OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 12 February 1998 *

The questions referred to the Court and their legislative and factual context

1. By order of 24 July 1996 the Sozialgericht Aachen (hereinafter 'the Sozialgericht') sought from the Court of Justice under Article 177 of the EC Treaty (hereinafter 'the Treaty') interpretative guidance to enable it to give judgment in the proceedings between Sema Sürül and the Bundesanstalt für Arbeit Nürnberg (hereinafter 'the BfA') pending before it. To that end, an interpretation is required 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 [1] (hereinafter 'Decision No 3/80').

The questions submitted by the national court are as follows:

'1. Does a Turkish national living in Germany who comes within the personal scope of Article 2 of Decision No 3/80

1 — OJ 1983 C 110, p. 60. The Association Council was set up by Article 6 of the Agreement establishing an association between the European Economic Community and Turkey (hereinafter 'the EEC-Turkey Agreement') which was signed at Ankara on 12 September 1963 by the Republic of Turkey of the one part and the Member States of the EEC and the Community of the other part, and was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1). Under Article 22(1) of the EEC-Turkey 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.'
In order to lay down the conditions, procedures and duration of the transitional phase provided for by the EEC-Turkey Agreement (see point 43 below), on 23 November 1970 the Contracting Parties signed an Additional Protocol (hereinafter 'the Additional Protocol'). The Additional Protocol, annexed to the EEC-Turkey Agreement, was approved on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 1); pursuant to Article 63(2), it entered into force on 1 January 1973. Decision No 3/80 was adopted on the basis of Article 39 of the Additional Protocol, according to which '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'.

* Original language: Italian.

of 19 September 1980 of the Association Council set up pursuant to the Agreement establishing an Association between the European Economic Community and Turkey ("Decision No 3/80"), and who possesses merely an *Aufenthaltsbewilligung*, have the right, deriving directly from Article 3 in conjunction with Article 4(1)(h) of Decision No 3/80, to German child benefit, in such a way that that right is conditional solely on fulfilment of the conditions applying with regard to German nationals and not on fulfilment of the further conditions applying to aliens which are laid down in the first sentence of Paragraph 1(3) of the Bundeskindergeldgesetz ("BKGG") in the version thereof published in the Official Notice of 31 January 1994 (BGBl. I, p. 168)?

Or, to phrase that question in more general terms:

Is a Member State prohibited from refusing a Turkish national who comes within the personal scope of Article 2 of Decision No 3/80 family benefits provided for under its law on the ground that that person does not possess an *Aufenthaltsberechtigung* or an *Aufenthaltserlaubnis*?

2. Is a Turkish national residing in the territory of a Member State a worker within the meaning of Article 2 in conjunction with Article 1(b) of Decision No 3/80 during periods when, pursuant to the law of that State, compulsory contributions to the social security pension scheme are deemed, in favour of that person, to have been paid in respect of time spent in bringing up a child?

3. Is a Turkish national residing in the territory of a Member State who, in addition to following a course of studies, is employed there on the basis of a corresponding *Aufenthaltserlaubnis* for up to 16 hours per week as an occasional worker to be regarded on that ground alone as a worker within the meaning of Article 2 in conjunction with Article 1(b) of Decision No 3/80, or in any event because that person is insured under a statutory accident insurance scheme against accidents at work?'

2. Decision No 3/80 is designed to coordinate the social security schemes of the Member States in order to allow Turkish workers who are employed in the Community, or have been in the past, and members of the families and their survivors to receive benefits in the traditional areas of social security.

To that end, Decision No 3/80 refers essentially to specific provisions of 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 (hereinafter 'Regulation No 1408/71'), [2] and to a number of

2 — OJ, English Special Edition 1971 (II), p. 416 (as subsequently amended).

provisions of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (hereinafter 'Regulation No 574/72'). [3]

3. Pursuant to Article 1(b) of Decision No 3/80, for the purposes of the decision "worker" means:

(i) subject to the restrictions set out in Annex V, A. BELGIUM (1), to Regulation (EEC) No 1408/71, any person who is insured, compulsorily or on an optional continued basis, against one or more of the contingencies covered by the branches of a social security scheme for employed persons,

(ii) any person who is compulsorily insured against one or more of the contingencies covered by the branches of social security dealt with in this Decision, [4] under a social security scheme for all residents or for the whole working population, if such a person:

— can be identified as an employed person by virtue of the manner in which that scheme is administered or financed; or

— failing such criteria, is insured against some other contingency specified in the Annex under a scheme for employed persons, either compulsorily or on an optional continued basis.' [5]

4. The persons to whom Decision No 3/80 applies and the matters covered are defined, respectively, in Articles 2 and 4. Under Article 4, the 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,

3 — OJ, English Special Edition 1972 (I), p. 159 (as subsequently amended).

4 — [Footnote not relevant to English version.]

5 — It should be noted, for the purposes of the following analysis, that Article 1(b) of Decision No 3/890, the wording of which appears in the main text, reproduces almost literally the definition of 'employed person' appearing in Article 1(a)(i) and (ii) of Regulation No 1408/71 (the latter provision, however, defines at the same time the terms employed person and self-employed person and gives further details under subparagraphs (iii) and (iv)).

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

— to the survivors of these workers'.

Article 4 then provides that Decision No 3/80 is to '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.'

5. The Sozialgericht's order for reference also refers to the principle of equal treatment enunciated in Article 3(1) of Decision No 3/80. That provision is virtually identical to Article 3(1) of Regulation No 1408/71; it states: '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.'

6. Finally, for the purposes of this Opinion, Article 32 of Decision No 3/80 is important; it is one of the final provisions of the decision and states: 'Turkey and the Community

shall, each to the extent to which they are concerned, take the necessary steps to implement this Decision.' However, the proposal for an (EEC) Council Regulation laying down the procedure for implementation in the European Economic Community of Decision No 3/80, submitted by the Commission on 8 February 1983 (hereinafter 'the proposed implementing regulation'), [6] has not been adopted.

7. To complete the outline of the legislative context of the main proceedings, reference will be made to the relevant provisions of German law regarding the residence of aliens and family benefits.

As the national court explains, the Ausländergesetz (Law on Aliens) includes under the general term '*Aufenthaltsgenehmigung*' (residence authorisation), four different types of residence status. Those relevant to these proceedings are the residence entitlement (*Aufenthaltsberechtigung*), the residence permit (*Aufenthaltserlaubnis*) and the accessory residence authorisation (*Aufenthaltsbewilligung*). [7]

8. The *Aufenthaltsberechtigung* is the document which allows the alien the most stable form of residence in Germany. Besides conferring an autonomous and unlimited right, it provides the holder with the same protection against any expulsion measure as is available constitutionally to persons granted a right of asylum.

9. The *Aufenthaltserlaubnis* too is granted without any explicit determination of its purpose by the administration and it is for an indeterminate period or else is extendible. That document may therefore allow an alien to reside on German territory for periods of unspecified duration.

10. The position is different in the case of the *Aufenthaltsbewilligung*, which is granted for a specified purpose (for example, for tourism or vocational training), is of limited duration and cannot in any circumstances lead to the

6 — OJ 1983 C 110, p. 1. The proposal for an implementing regulation states in Article 1 that Decision No 3/80 is to be 'applicable within the Community'. It contains, to that end, 80 articles and 7 annexes concerning the additional arrangements for applying the decision in question, laying down specific rules concerning its application for each category of benefits covered by it. They also contain details concerning in particular the prohibition of overlapping benefits, determination of the applicable legislation, aggregation of periods and financial and transitional provisions. Those provisions for the implementation of Decision No 3/80 are largely based on those of Regulation No 574/72.

