OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 7 October 1999 *

1. Given that the Court of Justice has already acknowledged the direct effect of the principle of equality of treatment [1] under Article 3(1) of Decision 3/80 of the Association Council [2] (hereinafter 'Decision 3/80') created by the Association Agreement between the Community and Turkey [3] (hereinafter 'the Association Agreement'), the question arises as to whether that principle precludes a Member State from limiting a person's right to rectify the date of birth he gave when he joined its social security scheme, when such rectification affects his entitlement to benefits, to cases in which there has been a clerical error and to cases in which documents issued before the date of birth was given are submitted, without taking account of the circumstances in which births are registered in Turkey.

This, in essence, is what the Eighth and Thirteenth Senates of the Bundessozialgericht (Federal Social Court), Germany, wish to ascertain by the questions they have referred to the Court under Article 177 of the EC Treaty (now Article 234 EC).

* Original language: Spanish.

1 — Case C-262/96 *Sürül* [1999] ECR I-2685.

2 — Decision 3/80 of the Association Council of 19 September 1980 concerning 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).

3 — Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey (OJ 1964 217, p. 3685).

I — The facts in Case C-102/98 *Kocack*

2. The plaintiff in the main proceedings, Mr Kocak, is a Turkish national who, between 1956 and 1962, worked in Turkey and was registered with the social security scheme in that country. Between April 1962 and December 1966 he worked in the mining industry in Germany. He has been permanently resident in that Member State since May 1970 and, until 1 October 1986, when he took early retirement, he was employed as a production worker. Since October 1991, when his early retirement payment ran out, he has been receiving social assistance.

3. In 1970, when he joined the social security scheme in Germany, he gave his date of birth as 20 October 1933. In a judgment of 3 December 1985 delivered by the Turkish Civil Court in Düzce, the entry for his year of birth was rectified, in the Turkish register of civil status, to 1926. In the light of this judgment, the Landesversicherungsanstalt Schleswig-Holstein (regional insurance office) assigned him a new insurance number incorporating the amended date of birth.

4. In August 1991 Mr Kocak applied for an old-age pension because he had reached

the age of 65. In February 1992 the regional insurance office informed him that it did not recognise, for the purposes of his entitlement to a pension in Germany, the judgment of the Turkish court correcting his year of birth. It rejected the plaintiff's pension application on the grounds that he was born in 1933 and would not reach the age of 65 until October 1998; it also assigned him another insurance number in which his date of birth was again shown as 1933.

5. Mr Kocak's objections against those decisions were dismissed because the judgment of the Turkish court was based solely on a medical opinion and the statement of one witness. In the circumstances, the regional insurance office considered that it had not been proved that Mr Kocak was born in 1926 instead of 1933, which was the year he gave when he joined the German pension insurance scheme.

6. Before the courts his claim was upheld at first instance by the Sozialgericht (Social Court) Itzehoe which ordered the regional insurance office to grant him an old-age pension because he had been 65 years old since November 1991. On appeal, the Schleswigholsteinische Landessozialgericht (Higher Social Court) set aside that judgment and dismissed the action on the grounds, amongst others, that the circumstances and the evidence put forward by Mr Kocak in the proceedings in the Turkish court which ordered rectification of his date of birth did not have sufficient weight to cast doubt upon the probative value of the original entry in the register of civil status. Mr Kocak appealed against that decision.

A partial settlement has been reached in the dispute. It now concerns the challenge to the assignment of a new insurance number to Mr Kocak by the defendant social security institution by its decision of 17 February 1992, and its refusal to grant an old-age pension by its decision of 1 December 1993.

II — The question referred for a preliminary ruling in case C-102/98 *Kocak*

7. The Thirteenth Senate of the Bundessozialgericht, which has to give judgment on the appeal on a point of law ('Revision') has considered it necessary to refer the following question to the Court of Justice for a preliminary ruling:

'Is the law relating to the Association between the European Economic Community and Turkey (in particular Article 9 of the Agreement establishing an Association between the European Economic Community and Turkey of 12 September 1963, Article 37 of the Additional Protocol to that Agreement of 23 November 1970, Article 10 of Decision 1/80 of the Council of Association of 19 September 1980 [4] and Article 3(1) of Decision 3/80 of the Council of Association of 19 September 1980) to be interpreted as not permitting the legislature of a Member State to adopt rules under

4 — Decision 1/80 of the Council of Association of 19 September 1980, concerning the development of the Association (not published).

which the applicable date of birth for use in the insurance number allocated to the insured person and for the grant of old-age pension is in principle, in the case of Turkish migrant workers also — without regard to particular characteristics of the Turkish register of civil status — the date of birth which results from the first information given by the insured person to the social security institution of the Member State in question or to the employer in that State (in so far as he is under a duty to notify the social security institution)?'

III — The facts in Case C-211/98 *Örs*

8. Mr Örs was born in Turkey and has lived in Germany since 1972. He is a member of the pension insurance scheme of the Bundesknappschaft (Federal Insurance Fund for Miners), the defendant social security institution. When he joined the scheme in Germany he gave his date of birth as 1 May 1950. On the basis of that information he was assigned insurance number 80 010550 O 016.

In February 1993 he lodged with the defendant institution a judgment of the Regional Court in Balikesir, Turkey, of 9 November 1992, amending the date of birth recorded for him in the Turkish register of civil status to 1 May 1946. Enclosed with the judgment was a certificate showing that he had completed his military service between July 1970 and March 1972. He also stated that he had not gone to school in Turkey.

