JUDGMENT OF THE COURT (First Chamber)

26 May 2011 *

In Case C-485/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Centrale Raad van Beroep (Netherlands), made by decision of 1 November 2007, received at the Court on 5 November 2007, in the proceedings

Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen

v

H. Akdas,

H. Agartan,

Z. Akbulut,

* Language of the case: Dutch.

M. Bas,

K. Yüzügüllüer,

E. Keskin,

C. Topaloglu,

A. Cubuk,

S. Sariisik,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel (Rapporteur), A. Borg Barthet, M. Ilešič and M. Berger, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 October 2010,

after considering the observations submitted on behalf of:

— the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, by F. Keunen and I. Eijkhout, acting as Agents,

— Mr Akdas, by C. de Roy van Zuydewijn, advocaat,

— Mr Agartan, by D. Schaap, advocaat,

— Mr Bas, by N. Türkkol, advocaat,

— the Netherlands Government, by C. Wissels, C. ten Dam and M. Noort, acting as Agents,

— the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, assisted by J. Coppel and T. Ward, Barristers,

— the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9 of the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113; the 'Association Agreement'), of Article 59 of the Additional Protocol, signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (JO 1972 L 293, p. 1; 'the Additional Protocol'), and of Article 3(1) and the first subparagraph of Article 6(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60; 'Decision No 3/80').

2 The reference was made in proceedings between the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Schemes Implementing Body; 'the Uwv') and Mr Akdas and eight other former migrant Turkish workers concerning the withdrawal of a supplement to the invalidity pension ('the supplementary benefit') paid to them under Netherlands legislation.

Legal context

European Union legislation

The EEC-Turkey Association

The Association Agreement

3 According to Article 2(1) of the Association Agreement, the aim of the agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties which includes, in relation to the workforce, the progressive securing of freedom of movement for workers (Article 12 of the Association Agreement), and the abolition of restrictions on freedom of establishment (Article 13 of the agreement) and on freedom to provide services (Article 14 of the agreement), with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date (fourth recital in the preamble to and Article 28 of the agreement).

4 To that end, the Association Agreement involves a preparatory stage, enabling the Republic of Turkey to strengthen its economy with aid from the Community (Article 3 of the agreement), a transitional stage covering the progressive establishment of a customs union and the alignment of economic policies (Article 4 of the agreement) and a final stage based on the customs union and entailing closer coordination of the economic policies of the Contracting Parties (Article 5 of the agreement).

5 Article 6 of the Association Agreement is worded as follows:

'To ensure the implementation and progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred on it by this Agreement.'

6 Article 8 of the Association Agreement, in Title II headed 'Implementation of the transitional stage' provides:

'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the [EC Treaty] which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.'

7 Article 9 of the Association Agreement, in Title II thereof, is worded as follows:

'The Contracting Parties recognise that within the scope of this Agreement, and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article [12 EC].'

8 Article 12 of the Association Agreement, which also appears in Chapter 3 of Title II, entitled 'Other economic provisions', provides:

'The Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them.'

9 Under Article 22(1) of the Association Agreement:

'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken. …'

— The Additional Protocol

10 The Additional Protocol, which, in accordance with Article 62 thereof, forms an integral part of the Association Agreement, lays down, as is stated in Article 1, the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of that Agreement.

11 The Additional Protocol contains a Title II, entitled 'Movement of persons and services', Chapter I of which relates to 'Workers'.

12 Article 36 of the Additional Protocol, which is part of Chapter I, provides that freedom of movement for workers between Member States of the Community and Turkey is to be secured by progressive stages in accordance with the principles set out in Article 12 of the Association Agreement between the end of the 12th and the 22nd year after the entry into force of that Agreement and that the Association Council is to decide on the rules necessary to that end.

13 Article 39 of the Additional Protocol is worded as follows:

'1. Before the end of the first year after the entry into force of this Protocol the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community and for their families residing in the Community.

2. These provisions must enable workers of Turkish nationality, in accordance with arrangements to be laid down, to aggregate periods of insurance or employment completed in individual Member States in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community. These measures shall create no obligation on Member States to take into account periods completed in Turkey.