7 — The fourth residence authority provided for by the Law on Aliens is the permit for humanitarian reasons (*Aufenthaltsbefugnis*) granted to aliens (and sometimes to members of their families authorised to enter Germany to bring the family together again) specifically for humanitarian or political reasons or to uphold fundamental rights.

subsequent issue of a permanent residence card. It is also granted to the alien's family members who are authorised to stay with him on German territory in order to make up, or continue to constitute, a family unit. The residence right of those family members is conditional upon the continuing validity of the main *Aufenthaltsbewilligung* of the alien who has been allowed to bring his family together.

11. Under Paragraph 1(3) of the *Bundeskindergeldgesetz* (Federal Child Benefit Law, hereinafter 'BKGG'), in the amended version that entered into force on 1 January 1994, only aliens in possession of a *Aufenthaltsberechtigung* or an *Aufenthaltserlaubnis* are entitled to family benefits. As stated in the order for reference, by introducing that provision the German legislature sought to limit the circle of beneficiaries to aliens who were present on national territory on a stable and permanent basis.

12. Moreover, German law takes a peculiarly independent approach, as far as social security is concerned, to the education of children in Germany (that requirement is deemed to be satisfied where the parent responsible for such education is habitually resident in Germany). In particular, for children born after 31 December 1991, contributions (which are in fact charged to compulsory invalidity and old-age insurance) are deemed to be paid by the mother (or by the father if he is declared to be responsible for the education of the child) for a period of 36 months. [8]

13. Finally, a brief account must be given of the facts of the main proceedings, as described by the Sozialgericht. The plaintiff in the main proceedings is a Turkish citizen who has resided in Germany since 1991, having joined her husband who emigrated there in 1987 in order to study. Since 1992 Mr and Mrs Sürül have held an *Aufenthaltsbewilligung*.

The card held by the plaintiff's husband is endorsed with the following clause: 'Valid only for study/training purposes. Work allowed only during summer holidays and only for activities for which a work permit is not required ... allowed in addition to studies. Up to 16 hours' work per week permitted as an occasional worker with Messrs Schoeller'. For the employment just referred to, Mr Sürül, holding as he does a valid permit for occasional work, is insured against accidents at work with the Papiermacher-Berufsgenossenschaft (Paper-Making Trade Employers' Liability Insurance Association), [9] and the contributions are paid exclusively by his employer. However, Mr Sürül is not

8 — See Paragraph 3(1) and Paragraph 56 of Book VI of the *Sozialgesetz*.

9 — As required by Paragraph 539(1)(1) of the *Reichsversicherungsordnung* (Social Insurance Code).

required to contribute to compulsory sickness and invalidity insurance. Because his pay is below the minimum subsistence level (as defined by the Law on income tax), Mr Sürül — the Sozialgericht observes — receives some of the income necessary to meet the cost of maintaining his family from his family of origin.

Mrs Sürül's *Aufenthaltsbewilligung* is endorsed with the following restriction: 'The taking up of work and/or the carrying-on of a trade is not permitted. Residence to be linked with husband's residence'.

Since giving birth in September 1992, the plaintiff has received the benefits provided for by Paragraphs 10 and 11a of the BKGG, namely an allowance for dependent children of DM 70, and, since January 1993, an additional amount payable to people with low income.

In December 1993 the BfA decided, with effect from 1 January 1994, to withdraw the abovementioned allowance on the ground that Mrs Sürül, not holding as from that date an *Aufenthaltsberechtigung* or an *Aufenthaltserlaubnis*, would no longer fulfil the legal requirements (see point 11 above). [10] Then, on 14 March 1994, the BfA also withdrew the additional payment for dependent children, stating that it was unavailable in the absence of entitlement to the allowance.

On 14 June 1994 the BfA rejected as unfounded the objection lodged by Mrs Sürül to the two abovementioned decisions. Mrs Sürül then brought proceedings for annulment of the decision of 14 June 1994 before the national court.

14. In its order for reference, the Sozialgericht observes that the plaintiff was unable to rely on Paragraph 42 of the BKGG in order to secure the same treatment as German citizens or, therefore, disapplication of Paragraph 1(3) of that Law (see point 11, above). In fact,

10 — In particular, as the representative of the German Government made clear at the hearing, the fact that Mrs Sürül held an *Aufenthaltsbewilligung*, of limited duration and non-extendible, would deprive of its *habitual* nature the residence on German territory of the partner responsible for educating the child, required by Paragraph 56(3) of Book VI of the Social Security Code as a precondition for entitlement to have the three-year period computed as a period of compulsory contribution.
For her part, the plaintiff made it clear in her observations to the Court that following the period at issue, and specifically as from 4 October 1996, the Sürül spouses were granted an *Aufenthaltsberechtigung* (that is to say a definitive permit — see point 8 above) under the second paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980. Under that provision, a Turkish citizen who has undergone vocational training in a Member State, in which one of his parents, likewise of Turkish nationality, has been lawfully employed for at least three years, is entitled — regardless of the duration of the residence in the host State — to respond to any offer of employment and consequently to obtain an extension of his authority to reside in that State (see Case C-355/93 *Eroglu* [1994] ECR I-5113, paragraphs 17 to 20).

Paragraph 42, which appears to transpose into national law, in the area at issue here, the principle of non-discrimination laid down in Article 6 of the Treaty, protects only citizens of the other Member States, refugees and stateless persons. Mrs Sürül does not fall into any of those categories.

However, if the Court were to interpret the relevant provisions of Decision No 3/80 as meaning that a person in the plaintiff's position falls within the scope of the measure in question *ratione personae* and *ratione materiae* and is entitled to be treated in the same way as German citizens, then Mrs Sürül's claim for the requested family benefits under the same conditions as apply to German citizens will have to be upheld, and she will thus receive them as if her entitlement were not subject to the requirements laid down by Paragraph 1(3) of the BKGG.

The arguments of the parties to the main proceedings and the observations submitted by the Member States involved and the Commission

15. In the *plaintiff's* view, this case is one to which Decision No 3/80 applies, pursuant to Article 4(1)(h) of the measure cited above (see point 4). Mrs Sürül seems to think that the decision in question is applicable to her circumstances *ratione personae* as well, and so firmly holds that view that she has not submitted observations on that point.

16. As regards the principle of equal treatment laid down in Article 3(1) of Decision No 3/80, the plaintiff maintains that that provision meets the requirements laid down by the case-law of the Court of Justice for it to be directly effective. Having regard to the literal wording, the purpose and nature of both Article 3(1) of Decision No 3/80 and of the agreement with which that provision is linked, clear and precise obligations flow from Article 3(1), the implementation and effects of which are not conditional upon the adoption of further measures.

In particular, the provision in question imposes on each Member State a general prohibition of treating Turkish citizens less favourably that the citizens of other Member States: a prohibition in the light of which the national courts are required to provide adequate judicial protection for private individuals. Therefore, the indirect reference made by the BKGG to *nationality* (by excluding certain types of residence authorisation) as well as to *residence* as a criterion for entitlement to the allowance for dependent children is unlawful.

The fact that in *Taflan-Met* [11] the Court held that Articles 12 and 13 of Decision No 3/80 did not have direct effect is irrelevant. The Court — Mrs Sürül goes on to say — in fact recognised at that time that at least some of the provisions of that decision are clear and precise.

