

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 18 May 1999 *

A — Introduction

1. In the present case the Cour du Travail (Higher Labour Court), Brussels, has referred for a preliminary ruling two questions which seek to establish whether the Moroccan mother-in-law of a worker — who was at least originally Moroccan — who lives in Belgium and has since acquired Belgian nationality, may rely on the requirement of equal treatment contained in the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco¹ (hereinafter 'the Cooperation Agreement') in order to obtain a disability allowance in Belgium and whether she, as a mother-in-law, constitutes a member of the family for the purposes of Article 41(1) of the Cooperation Agreement.

2. Mrs Mesbah, the plaintiff in the main proceedings (hereinafter 'the plaintiff'), applied for such a disability allowance on 22 March 1995. At the time she was a Moroccan national.² According to the referring court, she has lived in Belgium

since September 1985 and is part of the household of her son-in-law and daughter who acquired Belgian nationality 'apparently in the mid-1970s'.

3. According to the referring court, the provision of Belgian law relating to the grant of disability allowance states:

'Any person claiming an allowance must have their actual residence [in Belgium] and fall within one of the following categories:

1. persons who are Belgian;

2. persons who fall within the scope of Regulation (EEC) No 1408/71 ...

* Original language: German.

1 — Cooperation Agreement between the European Economic Community and the Kingdom of Morocco of 27 April 1976 approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 concerning the conclusion of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (OJ 1978 L 264, p. 1).

2 — According to the Belgian Government, she has possessed Belgian nationality since 9 January 1998.

3. stateless persons ...

tion to nationals of the Member States in which they are employed.'

4. refugees ...

5. ...³

The plaintiff was denied payment of that allowance solely on the ground that she did not possess Belgian nationality.

4. However, the plaintiff relied on the principle of non-discrimination in Article 41(1) of the Cooperation Agreement, which states:

'Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in rela-

5. The referring court considers that the plaintiff — who has no income of her own — can rely on the principle of non-discrimination in this case since the allowance she applied for comes within the field of social security and, moreover, Article 41 has direct effect. In that respect it relies on the case-law of the Court of Justice. However, the national court expresses doubts as to whether the plaintiff also falls within the scope *ratione personae* of the Cooperation Agreement since, according to the referring court, she was 'the only person in the household of her son-in-law and daughter to have kept her Moroccan nationality' at the time the application was submitted. The son-in-law and daughter acquired Belgian nationality 'apparently in the mid-1970s'. Therefore, the question arose whether the plaintiff was still to be regarded as a member of the family of a Moroccan worker for the purposes of Article 41(1) of the Cooperation Agreement.

6. Since the Cooperation Agreement does not define the term 'member of the family', the referring court is also uncertain as to the degree of relationship covered by that term and whether it can be applied to the mother-in-law in this case. Consequently, it has referred the following questions to the Court of Justice for a preliminary ruling:

1. Can a member of the family of a worker, who was originally Moroccan

3 — Article 4 of the Law of 27 February 1987, as amended by the Law of 20 July 1991.

but subsequently acquired Belgian nationality, still rely on Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978, and on the principle of non-discrimination with regard to 'Moroccan workers' and 'members of their family' living with them which is contained therein?

2. What degree of relationship — vertical and/or horizontal — is covered by the term 'family', contained in Article 41(1) of the EEC-Morocco Agreement, and can that term also be applied to persons of Moroccan nationality who are related only by marriage?

B — First question

I — *Submissions of the parties*

7. The plaintiff submits that she is still a member of the family of a Moroccan worker and therefore the first question is irrelevant. As proof of her claim she

produced — albeit not until the proceedings before the Court of Justice — a certificate of 27 July 1998 from the Consulate General of the Kingdom of Morocco in Brussels showing that her son-in-law possessed Moroccan nationality at that time.⁴

8. The other parties initially proceed from the basis of the facts stated by the referring court, according to which the plaintiff was the only person in her son-in-law's household to retain her Moroccan nationality. In their written observations only the Commission and the United Kingdom also address the possibility that the plaintiff's son-in-law may have retained his Moroccan nationality.

9. In its written observations the United Kingdom identifies three categories of case, since the order for reference does not specify the exact date on which the son-in-law acquired Belgian citizenship, nor does it indicate whether he also retained his Moroccan nationality in addition to it. The United Kingdom considers that if the worker had already lost Moroccan nationality at the time the Agreement entered into force, that Agreement cannot be applicable

⁴ — She produced a certificate that confirms that he is a Moroccan national and refers to a Moroccan passport issued to him on 27 May 1991.

to him or to members of his family living with him in Belgium.

10. However, if the worker did not acquire the nationality of a Member State in place of his Moroccan nationality until after the Agreement entered into force, Article 41 will be applicable in so far as it guarantees that the worker and the members of his family are not discriminated against because of the fact that the worker previously had Moroccan nationality. In the third category of case the United Kingdom assumes that the worker acquired Belgian nationality in addition to his Moroccan nationality after the Agreement had entered into force. If that is the case, Article 41 will apply so as to ensure that the worker and the members of his family living with him in Belgium are not discriminated against because of the fact that he retains Moroccan nationality.

11. The other parties assume that the Agreement can no longer apply if the worker is no longer a Moroccan national. In that respect they rely on the wording of Article 41 and submit that the plaintiff is no longer a member of the family of a Moroccan worker. In that context the French Government notes that, according to the referring court, the son-in-law acquired Belgian nationality before his mother-in-law came to Belgium and even before the Agreement entered into force. Consequently, the plaintiff does not fall within the scope *ratione personae* of the Agreement.

12. The parties also refer to the spirit and purpose of the Agreement. For example, the German Government contends that the present case is not covered by the protection intended by the Agreement. The aim of Article 41 is not to provide independent protection for an unemployed member of the family. His entitlements stemming from Article 41(1) are directly dependent on his family relationship to a Moroccan worker. Although the worker loses the protection afforded by the Agreement by renouncing his Moroccan nationality, he acquires new rights in respect of his new homeland which, where appropriate, also apply to the members of his family. Moreover, the equal treatment intended by Article 41(1) comes about the moment the Moroccan worker acquires Belgian nationality.

13. In their submissions at the hearing the parties also examined whether the Agreement is applicable if the worker (the plaintiff's son-in-law) retained his Moroccan nationality alongside his Belgian nationality. In that respect France concludes that if that is the case the plaintiff is a member of the family of a Moroccan worker and may rely on the Agreement. The question which of the specific cases actually exists is purely one of fact and therefore for the national court alone to examine.

