2. **Community law does not prohibit a Member State from refusing to allow a relative, as referred to in Article 10 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, of a worker employed within the territory of that State who has never exercised the right to freedom of movement within the Community to enter or reside within its territory if that worker has the nationality of that State and the relative the nationality of a non-member country.**

Mertens de Wilmars O'Keeffe Everling

Pescatore Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 27 October 1982.

For the Registrar

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 6 OCTOBER 1982

My Lords,

The Dutch Supreme Court has, in two cases pending before it, referred to the Court under Article 177 of the EEC Treaty the following questions:

1. "On an application for an interlocutory injunction, is the Supreme Court obliged, pursuant to the third paragraph of Article 177 of the Treaty . . ., when a question of interpretation within the meaning of the first paragraph of that Article is raised in an appeal on a point of law, to refer

the matter to the Court of Justice for a preliminary ruling, having regard to the fact that a judgment of the Supreme Court delivered on an application for an interlocutory injunction is not binding on a court which later has to try the case on its merits? If this question cannot be answered generally in the negative or affirmative, what are the circumstances which determine whether such an obligation should be deemed to exist?

2. Does Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 (OJ English Special Edition 1968 (III) p. 475) . . ., whether or not in conjunction with other provisions of Community law, prevent a Member State from refusing to admit a relative, mentioned in Article 10 (1) of the regulation, of a worker employed within the territory of that Member State, where the relative wishes to take up residence there with that worker, if the worker has the nationality of the State in which he works and the relative has another nationality?"

The questions arise in this way. The appellants in the proceedings before the Supreme Court, Mrs Morson in Case 35/82 and Mrs Jhanjan in Case 36/82, are nationals of Suriname. As they were living there on 25 November 1975, they lost their Dutch nationality pursuant to an agreement made between the Netherlands and Suriname which came into effect on that date, consequent on the latter's independence. They came to the Netherlands, apparently as tourists, Mrs Morson on 27 September 1978 and Mrs Jhanjan in May 1980. Mrs Morson went to live with her daughter who, according to the Order for Reference, is a Dutch national living and working in Amsterdam; Mrs Jhanjan went to live with her son, also of Dutch nationality. Subsequently both applied for a residence permit, arguing that they were dependents of their children. The Secretary of State refused both applications and they became liable to deportation.

It seems that, under Dutch law, the court competent to review the Secretary of State's decision is the Raad van State but that, even when proceedings are brought before it, the effect of the deportation order would not be suspended by the Secretary of State or the Raad van State pending the review. Mrs Morson and Mrs Jhanjan would therefore remain liable to deportation. In consequence both applied to the President of the local Arrondissementsrechtbank for an order restraining the Netherlands from deporting them. The President has a general power to grant interlocutory or interim relief where there is urgency but his decision is provisional and cannot decide the dispute between the parties or prejudge the eventual decision on the substance of the case before the Raad van State.

In the event, the President refused to make the orders sought and appeals were made first to the local Gerechtshof and then to the Supreme Court which made the Orders for Reference. At the hearing the Court was told that proceedings had since been begun before the Raad van State but that Mrs Jhanjan had in the

meantime been deported to Suriname. Mrs Morson was, it was thougth, still in the Netherlands, but the police had been unable to find her.

The point raised in the first question referred was considered by the Court in Case 107/76, *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957. There the Court held:

"The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or of validity mentioned in that Article when the question is raised in interlocutory proceedings for an interim order (. . .), even where no judicial remedy is available against the decision to be taken in the context of those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177."

The only real difference between these cases and *Hoffmann-La Roche* v *Centrafarm* seems to be that, here, jurisdiction to grant interlocutory or interim relief lies with the civil courts while jurisdiction to decide the substance of the case lies with the Raad van State. This does not seem to me to require a distinction to be drawn between these cases and the judgment in *Hoffmann-La Roche.*

Counsel for the Commission submitted that the obligation to refer may still exist where the object of the summary proceedings is to uphold a right under Community law which would be lost irretrievably if the request for relief were rejected. That seems to follow from the formulation of the Court's judgment. The essential criterion as to whether there is an obligation to refer is whether the question of Community law can effectively be reexamined in proceedings on the substance of the case. If it can, there is no obligation to refer. If it cannot because, for example, the applicant is disqualified from instituting proceedings on the substance of the case, or the question of law does not arise on the substance of the case, or because events have or will have made a decision on the question wholly academic or pointless, then the question must be referred. The decision in the summary proceedings in the latter situations is in a real sense one against which there is no judicial remedy for the purposes of Article 177 (3) of the EEC Treaty.

The second question is put in broad terms which go beyond the facts of the present case. It asks in effect whether a relative within the defined category can, as a matter of Community law, assert a right to entry into a Member State where the related worker is employed in that State and has the nationality of that State, but the relative has a different nationality.

