71 (1) (a) (ii) and (b) (ii).

2. The plaintiff in the main proceedings, Anna Bergemann, a Netherlands national, worked, during her last employment, as an animal-keeper at Venlo, the Netherlands. On 5 June 1984, while she was on maternity leave, Mrs Bergemann married and, on 6 June 1984, took up residence at her husband's home in Kerken (Federal Republic of Germany), where she registered with the authorities.

From that date until the expiry of her employment contract on 30 June 1984, Mrs Bergemann remained on leave and has since not returned to the Netherlands with a view to pursuing an occupation there.

On 20 August 1984 she applied to the German authorities for unemployment benefit, or at least, unemployment assistance but her application was rejected by a decision of 27 November 1984. On 25 February 1985 an appeal lodged against this decision was also rejected.

On 26 March 1985 Mrs Bergemann instituted proceedings in the Sozialgericht (Social Court) Duisburg. Her application was dismissed by judgment of 9 September 1985 and the plaintiff appealed to the Landessozialgericht (Higher Social Court) for the *Land* of Nordrhein-Westfalen which, by an order of 11 June 1987, referred the case to the Court for a preliminary ruling.

In its order, the Landessozialgericht stresses in the first place that Mrs Bergemann does not satisfy the conditions laid down by the national legislation, the Arbeitsförderungsgesetz (Law on the Promotion of Employment — hereinafter referred to 'the Employment Law') in order to qualify for unemployment benefit or unemployment assistance because when she had worked she had never come within the scheme under the Employment Law and had therefore not completed the 'qualifying period' (corresponding to the pursuit of an occupation giving rise to the payment of contributions for a minimum period of 360 days) provided for in Paragraph 168 of that law.

The Landessozialgericht also draws attention to the fact that, under the terms of Article 67 (3) of Regulation No 1408/71, the insurance or employment periods completed by the plaintiff in the Netherlands cannot be taken into account by the German authorities for the purpose of granting the benefits in question. In the light of that provision, the State responsible for paying such benefits is, in this case, the, Netherlands, as the State of last employment.

Nevertheless, the Landessozialgericht considered the possibility that Mrs Bergemann might be covered by the exceptions referred to in Article 71 (1) (a) (ii) or (b) (ii) of Regulation No 1408/71.

Accordingly, it decided to stay the proceedings and to ask the Court for a preliminary ruling on the following questions:

'Does a worker qualify for the status of "frontier worker" within the meaning of Article 1 (b) and Article 71 (a) of Regulation EEC No 1408/71 even during a period of leave in accordance with the terms of his employment contract, when he does not in fact return following that period of leave or indeed before the end of the employment relationship, in other words he never returns to his place of employment in one Member State from his place of residence in another?

If he does not:

Does Article 71 (b) (ii) of Regulation (EEC) No 1408/71 apply solely to the classes of persons referred in Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 24 January 1974?'

The national court's order was registered at the Registry of the Court of Justice on 31 July 1987.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the following: the plaintiff in the main proceedings, represented by Mr Leingärtner and Mr Siller, officials of the Federal Legal Department of the DGB (Trades Union Federation) Kassel, the Bundesanstalt für Arbeit (Federal Labour Office), represented by its President; and the Commission of the European Communities, represented by Mr Gouloussis, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By decision of the Court of 29 February 1988, the case was assigned to the First Chamber.

II — Written observations submitted to the Court

Mrs Bergemann points out in the first place that her position does not correspond to that of a 'frontier worker' within the meaning of Article 1 (b) of Regulation No 1408/71, namely an 'employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week'. Accordingly, Article 71 (1) (a) (ii) of the regulation, relating to 'frontier workers', is not, in her view, applicable.

On the other hand, she considers that Article 71 (1) (b) (ii) of Regulation No 1408/71 is applicable to the facts of the present case in so far as it concerns workers who, while pursuing an occupation in another Member State, retain close links with the country in which they are established and habitually reside. In this respect, she states that the employment relationship which bound her to her employer in the Netherlands was still in existence when she transferred her residence to the Federal Republic of Germany.

She stresses further that the Court has already held, in its judgment of 17 February 1977 in Case 76/76 (*Di Paolo* [1977] ECR 315) that Decision No 94 of the Administrative Commission of 24 January 1974 does not enumerate exhaustively the categories of workers who may come within the scope of Article 71 (1) (b) (ii).

Finally, Mrs Bergemann notes that she changed her place of residence for important family reasons and that her family life would be seriously disturbed if she was required to register with the employment authorities of her previous residence in Venlo, the Netherlands.

Mrs Bergemann suggests that the questions referred to the Court by the national court should be answered as follows:

'A worker does not qualify for the status of "frontier worker" within the meaning of Article 1 (b) and Article 71 (a) of Regulation (EEC) No 1408/71 during a period of leave in accordance with the terms of his employment contract, where he does not in fact return to work following that period of leave before the expiry of his employment contract, in other words he never returns to his place of employment in one Member State from his place of residence in another.