14. At the hearing the Belgian Government also considered the certificate produced by

the plaintiff according to which her son-in-law has retained his Moroccan nationality. Belgium takes the view that in that case there are two different possibilities, only one of which can be applicable. If the person applying for disability allowance possesses Belgian nationality, Belgian law alone applies. If he possesses Moroccan nationality, his entitlement to an allowance may stem only from Article 41 of the Cooperation Agreement. The right to an allowance which stems from those two possibilities is not cumulative. Any other interruption would be completely inconsistent with the aims of the Cooperation Agreement and the principles of equality of treatment. It would result in a person who possesses both Moroccan and Belgian nationality being able to assert greater rights than other citizens of the European Union or Moroccan nationals who come within the scope of the Agreement but have not acquired the nationality of a Member State.

15. Belgium does not dispute that the worker in this case still possesses Moroccan nationality under Moroccan law. However, it claims that he may not derive benefit from both nationalities, but that as a Belgian national Belgian law alone applies to him. In a letter written after the hearing the Belgian Government once again stated, by way of an explanation, that the plaintiff's son-in-law, who had acquired Belgian nationality in addition to his Moroccan nationality, is regarded under Belgian law as having only Belgian nationality and not Moroccan nationality, since Belgium does

not recognise at least the rights stemming from dual nationality.

16. In its written observations the Commission also first assumes, as the referring court stated, that the Moroccan worker renounced his Moroccan nationality when he acquired Belgian nationality. By analogy with the case-law of the Court of Justice⁵ it states that the plaintiff was no longer a member of the family of a Moroccan worker at the time for which the application was submitted. Therefore, there is no connecting factor with a situation that is covered by the Agreement. Since, according to the referring court, the Moroccan nationality was in fact lost before the Agreement entered into force, neither the plaintiff nor her son-in-law were ever able to rely on that Agreement. In that respect the Commission refers to the judgment of the Court of Justice in the case of *Tsiotras*.⁶

17. Furthermore, the Commission notes that the objective of Article 41(1), that is to say the exclusion of any discrimination on the ground of nationality, is achieved by definition when the circumstances of the worker who has become Belgian and his family are governed by Belgian law.

18. In its written submissions the Commission gives only brief consideration to the

⁵ — Judgment in Case 10/78 *Belbouab v Bundesknappschaft* [1978] ECR 1915 and judgment in Case C-105/89 *Buhari Haji v Institut National d'Assurances Sociales pour Travailleurs Indépendants* [1990] ECR I-4211.

⁶ — Judgment in Case C-171/91 *Tsiotras v Landeshauptstadt Stuttgart* [1993] ECR I-2925.

question how the case should be resolved if the plaintiff's son-in-law has retained his Moroccan nationality and concludes that, in accordance with the judgment in *Micheletti*,⁷ it is unlikely that a Moroccan worker and the members of his family living with him in Belgium may be denied the advantages stemming from the Cooperation Agreement merely because he has acquired Belgian nationality in addition to his Moroccan nationality. However, the Commission also points out that it is for the national court to establish any relevant facts and therefore the Court of Justice is only able to rely on the facts as presented by the referring court.

19. It also referred to that fact at the hearing. However, it also refers to the proof, that has since been produced, that the plaintiff's son-in-law has retained his Moroccan nationality. Account may be taken of that when the answer is drawn up, in which case it is important that the answer should be worded in such a way that the referring court is required to re-examine what the situation relating to the worker's nationality actually is.

20. For that reason the Commission examined further categories of case at the hearing, assuming first that the Moroccan

worker has retained his Moroccan nationality.

21. It maintains that in this case it is beyond dispute that formally he is still able to rely on the Cooperation Agreement. As a Belgian he certainly has no further interest in it, as he is not subjected to discriminatory treatment in relation to other Belgian workers. However, the members of his family are still able to rely on the Agreement since the connecting factor — the Moroccan nationality of the worker — continues to exist. In this case it is possible to rely by analogy on the judgment in *Micheletti*, according to which the effects of nationality are determined by the Member State which grants its nationality. Another Member State cannot restrict those effects.

22. Finally, the Commission puts forward another case which does not necessarily have to be equated with the present case. It assumes that the worker possessed Moroccan nationality at the time the Agreement entered into force and only lost it subsequently. In that case it is significant that he still possessed Moroccan nationality during the period for which the disability allowance was applied for. If that condition is not satisfied, no connecting factor with the Cooperation Agreement exists. In that respect it refers to the principle of legal certainty, which the Court of Justice also

⁷ — Judgment in Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Catabria* [1992] ECR I-4239.

upheld in its judgments in *Belbouab* and *Buhari Haji*.⁸

23. In that context the Commission also mentions that the United Kingdom takes a different view on that matter. However, it contends that there can be no discrimination between a worker who was a Moroccan national and is now a Belgian national and other Belgian workers. As regards the family of the worker who live with him in Belgium, it should be noted that the change of nationality was a voluntary decision whose consequences must also be borne by his family. Moreover, the members of his family are no longer subjected to discriminatory treatment either, once he becomes a Belgian national. They are treated as the members of the family of a Belgian worker. It is quite possible for the mother-in-law of a Belgian who is not a national of a Member State to have no right to disability allowance. In that respect the Commission refers to the judgment of the Court of Justice according to which the Iranian wife of a national of a Member State does not have to be granted such an allowance.⁹ Therefore, there are no grounds for applying the Agreement in this case — as the United Kingdom Government proposes — in order to prevent discrimination on the ground of previous Moroccan nationality.

24. The Commission rejects any extension of the scope of the Agreement by analogy with the judgment in *Krid*.¹⁰ In that

judgment the Court of Justice ruled that the members of the family who had lived with the deceased worker could continue to rely on the Cooperation Agreement. That unanimous and protection-minded interpretation could be accepted in this case if the plaintiff had lived with her son-in-law in Belgium at a time when he was still a Moroccan. The Agreement applies only to the members of the family of a Moroccan worker who live with him in the Member State concerned. However, since the plaintiff did not come to Belgium until 1985 and her son-in-law lost his Moroccan nationality at the end of the 1970s, she was never able to rely on the Agreement. Furthermore, in its judgment in *Krid* the Court of Justice also relied on arguments contained in the wording. Since the wording of the Agreement referred to survivor's pensions, the Court of Justice concluded that survivors were also covered by it. However, the Commission was unable to find similar arguments in the present case, where the worker renounced his Moroccan nationality in order to become a Belgian — as he has here — and therefore it cannot be assumed that the Cooperation Agreement can still apply in such a case.

25. Finally, with regard to the submissions of the parties it should be noted that it is not disputed that the plaintiff herself was and is not in gainful employment and cannot assert claims on the basis of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed per-

8 — Judgments in Case 10/78 and Case C-105/89 (cited in footnote 5).