9. According to the judgment, of which Mr Örs lodged a translation, the public hospital in Balikesir informed the court that the plaintiff was between 45 and 46 years of age. Furthermore, the witnesses for the plaintiff stated under oath that they knew him well because they had lived in the same village; his parents had lived together for years before they married; in the village everybody lived together and had children before marrying and Mr Örs was already four or five years of age when his parents married. One of the witnesses said that his own daughter Havva was also born in 1946 but was entered in the register of civil status as born in 1948. In his submissions the Public Prosecutor supported the view that the plaintiff had proved his claims. The Regional Court therefore granted his application for rectification of his date of birth.

10. In decisions of 14 June 1993 and 14 September 1993, the defendant rejected Mr Örs' application for amendment of his date of birth and insurance number.

The action brought before the Sozialgericht (Social Court) Gelsenkirchen was unsuccessful. On appeal, the plaintiff stressed that he was seeking the amendment not only of his insurance number but also of his actual date of birth which had a decisive influence on the duration of his working life. The Landessozialgericht Nordrhein-

Westfalen (Higher Social Court, North Rhine-Westphalia) dismissed the appeal, stating that the insurance number was used only to classify a person's details for the purposes of acknowledging his entitlement to social benefits and that, therefore, the social security institution was not bound to alter the date of birth contained in the insurance number on the basis of the judgment of the Turkish court. With regard to the need to correct the actual date of birth contained in the number, it applied the case-law of the Bundessozialgericht which had held, in those very circumstances, that the true date of birth is the date entered in the register of civil status when the insurance number is assigned.

IV — The question referred for a preliminary ruling in case C-211/98 *Örs*

11. The Eighth Senate of the Bundessozialgericht, which has to give judgment in the appeal on a point of law (Revision) has considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is there, on the basis of the law relating to the Association between the European Economic Community and Turkey, a prohibition of discrimination in the field of social security which is directly applicable to a Turkish worker in the Federal Republic of Germany?

2. If Question 1 is answered in the affirmative, is that prohibition to be interpreted as precluding a national provision under which the applicable date of birth for statutory pension insurance benefits and for the insurance number assigned in that regard is the date which was documented when the Turkish worker was first registered with a national social benefit institution?'

V — The national legislation

12. Men are entitled to receive an old-age pension when they are 65 and women when they are 60, provided they have paid contributions for 60 months. At the beginning of a person's working life, his employer must send his personal details to the health insurance institution and then the old-age pension institution assigns him an insurance number, of which his date of birth forms an integral part.

13. Under the provisions of Paragraph 1(5) of the Regulation on the assignment and composition of insurance numbers (Verordnung über die Vergabe und Zusammensetzung der Versicherungsnummer), that number is assigned only once and cannot be altered.

14. The question whether a date of birth contained in an insurance number is correct is now determined in accordance with Paragraph 33a of the First Book of the Sozialgesetzbuch (Code of Social Law) (hereinafter 'SGB I') which has been in force since 1 January 1998 and provides as follows:

'1. If rights or obligations are dependent on whether a specific age-limit is reached or not exceeded, the applicable date of birth is the date which results from the first information given by the person entitled to those rights or subject to those obligations, or by his relations, to a social security institution or, in so far as information within the context of the third or sixth chapters of the Fourth Book is concerned, to his employer.

2. An applicable date of birth under paragraph 1 may be departed from only if the competent benefit institution determines:

(a) that a clerical error has been made; or

(b) that a different date of birth results from a document whose original was made out before the information was given under paragraph 1.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to dates of birth which are a component of an insurance number or other reference mark used in the social benefit fields of this Code.'

15. These rules were adopted to prevent improper social benefit claims in cases where earlier payment could be applied for on the basis of an altered date of birth. When they were drafted it was borne in mind that various foreign legal systems make provision for dates of birth to be altered by a decision of a court, that such alterations can result in advantages under German social law and that, in the relevant foreign legal systems, alteration of date of birth does not affect entitlement to social benefits.

The new rules are intended to ensure that an alteration of date of birth obtained in these circumstances cannot be taken into consideration under German social law either.

It was not considered necessary to introduce a specific transitional provision.

VI — The Community law provisions whose interpretation has been requested

16. Article 9 of the Association Agreement provides:

'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 7 [5] of the Treaty establishing the Community.'

17. Article 37 of the Additional Protocol to the Association Agreement [6] provides:

' As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States in the Community.'

18. Article 10(1) of Decision 1/80 of the Association Council (hereinafter 'Decision 1/80') provides:

'As regards remuneration and other conditions of work, the rules which the Member States of the Community apply to Turkish workers belonging to their legal labour force shall not discriminate on grounds of nationality between such workers and Community workers.'

19. Article 3(1) of Decision 1/80 establishes:

'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.'

5 — This became Article 6 following amendment by Article G, point 8, of the Treaty on European Union, and is now Article 12 EC following amendment by the Treaty of Amsterdam.

6 — Regulation (EEC) No 2760/72 of the Council of 19 December 1972 concluding the Additional Protocol and also the Financial Protocol signed on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey and relating to the measures to be adopted to bring them into force.

VII — The proceedings for a preliminary ruling

20. Mr Örs, the French and German Governments and the Commission submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.