17. *In the alternative*, the plaintiff refers to the provisions of Article 9 to the EEC-Turkey Agreement, pursuant to which 'the Contracting Parties recognise that within the scope of this Agreement ... any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article [6 (previously 7)] of the Treaty'. On the basis of analogous application of the principles expounded by the Court in *Pabst and Richarz* — with reference to another Association Agreement concluded with the EEC (with Greece on 9 July 1961) — [12] Mrs Sürül submits that Article 9 of the EEC-Turkey Agreement, in its own context, performs the same function as the principle of non-discrimination laid down in Article 7 of the Treaty, imposing a clear and precise obligation which is not conditional upon the adoption of any further measure in order to be implemented and take effect.

The right to the same treatment as workers of the nationality of the host Member State, which is vested in Turkish workers employed in the Community and members of their families in relation to social security, therefore derives directly from the abovementioned Article 9, regardless of the direct effect of Article 3(1) of Decision No 3/80.

18. Finally, Mrs Sürül refers to the recent judgment of the European Court of Human Rights in the case of *Gaygusuz*. [13] According to that decision, the prohibition of discrimination regarding the enjoyment of financial rights, upheld by Article 14 in conjunction with the first paragraph of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'), is violated whenever a State refuses to grant a right of that kind (such as the right to an advance payment on account of a pension by way of emergency assistance provided for — as a benefit under an only partially contributory scheme — by the Austrian legislation on unemployment insurance) merely because the applicant is not a citizen of the State in question.

The plaintiff claims, in similar terms, that she is entitled not to be discriminated against on grounds of her nationality with regard to enjoyment of the allowance and additional benefit for her dependent children for which the BKGG provides. That right — like that

11 — Case C-277/94 *Taflan-Met and Others* [1996] ECR I-4085.

12 — Case 17/81 *Pabst and Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331, paragraphs 25 to 27, in which the Court inferred from the wording of Article 53(1) of the EEC-Greece Association Agreement, whose wording is similar to that of Article 95 of the Treaty, and from the objective and nature of the agreement in question, that, under the association between the Community and Greece, Article 53(1), fulfilled 'the same function as that of Article 95. It forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonisation of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law'.

13 — Judgment of 16 September 1996, *Gaygusuz* v *Austria* (European Human Rights Reports, 1997, p. 364).

of her fellow national Mr Gaygusuz in the case just cited — constitutes a fundamental right which, as such, forms an integral part of the general legal principles of which this Court is required to ensure observance.

19. A view similar to that of the plaintiff is taken by the *Commission*. The dictum of the Court in *Taflan-Met* is to be understood as meaning that no direct effect attaches only to the provisions of Decision No 3/80 which were relevant to that case, which in fact called for implementation measures, and it is no accident that such measures were specifically provided for in the proposal for an implementing regulation (in Chapter 3). However, that conclusion cannot be extended outright to all the provisions of Decision No 3/80.

20. As regards the answers to the two remaining questions on which a preliminary ruling is sought, the Commission, at the request of the Court, presented at the hearing its observations on the possible impact of the judgments in *Stöber and Piosa Pereira* [14] and *Merino García*, [15] both of which were delivered after written observations were lodged in these proceedings.

According to the Commission, in those judgments the Court established the principle that the status of worker is required in the particular area of social security considered on each occasion. Consequently, Mrs Sürül is not one of the persons covered by Decision No 3/80 either as a worker or — as regards the period following the three years spent educating her child — as a member of a worker's family. However, since in *Stöber and Piosa Pereira* and *Merino García* this Court found that there was indirect discrimination to the detriment of workers enjoying rights, holding that the relevant provisions of domestic law were incompatible with Article 48 or Article 52 of the Treaty, the Court should in this case state that, to the detriment of Mrs Sürül, there has been a breach of the prohibition of discrimination on grounds of nationality laid down in Article 3(1) of Decision No 3/80 (or, alternatively, in Article 9 of the EEC-Turkey Agreement). [16]

21. The BfA, the defendant in the main proceedings, has not submitted observations to the Court; but the German Government has. Whilst recognising that the judgment in *Taflan-Met*, cited above, does not expressly concern the direct effect of Article 3(1) of Decision No 3/80, the *German Government* observes that, in paragraphs 33 and 37 of that judgment, [17] the Court stated, in general terms, that by its nature Decision No 3/80 is intended to be supplemented and implemented in the Community by a subsequent act of the

14 — See Joined Cases C-4/95 and 5/95 [1997] ECR I-511.

15 — See Case C-266/95 [1997] ECR I-3279.

16 — According to the Commission, that prohibition applies to the present dispute, in that the working conditions of Turkish workers employed in the Community fall within the scope of the agreement, by virtue of Article 37 of the additional protocol. The term 'working conditions' which, according to the case-law of this Court, is to be interpreted extensively and includes situations governed by social security provisions, also covers the right to benefits such as dependent child allowances.

17 — See footnote 30 below and the corresponding part of the main text.

Council and, although some of its provisions are clear and precise, it cannot be applied so long as those supplementary and implementing provisions have not been adopted. Since the Council has not adopted the proposal for an implementing regulation (see point 6 above), the provisions of Decision No 3/80 — including Article 3(1) — therefore lack direct effect. The first question referred to the Court of Justice by the Sozialgericht should therefore be answered in the negative.

22. That conclusion is supported by the *Austrian, French, United Kingdom and Netherlands Governments.*

In particular, the Netherlands authorities refer to the settled case-law of this Court to the effect that the operative part of an act (including an interpretative judgment delivered under Article 177 of the Treaty) cannot be separated or interpreted separately from the statement of reasons. That principle should be applied in considering how *Taflan-Met* is to be taken into account in answering the first preliminary question before the Court today.

23. The French and United Kingdom Governments also observe that — in contrast to the cooperation agreements concluded by the EEC with Morocco and Algeria (see below, point 43) — the EEC-Turkey Agreement and the additional protocol thereto do not contain *in relation to social security* any general principle of equal treatment applicable to Turkish workers and members of their families, the Contracting Parties having agreed solely to be guided by Articles 48, 49 and 50 of the Treaty in order gradually to achieve free movement of workers between them. The Contracting Parties did not, however, refer to Article 51 of the Treaty, which constitutes the legal basis for Regulation No 1408/71 and in general for the coordinating measures necessary for introducing free movement for workers, which the Council adopts in relation to social security. The matter in hand thus falls outside the scope of the EEC-Turkey Agreement. Moreover, the wording used in setting out the principle of equality of treatment in the EEC-Morocco and EEC-Algeria Agreements (see below, footnotes 42 and 43) differs substantially from that of Article 3(1) of Decision No 3/80.

Furthermore, according to the French authorities, the proviso in Article 3(1) concerning the special provisions of the decision means that the provision at issue — even if it were to be regarded as clear and precise — cannot be said to be *unconditional*, in the sense laid down in the case-law of the Court.

24. The Netherlands Government has also given its views on the inferences which the plaintiff seeks to draw, for the purposes of the preliminary ruling sought in these proceedings, from the abovementioned judgment of the European Court of Human Rights in *Gaygusuz* (see point 18 above). Contrary to Mrs Sürül's assertion, Article 14 of the Convention is applicable, in conjunction with Article 1(1) of the First Protocol to the Convention, to the enjoyment of rights in respect of social security benefits only if the latter form part of a contributory scheme. In the main proceedings, the Sozialgericht therefore

has to decide whether or not the allowance and supplementary benefit for dependent children to which the plaintiff's claim relates form part of a contributory scheme and, if so, whether the BfA's refusal to award those benefits, in the circumstances of this case, involves unjustified discrimination.

25. The German Government has submitted, by way of alternative, observations on the second and third questions from the national court, maintaining that — even if it is conceded that the principle of equal treatment laid down in Decision No 3/80 has direct effect — Mrs Sürül is not one of the persons to whom that measure applies.