3. The abovementioned measures must ensure that family allowances are paid if a worker's family resides in the Community.

4. It must be possible to transfer to Turkey old-age pensions, death benefits and invalidity pensions obtained under the measures adopted pursuant to paragraph 2.

5. The measures provided for in this Article shall not affect the rights and obligations arising from bilateral agreements between Turkey and Member States of the Community, in so far as these agreements provide more favourable arrangements for Turkish nationals.'

14 Article 59 of the Additional Protocol is worded as follows:

'In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the [EC Treaty].'

Decision No 3/80

15 The purpose of Decision No 3/80, adopted on the basis of Article 39 of the Additional Protocol, is to coordinate the social security systems of the Member States so as to enable Turkish workers working or having worked in one or more Member States of the Community, members of those workers' families and survivors of such workers to enjoy benefits in the traditional branches of social security. To that end, the provisions of that decision are repeated in substance in certain provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

16 According to Article 2 of Decision No 3/80, entitled 'Persons covered':

'This Decision shall apply:

— to workers who are or have been subject to the legislation of one or more Member States and who are Turkish nationals,

— to the members of the families of these workers, resident in the territory of one of the Member States,

— to the survivors of these workers.'

17 Article 3(1) of Decision No 3/80, headed 'Equality of treatment', which repeats the text of Article 3(1) of Regulation No 1408/71, provides:

'Subject to the special provisions of this Decision, persons resident in the territory of one of the Member States to whom this Decision applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

18 Article 4 of Decision No 3/80, entitled 'Matters covered' provides, in paragraphs 1 and 2:

'1. This Decision shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory …'

19 Article 6 of Decision No 3/80, entitled 'Waiving of residence clauses …', which corresponds to Article 10 of Regulation No 1408/71, states as follows in the first subparagraph of paragraph 1:

'Save as otherwise provided in this Decision, invalidity, old-age or survivors' cash benefits and pensions for accidents at work or occupational diseases, acquired under the legislation of one or more Member States, shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated.'

20 Title III of Decision No 3/80, entitled 'Special provisions relating to the various categories of benefits', includes coordinating provisions inspired by Regulation No 1408/71 relating, among other things, to invalidity, old-age and death benefits (pensions).

21 Pursuant to Article 32 of Decision No 3/80:

'Turkey and the Community shall, each to the extent to which they are concerned, take the necessary steps to implement this Decision.'

22 On 8 February 1983, the Commission of the European Communities submitted a proposal for a Council Regulation (EEC) implementing within the European Economic Community Decision No 3/80 (OJ 1983 C 110, p. 1), which stated that the decision '[was to be] applicable in the Community' (Article 1) and laid down additional arrangements for the application of that decision.

23 As it is, however, the Council of the European Union has not adopted that proposal for a regulation.

Regulation No 1408/71

24 Article 3(1) of Regulation No 1408/71, entitled 'Equality of treatment', provides as follows:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

25 Article 4(1) and (2) of that Regulation defines the scope *ratione materiae* of that regulation in the following terms:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory…'

26 Article 1(2) of Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation No 1408/71 (OJ 1992 L 136, p. 1), which entered into force of 1 June 1992, added paragraph 2a to Article 4 of the latter, worded as follows:

'This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h); or

(b) solely as specific protection for the disabled.'

27 Article 1(2) of Regulation No 647/2005 amended Article 4(2a), which now states:

'This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or (ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone, and

(c) which are listed in Annex IIa.'

28 According to the first sub-paragraph of Article 10(1) of Regulation No 1408/71:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

29 Article 1(4) of Regulation No 1247/92 also inserted Article 10a into Regulation No 1408/71, paragraph 1 of which is worded as follows:

'Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.'

30 Article 1(5) of Regulation No 647/2005 amended Article 10a(1), which now states:

'The provisions of Article 10 and of Title III shall not apply to the special non-contributory cash benefits referred to in Article 4(2a). The persons to whom this Regulation applies shall receive these benefits exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as these benefits are mentioned in Annex IIa. Benefits shall be paid by, and at the expense of, the institution of the place of residence.'