At the hearing on 7 September 1999 a representative of the Landesversicherungsanstalt Oberfranken und Mittelfranken, which is the institution whose decision is being challenged by Mr Kocak, the Agent of the German Government and the Agent of the Commission submitted their oral observations.

21. Mr Örs maintains that the defendant social security institution has no reasonable grounds for refusing to accept the rectification of his date of birth and, in accordance with the prohibition of discrimination on grounds of nationality, which is directly applicable, it may not treat a Community national differently from a Turkish national who is living in a Member State. He believes that the judicial decision correcting the entry in the register of civil status in respect of the year of his birth is binding on the German social security institutions, unless there is reason to believe that the decision was irregular, which is not proven.

22. At the hearing Landesversicherungsanstalt Oberfranken und Mittelfranken stated that, initially, there were only isolated applications for dates of birth to be rectified in order to extend the length of time social benefits were received or to bring forward the date on which they should start to be paid. However, since the late eighties, they have become a much more common phenomenon, to the extent that, in 1998, the German social security institutions received about 5 000 such applications from Turkish nationals. If altering those dates of birth meant that the amount of social benefit paid out was affected, the cost incurred would be both extremely high and unexpected, and might upset the financial equilibrium of the system. It added that if transitory measures had been adopted — as the Commission recommends — it would have been years before the new legislation was applicable and it would not have been able to achieve its objective.

23. The German Government argues that, even if the principle of equality of treatment in matters of social security is applicable to Turkish workers, this does not mean that extracts from the register of civil status issued by the Turkish authorities are binding on the German pension insurance institutions and courts. It points out that there are significant differences in the procedure followed in Turkey and the Member States for rectifying dates of birth; there is no harmonisation in this sphere between the Member States and Turkey, no scheme has been established for the mutual recognition of judgments correcting dates

of birth, and judicial decisions which correct dates of birth do not affect social security matters, even in Turkey. [7]

It contends that the provision contained of Paragraph 33a of the SGB I applies both to Turkish nationals and to German nationals born in a third State and cites, by way of example, the some 2 800 000 repatriates in Germany, most of whom came from the former Soviet Union.

It adds that the provision which limits the opportunity of altering entitlement to social benefits on the basis of the rectification of the date of birth was adopted because it was necessary, fair and justified by objective considerations. In fact, it had been observed that insured persons frequently applied for extensions of their entitlement to benefits such as, for example, orphan's pension or family allowance, or for early payment of the old-age pension, by reason of an amendment *a posteriori* to their date of birth. To investigate each case was long and expensive, because the social security institutions in the applicant's native country had to carry out exhaustive inquiries. Moreover, the mechanism currently in force for acknowledging a change of date of birth makes it possible to compensate, to a large extent, for the frauds practised in order to obtain an old-age pension ahead of time, because in almost all the applications for amendment of date of birth, the date stated is prior to the one given when the applicant joined the insurance scheme, and it is a question here not of isolated cases but of a widespread phenomenon.

It concludes by pointing out that evidentiary documents issued before the date on which the claimant joined the scheme are accepted, and these may be documents from the registry of civil status or any other documents which make it possible to establish date of birth such as, for example, documents issued in connection with education and military service.

24. The French Government contends that the same evidential value cannot be given to entries in the civil registers of non-member countries as to those of Member States. It maintains that a Member State may hold that the evidence accompanying an application for alteration of a date of birth is insufficient or false by reference, in particular, to the ease with which courts in some countries give judgments relating to the rectification or supplementing of particulars contained in the register of civil status, with the sole aim of circumventing the law of the Member States relating to nationality, right of residence and entitlement to receive social benefits or an old-age pension.

25. The Commission contends that German law, which makes rectification of a date of birth with subsequent effect on

7 — The German Government states that, according to the information available to it, Turkish law, when trying to determine the applicable date of birth, distinguishes between accident insurance, for which the date of birth to be taken into account is the date in the register of civil status at the time of the accident, and invalidity and old-age pensions and death benefits, for which the date to be taken into account is the date in the register when the insurance scheme is joined.

entitlement to the old-age pension conditional on submission of a document issued before the worker entered the insurance scheme in Germany, is practising covert discrimination against Turkish migrant workers whose circumstances are different, in fact and in law, from those of German nationals.

To explain why it takes this view, it says that German law imposes on certain persons the duty, subject to a fine, of notifying a birth at the register office within a week, and that the date which is entered can be amended only by court order in non-contentious proceedings in which the court, of its own motion, orders the necessary checks to be made and grants correction only if it is certain that the entry is incorrect. On the other hand, in Turkey, the time-limit for registering a birth is one month and this does not seem to be observed in all cases, especially in rural areas. Correction of the entry is granted only once and pursuant to a judicial decision, given in proceedings considered extremely lenient and generous, in which there is no thorough investigation of the facts on the initiative of the court.

It considers that there may be reason in the future to apply the provision which came into force in January 1998, and which was adopted in order to avoid fraud and the administrative burden involved in checking procedures carried out abroad, but it is doubtful whether, in the absence of transitional provisions, there is reason to apply it to the information supplied by a Turkish worker when he joined the social security scheme in Germany at a time when another provision was in force.