9 — Judgments in Case C-243/91 *Belgian State v Taghavi* [1992] ECR I-4401.

10 — Judgment in Case C-103/94 *Krid v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS)* [1995] ECR I-719.

sons and their families moving within the Community¹¹ as her son-in-law has never left Belgium. Furthermore, it is not disputed that the disability allowance which has been applied for in this case comes within the field of social security referred to in Article 41(1) of the Cooperation Agreement.

II — Analysis

26. In the proceedings before the Court of Justice the plaintiff produced a certificate from the Moroccan Consulate General attesting to the Moroccan nationality of her son-in-law. However, since it may not be inferred with complete certainty from that certificate that the plaintiff's son-in-law possessed Moroccan nationality continuously, and therefore that he did not renounce it only to re-acquire it subsequently, there is uncertainty as to which facts must be taken as a basis. It is for the national court to examine that matter. On account of the uncertainty which consequently exists in respect of the son-in-law's nationality, several variants must be examined.

27. In proceedings for a preliminary ruling the Court of Justice must initially take as a basis the facts which the national court puts before it.¹² For that reason the present case must first be examined on the basis of

those details. On the other hand, in proceedings for a preliminary ruling the duty of the Court of Justice is to supply the referring court with the information on the interpretation of Community law which is necessary to enable it to settle genuine disputes which are brought before it.¹³ For that reason the Court of Justice is free to extract from all the factors presented to it, the elements of Community law requiring an interpretation — or, as the case may be, an assessment of validity — having regard to the subject-matter of the dispute.¹⁴ In that connection the Court of Justice has also ruled that in order to provide a satisfactory answer to a national court which has referred a question to it, it may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question.¹⁵

28. Since during the course of the proceedings before the Court of Justice the plaintiff produced a certificate showing that her son-in-law still possesses Moroccan nationality, it would appear appropriate to comment specifically on that factual situation and state whether or not a Member State may, under Community law, refuse to recognise another nationality or — as Belgium does — give precedence to its own nationality. Such additional examination would also appear appropriate since all the parties represented at the hearing expressed an opinion on the certificate that had been produced. It is then for the referring court to examine which of the various categories

11 — OJ, English Special Edition 1971 (II), p. 416.

12 — Judgment in Case 104/77 *Oehlschläger v Hauptzollamt Emmerich* [1978] ECR 791, paragraph 4.

13 — Judgment in Case 104/79 *Pasquale v Novello* [1980] ECR 745, paragraph 11.

14 — Judgment in Case 83/78 *Pigs Marketing Board v Redmond* [1978] ECR 2347, paragraph 26.

15 — Judgment in Case 35/85 *Procureur de la République v Tissier* [1986] ECR 1207, paragraph 9.

of cases actually exists and take evidence in respect thereof.

1. *Examination on the basis of the facts stated by the referring court*

29. According to those details, the plaintiff has lived in Belgium since 10 September 1985 in the household of her daughter and son-in-law, who apparently acquired Belgian nationality 'in the mid-1970s'. According to the referring court, the plaintiff alone retained her Moroccan nationality. Since it is not stated precisely when the son-in-law lost his Moroccan nationality, it is unclear whether he was still a Moroccan national when the Cooperation Agreement entered into force.

(a) Loss of Moroccan nationality before the Agreement entered into force

30. In respect of this case reference must be made to the judgment in *Buhari Haji*.¹⁶ That case related to the scope *ratione personae* of Regulation No 1408/71, as

follows from Article 2 thereof. Subparagraph (1) provides that the Regulation applies *inter alia* to employed or self-employed persons if they are nationals of one of the Member States.¹⁷ According to the Court of Justice, it follows that those terms must be considered 'in relation to the period in which the worker pursued his occupation. That condition of nationality cannot be regarded as fulfilled where the worker in question was, at the time when he pursued his occupation and paid his contributions, a national of a State which was not yet a member of the Community and he lost the nationality of that State before its accession to the Community.'¹⁸

31. By analogy, the nationality requirement contained in Article 41 of the Cooperation Agreement cannot be fulfilled where the worker originally possessed Moroccan nationality but lost it before the relevant agreement with the Community was concluded. That means that in determining whether or not he fulfils the conditions for certain entitlements — in this case entitlement to the same treatment as Belgian nationals — he may not take into consideration the period prior to the conclusion of an agreement or treaty which grants him those rights for the first time. For that reason a Moroccan worker and the members of his family cannot rely on the Cooperation Agreement if he lost his Mor-

16 — Judgment in Case C-105/89 (cited in footnote 5).

17 — Article 2 of Regulation No 1408/71, as amended by Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating 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 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1).

18 — Judgment in Case C-105/89 (cited in footnote 5), paragraphs 18 and 19.

occan nationality prior to the conclusion of that Agreement.

renounced his Moroccan nationality and adopted Belgian nationality.

(b) Loss of Moroccan nationality after the Cooperation Agreement was concluded

32. It is uncertain whether the worker or the members of his family can rely on the Agreement where the worker was a Moroccan national when the Agreement entered into force but where that condition was no longer fulfilled at the time the application was submitted or during the period when the disability allowance was to be paid. The United Kingdom takes the view that the rule of non-discrimination in the Agreement also applies in that case, so as to prevent possible discrimination against the worker and his family on the ground of his previous Moroccan nationality.

33. I cannot concur with that. The worker himself no longer has any need to rely on the requirement of equal treatment contained in the Cooperation Agreement since he possesses Belgian nationality and is therefore treated in the same way as Belgian workers. In that respect it should be borne in mind that he voluntarily

34. However, it is uncertain whether that also applies to his family. The members of his family have a personal right to disability allowance via the 'roundabout route' provided by Article 41 and on account of the Moroccan nationality of the worker, who is a member of their family. Even though it is not only a derived but also a personal right, it is granted only because they live together with a Moroccan worker in Belgium as members of his family. If he now decides voluntarily to be treated only as a Belgian in accordance with Belgian law, it is not clear why the Agreement should still apply to the members of his family.

35. Furthermore, is not possible to detect any discrimination in relation to Belgian nationals. It is consistent with Community law for the plaintiff to be denied disability allowance in accordance with Belgian law as a non-Belgian and a non-national of a Member State, even though she is the mother-in-law of a Belgian national. In its judgment in *Taghavi* the Court ruled that even a national of a non-member country who is the spouse of a national of a Member State cannot claim a handicapped person's allowance which is provided for by national legislation as a personal right and not on account of membership of a worker's family.¹⁹ That means that Belgian law applies to the plaintiff in the same way as it

19 — Judgment in Case C-243/91 (cited in footnote 9), paragraph 11 et seq.

does to all mothers-in-law of Belgian workers who do not possess the nationality of a Member State. As a Moroccan she would be entitled to the same treatment as Belgian nationals under Article 41(1) of the Agreement, but only on account of her membership of the household of a Moroccan worker. However, since he has voluntarily renounced his Moroccan nationality, the plaintiff can no longer claim that she is discriminated against in relation to Belgian nationals.