31 Under Article 2(1) and (2) of Regulation No 1247/92:

'1. Application of Article 1 of this Regulation shall not by itself have for effect the withdrawal of benefits granted prior to the entry into force of this Regulation by the competent institutions of the Member States in pursuance of the provisions of Title III of Regulation … No 1408/71, to which the provisions of Article 10 of that Regulation apply.

2. Application of Article 1 of the Regulation shall not by itself have for effect the refusal of the application for a special non-contributory benefit, granted in addition to a pension, made by the claimant or beneficiary who fulfilled the conditions for the grant of that benefit before the entry into force of this Regulation even if he or she is resident in the territory of a Member State other than the competent State, provided that the application for benefit is made within five years of the entry into force of this Regulation.'

32 The procedure for implementing Regulation No 1408/71 was laid down in Regulation (EEC) No 574/72 of the Council of 21 March 1972 (English Special Edition, 1972 (I), p. 159).

National legislation

33 In the Netherlands, the Law on insurance against incapacity for work (Wet op de arbeidsongeschiktheidsverzekering; 'the WAO'), in force since 1966, provides insurance for employed persons against incapacity for work.

34 The Law on supplementary benefits (Toeslagenwet; 'the TW') of 6 November 1986, which entered into force on 1 January 1987, the aim of which is to award to persons receiving, under an employees' insurance scheme such as that implemented by the WAO (on the same basis as, in particular, insurance against unemployment, sickness and industrial accidents), a loss-of-earnings benefit which amounts to less than the minimum wage, a supplementary benefit which raises their income to a level that, at the maximum, is equal to the minimum wage applicable in the Netherlands. At the material time, the supplementary benefit amounted to a maximum of 30% of the minimum wage, so that those entitled to a benefit of less than 70% of the minimum wage had an income lower than that wage. The Uwv determines, at the request of the person concerned, whether there is entitlement to the supplementary benefit under the TW.

35 The Law on the restriction of the payment abroad of social security benefits (Wet beperking export uitkeringen; 'the Wet BEU') of 27 May 1999 inserted a new Article 4a into the TW, paragraph 1 of which provides that persons who satisfy the conditions to receive benefit under the latter Law are not entitled to the supplementary benefit during periods when they are not resident in the Netherlands. It states that payment

outside the Netherlands of the benefit is not possible unless the proper application of the Netherlands legislation is ensured by means of a treaty with the State in which the person concerned is resident.

36 As is apparent from the grounds for the Wet BEU, that amendment to the TW sought to substitute the territoriality principle for the personality principle in order to improve the systems for monitoring benefit paid to recipients resident outside the Netherlands. In that context, in support of that amendment, the Netherlands legislature also referred to the nature of the supplementary benefit intended to provide a minimum standard of living in the Netherlands and the fact that it is financed by the State budget.

37 The abovementioned amendment to the TW entered into force on 1 January 2000.

38 Transitional rules were, however, introduced, by virtue of which persons who, on the date preceding that of entry into force of the new rules, were entitled to benefits under the TW and who, on that date, did not reside in the Netherlands:

‘1. shall receive payment [in full] of the sum to which they would be entitled if they lived in the Netherlands during the first year after entry into force of that Law [namely during 2000];

2. shall receive payment of two thirds of the sum to which they would be entitled if they lived in the Netherlands during the second year after entry into force of that Law [namely during 2001];

3. shall receive payment of one third of the sum to which they would have been entitled if they lived in the Netherlands during the third year after entry into force of that Law [namely during 2002].'

39 The benefit is withdrawn in full for the subsequent years from persons who do not live in the Netherlands.

40 Regulation No 647/2005 added the TW, as amended in 2000 by the Wet BEU, to the list in Annex IIa to Regulation No 1408/71, as amended by Regulation No 1247/92, of special non-contributory benefits within the meaning of Article 4a of Regulation No 1408/71, to which the requirement of exportability laid down in Article 10 of Regulation No 1408/71 does not apply, in accordance with Article 10a of that regulation as amended.