With regard to the fact that, in Turkey, the date of birth which is taken into account for the purposes of invalidity and old-age pensions and death benefits is the one appearing in the civil register at the time of affiliation to the social security scheme, the Commission points out that this was not the rule in Germany before 1998 and that a Turkish worker had no reason to think that the German authorities were going to pass a law to introduce that principle into its social security system, with retroactive effect and without transitional provisions. It adds that, in cases such as those of Mr Kocak and Mr Örs, in which correction of their dates of birth was based solely on a medical opinion, it is not surprising that reliability of the judgment of the Turkish court should be called into question. Therefore the burden of proving in the German courts that the new date of birth is correct rests on the applicant, who will have to submit more convincing evidence.

It concludes by saying that the provision in dispute is out of all proportion to the objective pursued, because there are no transitional provisions which take into account the structural differences between the States bound by the Agreement of Association

VIII — Analysis of the questions referred for a preliminary ruling

26. In order to answer the questions referred for a preliminary ruling by the Eighth and Thirteenth Senates of the Bundessozialgericht, which I shall consider together, I shall first examine whether the prohibition on discrimination on grounds of nationality, which is included in the law governing the association between Turkey and the Community, is directly applicable to Turkish workers. If the answer is in the affirmative, I shall consider whether they may invoke it in a Member State in order to avoid application against them of a social security provision which allows rectification of the date of birth given by the worker when he joined the social security scheme in that State only if it is shown that there has been a clerical error or if the applicant submits a document issued before he joined the scheme and showing a different date of birth. Finally, I shall consider the temporal application of the principle of equality of treatment in the main proceedings.

A. *Concerning the direct effect of the principle of non-discrimination on grounds of nationality in the law governing the association between the Community and Turkey*

27. Article 9 of the Association Agreement, Article 37 of the Additional Protocol to that Agreement, Article 10(1) of Decision No 1/80 and Article 3(1) of Decision No 3/80 all prohibit discrimination on grounds of nationality. However, it will not be necessary to interpret all of these provisions in order to reply to the questions referred for a preliminary ruling.

28. Article 9 of the Association Agreement, which prohibits discrimination on grounds of nationality within its scope of application, is a general provision which, as in the case of Article 6 of the EC Treaty (now, after amendment, Article 12 EC) is intended to be applied separately only in situations for which the Agreement and its implementing measures do not lay down specific rules against discrimination.

29. In the context of the freedom of movement of workers between the Member States and Turkey, the principle of non-discrimination has been applied and defined by Article 37 of the Additional Protocol to the Association Agreement.

30. Decision No 1/80, which develops the Association, includes the principle, although limiting it to remuneration and other conditions of work. I agree with the Commission that the German rules governing the amendment of insurance numbers or the granting of social benefits cannot be regarded as establishing conditions of work within the meaning of that provision.

31. Article 3(1) of Decision No 3/80 concerning the application of the social secur-

ity schemes of the Member States to Turkish workers and the members of their families, which develops Article 39 of the Additional Protocol, lays down the principle that any person resident in a Member State to whom the Decision applies must receive the same treatment as the Member State accords its own nationals.

By virtue of Article 2 of Decision No 3/80, that decision is applicable to the two plaintiffs in the main proceedings, because they are both Turkish workers who are subject to the legislation of a Member State.

32. The two actions in which the questions referred for a preliminary ruling have arisen concern the possibility of rectifying the date of birth which is included in the insurance number assigned when a person joins the social security scheme in Germany and constitutes the basis on which the social security institutions acknowledge a person's entitlement to the various benefits. Therefore the Court must reply to the questions referred for a preliminary ruling on the basis of Article 3(1) of Decision No 3/80 which governs the application of the social security schemes of the Member States to Turkish workers. [8]

33. As I pointed out at the beginning of this Opinion, part of the problem raised by the two cases I am considering was resolved by the judgment in *Sürül* [9], when the Court of Justice stated that Article 3(1) of Decision No 3/80 establishes, in the area in which that Decision applies, a precise and unconditional principle such as is capable of being applied by a national court and, therefore, of governing the legal situation of individuals. The Court added that the direct effect attributed to that provision means that the persons to whom it applies are entitled to rely on it before the courts of the Member States. [10]

34. It is therefore necessary to reply in the affirmative to the first of the questions referred for a preliminary ruling by the Eighth Senate of the Bundessozialgericht in Case C-211/98 *Örs* and hold that Article 3(1) of Decision No 3/80 — which lays down the principle that any person to whom the Decision applies and who is resident in a Member State, must receive

8 — Under Article 4 the matters covered by the Decision include all legislation concerning the branches of social security relating to sickness and maternity benefits, invalidity benefits, including those intended for the maintenance or improvement of earning capacity, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. The Decision applies to general and particular, contributory and non-contributory social security systems.

9 — Cited in footnote 1, paragraph 74.

10 — The Court had already arrived at this interpretation with regard to the principle of equality of treatment contained in Article 39(1) of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Algiers on 26 April 1976 and concluded on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978 (OJ 1978 L 263, p. 1). See the judgments in Case C-103/94 *Krid* [1995] ECR I-719, paragraphs 21 to 24, and in Case C-113/97 *Babahenini* [1998] ECR I-183, paragraphs 17 and 18. The Court took the same view of the principle with regard to Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 26 April 1976 and concluded on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1). See the judgments in Case C-18/90 *Kziber* [1991] ECR I-199, paragraphs 15 to 23, in Case C-58/93 *Yousfi* [1994] ECR I-1353, paragraphs 16 to 19, and in Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807, paragraphs 19 and 20.

the same treatment as the Member States confer on their own nationals — has direct effect.