In the first place, the plaintiff does not have the status of 'worker' subject to the legislation of a Member State within the meaning and for the purposes of the first indent of Article 2 of Decision No 3/80. Whilst recognising that the concept of 'worker' defined in Article 1(b) of Decision No 3/80 derives essentially from the application of criteria based on social security law rather than employment law in the strict sense, the German Government submits that the definitions in Article 1(b)(i) and (ii) should be construed not simply as alternatives but as being applicable to specifically identified autonomous systems. The Court, in its view, has recently confirmed that approach — with reference to the analogous provision contained in Article 1(a) of Regulation No 1408/71 [18] — in the abovementioned cases of *Stöber and Pisoa Pereira* and *Merino García*.

26. As regards family benefits, the German legislation has established a 'social security scheme applicable to all residents' regardless of their occupational status (and subject to exceptions based on the legislation concerning aliens' residence). In other words, the right to those benefits does not depend on compulsory or optional membership of a social insurance scheme. Nevertheless, for the purpose of paying family benefits on the basis of the German legislation, the only persons who — again according to Decision No 3/80 — could be regarded as workers are Turkish citizens who are 'insured against some other contingency specified in the Annex under a scheme for employed persons, either compulsorily or on an optional continued basis' (see Article 1(b)(ii), second indent, of Decision No 3/80).

It is true that, for the purpose of applying the provision last referred to, the Annex to Decision No 3/80 — although indicating in part II the 'other contingencies' against which the 'worker' must be insured under a social security scheme applicable to all residents, under the Danish, Irish and United Kingdom schemes — does not set out particular arrangements for applying the German legislation. However, that lacuna is — in the opinion of the German Government — to be supplied by means of interpretation, by recourse to Article 25(1) of Decision No 3/80, according to which 'for the purpose of implementing this Decision, Annexes I, III and IV to Regulation (EEC) No 1408/71 shall be applicable'.

18 — See footnote 5 above and the corresponding part of the main text.

Thus, the present case will be covered by point I(C) of Annex I to Regulation No 1408/71. [19]

27. Mrs Sürül is regarded as compulsorily insured only under the statutory invalidity and old-age scheme as a result of account being taken of the period (from 1 October 1992 to 30 September 1995) devoted to the education of her child, during which, by operation of law, she is deemed to have satisfied the obligation to pay contributions. Not being 'compulsorily insured against the risk of unemployment' and not receiving, by virtue of such insurance, 'cash benefits under sickness insurance or comparable benefits' the plaintiff dos not meet the requirements of Annex I(C) to Regulation No 1408/71, indirectly referred to in Article 1(b)(ii), second indent, of Decision No 3/80. That decision is consequently inapplicable to a person in Mrs Sürül's position.

Whilst conceding that the opposite result could be arrived at on the basis of an interpretation designed to allow application in the alternative of Article 1(b)*(i)* of Decision No 3/80, the German Government maintains that such an approach should be ruled out since, contrary to the clear intention of the Association Council, it would render the provisions of the *second indent* of Article 1(b)(ii) superfluous.

28. Finally — the German authorities argue — Mrs Sürül does not fall within the category of persons covered by Decision No 3/80 or by the second indent of Article 2, that is to say, she is not a member of the family of a Turkish worker subject to the legislation of a Member State, who resides in the territory of that Member State. Although Mr Sürül was engaged at the material time in a part-time job in addition to his university studies, that activity did not, under domestic legislation, give rise to any obligation to pay insurance contributions in respect of unemployment, sickness or old age. The plaintiff's spouse was insured only against accidents at work by virtue of contributions paid entirely by his employer.

Since the definitions in Article 1(b)(i) and (ii) of Decision No 3/80 apply to specific and independent risks and schemes — the German Government concludes — Mrs Sürül is to be classified as a worker only for the purpose of applying the provisions of Decision No 3/80 which concern benefits in respect of accidents at work, but not those governing other branches of the German social security scheme for employed persons, including the branch of family benefits.

29. In the event, therefore, of the Court's answering the questions from the Sozialgericht to the effect contended for by the

19 — Annex I to Regulation No 1408/71, entitled 'Persons covered by the regulation' states in point I ('Employed persons and/or self-employed persons (Article 1(a)(ii) and (iii) of the regulation)'), under C:
'Germany
If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the regulation is a German institution, then within the meaning of Article 1(a)(ii) of the regulation:
(a)"employed person" means any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits; ...'.

plaintiff and the Commission, repudiating the position that it adopted previously in *Taflan-Met*, the French, United Kingdom and Netherlands Governments maintain in the alternative that in these proceedings the conditions are fulfilled for this Court to limit the temporal effects of its interpretative ruling, allowing the Community provisions at issue in this case to be relied on only by applicants for the family benefits at issue who have resorted to proceedings before a national court or have availed themselves of equivalent remedies against the competent authorities of the Member State concerned prior to the date of publication of this Opinion or of the judgment of the Court of Justice.

Legal analysis

(i) *Jurisdiction of the Court*

30. Let me first of all point out, incidentally, that the Court has already clarified how provisions adopted by the Council set up under an association agreement concluded between the Community and a third country, in implementation of that agreement, form an integral part of Community law in the same way as the agreement and with effect from the latter's entry into force. The jurisdiction of the Court to give rulings under Article 177 of the Treaty on the agreement, as an act of a Community institution, thus extends to interpretation of the provisions in question: thereby contributing to ensuring uniform application of Community law in all the Member States. [20]

Accordingly, this Court certainly has jurisdiction to give preliminary rulings on the interpretation of provisions of Decision No 3/80.

(ii) *The answer to the first preliminary question*

31. By asking for interpretative guidance concerning Article 3(1) of Decision No 3/80, the Sozialgericht has confronted the Court with the problem of precisely defining the terms of the judgment in *Taflan-Met*, cited above. And the problem must necessarily, in my opinion, be dealt with now: the national court did not expressly formulate its questions in that way solely because the judgment in *Taflan-Met* was delivered after the request for a ruling was submitted. [21]

20 — See, among many, Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 8 to 11.

21 — The authority to resubmit to the Court a question on which it has already given a preliminary ruling is available not only to the national court to which the ruling was addressed (which might encounter difficulties in understanding or applying it — see, among many, the order of 5 March 1986 in Case 69/85 *Wünsche* v *Germany* [1986] ECR 947 and the judgment in Case C-169/91 *B&Q* [1992] ECR I-6635), but also to any other judicial authority upon which the earlier decision is not binding (see Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191, paragraphs 9 to 17, and Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraph 12).
Moreover, it is true that, in order to resolve any difficulties deriving from the sense and scope of an earlier judgment, Article 40 of the EEC Statute of the Court of Justice lays down a specific procedure, which may be followed 'on application by any party or any institution of the Community establishing an interest therein'. According to settled case-law of this Court, Articles 38 to 41 of the Statute, which exhaustively list the special appeal procedures under which the effectiveness of judgments of the Court may be challenged, do not apply to judgments given by way of preliminary ruling, in view of the lack of parties to the case (see the order of 18 October 1979 in Case 40/70 *Sirena* v *Eda* [1979] ECR 3169 and the order of 5 March 1986 cited in footnote 14 above). Above all, the fact that that procedure may be commenced on application by an institution does not mean that the Community Court does not retain jurisdiction to establish the meaning and scope of an earlier judgment where such an interpretation is necessary in order to give judgment in the proceedings before it (see Case C-412/92 P *Parliament* v *Meskens* [1994] ECR I-3757, paragraph 35).