The fact that the relative has a different nationality, whether or not that of another Member State, is no bar to entry. Article 10 (1) of Regulation No 1612/68 clearly confers the right "irrespective of nationality". Nor does it seem to me to matter that, as here, the applicants were neither resident in nor

employed in any Member State. The rights of relatives of the appropriate class derive from their connection with a person who is a worker upon whom rights are conferred by e.g. Articles 48 to 51 of the Treaty and secondary legislation, and are intended to give real effect to those rights (see e.g. Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669 dealing with Regulation No 1408/71 of 14 June 1971 (OJ L 149, 5. 7. 1971, p. 2).

It seems now to be established that a worker may assert rights under Community law against his own Member State (see e.g. Case 115/78 *Knoors* v *Secretary of State* [1979] ECR 399; Case 175/78 *R.* v *Saunders* [1979] ECR 1129 and Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311). Derived rights may in appropriate circumstances equally be enforced under Community law against that Member State. It does not, however, follow that the mere fact that a person lives and works in the Member State of which he is a national is sufficient of itself under Community law to give him the right against the Member State to bring his relatives in, or them the right to enter. He and they can only assert such rights in the situations covered by the provisions of Community law: otherwise his and their rights depend on national law.

Article 10 of Regulation No 1612/68 confers rights only where a worker who is a national of one Member State is employed in the territory of another Member State. This provision is, as I see it, primarily intended to cover the situation where a worker moves his house to take up employment in another Member State. Otherwise, if he could not take his family to his new home, freedom of movement under Article 48 would not be achieved in any real sense. *Ex facie* it also covers the worker who does not move his home, but is merely employed in another Member State. His relative can under Community law assert a right to be installed with him against his Member State.

What is common to both situations is that two Member States are involved: one of nationality and one of employment. Whether, as I understand the Commission to argue, it follows that an individual employed in a Member State of which he is not a national, can assert a right to go back to his Member State, and whether in consequence his relatives can assert a right under Community law, in particular under Article 10 to go and be installed with him there, is in my view a more difficult question which does not arise in this case and on which it is neither necessary nor desirable to comment.

It is contended that this requirement of two Member States is erroneous and that Article 10 must be interpreted quite generally so that it covers the worker employed in the State of which he is a national and who has not moved either his home or his employment. Reliance is

placed first on Article 11 of the same regulation which, in the French and some other texts, gives to certain relatives of a national of one Member State "exerçant sur le territoire d'un État membre une activité salariée ou non salariée" the right to take up employment in the same Member State. Whether, as is expressly stated in the English text ("another Member State") and as I understand it in the Danish text, "un Etat membre" is to be construed in the light of Article 10 as "un autre État membre" does not fall for decision. The argument that Article 11 should be construed in the light of Article 10 seems to me if anything stronger than the converse argument. In any event no rights are claimed under Article 11 in the present case. Reliance is also placed on the Court's decision in the *Knoors* case. That case, however, fell under Article 52 of the Treaty and dealt with the situation where a Dutch national who had qualified as a plumber in Belgium wished to move back to carry on his trade in the Netherlands. The Court's decision may be very relevant to the Commission's argument that a family has the right to return with a worker who goes back to his own Member State to work. It does not seem to me to have any bearing on a case where no movement between states has occurred, and indeed the Court pointed out that Member States have a legitimate interest in preventing their nationals from wrongly evading the application of national law by means of the facilities brought into being by the Treaty.

In the present case there is no suggestion or indication that the workers in question have ever exercised or sought or intended to assert their rights under the Treaty. They have not been employed in another Member State. Accordingly it seems to me that their relatives cannot say that they have any rights under Community law to install themselves with their children.

This it is said causes incongruous results if a non-national can come in with his family, or if, as the Commission contend, a national can come back with his family, but a national cannot bring in his family to join him in the place where he has always been. Since the rights conferred derive from the principle of a freedom of movement for workers, and not from a right of residence, throughout the Community, gaps in the right of a family to live with an individual are at the least possible and perhaps inevitable.

My conclusion is accordingly that the two questions should be answered on the following lines:

1. The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court is not required to refer to the Court a question of interpretation mentioned in that article when the question is

raised in proceedings for an interlocutory injunction, even when no judicial remedy is available against any decision to be taken in those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case even if before a different court or tribunal, and that during such proceedings the question provisionally decided may effectively be re-examined and may be the subject of a reference to the Court under Article 177.

2. Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 (OJ English Special Edition 1968 (III) p. 475) in conjunction with Article 48 of the Treaty is to be interpreted to the effect that a Member State is not prevented under Community law from refusing to admit a relative, mentioned in Article 10 (1) of that regulation, of a worker employed within the territory and having the nationality of that Member State where the relative is of a different nationality and wishes to install himself with that worker, in a situation where the worker is not employed and has not been employed in the territory of another Member State.