B. *Concerning equality of treatment for Turkish workers in the field of social security and the possibility of correcting dates of birth with subsequent effect on entitlement to social benefits.*

35. This is not the first time that a national court has asked the Court of Justice whether, in proceedings for determining a migrant workers entitlement to social benefits, the social security institutions and courts of a Member State are under a duty to recognise certificates and analogous documents relative to personal status which have been issued by the competent authorities of other States.

The Court ruled on this matter in its judgment in *Dafeki*, [11] in reply to a question referred for a preliminary ruling by the Sozialgericht Hamburg, Germany.

36. The facts in that case were similar to those which gave rise to the two cases I am considering here.

Mrs Dafeki was a Greek national who had been living since 1966 in Germany, where she had been in paid employment until 1987. Her identity papers showed her date of birth as 3 December 1933.

On 4 April 1986, at Mrs Dafeki's request, the Court in Trikala, Greece, rectified that date in accordance with the special procedure applied when civil status archives had been destroyed during the war. Mrs Dafeki's date of birth was consequently established as 20 February 1929. She was then issued with a birth certificate recording her amended date of birth.

37. In December 1988 Mrs Dafeki applied in Germany for the early retirement pension provided for women who have reached the age of 60. Although she fulfilled the other requirements for entitlement to an early pension, her application was rejected. Basing its decision on the documents drawn up before Mrs Dafekis date of birth had been rectified, the competent German institution decided that she had not reached the age required for pension entitlement at the time when her application was made.

38. Paragraph 66 of the Personenstandsgesetz (Law on Civil Status), which was the provision applicable to the matter, provided that certificates of civil status issued in another country did not benefit from the

11 — Case C-336/94 [1997] ECR I-6761.

same presumption of accuracy as German certificates, and therefore the court seised of the matter must proceed to an evaluation of the documents before it in accordance with the rule of free assessment of evidence. In so doing, the court must take account in particular of a rule of case-law which establishes a presumption that, in the event of inconsistency between several documents of differing dates, the document which prevailed was generally, in the absence of other sufficient evidence, the one closest in time to the event. Hence, in Mrs Dafeki's case, the document which prevailed was the first extract from the register of births. As the application of the provision by a court meant that the probative value accorded by the German courts to certificates of civil status issued in another Member State was lower than that accorded to certificates drawn up by the German authorities, the court hearing this case questioned whether the provision was compatible with Community law, in particular with Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and with Article 51 of the EC Treaty (now, after amendment, Article 42 EC), as amounting to indirect discrimination on grounds of nationality. Indeed, although the provision applied irrespective of the nationality of the worker, in practice it operated to the detriment of workers who were nationals of other Member States.

39. In its judgment in Mrs Dafeki's case, the Court took account of the differences that exist between the national legal orders as regards the conditions and procedures for rectification of a date of birth, and also of the fact that the Member States had neither harmonised the matter nor established a system of mutual recognition of such decisions, as had been done for judgments falling within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [12] The Court also acknowledged that the possibility of successfully challenging the accuracy of a certificate of social status depended, to a large extent, on the procedure followed and on the conditions which had to be satisfied in order for such a birth certificate to be altered. These could vary considerably from one Member State to another.

That is why it expressly stated, in paragraph 18: '[...] The administrative and judicial authorities of a Member State are not required under Community law to treat as equivalent subsequent rectifications of certificates of civil status made by the competent authorities of their own State and those made by the competent authorities of another Member State.'

40. By this statement the Court was echoing and responding to the concern expressed by the German Government and the Commission. The German Government submitted that there were significant differences between the Member States as

12 — OJ 1972 L 299, p. 32.

regards the provisions governing the maintenance and rectification of registers of civil status. It gave as an example the fact that, in Greece, alteration of a date of birth could be obtained by judgment of a single judge, for which the evidence of two witnesses sufficed. It added that many migrant workers of Greek nationality had availed themselves of this opportunity and that the competent German social security institution had noted some hundreds of cases in which the date of birth declared on taking up employment differed significantly from the date given on application for the award of a pension. As a general rule, rectification operated to the worker's advantage.

The Commission pointed out that questions relating to civil status differed from one Member State to another since the respective systems had been strongly influenced by an extremely wide variety of cultural phenomena and specific events, such as wars and transfers of territory. It considered, therefore, that it was difficult to start from the premise that the factual and legal situations were identical or equivalent. It added that the Community had no general competence to lay down rules concerning the law applicable to civil status or matters related to the probative value of documents relative to civil status.

41. However, at paragraph 19 of its judgment, the Court appears to do an about-turn. I must admit that I can only manage to reconcile the reasoning up to that point with what follows if I take the view that:

— up to paragraph 18, when it pointed out that Community law does not require a Member State to treat as equivalent rectifications of certificates of civil status made by its own authorities and those coming from other Member States, the Court was referring to the purely civil effects of such amendments, because the provision in dispute in that case was an article of the Law relating to civil status;

— from the following paragraph, the Court began to reason in terms of the documentation needed for ensuring exercise of one of the freedoms conferred by the Treaty, because it states: 'Nevertheless, exercise of the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin. It follows that the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.'

In the light of that statement the Court concluded that '[...] A rule of national law which establishes a general and abstract

presumption that, in the event of inconsistency between several documents of differing dates, it is the document closest in time to the event to be proved which prevails in the absence of other sufficient evidence, cannot justify refusal to take account of a rectification made by a court in another Member State.'