32. In *Taflan-Met*, the Court had to deal with the interpretation of Articles 12 and 13 of Decision No 3/80 concerning, respectively, invalidity benefits and old-age and death benefits. [22]

In reply to the first question from the national court in that case, the Court of Justice held that — in the absence of express provisions on the matter — Decision No 3/80 entered into force on 19 September 1980, the day of its adoption, and has been binding on the Contracting Parties since then. [23] The decisions of the Association Council — the Court held — implement the objectives of the EEC-Turkey agreement, are therefore directly connected with it, and have the effect of binding the parties to that international instrument as a result of Article 22(1) thereof. [24] Consequently, the Court added, 'if those parties were to withdraw from that commitment [to be bound by the decisions adopted], that would constitute a breach of the Agreement itself'. [25] In paragraph 20 of the judgment the Court added 'consequently ... the binding effect of the decisions of the Association Council cannot depend on whether implementing measures have in fact been adopted by the Contracting Parties' or in particular on the adoption by the Council of the European Union — in accordance with Article 2(1) of the Agreement on measures and procedures required for implementation of the EEC-Turkey agreement [26] — of the acts necessary for application of the measures (decisions and recommendations) adopted by the Association Council in those sectors which, under the Treaty, are within the competence of the Community.

33. In the second question referred to the Court of Justice, the national court in the *Taflan-Met* case asked '(b) If the first question is answered in the affirmative, are Articles 12 and 13 of Decision No 3/80 sufficiently

22 — In *Taflan-Met* the plaintiffs in the four main actions before the Arrondissementsrechtbank, Amsterdam, were three Turkish citizens residing in Turkey, the spouses of other Turkish nationals who had been employed in various Member States, including the Netherlands, and a Turkish worker residing in Germany, earlier employed in the Netherlands and then in Germany, where he became unfit for work. Following the deaths of their husbands, the three plaintiffs applied for — and obtained from the competent German and Belgian institutions — a widow's pension in the Member States in which the husband had worked. The Netherlands authorities, however, rejected such applications on the ground that the spouses of the applicants had died in Turkey, and under Netherlands law a person affiliated to the scheme or his beneficiaries are entitled to a benefit only if the risk insured against materialises when the person concerned is subject to that legislation. And the plaintiff in the fourth national action, who had applied for an invalidity pension both in Germany and in the Netherlands, was refused it by the competent Netherlands institution (but not by the German one) on similar grounds: the applicant's incapacity for work occurred when the person concerned was no longer employed in the Netherlands and, therefore, he was not subject to Netherlands legislation.
In the opinion of the national court, the plaintiffs in the main proceedings — although not insured within the meaning of the relevant provisions of national law — could have been entitled to the allowances for which they applied in the Netherlands by virtue of Decision No 3/80 and, in particular, Articles 12 and 13 thereof. Under Articles 12(b) and 13 of Decision No 3/80, relating to invalidity benefits, old-age benefits and survivors, Article 45 of Regulation No 1408/71 applies by analogy. However, under paragraph 4 of that provision (as in force on 1 June 1992, and applicable to the facts of that case) employed persons who were subject to a national insurance scheme but were no longer covered when the insured event materialised were regarded as still insured if they were covered under the legislation of another Member State or could claim entitlement to benefits under the legislation of another Member State. Since the plaintiffs in other Member States were granted the right to invalidity and death benefits, they could in principle also claim entitlement to the benefits at issue in the Netherlands under the law on insurance against incapacity for work and the general law covering widows and orphans.

23 — See Case C-277/94 (cited in footnote 11 above), paragraphs 17 to 22.

24 — The text of Article 22(1) of the EEC-Turkey Agreement appears in footnote 1 above.

25 — See Case C-277/94 (cited in footnote 11 above), paragraph 19.

26 — See Decision No 64/737/EEC on measures and procedures required for the implementation of the agreement creating an association between the European Economic Community and Turkey (Journal Officiel 1964, p. 3703).

clear and precise to be capable of being applied directly without the need for further implementing measures, as provided for in Article 32 of Decision No 3/80?'

The Court seems to have interpreted that question in broader terms, deeming it to be intended to ascertain whether direct effect attaches to the provisions of Decision No 3/80 in general '*and more specifically* Articles 12 and 13'. [27] The Court observed that a comparison of the decision in question with Regulations Nos 1408/71 and 574/2 showed that the former 'does not contain a large number of precise, detailed provisions, even though such were deemed indispensable for the purpose of implementing Regulation No 1408/71 within the Community'. [28] Thus, for example, the Court noted that for the specific implementation of the provisions of Regulation No 1408/71 concerning the aggregation of all the periods covered by the various laws of the Member States applicable to migrant workers, it was necessary to adopt Article 15 of Regulation No 574/72. Similar supplementary implementing measures must therefore be adopted, reasoned the Court, before the principle of aggregation can be applied in the context of Decision No 3/80. [29]

After holding 'that, by its nature, Decision No 3/80 is intended to be supplemented and implemented in the Community by a subsequent act of the Council', but that the proposal for an implementing regulation had not yet been adopted, the Court concluded that 'even though some of its provisions are clear and precise, Decision No 3/80 cannot be applied so long as supplementary implementing measures have not been adopted by the Council'. [30]

34. It is important to note, however, that in the operative part of that judgment the Court held as a matter of law that 'so long as the supplementary measures essential for implementing Decision No 3/80 have not been adopted by the Council, *Articles 12 and 13 of that decision do not have* direct effect in the territory of the Member States and *are therefore not such* as to entitle individuals to rely on them before the national courts' (emphasis added).

35. In the light of the foregoing, I recognise that the argument put forward in this case by the representatives of the five national governments which had submitted observations to the Court (see points 21 and 22 above) is not in any way specious: the grounds of the decision in *Taflan-Met*, at least if interpreted merely literally, support the conclusion that *none* of the provisions of Decision No 3/80 — including therefore Article 3(1) — has direct effect in the laws of the Member States. The first question before the Court should therefore, it is argued, be answered in the negative.

27 — See Case C-277/94 (cited in footnote 11 above), paragraph 23 (emphasis added).

28 — Ibid., paragraph 30.

29 — Ibid., paragraphs 31 and 32.

30 — Ibid., paragraphs 33 to 37.

36. However, in my opinion there are good reasons for doubting the correctness of that reading of the judgment concerned. [31] Let us be clear: I do not seek to object that the (implicit) statement that Article 3(1) has no direct effect is alien to the *ratio decidendi* of the judgment in *Taflan-Met* and constitutes a mere *obiter dictum* having no practical relevance. [32]

I agree, in fact, that 'the question where, in judgments, the decisive grounds of judgment end and any *obiter dicta* begin seems to me in any case to be of secondary importance. In each case everything that is said in the text of the judgment expresses the will of the Court'. [33] That principle also derives from the fact that the rule *stare decisis* has not been incorporated in the Community judicial system. The Court does not of course fail to ensure that its case-law displays continuity and that its judgments are logically compatible and not contradictory with each other. However, the Court is not technically bound by its earlier judgments, [34] and may therefore — as far as the present case is concerned as well — give a different answer to a preliminary question dealt with in an earlier

31 — It seems to me that certain writers were over-hasty when, in relation to the *Taflan-Met* judgment, they employed terms such as completely illogical, *per incuriam*, or simply *mistaken* on the question of equal rights in matters of social security (see S. Peers, 'Equality, free movement and social security', *Eur. Law. Rev.*, 1997, p. 342, in particular pp. 350 and 351).