41 Subsequently, a new transitional provision was added to the TW with effect from 7 December 2006 for the benefit of persons not resident in the Netherlands but in another Member State of the European Union, a State of the European Economic Area or in Switzerland, by virtue of which those persons, provided they were entitled, on the day preceding the entry into force of Regulation No 647/2005, to benefits under Article 10(1) of Regulation No 1408/71,

— are to receive, during 2007, payment in full of the sum to which they would be entitled if they lived in the Netherlands;

— are to receive, during 2008, payment of two thirds of the sum to which they would be entitled if they lived in the Netherlands;

— are to receive, during 2009, payment of one third of the sum to which they would have been entitled if they lived in the Netherlands.

42 The benefit is withdrawn in full from those persons with effect from 1 January 2010.

The dispute in the main proceedings and the questions referred for a preliminary ruling

43 It is apparent from the order for reference that the respondents in the main proceedings are Turkish nationals who were employed for a certain period in the Netherlands.

44 Having become incapacitated for work, they applied for and obtained, before 2000, the award of a benefit under the WAO paid by the Netherlands State.

45 Since the amount of that benefit was lower than the minimum wage, the respondents in the main proceedings also obtained, pursuant to the TW in the version in force before 2000, payment of the supplementary benefit, which was intended to ensure that they had an income of a level as close as possible to the minimum wage.

46 Due to their physical incapability to continue working, the respondents in the main proceedings subsequently returned to Turkey to be near to their families, while retaining the award of those two benefits, pursuant to Article 39(4) of the Additional Protocol. Payment was always made in the form of a single transfer which did not

distinguish between the amount of the invalidity benefit and that of the supplementary benefit.

47 Following the amendment of the TW by the Wet BEU, which entered into force on 1 January 2000, the competent Netherlands authorities decided, under the transitional system referred to in paragraph 38 of this judgment, on the progressive withdrawal, by one third per year with effect from 1 January 2001, of the supplementary benefit paid to them up to that date.

48 The respondents in the main proceedings brought actions against that progressive withdrawal.

49 By decision of 14 March 2003, the Centrale Raad van Beroep ruled that this progressive withdrawal was inconsistent with the obligation to allow exportability of the benefits laid down in Article 5(1) of Convention 118 concerning Equality of Treatment of Nationals and Non Nationals in Social Security, adopted on 28 June 1962 by the International Labour Organisation ('ILO Convention 118').

50 On 18 August 2003, the Uwv decided to award the respondents in the main proceedings a full supplementary benefit from 1 January 2001 to 30 June 2003. However, payment of that benefit was terminated with effect from 1 July 2003.

51 The complaints lodged by the respondents in the main proceedings against those withdrawal decisions were rejected.

52 By judgments of 19 March 2004 and 23 August 2004, the Rechtbank te Amsterdam (Amsterdam District Court) declared the appeals of the respondents in the main proceedings to be well founded and annulled the contested decisions, taking the view that withdrawal of the supplementary benefit received by them was inconsistent not only with Article 5(1) of ILO Convention 118, but also with Article 6(1) of Decision 3/80 and the principle of non-discrimination on grounds of nationality set out in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR'), read in conjunction with Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the first Additional Protocol'), and Article 26 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the General Assembly of the United Nations and entered into force on 23 March 1976.

53 The Uwv then appealed against those judgments before the Centrale Raad van Beroep.

54 After holding, as did the Rechtbank te Amsterdam and in the absence of any challenge by the parties to the dispute before it, that the supplementary benefit paid under the WAO, the award of which does not depend on an individual assessment of the personal needs of the applicant, must be treated as an invalidity benefit within the meaning of Article 4(1)(b) of Decision No 3/80 and that it falls within the material scope thereof, the Centrale Raad van Beroep none the less is uncertain, firstly, as to the direct effect and scope of the first subparagraph of Article 6(1) of that decision, since the prohibition of residence clauses stated therein is absolute while, after the date on which that decision was adopted, Regulation No 1408/71 has been amended so that, on certain conditions, that prohibition does not apply to special non-contributory benefits.