42. The differences between Mrs Dafeki's situation and that of Mr Kocak and Mr Örs are quite obvious. She was a national of a Member State whereas they are nationals of a third country. The documents which Mrs Dafeki submitted as proof of a date of birth different from the one she gave when she joined the social security scheme had been issued by the competent authorities of a Member State whereas the documents presented by Mr Kocak and Mr Örs came from a third country.

43. However, these differences are not conclusive. Indeed, in the sphere of the freedom of movement for workers, both Community nationals, pursuant to Article 48(2) of the EC Treaty, which was applied to Mrs Dafeki, and Turkish nationals, under Article 37 of the Additional Protocol, are entitled to receive the same treatment as the Member States confer on their own nationals. As far as concerns social security, Article 3(1) of Council Regulation (EEC) No 1408/71 [13] (hereinafter 'Regulation No 1408/71') which is applicable to Community nationals, and Article 3(1) of Decision No 3/80, which applies to Turkish nationals, are drafted in identical terms and impose on the Member States the obligation to confer on residents of a Member State who rank among the persons covered by the provision the same treatment as they confer on their own nationals.

The direct effect of the principle of equality of treatment in the field of social security has been recognised by the Court in relation to both Article 3(1) of Regulation No 1408/71 [14] and Article 3(1) of Decision No 3/80. [15] Consequently, a Member State may not assign a different scope to the principle depending on whether the person to whom the provision applies is a worker who is a national of another Member State or a worker who is a Turkish national.

44. However, there is one difference which I do think is conclusive. Contrary to what happened in the case of the legislation that was applicable in *Dafeki* — which accorded a lower probative value to certificates of civil status issued abroad than to those drawn up in Germany — the provisions which are at issue in the cases with which I am concerned do not differentiate, on the basis of where they originate or come from,

13 — Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

14 — Case 1/78 *Kenny* [1978] ECR 1489, paragraph 12.

15 — Judgment in *Sürül*, cited in footnote 1, paragraph 74.

between the documents submitted in support of an application for rectification of a date of birth for the purposes of acknowledgment of entitlement to social benefits.

45. I agree with the judgment in *Dafeki* that, in order to invoke the right to a social security benefit flowing from the exercise of the right of free movement for workers guaranteed by the Treaty, workers must supply proof of certain particulars entered in the registers of civil status. The same applies to Turkish workers who go and work in the Member States under the Association Agreement and its implementing measures.

46. As I have already pointed out, the provision in dispute, Paragraph 33a of the SGB I, came into force on 1 January 1998 and was adopted to avoid the situation in which a worker arranged for his date of birth to be rectified in order to procure a change in his entitlement to social benefits in Germany.

In order to achieve this objective, the provision has tightened the conditions under which the German social security authorities agree to rectify the date of birth of recipients which is, indisputably, the fact which the social security systems take as a basis for establishing the length of entitlement to family benefits or the orphans pension and which determines the date on which entitlement to the old-age pension begins. I think it is indicative that legal systems, like the Greek [16] and Turkish systems, which are apparently quite ready to rectify dates of birth, do not recognise such rectifications in the field of social security rights.

Under these more stringent conditions the recipient is required to keep the date of birth which he or his relatives gave when he joined the social security scheme in Germany and which is incorporated into his social security number, unless the competent benefit institution determines that there has been a clerical error or that a different date results from a document whose original was made out before the information was given.

47. The provision does not differentiate between insured persons on grounds of nationality and therefore does not discriminate directly.

16 — As Advocate General La Pergola points out in the Opinion he delivered in *Dafeki*, the German Government maintained that the amendment sought and obtained by Mrs Dafeki did not, under Greek law, enable her to obtain social security benefits; therefore, to acknowledge that this would be possible in Germany would have the absurd result of according a foreign document greater probative value than it is accorded by the legal system from which it comes.

However, the Senates of the Bundessozialgericht which have referred the questions for a preliminary ruling wonder whether there may be covert discrimination and the Commission says categorically that there is.

48. As we know, the Court of Justice defines covert discrimination by reason of nationality as any form of discrimination which, by the application of other criteria of differentiation, leads in fact to the same result. Since 1974 the Court has held that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty. [17]

By way of example, the Court has held that there was covert discrimination on the grounds of nationality in the area of the free movement of persons when the law of a Member State imposed a residency condition on a worker for the granting of social [18] or tax [19] advantages or made the granting of those advantage subject to a minimum period of occupational activity in the territory of that State, [20] or limited the duration of contracts of employment of foreign language assistants in its universities where there was no such limit with regard to other teachers, [21] or when, to recruit staff [22] or to calculate salary scale grading and seniority, [23] a Member State took into account only periods of employment completed its own public service, or when it made the grant of tideover allowances to young people seeking their first employment subject to the requirement of having completed their secondary education in a teaching establishment of that State. [24]

In these examples the covert discrimination lay either in the fact that the conditions imposed by the national law for the grant of an advantage could be fulfilled more easily by the nationals of that State than by the nationals of the other Member States, or in the fact that the less favourable working conditions introduced by a Member State ended up applying, in almost every case, to workers from other States in the European Union.

49. The Commission points out that covert discrimination would result because the provision in dispute does not take proper account of the differences between the rules relating to civil status registration in Germany and Turkey. Turkish nationals would therefore be disadvantaged because Para-

17 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11.

18 — Case C-337/97 *Meeusen* [1999] ECR I-3289.