32 — On reflection, a hypothetical decision of the Court on the direct effect of the principle of equal treatment (or of provisions of Decision No 3/80 other than Articles 12 and 13) would have been not only arbitrary but even pointless in the context of the facts of that case: not only did the questions from the national court not refer to Article 3(1) of the decision in question but the Court of Justice itself did not consider it appropriate to widen the scope of its judgment — a course which it does not hesitate to take in appropriate cases — by providing interpretative guidance (even if not asked for it) in relation to that provision as well. By taking that course, the Court demonstrated that it agreed with the position taken by the national court to the effect that, in view of the subject-matter of the dispute, Article 3(1) was not relevant to the decision to be given. For another example of a preliminary ruling in which the operative part was drafted in more restrictive terms than the relevant part of the grounds of the judgment, see Case 14/83 *von Colson and Kamann* v *Landnordrein-Westfalen* [1984] ECR 1891. The Court held in that case, *inter alia*, that 'it is for the national court to interpret and apply the legislation adopted for the implementation of the directive [Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions] in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law'. Slightly different wording is used in paragraph 26 of the same judgment, which referred to the obligations incumbent upon the national court 'in applying *the national law and in particular* the provisions of a national law specifically introduced in order to implement Directive 76/207' (emphasis added). On the basis of that broader approach, it was inferrable that *all* national provisions — including those predating the adoption of a directive or in any event not specifically adopted for its implementation — must where possible be interpreted in the light of the text and purpose of the directive in question. That interpretation was rejected in the later case of *Marshall* by Advocate General Slynn, who preferred to abide by the approach taken in the operative part of the *von Colson* judgment rather than the *obiter dictum* in paragraph 26 (see his Opinion of 18 September 1985 in Case 152/84 [1986] ECR 725, particularly at 732 and 733). Incidentally, the *obiter dictum* in question faithfully expressed the thinking of the Court, as it finally emerged in the later judgment of 13 November 1990 in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, in which the Court referred to the obligation of the national court to interpret its national law in the light of the Community directive relevant to the subject-matter of the dispute 'whether the provisions in question were adopted before or after the directive'. See also A. Arnull, 'Owning up to fallibility: Precedent and the Court of Justice', *Common Market Law Review*, 1993, p. 247, in particular at 250 and 251.

33 — These are the words of Advocate General Roemer in his Opinion of 7 June 1962 in Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213, at p. 242 in particular. The distinction between *ratio decidendi* and *obiter dicta* is, on the other hand, important in common law jurisdictions since only the former can bind other courts in the future (see Arnull, op. cit. — footnote 32 — p. 249).

34 — See ibid., pp. 248 and 249 (where there are also further bibliographical references) and H. G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, Deventer, 1992 (5th edition) pp 96 and 495. The principle enunciated in the text explains, for example, why national courts are not precluded from resorting to the cooperation procedure under Article 177 of the Treaty in order to obtain from the Court of Justice an interpretation of a point of Community law already resolved by an earlier decision of the Community Court (see footnote 21 above and the corresponding part of the text; see also Case 28/67 *Molkerei-Zentrale Westfalen* v *Hauptzollamt Paderborn* [1968] ECR 143, in which the Court, at the request of the national court, confirmed a judgment which it gave two years earlier under Article 177 and stated that there were 'no grounds for giving a fresh interpretation of the first paragraph of Article 95 of the Treaty' — ibid., p. 155).

decision, if such a result is justified by new matters brought to its attention in the later proceedings. [35]

37. For my part, therefore, I am inclined not to attach too much importance to the question of whether or not in *Taflan-Met* the Court actually excluded the direct effect of the principle of equal treatment laid down in Article 3(1) of Decision No 3/80. Even if the reconstruction of the view incidentally expressed by the Court in that judgment made by the governments which have submitted observations were correct, the position adopted by the Court could be reviewed, provided that the approach taken was based on appropriate and logical grounds and conformed with the relevant precedents.

38. Now, the arguments for direct effect of Article 3(1) of Decision No 3/80 in my view are stronger than those put forward in support of the opposite conclusion. [36] In all frankness, I cannot fail to point out that the Court's position (provided that the above literal interpretation is correct) coincides with the one taken by me in my Opinion in *Taflan-Met*. Having drawn attention, first, to the incompleteness of the prescriptive contentive Decision No 3/80 and, secondly, to the wish of the author of the measure — expressed in the final part of Article 32 (see points 6 and 33 above) — that its provisions should be implemented by means of further measures, I expressed the view that, for the application of Decision No 3/80 in the Community, it was necessary first for precise and detailed implementing and supplementary provisions to be adopted. 'In fact, it seems to me', I observed, 'that it would be impossible to envisage a social security system operating without a specific framework of implementing rules ... a whole series of rules governing the complex area'. [37]

39. In that Opinion, however, I dwelt (as well as upon the content of Decision No 3/80 and its important financial repercussions) on the need to adopt proper measures for the implementation of that decision, putting forward an argument very different from that advanced in this case by the five Member States which have submitted observations to the Court. I argued, in fact, that — in view of the silence of the contracting parties regarding the date of entry into force of the measure and since there was no other indication of their unequivocal intention to deem it to be in force as

35 — See the judgment in Case 14/86 (cited in footnote 21 above), paragraph 12. The cases in which the Court has expressly departed from its earlier case-law are as few as they are celebrated (see Case C-10/89 *HAG GF* [1990] ECR I-3711, relating to trade marks, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, regarding measures having effect equivalent to quantitative restrictions on imports, and Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, concerning the importance of the distinction drawn in national social security systems between rights acquired in person and rights derived through others for the purposes of determining whether numerous provisions of Regulation No 1408/71 are applicable *ratione personae*).

36 — V. P. Mavridis, 'Étrangers sans prestations sociales?', *l'Observateur de Bruxelles*, No 20/1996, p. 29, in particular at 31, according to which the conclusion at Article 3(1) of Decision No 3/80 may be relied on in legal proceedings as fully in line with the case-law of this Court.

37 — Opinion in Case C-277/94 (cited above, footnote 11), point 12.

from the date of its adoption — Decision No 3/80 could not be regarded as having entered into force, and therefore could not be seen as forming part of Community law.

However, the problem of the entry into force of Decision No 3/80 remains — it need hardly be pointed out — an issue separate from that of the possibility of reliance on that measure in legal proceedings. Moreover, in *Taflan-Met* I made the following observation: 'In this case, the need for implementing measures determines not only the application of a rule that is already in force but the actual entry into force of the rule. This case differs from those already considered by the Court in which it ruled that measures to supplement or implement a decision of the Association Council are not needed where the provisions of that decision are sufficiently clear and precise to be able to be applied immediately. Those cases in fact involved decisions that had already entered into force. And it is plain that if the rule is already in force and further specification is not required, it may take effect immediately'. [38]

40. It is precisely on the basis of those considerations that, in my opinion, it is necessary to reject the purely literal interpretation of the judgment in *Taflan-Met* proposed by the German Government and the other Member States (see point 35 above) to the effect that neither Article 3(1) nor any other provision of Decision No 3/80 has direct effect, despite the fact that the decision entered into force on the day of its adoption. Thus interpreted, the judgment of the Court would mark a departure from its settled case-law according to which — in order to avoid pointless proliferation of the already copious Community legislation and extending the area of effective judicial protection of individuals, as citizens of the contracting parties — it is unnecessary formally to transpose decisions of the Association Council in cases in which their 'internal effect in Community law is inherent in the measure itself or is achieved by other means' and the text of the provision therefore allows the national court to apply it immediately. [39] If this Court had really intended to depart from that approach, clearly set out in its earlier decisions, it would — I believe — have said so in so many words. In *Taflan-Met*, however, the Court adhered to its earlier case-law, expressly rejecting the argument raised by the defendants in the main proceedings and by the intervening national governments to the effect that the binding effect of the decisions of the Association Council depended upon actual adoption, by the contracting parties, of the appropriate implementing measures (see point 32 above).