36. For that reason the view of the United Kingdom is of no avail as this case does not concern possible discrimination on the ground that the worker was originally a Moroccan. It concerns instead the possibility that the position of the mother-in-law may have changed for the worse because her son-in-law is now Belgian rather than Moroccan. She cannot rely on the Agreement as the mother-in-law of a former Moroccan national. That conclusion is reinforced by the fact that the worker concerned renounced his Moroccan nationality before the plaintiff came to live in his household in Belgium. That means that in that case she has never lived in Belgium as the member of the family of a Moroccan worker.

37. For that reason no analogy may be drawn with the case of *Krid*.²⁰ That case related to the widow of an Algerian worker who had lived with him in France who was able to rely on the principle of non-discrimination contained in the Cooperation Agreement with Algeria even after his death. In that context the Court of Justice also ruled that Article 41 of the Cooperation Agreement with Morocco and the corresponding provision of the Cooperation Agreement with Algeria are identical and that the case-law relating to Article 41 of the Cooperation Agreement with Morocco is consequently applicable by analogy.²¹ That must also apply conversely, so that the judgment in *Krid* may be applied to the Cooperation Agreement with Morocco. However, in the present case only an application by analogy could be possible, since the situation is not exactly the same. None the less, there is no scope in this case for such application by analogy. The present case does not concern the family of a Moroccan who never renounced his nationality remaining free from discrimination after his death. Instead it concerns a Moroccan worker voluntarily and with all consequences for the members of his family renouncing his Moroccan nationality in order to acquire Belgian nationality. In that respect it should be noted that he renounced it when the plaintiff was still

20 — Judgment in Case C-103/94 (cited in footnote 10).

21 — Judgment in Case C-103/94 (cited in footnote 10), paragraph 26.

living outside Belgium. Therefore, her status has never changed, as she came to Belgium as the mother-in-law of a Belgian.

38. Furthermore, it should be noted that in *Krid* the Court extended the scope of the Agreement to survivors since Article 39(2) expressly refers, in connection with the aggregation of periods of insurance, to pensions and annuities in respect of death. Moreover, provision is made for the transfer to Algeria of pensions and annuities in respect of death. For that reason the Court held that Article 39 of the Cooperation Agreement also covers members of the family of an Algerian migrant worker who continue, after the worker's death, to live in the Member State in which he was employed.²²

2. Examination in the event that the worker has retained his Moroccan nationality

39. In the event that the worker has retained his Moroccan nationality alongside his Belgian nationality, the conditions contained in Article 41(1) would be fulfilled in terms of the wording thereof. The plaintiff would be a member of the family of a Moroccan worker and living with him in his household in Belgium. She could

therefore formally rely on the requirement of equal treatment in Article 41.

40. However, Belgium considers that the plaintiff's son-in-law possesses only Belgian nationality and not (also) Moroccan nationality. However, it is uncertain whether that is possible, that is to say whether Belgium can refuse the worker and the members of his family the right to rely on the Agreement in that way.

41. In that context the Commission refers to the judgment in *Micheletti*.²³ That judgment related to the question whether the provisions of Community law concerning freedom of establishment preclude a Member State from withholding that freedom from a national of another Member State who at the same time possesses the nationality of a non-member country, on the ground that the legislation of the host State deems him to be a national of the non-member country. In that respect the Court of Justice held that '[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.'²⁴ That competence is to be exercised in conformity with Community law. The Court then added:

'However, it is not permissible for the legislation of a Member State to restrict

22 — Judgment in Case C-103/94 (cited in footnote 10), paragraph 28 et seq.

23 — Judgment in Case C-369/90 (cited in footnote 7).

24 — Judgment in Case C-369/90 (cited in footnote 7), paragraph 10.

the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.²⁵

42. Consequently, the Court of Justice concluded that where the persons concerned have produced documents in order to establish their status as nationals of a Member State, the other Member States are not entitled 'to challenge that status on the ground that the persons concerned might also have the nationality of a non-member country which, under the legislation of the host Member State, overrides that of the Member State.'²⁶

43. In this case it must be assumed that the plaintiff's son-in-law still possesses Moroccan nationality. Belgium has probably granted him Belgian nationality without requiring him to renounce his Moroccan nationality. That means that Belgium does not dispute that he possesses both nationalities. Nor did it prevent such dual nationality. It simply wishes to prevent

him from being able to derive benefit from both nationalities.²⁷ However, Belgium could be denied the ability to do so by analogy with the judgment in *Micheletti*.

44. The judgment in *Micheletti* related to the nationality of a non-member country being given precedence over the nationality of another Member State with the result that the national concerned was denied the status of a national of a Member State. That is not the case here. Belgium recognises the plaintiff's son-in-law as a Belgian — but only as a Belgian. In doing so it denies him the right to rely on his Moroccan nationality. In this case the most crucial factor is that in doing so it denies

27 — In that respect Belgium relied on the Agreement on certain issues arising from the non-conformity of nationality laws, resolution of the Hague international codification conference of 1930 — adopted by Belgium by a Law of 1939 — which it submitted in a letter written after the hearing. Apart from the fact that that submission must probably be regarded as too late, the following should be noted in that connection. The Court of Justice has consistently held that the purpose of the first paragraph of Article 234 of the EC Treaty (now, after amendment, the first paragraph of Article 307 EC) is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder (Case 812/79 *Attorney General v Burgoa* [1980] ECR 2787, paragraph 8). However, that applies only to the rights of non-member countries and the obligations of the Member States (Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 12). Consequently, Belgium can by no means derive from a previous agreement the right to give precedence to its nationality over the nationality of a non-member country. That is because according to the principles of international law, a State which assumes new obligations which conflict with rights held under an earlier agreement, *ipso facto* refrains from exercising such rights to the extent necessary for the performance of its new obligations (Case 10/61 *Commission v Italy* [1962] ECR 1, at p. 10). In this case Belgium has assumed a new obligation under the Cooperation Agreement. It should also be noted that according to settled case-law that Agreement forms an integral part of Community law (Case 181/73 *Haegeman v Belgian State* [1974] ECR 449, paragraph 5, and Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, paragraph 13 et seq.).

25 — Judgment in Case C-369/90 (cited in footnote 7), paragraph 10.