19 — Case 175/88 *Biehl* [1990] ECR I-1779, Case C-279/93 *Schumacker* [1990] ECR I-225 and Case C-151/94 *Commission* v *Luxembourg* [1990] ECR I-3685.

20 — Case 39/86 *Lair* [1988] ECR 3161 and Case 197/86 *Brown* [1988] ECR 3205.

21 — Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1999] ECR I-4309 and Case C-272/92 *Spotti* [1993] ECR I-5185.

22 — Case C-419/92 *Scholz* [1994] ECR I-505.

23 — Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095.

24 — Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307.

graph 33a of the SGB I will prevent a greater number of Turks than Germans from rectifying their dates of birth. It also maintains that there are factual differences because, it claims, in Turkey, the duty to register a birth within one month does not seem to have been fulfilled in every case in rural areas.

50. I cannot agree with the Commission, for reasons I shall explain. Both Germany and Turkey are members of the International Commission on Civil Status (hereinafter 'the CIEC'), an intergovernmental body made up of 12 countries which ensures that the information contained in civil registers is reliable.

In fact, CIEC Convention No 9 of 10 September 1964 concerning judgments rectifying civil status certificates has been ratified by both countries and has been in force in Turkey since 24 August 1967 and in Germany since 25 July 1969. [25]

Furthermore, it cannot be inferred from the documents in these two cases that Germany does not now — although it did not do so in the *Dafeki* case — accord certificates submitted by Turkish workers and issued by the civil registry in their country the same validity as those issued in Germany.

What is more, I imagine that when a person gives his date of birth on joining the social security scheme, he does so on the basis of one of those certificates, issued in Turkey, to which Germany accords the same validity as to the certificates issued by its own civil registry. [26]

51. The problem arises when a member of the social security scheme in Germany applies for rectification of his own date of birth or of that of a beneficiary in order that such rectification should affect the entitlement to social benefits. [27] I realise that States will wish to do their utmost to

25 — Liste des Conventions, état des signatures, des ratifications et des adhésions au 30 November 1998, provided by the Secrétariat général of the CIEC.

26 — Both Germany and Turkey have ratified Convention No 3 concerning the international exchange of information relating to civil status, of 4 September 1958. It has been in force in Germany since 24 December 1961 and in Turkey since 8 October 1962.

27 — Guyon-Renard, Isabelle, 'La fraude en matière d'état civil dans les Etats membres de la CIEC', *Revue critique de droit international privé*, 85 (3) July-September 1996, pp.541 et seq., especially p. 542; the author points out that the replies of the States which are party to the CIEC to questionnaires prepared by a subcommittee made up of one representative from each State have revealed that eight of those States, amongst them both Germany and Turkey, acknowledge that fraud is committed in relation to birth certificates and that the false statements refer in particular to date of birth and identity. She adds that fraud is rarely attributable to the officials at the civil registry of a State which is party to the CIEC, because only Greece mentioned the extreme case of a mayor who had issued his own death certificate in an attempt to evade criminal proceedings.

restrict this practice,[28] both to avoid fraud in the acquisition of nationality and because of the not insignificant financial impact the practice has on their respective social security systems, in view of the increasing longevity of the population.

52. By specifying that a date of birth will be rectified only if there has been a clerical error or if the claimant submits a document whose original, showing a different date of birth, was made out before he joined the social security scheme, does the provision in dispute impose a condition which German nationals can fulfil more easily than Turkish nationals? Or, in some circumstances, is the provision more detrimental to Turkish workers that to German workers?

53. I think the answer to these questions has to be in the negative, even though the Commission stresses the differences — at the time they join the social security scheme — between Turkish migrant workers, who provide information which may not be accurate and may need to be rectified, and German workers who give details based on entries in the register which are usually reliable and seldom need to be rectified.

54. Even if the details entered in the Turkish civil status register are as unreliable as the Commission seems to believe, such a shortcoming would be reason enough for claimants themselves to try and check the accuracy of a detail as important as a date of birth before providing their personal details when they join the social security scheme.

55. The fact remains that Germany agrees to rectify a date of birth, when such rectification affects entitlement to social benefits, if the claimant submits a document which shows a different date of birth and whose original was made out before he joined the social security scheme.

56. The Commission adds that, in rural areas in Turkey, the duty to register a birth within a month is not always fulfilled.[29]

28 — *Ibidem*, p. 546. If a legal decision rectifying a date of birth and pronounced abroad is to be recognised in the Netherlands and Austria, it must have been given by a competent court, after a case has been prepared, and not be contrary to law and order. The Netherlands also requires the decision to be based on hard evidence, such as an opinion drawn up by a medical department appointed for the purpose. The public prosecutor and/or the director of the civil registry must be given the opportunity to be heard, and the claimant, who bears the burden of proof, must have appeared before the court which gives the decision. Even so, the authorities are not compelled to recognise a legal decision which contradicts other known facts, such as facts relating to the members of the claimants family.It is not stated whether, in the Netherlands, recognition of rectification affects entitlement to social benefits.

29 — That cannot mean, in my opinion, that a child who is already seven years old can be registered as a newborn baby.

However, this situation is not peculiar to Turkey or to rural areas, because the civil registration rules in the other States also make thorough provision for investigation into cases of registration of births out of time. The cases most often concern babies born out of wedlock [30] and on the so-called fringes of society. [31] These are familiar phenomena in all States.