41. Above all, if *Taflan-Met* were to be understood as construed by the national governments in this case, it would have to be assumed that the impossibility of relying on Decision No 3/80 before the national courts derived from a rule that its various provisions were 'inseparable'. In other words, it would have to be presumed that all the provisions in question were, as a whole, devoid of direct applicability; and that inapplicability would be based on a presumption, which would not

38 — Ibid., footnote 27.

39 — See Case 30/88 *Greece* v *Commission* [1989] ECR 3711, paragraphs 10 to 17, and the Opinion delivered on 4 July 1989 by Advocate General Tesauro in that case (p. 3723, point 9).

allow an interpreter to verify which provisions were and which provisions were not capable of having direct effect. And such a result would ultimately go against the earlier case-law of this Court, to the effect that it is necessary to verify in each case whether individual provisions of an international agreement or a decision adopted by the Association Council, at issue in this case, are merely programmatic in character [40] or, in contrast, embody clear and precise obligations, whose effect is direct because it is not dependent on the adoption of further measures by the contracting parties. [41] In the latter case, the individual concerned will be able to secure protection of his rights by the national courts. The earlier case-law of this Court has clearly been guided by the need to ensure, as far as possible, the immediate protection of rights deriving from the international agreement and the legislation adopted under it, once the agreement has entered into force. This is a requirement of protection which the Court has interpreted in accordance with the principles characterising a community governed by the rule of law. In this case — the Court has held — we are dealing with a decision which has already entered into force: how therefore could there be any justification for the national court being unable immediately to apply provisions which this Court has expressly and unequivocally held to be covered by the rule of direct effect? As the Commission has observed, there is nothing in *Taflan-Met* to support the view, and still less the presumption, that the Court intended to depart from its earlier case-law — which, on the contrary, is expressly referred to in paragraphs 24 and 25 of the judgment.

40 — See Case 12/86 *Demirel* v *Stadt Schwäbish Gmünd* [1987] ECR 3719. The Court stated that Article 12 of the EEC-Turkey Association Agreement (under which the contracting parties agree to be guided by Articles 48, 49 and 50 of the Treaty for the purpose of progressively securing freedom of movement for workers between them) and Article 36 of the additional Protocol (under which freedom of movement is to be secured in progressive stages in accordance with the principles set out in Article 12 of the Agreement between the end of the 12th and the 22nd year after the entry into force of the Agreement, in accordance with rules to be decided upon for that purpose by the Association Council) essentially serve to set out a programme. Moreover, the Court held that Article 7 of the Agreement (under which the contracting parties are to adopt all measures of a general or particular nature to ensure fulfilment of the obligations arising from the Agreement and are to refrain from any measures liable to jeopardise the attainment of the objectives of the Agreement) cannot directly confer on individuals rights which are not already vested in them by other provisions of the Agreement.

41 — See Case C-192/89 (cited in footnote 20 above) which is concerned with: (i) Article 2(1)(b) (under which after five years' lawful employment in a Member State a Turkish worker enjoys free access to any paid employment of his choice) and Article 7 (under which the Member States and Turkey may not introduce new restrictions on access to employment for workers and members of their families who are resident in their respective territories and in lawful employment) of Decision No 2/76 of the Association Council adopted in order to implement the EEC-Turkey agreement; and (ii) Article 6(1) (under which Turkish workers registered as belonging to the labour force of a Member State enjoy in that State free access to any paid employment of their choice after four years' lawful employment) and Article 13 (containing a standstill clause similar to that in Article 7 of Decision No 2/76) of Decision No 1/80 of the Association Council concerning development of the association. See also the judgment in Case C-355/93 (cited in footnote 10 above), paragraphs 17 to 20, concerning the interpretation of the second paragraph of Article 7 of the abovementioned Decision No 1/80 of the Association Council.

42. That said, it is difficult to see how the general statements made in paragraphs 33 and 37 of that judgment, to the effect that Decision No 3/80 is not capable of immediate application in the absence of additional implementing measures, can be in any way linked with the provisions of Article 3(1) of that decision (which, after all, is the only provision relevant to the decision to be given in the main proceedings).

The principle laid down by Article 3(1) of the decision is simply the principle of equal

treatment. That principle — in the same way as prohibitions of discrimination on grounds of nationality laid down by the Treaty (for example in Articles 6, 48(2), 95 and 119) — does not need further measures for its implementation. That is corroborated by the fact that the proposal for an implementing regulation contains no provision implementing Article 3(1). The same must be said of Regulation No 574/72, which laid down arrangements for implementing Regulation No 1408/71: it contains no provisions for application of the principle of equal treatment laid down in Article 3(1) of the latter regulation.

Furthermore, none of the national governments which submit that Decision No 3/80 lacks direct applicability in its entirety, relying in support on *Taflan-Met*, has been able to indicate what specific additional measures should be adopted to give effect to the principle of equal treatment.

43. It should be added that this Court has already indicated that the principle of equal treatment has direct effect, in relation to the similar provisions of Article 39(1) of the EEC-Algeria Cooperation Agreement [42] and Article 41(1) of the EEC-Morocco Cooperation Agreement: [43] the text of those provisions, contrary to the contention of the United Kingdom and French authorities, is in terms not dissimilar from those of Article 3(1) of Decision No 3/80.

The Court reached the conclusion that Article 41(1) of the EEC-Morocco Cooperation Agreement was directly applicable even though Article 42(1) confers on the Cooperation Council the power to adopt (within the

42 — See Case C-103/94 *Krid* [1995] ECR I-719 and Case C-113/97 *Babahenini* [1998] ECR I-183, paragraphs 17 and 18. The abovementioned Article 39(1) appears in Title III (concerning cooperation regarding labour) of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Algeria on 26 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978 (OJ 1978 L 263, p. 1). That provision states: 'Subject to the provisions of the following paragraphs (concerning aggregation of insurance, employment and residential periods completed in the various Member States, entitlement to family benefits for family members residing in Community territory and the transfer of pensions of income to Algeria), workers of Algerian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member State in which they are employed'.

43 — See Case C-18/90 *Kziber* [1991] ECR I-199, Case C-58/93 *Yousfi* [1994] ECR I-1353, and Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807, paragraphs 19 and 20. The abovementioned Article 41(1) appears in Title III (concerning cooperation regarding labour) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 26 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 (OJ 1978 L 264, p. 1). The provision in question states: 'Subject to the provisions of the following paragraphs (concerning aggregation of insurance, employment and residential periods completed in the various Member States, entitlement to family benefits for family members residing in Community territory and the transfer of pensions of income to Algeria), workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member State in which they are employed'. In those judgments, the Court observed that the objective of the EEC-Morocco Agreement, namely the promotion of comprehensive cooperation between the contracting parties, particularly regarding labour, confirms that the principle of non-discrimination laid down in Article 41(1) can directly apply to the legal situation of individuals.

first year following entry into force of the Agreement) provisions for the application of Article 41, in order to facilitate implementation of the principle of equal treatment regarding particular aspects of its application. The Court observed in that regard that the role conferred by Article 42(1) on the Cooperation Council consists 'in facilitating compliance with the prohibition of discrimination and, if necessary, in adopting the measures required for the implementation of the principle of aggregation embodied in paragraph 2 of Article 41 but it may not be regarded as rendering conditional the immediate application of the principle of non-discrimination'. [44]

An association agreement creates between the Community and the third country concerned a closer link than that provided by a cooperation agreement, [45] 'creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system'; [46] the direct effect of the principle of equal treatment must therefore *a fortiori* be upheld in the present case.