26 — Judgment in Case C-369/90 (cited at footnote 7), paragraph 14.

the mother-in-law, as a member of his family, the right to rely on the Moroccan nationality of the worker, her son-in-law, at the same time. Consequently, however, a country's own — Belgian — nationality is specifically given precedence over that of another with the result — as in the case of *Micheletti* — that the person concerned is denied a certain right.

members of his family stemming from Article 41 of the Cooperation Agreement. The exercise thereof might be restricted if they are denied the right to rely on the Agreement.

45. In *Micheletti* the Court of Justice ruled that the effects of the grant of the nationality of another Member State may not be restricted by the imposition of an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms. It is true that in the present case the son-in-law is recognised as a Belgian and thus treated in the same way as other Belgian nationals, also in respect of the exercise of fundamental freedoms. However, the effects of his Moroccan nationality might be restricted with a view to the exercise of the rights vested in him as a Moroccan by the Cooperation Agreement.

46. As far as he himself is concerned, no such restriction is initially apparent since he is not subject to discrimination if his Belgian nationality is recognised and he may rely on it. However, in that context note should be taken of the rights of the

47. According to the case-law of the Court of Justice, the principle of non-discrimination contained in Article 41(1) means that the persons referred to by that provision — that is to say migrant workers and members of their family living with them — must be treated as if they were nationals of the Member States concerned. It follows consequently that the national legislation at issue cannot impose upon those persons more or stricter conditions than those applicable to nationals of that Member State.²⁸ Therefore, under the Cooperation Agreement the members of the family of a Moroccan worker living with him have a right to the same treatment as Belgian nationals or the nationals of other Member States. In that respect it is irrelevant whether or not the benefit applied for is awarded to a beneficiary as a personal right or in that person's capacity as a member of the family.²⁹ Therefore, in accordance with Article 41(1) of the Agreement, a member of the family who satisfies all the conditions laid down by national legislation for

28 — Judgment in Case C-126/95 *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* [1996] ECR I-4807, paragraph 35 et seq.

29 — In respect of the Cooperation Agreement with Algeria, see the judgment in Case C-113/97 *Bababenini v Belgian State* [1998] ECR I-183, paragraph 25.

the purposes of entitlement may not be refused a benefit in the field of social security on the ground of his nationality.³⁰

whereas the Moroccan mother-in-law of a Moroccan worker has such a right on account of the principle of non-discrimination contained in the Cooperation Agreement. However, that more favourable treatment is a consequence of the Agreement itself which the Community has concluded with Morocco. It is not due to the fact that the worker invokes both nationalities.

48. If the Moroccan nationality of her son-in-law is not recognised, the plaintiff's rights under the Cooperation Agreement as a member of the family of a Moroccan worker are restricted. That in turn may constitute a restriction on the Moroccan worker in respect of the exercise of his rights since he may be prevented from living with the members of his family in the exercise of his rights, under the Cooperation Agreement.

50. Similarly, Belgium's argument that the aim of the Cooperation Agreement is simply to ensure that Moroccan workers are treated in the same way as Belgian workers must be refuted. As has been seen, it follows from Article 41 that it also seeks to ensure that the members of their families are treated in the same way as Belgian nationals in respect of both their personal and derived rights.

49. Belgium submits that if reliance on Moroccan nationality were also possible, the person possessing both nationalities would be granted greater rights than other citizens of the European Union. However, that is a consequence of the Agreement itself and the rights established therein. According to the case-law of the Court of Justice, it follows from Article 41 that the members of the family of a Moroccan worker may be treated more favourably than the members of the family of a Belgian national. For example, the Moroccan mother-in-law of a Belgian worker probably has no right to a disability allowance,

51. Finally, Belgium claims that in the present case reliance on Moroccan nationality results in the Moroccan worker being granted greater rights than other Moroccans. However, the reason for that is that Belgium granted him Belgian nationality without requiring him to renounce his Moroccan nationality.

30 — Judgment in Case C-18/90 *Office National de l'Emploi v Kziber* [1991] ECR I-199, paragraph 28.

52. Consequently, it is established that if the plaintiff's son-in-law has retained his Moroccan nationality, the plaintiff may rely on Article 41 of the Cooperation Agreement. However, the reason for that is not, as the United Kingdom Government, that she may not be subjected to discriminatory treatment on account of her continuing Moroccan nationality. It is because she continues to enjoy the rights which exist on account of her son-in-law's Moroccan nationality.

tions) or (two) to Regulation (EEC) No 1612/68³¹ or (three) to Regulation No 1408/71, whereby the latter makes partial reference in turn to national law.

Article 10(1) of Regulation No 1612/68 provides that:

'The following shall ... have the right to install themselves with a worker ...:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.'

C — Second question

I — *Submissions of the parties*

Article 1(f) of Regulation (EEC) No 1408/71, as amended by Regulation No 118/97, on the other hand, sets out the following definitions in respect of its scope:

53. There are three possible answers to the question how the term 'member of the family' in Article 41(1) of the Cooperation Agreement should be interpreted. Either reference is made (one) to national law (as it is by Germany in its written observa-

'(i) *member of the family* means any person defined or recognised as a member

31 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 473).

of the family or designated as a member of the household by the legislation under which benefits are provided ...

analogy with Regulation No 1612/68. Finally, with reference to the importance of residence in respect of the term 'member of the family', France notes that under the French national provision residence in France alone is sufficient for the grant of an allowance.

- (ii) where, however, the benefits concerned are benefits for disabled persons granted under the legislation of a Member State to all nationals of that State who fulfil the prescribed conditions, the term 'member of the family' means at least the spouse of an employed or self-employed person and the children of such person who are either minors or dependent upon such person.³²

54. France, for example, concludes that the term should be defined by analogy with Article 10 of Regulation No 1612/68. The reason it gives is that the Court of Justice has ruled that the scope *ratione personae* of Article 41(1) of the Agreement is not the same as the scope *ratione personae* of Regulation No 1408/71.³² For that reason the term 'member of the family' cannot be defined in accordance with Regulation No 1408/71. That regulation relates solely to the coordination of the national social security systems which are referred to. However, the present case does not relate to discrimination on the ground of inclusion in a particular social system of the State in which the worker is employed, and therefore the term must be defined on the basis of whether or not the person concerned lives with the worker and thus by

55. Belgium — also with reference to the case-law of the Court of Justice — concludes that the term must be defined by analogy with Regulation No 1408/71. In that respect it refers to the judgment in *Yousfi*,³³ according to which the term 'social security' in Article 41 of the Cooperation Agreement must be interpreted by analogy with Regulation No 1408/71. Consequently, that also applies to the term 'member of the family' contained in Article 41(1). That must be defined in accordance with Article 1(f)(ii) of the Regulation, according to which at least the spouse and the children who are either minors or dependent on the worker concerned must be regarded as members of the family. Belgium adds that the mother-in-law of the worker cannot be covered since that would result in discrimination against the members of the families of citizens of the European Union. Even the mother-in-law of a Belgian has no entitlement to a disability allowance in her capacity as a member of the family. Such discrimination cannot be intended by the Agreement. Regulation No 1408/71 must also apply because disability allowance comes within the scope of Article 4(2a) of that regulation. On the other hand, Regulation No 1612/68 cannot be applied, since that

32 — Judgment in Case C-103/94 (cited in footnote 10), paragraph 39.