Article 71 (b) (ii) of Regulation (EEC) No 1408/71 does not apply solely to the categories of persons enumerated in Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers. Workers who transfer their place of residence to the territory of another Member State with a view to setting up a shared home after marriage also fall within that category.'

According to the Bundesanstalt für Arbeit (Federal Labour Office), Mrs Bergemann's situation does not correspond in any way to the cases envisaged under Article 71 (a) (ii) and (b) (ii) because after the transfer of her

residence to the Federal Republic of Germany she in fact never journeyed from the State of her new residence to the State of her last employment. Furthermore, if the broad interpretation sought by the plaintiff were accepted, that would amount to transferring the cost of unemployment benefits to the State of residence (instead of the State responsible — State of last employment) whenever migrant workers go on leave towards the end of their employment contract, visit another State and apply there for unemployment benefit. Such a transfer of the obligation to pay social security benefits is not justified under the very specific rules laid down by Article 67 *et seq.* of Regulation No 1408/71.

The Commission observes in the first place that a worker in Mrs Bergemann's position cannot be regarded as a 'frontier worker' within the meaning of Article 71 (1) (a) (ii) of Regulation No 1408/71. This is so because the concept of 'frontier worker' (as defined in Article 1 of Regulation No 1408/71) presupposes regular and frequent travelling between the State of employment and the State of residence, whereas after Mrs Bergemann had taken up residence in the Federal Republic of Germany (during a period of leave and only a few days before the end of her employment contract in the Netherlands) she did not in fact return to the Netherlands to pursue an occupation there.

As regards specifically the nature and the scope of Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, of 24 January 1974, the Commission notes that in the judgment of 14 May 1981 in Case 98/80 *Romano* [1981] ECR 1241, the Court had already established 'that an organ such as the Administrative Committee cannot be empowered by the Council to adopt measures of a legislative character' (paragraph 20 of the judgment). In addition, according to the judgment of 12 February 1977 in Case 76/76 *Di Paolo* [1977] ECR 315, Decision No 94 cannot be regarded as enumerating exhaustively the categories of workers which may come within the scope of Article 71 (1) (b) (ii), which is moreover confirmed by the clearly non-exhaustive wording appearing in Decision No 131 of 3 December 1985 (Official Journal 1985, C 141, p. 10), which replaced Decision No 94.

As regards the application of Article 71 (1) (b) (ii), the Commission observes in the first place that this article constitutes an exception in relation to the general rule laid down in Article 67 and points out that, according to the *Di Paolo* judgment, 'the transfer of liability for payment of unemployment benefits from the Member State of last employment to the Member State of residence is justified for certain categories of workers who retain close ties with the country where they have settled and habitually reside, but it would no longer be justified if, by an excessively wide interpretation of the concept of residence, the point were to be reached at which all migrant workers who pursue an activity in one Member State while their families continue habitually to reside in another Member State were given the benefit of the exception contained in Article 71 (1) of Regulation No 1408/71. It follows from these considerations that the provisions of Article 71 (1) (b) (ii) must be interpreted strictly'.

The Commission notes nevertheless that, even if the concept of 'residence' is interpreted restrictively, it is any event clear that by taking up residence in a Member State other than the State of employment when

the employment relationship previously existing in the latter State is maintained, the person concerned becomes 'an employed person, other than a frontier worker' within the meaning of Article 71 (1) (b) (ii).

This interpretation, which is confirmed not only by the Court's decisions (judgments of 15 December 1976 in Case 39/76 *Mouthaan* [1976] ECR 1901; of 27 May 1982 in Case 227/81 *Aubin* [1982] ECR 1991 and of 12 June 1986 in Case 1/85 *Miethe* [1986] ECR 1837), but also by Article 69a contained in the Council proposal for an EEC regulation amending Regulation No 1408/71, which allows an unemployed person who leaves the State liable to pay benefits (in other words the State of last employment) in order to rejoin his spouse in another Member State, to receive unemployment benefit in the new State of residence.

The Commission therefore proposes that the questions submitted by the national court should be answered as follows:

'(1) A worker does not qualify for the status of "frontier worker" within the meaning of Article 1 (b) and Article 71 (a) of Regulation (EEC) No 1408/71 during a period of leave in accordance with the terms of his contract where he does not in fact return to work following that period of leave and before the expiry of the employment contract, in other words where the worker, whose place of residence is in one Member State, never returns to his place of employment in another Member State.

(2) Article 71 (b) (ii) of Regulation (EEC) No 1408/71 does not apply solely to the categories of persons enumerated in Decision No 94 of the Administrative Commission of the European Communities on Social Security for Migrant Workers which was in force at the material time, but also to other categories of persons who have close links with their State of residence.'

G. Bosco
Judge-Rapporteur