55 Secondly, the national court is doubtful as to the interpretation of the principle of non-discrimination on grounds of nationality in the context of the EEC-Turkey Association.

56 In that regard, as the Rechtbank te Amsterdam has already held, the rule of equal treatment set out in Article 3(1) of Decision No 3/80 cannot be usefully relied upon in the present case, since that provision applies only to 'persons resident in the territory of one of the Member States', whereas the respondents in the main proceedings are now resident in Turkey. However, under Article 9 of the Association Agreement, which is not subject to a similar reservation, the position would be different.

57 It is common ground between the parties to the main proceedings that that article has direct effect. It is also clear from case-law that it prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

58 In the present case, the Centrale Raad van Beroep notes that two forms of indirect distinction on grounds of nationality arise from Article 4a of the TW and should be assessed separately as regards any justification for them.

59 First, it is probable that the number of persons entitled to benefit who are nationals of countries other than the Netherlands, including a large group of Turkish nationals, who are no longer entitled to a supplementary benefit because they are no longer resident in the Netherlands is higher than the number of persons of Dutch nationality entitled to the benefit, who usually continue to reside in the Netherlands.

60 In that regard, the grounds advanced by the Kingdom of the Netherlands for terminating the possibility of exporting the supplementary benefit paid under the TW are the alleged difficulty of verifying personal and financial situations of recipients resident outside the Netherlands, the financing of that benefit from the State budget, the desire of the State legislature to return to the essence of national insurance schemes, that is to say, the award of benefits to residents, and the particular nature of the TW, which is intended to raise a social security benefit to the level of the minimum wage in the Netherlands.

61 As regards the verification, the national court refers to the treaty concluded with the Republic of Turkey, which provides for the means to undertake verification in that State. Accordingly, the Centrale Raad van Beroep wonders whether the other grounds, relating essentially to financial grounds, can form sufficient justification for the difference in treatment at issue in the dispute before it.

62 Secondly, an indirect distinction is made on grounds of nationality in that the supplementary benefit payable to the respondents in the main proceedings was withdrawn with effect from 1 January 2003 because they were resident in Turkey, whereas the application of the transitional system for the progressive withdrawal of that benefit awarded to persons entitled who are nationals of a European Union Member State or certain non-Member States, but resident in the territory of the European Union, did not begin until 2007.

63 In that context, the Uwv has argued that the distinction at issue must be examined in the light of the limited objectives of the Association Agreement, which consist of progressively securing freedom of movement for workers and steady and progressive development of economic relations between the Member States and Turkey. Accordingly, it is not possible to ascribe the same scope to Article 9 of the Association Agreement as that of Article 12 EC.

64 However, the national court is doubtful whether that ground constitutes sufficient justification for the difference in treatment. It adds that, in the context of the interpretation of Article 9 of the Association Agreement, it would also be grateful for clarification of the relevant factors intended to enable it to assess the conformity of the national legislation in question with the fundamental rights, respect for which is guaranteed by the Court, such as those guaranteed by the ECHR and the first Additional Protocol.

65 In those circumstances, the Centrale Raad van Beroep decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Having regard to the wording, objective and nature of [the first subparagraph of] Article 6(1) of Decision 3/80 and to the objective and nature of the Association Agreement, does that provision contain a clear and accurately defined obligation whose fulfilment and effect does not require any supplementary measures, it therefore being appropriate for that provision to have direct effect?

2. If the answer to the first question is affirmative:

(a) In the application of Article 6(1) of Decision 3/80, must account be taken in any way of the amendments to Regulation No 1408/71, such as those which have been made since 19 September 1980 with respect to special benefits which are not based on the payment of premiums or contributions?

(b) In this connection, is Article 59 of the Additional Protocol to the Association Agreement of significance?