33 — Judgment in Case C-58/93 *Yousfi v Belgian State* [1994] ECR I-1353.

covers the case of the family of a worker who possesses the nationality of a Member State but works in another Member State. That is not the case here.

security benefits. If that is adequate for the regulation, then it must also be adequate for the Agreement.

56. The United Kingdom also takes the view that the term 'member of the family' must be defined by analogy with Regulation No 1408/71. It states three reasons for that. Firstly, similar issues arise in the context of Article 2(1) and 3(1) of that regulation as do in the context of Article 41 of the Agreement. Both cases relate to the obligation of a (Member) State to treat equally workers and their families who move from one (Member) State to another. There is therefore a significant degree of similarity between the structure, scope, effect and purpose of the two rules. Moreover, the Court of Justice has also drawn a comparison between Regulation No 1408/71 and the Agreement with regard to the term 'social security'.

57. The second reason is that the definition set out in Article 1(f) of Regulation No 1408/71 is capable of resolving the issue in respect of both this specific case and all types of social benefits. It offers a solution, irrespective of whether a disability allowance is regarded as a personal or a derived right, and is thus consistent with the case-law of the Court of Justice which, in the context of the Agreement, likewise draws no distinction between those two types of entitlement. Consequently, Regulation No 1408/71 has laid down a term which is applicable to all types of social

58. Finally, as a third reason the United Kingdom Government notes that there could be problems if individual terms in Article 41(1) had to be interpreted in accordance with different regulations, for example the term 'social security' in accordance with Regulation No 1408/71 and the term 'member of the family' in accordance with Regulation No 1612/68. In that case it would be better to have a coherent, unified system and to refer to Regulation No 1408/71 alone.

59. Unlike the United Kingdom, the Commission does not consider that reference to Regulation No 1408/71 provides a solution in respect of all possible cases. Although the present case is covered by Article 1(f)(ii), that relates solely to the payment of a disability allowance. In this case at least the spouse of the worker and his children who are either minors or dependent on him are covered. However, the Commission considers that the Court of Justice should propose a definition of the term 'member of the family' which provides a solution in respect of all cases. For that reason it refers to Regulation No 1612/68 since it, like the Agreement, provides specifically for the possibility that the family will move with the worker to the State in which he exercises his professional activity. If reference were made to Article 1(f) of Regulation No 1408/71, it is possible, in the case of Article 1(f)(i), that

reference would be made in turn to national law which, however, does not define the term 'member of the family' at issue in the present case, for example, since the allowance is granted as a personal right.

II — Analysis

60. It is not disputed that the Cooperation Agreement provides no criterion for who is to be regarded as a member of the family for the purposes of Article 41(1). Furthermore, the Court of Justice has yet to express a view on that matter.

1. Definition in accordance with national law

61. The Community's recent practice in respect of the conclusion of association agreements provides a basis for the definition of member of the family in accordance with national law. For example, the Mediterranean Agreement with Tunisia contains an explanatory joint declaration relating to Article 65, which is similar to the rule at issue in this case, stating that 'it is understood that the term "members of their family" shall be defined according to the

national legislation of the country concerned.'³⁴ In accordance with Article 96(3), that Agreement replaces the 1978 EEC-Tunisia Cooperation Agreement which, for its part, is largely the same as the EEC-Morocco Cooperation Agreement. The Mediterranean Agreement with Morocco of 15 November 1995 contains the same provisions and declarations.³⁵ That Agreement has yet to be ratified. Similar declarations are also contained in the Europe agreements which are much more restrictive in respect of equal social rights.³⁶

62. The question of the legal significance of such declarations may be left open. However, in the absence of any specific reference the terms of Community law must in principle be defined autonomously, as otherwise they would not be applied in a uniform manner. Accordingly, a definition of the term 'member of the family' which varies from Member State to Member State is certainly not appropriate.

34 — OJ 1998 L 97, p. 2 (20, 16 and 182): cf. in that respect Peers, *CMLRev* 1996, 7 (35). The first subparagraph of Article 65(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, states:
'Subject to the provisions of the following paragraphs, workers of Tunisian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed.'

35 — COM(95) 740, pp. 33 and 44.

36 — See, for example, the declaration relating to Article 38 of the Europe Agreement with Hungary, OJ 1993 L 347, p. 265; cf. Peers, *CMLRev* 1996, 7 (25).

2. *Extension of principle of non-discrimination to all resident Moroccans*

63. A rule which, as France submits, takes as its sole basis permanent residence in the relevant Member State would have the advantage of simplifying administrative procedures. Moreover, the Member States are free in principle to adopt such a rule. However, that would appear to be too broad an approach. Article 41(1) of the Cooperation Agreement contains no indication that would render such a solution possible. The criterion of being a member of the family as a condition for application of the principle of non-discrimination contained in the Cooperation Agreement would become completely meaningless.

3. *Article 10(1) of Regulation No 1612/68*

64. However, Article 10(1) of Regulation No 1612/68 might open up the possibility of reference to a definition contained in Community law to define the term 'member of the family'.

65. Reference to that provision would not, as Belgium submits, result in discrimination. Belgium contends that even the mother-in-law of a Belgian worker has no entitlement to an allowance in her capacity as a member of his family. However, the aim here is to ensure, on the basis of the Cooperation Agreement and the principle

of non-discrimination contained therein, that the members of the family of a Moroccan worker are also entitled to the same treatment as Belgian nationals. That means that they are consequently entitled to disability allowance as a personal right.³⁷ The fact that the mothers-in-law of Belgian nationals may not have such a right is not due to an excessively broad interpretation of the term 'member of the family'. The reason is rather that the Cooperation Agreement provides for treatment of the members of the family of Moroccan workers which is equal not to that of the members of the families of Belgian workers but to that of Belgian nationals.