57. In my view, a person who, up to a certain point in his life, has believed that his details as entered in the civil register are correct, will be uncertain about his true age if he discovers facts that he did not know, but above all if he finds documents which relate to him and contain details which contradict the ones in the register. [32] That can happen to anybody, irrespective of nationality.The decisive factor for precluding the discriminatory nature of a provision like the one in dispute in the two main proceedings is that, as well as imposing uniform conditions for obtaining rectification of a date of birth, it does not put Turkish workers in a more difficult position than German nationals when it comes to submitting documents showing a different date of birth, such as those issued when a person goes to school, does his military service, or marries, or any other similar official document to which, naturally, Germany must accord the same validity as to those issued by the national authorities. [33]

58. In view of what I have said so far, I have to conclude that the principle of equality of treatment in the field of social security which is applicable to Turkish workers in Germany does not prevent that Member State from establishing that a worker's date of birth, for the purposes of entitlement to social benefits, is the one he gave when he joined the social security scheme, or from restricting the opportunity of rectifying that date to clerical errors and cases in which the claimant submits a document whose original was made out before he joined the social security scheme and which mentions a different date of birth.

In any event, the principle does not require the State to organise its rules for joining the social security system to take account of future rectifications to the dates of birth of the Turkish workers supposedly due to the

30 — Luces Gil, *Derecho Registral Civil*, Bosch 1991, cited by Linacero de la Fuente, M., 'Notas sobre el Registro civil', *Revista de Derecho Privado*, February 1998, p. 83 et seq., especially p. 96.

31 — Linacero de la Fuente, M, op. cit. footnote 30, p. 102.

32 — We should not forget that the civil registry is the instrument which serves to record the facts and features which affect a person's civil status and that its certificates constitute ordinary proof of the features of civil status. Even so, these registry certificates are not free from error in any country. For example, in Spain a date of birth was mistakenly entered as 24 March 1970 instead of the right year, which was 1971; this could be deduced from the fact that the volume, according to its opening and closing entries, covered the period from 30 May 1970 to 17 March 1972 (DGRN R 24 March 1986; RJA, 1986, 3025).

33 — People who have married in Turkey have an additional document which may serve for this purpose, which is the International Family Book introduced by CIEC Convention No 15 of 12 September 1974 which has been in force in Turkey since 3 March 1984. The book contains the date and place of birth of the bride and groom. On the other hand, people who have married in Germany do not have this document, because that State has not yet signed the Convention.

different ways in which the civil registers are kept in Turkey and Germany.

C. *Concerning equality of treatment for Turkish workers in the area of social security, the amendments to Mr Kocak's insurance number, and the application made by Mr Örs before Paragraph 33a of the SGB I came into force*

59. Mr Kocak said, initially, that he was born in 1933. In 1985, pursuant to the judgment of a Turkish court, he requested and obtained rectification in Germany of his date of birth, which was amended to 1926. He was assigned a new insurance number which included the new date. However, in 1991, when he applied for a retirement pension because he had reached the age of 65, the authority refused to recognise the Turkish judgment and assigned him a new insurance number which showed 1933 as his date of birth.

By contrast, in the case of Mr Örs — who, in 1972 when he joined the social security system, said that he was born in 1950, and in 1993 submitted a judgment from a Turkish court altering the year of his birth to 1946 — the German social security institution refused to recognise the judgment.

60. As Paragraph 33a of the SGB I was not in force when the two workers applied for rectification of their dates of birth, it is clear that it cannot apply to them and that, as the Court of Justice has recognised the direct effect of Article 3(1) of Decision No 3/80, which establishes the principle of equality of treatment for Turkish workers in the Member States, they are in the same position as the workers who are nationals of the other States in the European Union.

61. With regard to Community nationals, the judgment in *Dafeki* has already pointed out that the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.

I believe that the same should apply to certificates issued by the competent authorities in Turkey.

62. Finally, we must bear in mind that the Court of Justice, in its judgment in *Sürül*,[34] not only acknowledged the direct effect of Article 3(1) of Decision No 3/80 but also imposed temporal limits on its effect, pointing out that the provision may not be relied upon in support of claims relating to benefits in respect of periods prior to the date of the judgment (4 May 1999) except as regards those persons who, before that date, initiated proceedings or made an equivalent claim.

34 — Cited in footnote 1, paragraph 113.

IX — Conclusion

63. In view of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred by the Thirteenth and Eighth Senates of the Bundessozialgericht for a preliminary ruling in cases *Kocak* and *Örs* respectively:

(1) Article 3(1) of Decision No 3/80 of the Council of Association of 19 September 1980 concerning the application of the social security schemes of the Member States to Turkish workers and the members of their families, which establishes the principle of non-discrimination on grounds of nationality, has direct effect and its temporal effects are those stated by the Court of justice in its judgment of 4 May 1999 in *Sürül*.

(2) Article 3(1) of Decision No 3/80 does not preclude a Member State from establishing that the date of birth of an insured person, for the purposes of entitlement to social benefits, is the date originally given when he joined the social security scheme of that State, nor from restricting rectification of date of birth to cases of clerical error or cases in which the claimant submits a document whose original was made out before he joined the social security scheme and which shows a different date of birth.

(3) In view of the temporal effect of application of the principle of equality of treatment for Turkish workers in the Member States, the administrative and judicial authorities of a Member State had the duty, before national legislation of the nature described above came into force, to accept certificates and analogous documents relative to personal status issued by the competent authorities in Turkey unless their accuracy was seriously undermined by concrete evidence relating to the individual case in question.