3. Must Article 9 of the Association Agreement be interpreted as precluding the application of a Member State's legislation, such as Article 4a of the Netherlands TW, which results in an indirect distinction being made on grounds of nationality,

— firstly, because the number of nationals of countries other than the Netherlands, including a large group of Turkish nationals, who are not, or no longer, entitled to a supplementary benefit because they are no longer resident in the Netherlands, is higher than such persons having Dutch nationality, and

— secondly, because the supplementary benefits of Turkish nationals resident in Turkey have been withdrawn since 1 July 2003, whereas the phasing out of the supplementary benefits of nationals of a Member State of the EU and of [non-Member States], provided that they are resident in the territory of the EU, did not begin until 1 January 2007?'

Consideration of the questions referred

The first question

66 By its first question the national court asks whether the first subparagraph of Article 6(1) of Decision No 3/80 has direct effect in the Member States.

67 It is settled case-law of the Court that a provision in an agreement concluded by the Community with non-Member States must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. The same conditions apply in determining whether the provisions of a decision of the Association Council may have direct effect (see, inter alia, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 60 and the case-law cited).

68 Having regard to its wording, the first subparagraph of Article 6(1) of Decision No 3/80 prohibits, in clear, precise and unconditional terms, the Member States from reducing, modifying, suspending, withdrawing or confiscating the benefits listed in that provision by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated.

69 As the European Commission has rightly pointed out, that rule lays down a precise obligation of result, namely the prohibition of any restriction on the export of rights acquired by the Turkish nationals concerned under the legislation of a Member State. Such an obligation can, accordingly, be relied on by an individual before a national court as a basis for requesting it to disapply the discriminatory provisions of the legislation of a Member State without further implementing measures being required (see, by analogy, *Sürül*, paragraph 63).

70 The first subparagraph of Article 6(1) of Decision No 3/80 is thus to be clearly distinguished from technical provisions for the coordination of the different national laws on social security such as the rules in Articles 12 and 13 of that decision, which were at issue in Case C-277/94 *Taflan-Met and Others* [1996] ECR I-4085 and in respect of which the Court held that they do not have direct effect in the territory of Member

States so long as the necessary supplementary implementing measures have not been adopted by the Council.

71 The above interpretation is not called into question by the fact that the first subparagraph of Article 6(1) of Decision No 3/80 states that the prohibition of residence clauses contained therein takes effect '[s]ave as otherwise provided in this Decision'. It is sufficient to note that the decision neither makes any exception to nor imposes any restriction on the prohibition of residence clauses set out in that provision.

72 Furthermore, on grounds identical to those set out in paragraphs 70 to 72 of the judgment in *Sürül*, consideration of the purpose and the nature of the Association Agreement of which that provision forms part does not contradict the finding that the first subparagraph of Article 6(1) of Decision No 3/80 is capable of directly governing the situation of individuals.

73 It follows from the foregoing considerations that the first subparagraph of Article 6(1) of Decision No 3/80 establishes a precise and unconditional principle that is effective enough to be applied by a national court and, therefore, to govern the legal situation of individuals.

74 Accordingly, the answer to the first question is that the first subparagraph of Article 6(1) of Decision No 3/80 must be interpreted as having direct effect, so that Turkish nationals to whom that provision applies are entitled to rely on it directly before the Member States' courts to have rules of national law which are contrary to it disapplied.

The second question

75 By its second question, the national court asks, essentially, whether the first subparagraph of Article 6(1) of Decision No 3/80 is to be interpreted as meaning that it precludes a Member State's national legislation, such as that in Article 4 of the TW, in so far as it withdraws the award of supplementary benefit made under the national legislation where the recipients of that benefit are no longer resident in the territory of that State.

76 In that regard, it must be borne in mind that the first subparagraph of Article 6(1) of Decision No 3/80 sets out the principle of prohibition of residence clauses as regards the social security benefits to which it refers, which include invalidity cash benefits.

77 As is apparent from the decision for reference, it is accepted by the parties to the main proceedings that a social benefit such as the supplementary benefit paid under a social insurance scheme such as that established by the WAO must be treated as an invalidity benefit within the meaning of Article 4(1)(b) of Decision No 3/80 and thus falls within the material scope of the first subparagraph of Article 6(1) of that decision.