66. However, it is not possible to infer a definitive definition of what constitutes membership of a family from Article 10(1) of Regulation No 1612/68, as Article 10(2) deals with other members of the family whose admission the Member States must facilitate if they are dependent on the worker or live under his roof in the country whence he comes.³⁸

67. Other provisions of Regulation No 1612/68 also tell if anything against there being a connection between the

37 — Judgment in Case C-113/97 (cited in footnote 29), paragraph 25.

38 — Article 10(2) states:
'Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.'

definition of family membership set out in Article 10(1) and the principle of non-discrimination in respect of social law. The subject-matter of the abovementioned provision is simply the right of residence, not the grant of social rights. Regulation No 1612/68 clearly grades the beneficiaries in respect of their rights against the host country concerned. Article 11 permits only the spouse and certain children of the worker, but not relatives in the ascending line as provided for in Article 10(1)(b), also to take up employment in the host country.³⁹ Article 12 grants a right to education only to the children of the worker.⁴⁰ Finally, the principle of non-discrimination in respect of social law contained in Article 7(2) benefits only the worker.⁴¹

4. Article 1(f) of Regulation No 1408/71

69. It must therefore be examined whether Article 1(f) of Regulation No 1408/71 should be used to define the term 'member of the family'.

70. That is supported by the fact that the Court of Justice uses the concept of social security in Article 41(1) of the Agreement by analogy with the identical concept in Regulation No 1408/71.⁴² That conclusion is reinforced by the fact that both the Agreement and Regulation No 1408/71 relate to the equal treatment of workers and members of their families in the field of social security.

68. It thus appears doubtful whether the application of the criterion in Article 10(1) of Regulation No 1612/68 to Article 41(1) of the Cooperation Agreement is in fact warranted.

71. Nor does the judgment in *Krid*⁴³ argue against the application of Article 1(f) of Regulation No 1408/71. In that judgment the Court of Justice ruled that the persons covered by the principle of non-discrimination contained in the Cooperation Agreement with Algeria are not the same as those covered by Article 2 of Regulation No 1408/71. Article 2 of Regulation No 1408/71 sets out who is covered by it. That case raised the question whether the members of the family of a worker also had an entitlement, on the basis of the Cooperation Agreement, to benefits granted

39 — Article 11 states:

'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.'

40 — Article 12 states:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

41 — Article 7(2) states:

'He [the worker] shall enjoy the same social and tax advantages as national workers.'

42 — Judgment in Case C-18/90 (cited in footnote 30), paragraph 25.

43 — Judgment in Case C-103/94 (cited in footnote 10), paragraph 39.

under national law not as derived but as personal rights. In that context the Court of Justice ruled that that is in fact the case and that no distinction is drawn between derived and personal rights of members of the family in the context of the Cooperation Agreement.⁴⁴ However, those comments do not necessarily relate to the definition of the term 'member of the family' as such. They refer to — since amended — case-law of the Court of Justice (the distinction between personal and derived rights).⁴⁵

must be assumed that national law does not contain a definition of the term 'member of the family' in every case. Nor is that necessary in respect of personal rights that are not asserted as rights derived from members of the family. To that extent Regulation No 1408/71 would not provide a definition of the term 'member of the family' for every conceivable case. (For that reason direct reference to national law can likewise provide no definitive resolution.)

72. The case at issue here would be covered by Article 1(f)(ii), since the allowance at issue is a benefit for disabled persons. In that case the regulation sets out a minimum definition of the term 'member of the family'. However, contrary to the submission of the United Kingdom, Article 1(f) does not provide a solution in respect of all types of social benefit. In cases where an application is made not for disability allowance but for another allowance stemming from the field of social security, Article 1(f)(i) would be relevant. However, it refers to national law and the definitions of 'member of the family' set out therein. However, since — as has already been mentioned — according to the case-law of the Court of Justice, members of the family also have, on the basis of Article 41 of the Agreement, a right to allowances granted under national law as personal rights, it

73. Nevertheless, that inadequate definition does not preclude the application of the definition set out in Article 1(f) of Regulation No 1408/71 to the Cooperation Agreement. There is a fundamental gap in the provisions of Regulation No 1408/71 which the Community legislature should fill.⁴⁶ I would be inclined to extend the interpretation of Article 1(f)(ii) of Regulation No 1408/71 so that it defined the term 'member of the family' in respect of all personal rights. However, that issue does not have to be resolved here. The need to supplement a rule in future cannot preclude its application at any rate where it is structurally necessary as a matter of course.

44 — Judgment in Case C-103/94 (cited in footnote 10), paragraph 39.

45 — Judgment in Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte* [1996] ECR I-2097.

46 — A similar problem is likely to arise in future with regard to the scope of the Mediterranean agreements in so far as the fields of social security listed in Article 65 thereof establish personal rights of members of the family which, according to the explanatory declarations, must be defined according to the national legislation of the country concerned (see point 61 et seq. above). However, according to the wording of the relevant rules, disability allowance is already likely to be excluded from the subject-matter.

74. Accordingly, Article 1(f) of Regulation No 1408/71 gives a specific definition of the term 'member of the family' which reflects the aims of the Community legislature in promoting living together as a family in the specific field of social security more accurately than Article 10(1) of Regulation No 1612/68. Consequently, the term 'member of the family' must be defined on the basis of Article 1(f) of Regulation No 1408/71.⁴⁷

75. No specific reference is made to the mother-in-law in the definition set out in Article 1(f)(ii) of Regulation No 1408/71. However, it does not follow that she is excluded from the scope of the principle of non-discrimination.

76. The wording of Article 1(f)(ii) of Regulation No 1408/71 contains only a minimum definition characterised by the words 'at least'. The schematic connection with Article 1(f)(i) of Regulation No 1408/71 suggests that any exceeding of that minimum standard comes under national social law. In the case of personal rights which are not based on a family relationship to the

worker under national law and therefore contain no relevant definition of 'member of the family', the number of beneficiaries would be restricted accordingly to that minimum standard.

77. However, the historical purpose of Article 1(f)(ii) of Regulation No 1408/71 is at odds with that conclusion. That provision was incorporated into Regulation No 1408/71 only by Regulation (EEC) No 1247/92.⁴⁸ The second recital in the preamble thereto states:

'Whereas it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression'.

According to the reasons stated in the Commission Proposal, that case-law is the judgments in the *F.* and *Inzirillo* cases,⁴⁹ in which the Court of Justice held that the term 'member of the family' referred to in national law was inadequate and extended it to children who are not minors but dependent on the worker concerned.

47 — In respect of derived rights the term 'member of the family' is then defined in principle by subparagraph (i), but in the field of disability allowance at least by the conditions in subparagraph (ii). As regards the application of the principle of non-discrimination in Article 3 of Regulation No 1408/71 to personal rights, subparagraph (ii) lays down a minimum standard in the field of disability allowance. A gap still exists in respect of other personal rights.

48 — Council Regulation of 30 April 1992, OJ 1992 L 136, p. 1.

49 — COM(85) 396, p. 8, refers to the judgments in Case 7175 *Mr and Mrs F. v Belgian State* [1975] ECR 679, paragraphs 18 to 20, and in Case 63176 *Inzirillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* [1976] ECR 2057, paragraphs 18 to 21.

According to the judgments, that opening up in Community law of the more restrictive national definitions of 'family' is not to be understood as definitive but rather as an expression of the concept of fairness which must also be exercised having regard to the assessment underlying Article 10(1) of Regulation No 1612/68.⁵⁰

78. The openness of the term 'member of the family' required accordingly by Community law must have been acknowledged in the further legislative process to amend Regulation No 1408/71 by Regulation No 1247/92. Whereas the Commission Proposal defines the term definitively as 'the spouse of an employed or self-employed person and the children of such person who are either minors or dependent upon such person',⁵¹ the final version of Article 1(f)(ii) of Regulation No 1408/71 is supplemented by the words 'at least'. Therefore, contrary to what the systematic context would suggest, that minimum standard is imposed not only on the national legal order for extension but also on Community law.

79. An extension in Community law need not be based solely on the concept of fairness. Precisely, within the scope of Article 41(1) of the Cooperation Agreement it must be noted that the use of the definition contained in Article 1(f)(ii) of Regulation No 1408/71 restricts quite considerably a very broad legal concept. Workers who live in a different country have to look after first their children who are minors, and then adult disabled children and possibly parents — who may be in need of care — and consequently it would seem appropriate to include them too in the scope of the principle of non-discrimination contained in the Cooperation Agreement. To interpret the concept of family with regard to those needs would not be unusual even in West European countries. Much greater weight must be attached to that idea precisely in connection with the Cooperation Agreement with Morocco. On account of the cultural conditions that prevail there, Moroccan families show much greater solidarity across the generations than European families, and thus protect against the risks involved in old age. Belgium was also aware of those cultural differences when the Cooperation Agreement was concluded. Therefore, a more restrictive definition of members of the family would have required an express provision.

80. Consequently, it is necessary to refer to the assessment of relationships which warrant particular protection in respect of families living together under Article 10(1)

⁵⁰ — Cf. Opinion of Advocate General Trabucchi relating to the judgment in Case 7/75 (cited in footnote 49), at p. 697; in that case the Court of Justice disregarded that suggestion (paragraphs 18 to 20); Opinion of Advocate General Reischl on the basis of the Commission's submissions relating to the judgment in Case 63/76 (cited in footnote 49), at p. 2071 et seq., which was adopted by the Court of Justice on that occasion (paragraphs 18 to 21).

⁵¹ — OJ 1985 C 240, p. 6.

of Regulation No 1612/68, as the Court of Justice has already done in the judgment in *Inzirillo*.⁵² That relatively broad category of person must then be restricted by the criterion of living together in Article 41(1) of the Cooperation Agreement. The more distant the relationship between the intended beneficiary and the Moroccan worker, the greater the requirements that must be placed on living together particularly in temporal, economic and spatial terms. In that respect account may be taken, for example, of the reasons for living together, whether or not the intended beneficiary could live with other, closer, members of the family or whether he could reasonably be expected to live alone, also in order to examine whether living together is comprehensible for family reasons and is not done primarily to assert claims. This complementary evaluation of family relationships and actual living together is also consistent with the criteria applied by the European Court of Human Rights to assess the degree of protection warranted by an existing family relationship as family life under Article 8(1) of the European Convention on Human Rights.⁵³ Consequently, in accordance with Article 1(f)(ii) of Regulation No 1408/71 too, it must be concluded that the scope *ratione personae* of Article 41(1) of the Cooperation Agreement is close to that of Article 10(1) of Regulation No 1612/68.

52 — Judgment in Case 63/76 (cited in footnote 49).

53 — See the *Keegan v Ireland* judgment of 26 May 1994 Series A, No 290 § 45; the *Moustaquin* judgment of 18 February 1991 Series A No 193 § 36; the *Hokkanen v Finland* judgment of 23 September 1994 Series A No 299-A § 54; the *Hoffman v Austria* judgment of 23 June 1993 Series A No 255-C § 29; the *Bouchelkia v France* judgment of 29 January 1997 Reports 1997-1, 47 § 41; see also Wildhaber/Breitenmoser, in: *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, 3rd instalment, 1995, Article 8, paragraph 389 et seq.; Harris/O'Boyle/Warbrick, *Law of the European Convention of Human Rights*, London 1995, p. 315.

81. As long as there is no statutory clarification of the term 'member of the family', in particular in the Agreement with Morocco, relationship by marriage thus also constitutes an adequate family relationship. However, the further condition of living together must be satisfied to establish a right. However, the additional condition that the persons concerned must live together to a sufficient extent which, like the term 'family', must be assessed also having regard to the Moroccan point of view, precludes an abstract answer to the question referred for a preliminary ruling, since it will depend on each specific case.

82. In the present case it must first be noted that the plaintiff, as a mother-in-law, is closely related to the worker. As the mother of his wife she must be treated in the same way as a child in terms of the degree of relationship. Therefore, in the context of Article 41(1) of the Cooperation Agreement, a state of living together as a family must be assumed in principle where the mother-in-law has — as in this case — lived under the same roof as the worker for ten years prior to the initial dispute. The economic factor of supporting a relative in the ascending line under Article 10(1)(b) of Regulation No 1612/68 also supports that conclusion. According to the referring court, Mrs Mesbah has no income. Therefore, it must be assumed that she is supported by her son-in-law's family. In

that case the mother-in-law of a (Moroccan) worker who has lived in his household in Belgium for 10 years would have to be regarded as a member of the family for the purposes of Article 41(1) of the EEC-Morocco Cooperation Agreement.

D — Conclusion

83. For that reason I propose that the Court of Justice should answer the questions referred to it for a preliminary ruling as follows:

- (1) A member of the family of a worker, who was originally Moroccan but subsequently acquired Belgian nationality, can still rely on Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, and on the prohibition therein of discrimination against Moroccan workers and members of their family living with them, but only if he has retained his Moroccan nationality in addition to his Belgian nationality.
- (2) A person related by blood or by marriage in the ascending line may also be regarded as a 'member of the family' for the purposes of the EEC-Morocco Agreement. It is for the national court to decide whether, having regard to the degree of relationship, the reasons, intensity and duration of the state of living together with the worker are sufficient to establish an entitlement for the purposes of Article 41(1) of the Agreement.