78 In addition, it is established that the respondents in the main proceedings are Turkish nationals who have lawfully resided and worked in the territory of a Member State. After working for a certain period, they became entitled to social benefits under the legislation of the host Member State. The present case involves an invalidity pension, since the persons concerned became incapable of continuing to work, and the supplementary benefit under the TW, since the amount of the pension to which they were entitled was lower than the minimum wage. Those two benefits were indeed paid to them for a certain period, including in Turkey after they returned there, in

accordance with Article 39(4) of the Additional Protocol, which provides that it must be possible to export old-age pensions, death benefits and invalidity pensions obtained in the Member States.

79 In those circumstances, the respondents in the main proceedings fall within the scope *ratione personae* of the first subparagraph of Article 6(1) of Decision No 3/80 as Turkish workers who receive cash invalidity benefits acquired under the legislation of a Member State and who now reside in Turkey.

80 It must be added that, as has already been stated in paragraph 71 of the present judgment, Decision No 3/80 neither makes any exception to nor imposes any restriction on the prohibition of residence clauses set out in the first subparagraph of Article 6(1) thereof.

81 In the light of the foregoing, all the conditions for the first subparagraph of Article 6(1) of Decision No 3/80 to apply to a situation such as that at issue in the main proceedings are met.

82 It follows that Turkish nationals such as the respondents in the main proceedings are entitled to rely upon the first subparagraph of Article 6(1) of Decision No 3/80 to require that the supplementary benefit under the WAO continue to be paid to them in Turkey.

83 The above finding is not called into question by the fact that, as regards a social benefit such as the supplementary benefit under the WAO, the system currently laid down in Regulation No 1408/71 differs from that instituted in Decision No 3/80.

84 Regulation No 1408/71 has been amended since the adoption of Regulation No 1247/92. Thus, since the entry into force of the latter regulation on 1 June 1992, special non-contributory cash benefits of the same type as the supplementary benefit have been expressly included in the material scope of Regulation No 1408/71, pursuant to Article 4(2a)(a) thereof.

85 Furthermore, with effect from the same date, Regulation No 1247/92 inserted into Regulation No 1408/71 a new Article 10a, which introduced an exception to the requirement of exportability laid down in Article 10(1) of the latter regulation.

86 Moreover, Regulation No 647/2005 added the TW, as amended in 2000 by the Wet BEU, to the list in Annex IIa to Regulation No 1408/71, as amended by Regulation No 1247/92, of special non-contributory benefits within the meaning of Article 4a of Regulation No 1408/71, to which the requirement of exportability laid down in Article 10 of that regulation does not apply, in accordance with Article 10a of that regulation as amended.

87 It is on that basis that the Kingdom of the Netherlands withdrew the award of supplementary benefit previously made under the TW from European Union nationals when the recipients are no longer resident in Netherlands territory.

88 None the less, in circumstances such as those in the main proceedings, a situation in which former Turkish migrant workers who have returned to Turkey continue to receive, under the first subparagraph of Article 6(1) of Decision No 3/80, a social benefit such as the supplementary benefit, when it is withdrawn from European Union citizens who do not reside in the territory of the Member State which awarded it, cannot be regarded as incompatible with the requirements of Article 59 of the Additional

Protocol, pursuant to which Turkish nationals must not be placed in a more favourable position than that of European Union nationals (see, to that effect, inter alia, Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 61).

89 Firstly, Article 39(4) of the Additional Protocol expressly provides for the exportability to Turkey of certain social benefits, including pensions and invalidity pensions obtained by Turkish workers under the legislation of one or more Member States.

90 Secondly, the first indent of Article 2 of Decision No 3/80 includes in its scope Turkish workers who 'have been subject' to the legislation of one or more Member States, without further specification, whereas, under the second indent of Article 2 thereof, the family members of those workers are required to be 'resident in the territory of one of the Member States'.

91 In addition, to apply, in the context of Decision No 3/80, the system currently in force under Regulation No 1408/71 as regards special non-contributory benefits would amount to amending that decision, whereas such power is reserved to the Association Council, in accordance with Articles 8 and 22 of the Association Agreement.

92 Finally, it is clear that the respondents in the main proceedings returned to Turkey after having become incapacitated in the host Member State.

93 Pursuant to the settled case-law of the Court, a Turkish national who has belonged to the legitimate labour force of a Member State within the meaning of Article 6 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council instituted by the Association Agreement, cannot be entitled under that decision to remain in the territory of that State following an

accident at work rendering him permanently incapacitated for work which definitively removes him from the labour market (see Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraph 42).

94 In those circumstances, it cannot validly be claimed that the persons concerned left the territory of the host Member State of their own volition without legitimate reason and that such conduct led to the loss of rights acquired under the EEC-Turkey Association (see, inter alia, Case C-14/09 *Genc* [2010] ECR I-931, paragraph 42).

95 Accordingly, the situation of former Turkish migrant workers such as the respondents in the main proceedings, who returned to Turkey after having lost their right to remain in the host Member State because they became incapacitated in that Member State, cannot, for the purposes of applying Article 59 of the Additional Protocol, usefully be compared to that of a European Union national inasmuch as the latter, who are entitled to move around and reside in the territory of the Member States and retain their right of residence in the Member State which awarded the benefit in question, firstly, can choose to leave the territory of that State and, for that reason, lose that benefit and, secondly, have the right to return at any time to the Member State concerned (see, by analogy, Case C-325/05 *Derin* [2007] ECR I-6495, paragraph 68, and Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 45).

96 In view of all of the foregoing considerations, the answer to the second question is that the first subparagraph of Article 6(1) of Decision No 3/80 must be interpreted, in circumstances such as those at issue in the main proceedings, as precluding legislation of a Member State, such as Article 4 of the TW, which withdraws the award of a benefit such as the supplementary benefit, made under the national legislation, from former Turkish migrant workers such as the respondents in the main proceedings who returned to Turkey after losing their right to remain in the host Member State because they became incapacitated in that Member State.

The third question

97 The third question referred by the national court relates in essence to the effect, in a situation such as that in the main proceedings, of the principle of equal treatment, as laid down in Article 9 of the Association Agreement, which prohibits any discrimination on grounds of nationality 'without prejudice to any special provisions which may be laid down [by the Association Council] pursuant to Article 8' of that agreement.

98 Under the case-law of the Court, Article 3(1) of Decision No 3/80 constitutes the implementation and the concrete expression, in the particular field of social security, of the general principle of non-discrimination on grounds of nationality laid down in Article 9 of the Association Agreement (see *Sürül*, paragraph 64; Joined Cases C-102/98 and C-211/98 *Kocak and Örs* [2000] ECR I-1287, paragraph 36; and Case C-373/02 *Öztürk* [2004] ECR I-3605, paragraph 49).

99 As is apparent from its very wording, Article 3(1) of Decision No 3/80, in turn, applies 'subject to the special provisions of this Decision'.

100 The first subparagraph of Article 6(1) of that decision constitutes such a special provision on the scope of which the Court has already ruled in the context of the first and second questions.

101 Having regard to the foregoing, the answer to the third question is that Article 9 of the Association Agreement does not apply to a situation such as that at issue in the main proceedings.

Costs

102 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **The first subparagraph of Article 6(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families must be interpreted as having direct effect, so that Turkish nationals to whom that provision applies are entitled to rely on those provisions directly before the Member States' courts in order to have rules of national law which are contrary to it disapplied.**

2. **The first subparagraph of Article 6(1) of Decision No 3/80 must be interpreted, in circumstances such as those at issue in the main proceedings, as precluding legislation of a Member State, such as Article 4 of the Law on supplementing benefits (Toeslagenwet) of 6 November 1986, which withdraws the award of a benefit such as the supplement to invalidity benefit, made under the national legislation, from former Turkish migrant workers such as the respondents in the main proceedings when they have returned to Turkey after losing their right to remain in the host Member State because they became incapacitated in that Member State.**

3. Article 9 of the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, does not apply to a situation such as that at issue in the main proceedings.

[Signatures]