In particular, the object of the EEC-Turkey Agreement is 'to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people *[so as to] facilitate the accession of Turkey to the Community at a later date.*' [47] In pursuing those objectives, the Agreement provided for strengthened cooperation in the coordination of the economic policies of the contracting parties and established a customs union between them, to be implemented progressively. The association set up by the EEC-Turkey Agreement is characterised by a preparatory phase, a transitional phase and a final phase.

It is true that the EEC-Turkey Agreement — and in particular Article 12, which goes no further than providing that the contracting parties agree to be guided by Articles 48, 49 and 50 of the Treaty — [48] is intended to bring about the free movement of workers between the Member States and Turkey only gradually in accordance with the requirements of Community law. That consideration, however, does not in my opinion mean that the provisions intended to implement that process cannot, as a matter of principle, have direct effect. [49] Indeed, it is clear from the case-law of this Court that an 'international agreement does not necessarily have to be "long term" (in other words directed towards integration into the Community) for its

44 — See Case C-18/90 (cited in footnote 43 above), paragraph 19.

45 — Although the legal basis is the same (Article 238 of the Treaty), the purpose of cooperation agreements is more limited than that of agreements providing for an association with or future accession to the Community of the third State concerned. For example, the abovementioned EEC-Algeria and EEC-Morocco Agreements purport merely 'to promote overall cooperation between the Contracting Parties with a view to contributing to the economic and social development of [the third country] and helping to strengthen relations between the Parties' (see Article 1 of the EEC-Algeria Agreement and Article 1 of the EEC-Morocco Agreement), to that end providing for the adoption of provisions and measures in the fields of economic, technical and financial cooperation and in the trade and social fields.

46 — See Case 12/86 (cited in footnote 40 above), paragraph 9.

47 — See the preamble to and Article 2(1) of the EEC-Turkey Agreement (emphasis added).

48 — See footnote 40 above.

49 — See the Opinion of Advocate General Darmon delivered on 15 May 1990 in Case C-192/89 (cited above, footnote 20, p. I-3473), points 27 to 29.

provisions to be of direct effect.' It is sufficient if the agreement in question 'does more than merely impose reciprocal obligations on the signatory States, in other words [if] the agreement is of such a nature as or is intended to govern the legal situation of individuals'. [50]

That criterion — as indicated above — applies without distinction to the provisions of the agreement itself and to the provisions of the decisions of the Association Council established by it. The Court's dicta have already been mentioned: the provisions adopted by the Association Council give effect to the objectives laid down by the agreement and are directly linked with the latter, binding the contracting parties in the same way and forming an integral part of Community law (see point 32 above). It is thus clear that there is no basis for the argument put forward by the United Kingdom and French Governments that the area of social security falls outside the scope of the EEC-Turkey Agreement and that the principle of equal treatment at issue in this case, not directly provided for in the EEC-Turkey Agreement, is not capable of immediate application (see point 23 above).

50 — See the Opinion of Advocate General Van Gerven delivered on 6 September 1990 in Case C-18/90 (cited above, footnote 43, [1991] I-208), point 8. See also the judgment in Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, in which the Court held that the peculiar features of the General Agreement on Tariffs and Trade (GATT) — characterised by the great flexibility of its provisions, in particular those relating to the possibility of derogation, the measures to be taken in cases of exceptional difficulty and the settlement of conflicts between contracting parties — were such that the direct effect of its provisions is excluded; on the other hand, the Court recognised that the fourth ACP-EEC Convention, although characterised (in the same way as the earlier conventions and the association agreements between the EEC and the African States and Madagascar) by a great imbalance in the level of the obligations undertaken by the contracting parties — an imbalance inherent in the special nature of the convention in question — may contain provisions capable of conferring on individuals rights which they may invoke before national courts to preclude the application of conflicting national provisions.

44. Finally, as observed by the plaintiff, it does not seem to be of any importance, as far as the answer to the first question is concerned, that Article 3(1) upholds the principle of non-discrimination but does so expressly subject to special provisions of Decision No 3/80. In fact, that decision contains no provision restricting entitlement to family benefits. The proviso in Article 3(1) cannot therefore be interpreted as depriving the prohibition of discrimination of its comprehensive and unconditional character.

45. In the light of the foregoing observations — and having regard in particular to the literal wording of Article 3(1) of Decision No 3/80 and to the purpose and nature of the EEC-Turkey Agreement — it must be concluded that the provision at issue in these proceedings embodies, for the Member States, a clear, precise and unconditional obligation not to treat Turkish migrant workers or members of their families or survivors less favourably than Community citizens as regards family benefits under the social security system. If that obligation is not observed, individuals may therefore seek a judicial remedy before the national courts.

I recognise that this solution — which may extend to other areas of social security, in respect of which Decision No 3/80 likewise

contains no special provisions restricting entitlement to equal treatment — is liable to have important repercussions of a financial nature for the social security schemes of the Member States, and it does not seem to me to be entirely coincidental that the principle of non-discrimination has not been reproduced in the European association agreements with the countries of Central and Eastern Europe, [51] concluded by the Community and the Member States after delivery of the judgment in *Kziber*. [52] The fact is, however, that in the present case the Association Council, and therefore indirectly a third country, has been granted an 'authoritative voice' in coordinating the social security systems of the Member States. [53]

46. Having confirmed the availability in proceedings before the Sozialgericht of the principle of equal treatment embodied in Decision No 3/80, it is now time to consider other problems. The principle in question — *inter alia* as regards the application to Turkish workers (and people treated as such) of the social security schemes of the Member States and in the context of Decision No 3/80 — has the status of an *instrumental* provision, but not a *substantive* provision. It is therefore in relation to the application by the Member States of *other* legislative provisions to situations envisaged and regulated by the agreement that Article 3(1) imposes on them the obligation not to apply different treatment, in the absence of proper and logical justification, to their own citizens as compared with Turkish citizens residing within national territory.

Accordingly, it is necessary first to determine whether or not direct effect attaches to any other (substantive) coordinating provisions contained in the decision under review, on which the claim of the plaintiff in the main proceedings is based (without prejudice, for the moment, to the question whether Decision No 3/80 is applicable *ratione personae* to her legal situation).

A case like that of Mrs Sürül concerns, I think, a situation which can be appraised directly in relation to the obligation of equal treatment described above: the right asserted by the plaintiff to receive the family benefits at issue for the period claimed — which, undisputedly, fall within the substantive scope of Decision No 3/80 (see Article 4(1)(h)) — derives from application of the principle of non-discrimination in conjunction with the German legislation on family benefits. The finding that Article 3(1), relied on by the

51 — See the European agreements establishing associations between the European Communities and their Member States, on the one hand, and the Republic of Hungary (adopted by Council and Commission Decision of 13 December 1993, 93/742/Euratom-ECSC-EC, OJ 1993, L 347, p. 1), the Republic of Poland (adopted by Council and Commission Decision of 13 December 1993, 93/743/Euratom-ECSC-EC, OJ 1993 L 348, p. 1), the Republic of Romania (adopted by Council and Commission Decision of 19 December 1994, 94/907/Euratom-ECSC-EC, OJ 1994 L 357, p. 1), the Republic of Bulgaria (adopted by Council and Commission Decision of 19 December 1994, 94/908/Euratom-ECSC-EC, OJ 1994 L 358, p. 1), the Slovak Republic (adopted by Council and Commission Decision of 19 December 1994, 94/909/Euratom-ECSC-EC, OJ 1994 L 359, p. 1), and the Czech Republic (adopted by Council and Commission Decision of 19 December 1994, 94/910/Euratom-ECSC-EC, OJ 1994 L 360, p.1).

52 — See footnotes 43 and 44 and the corresponding parts of the main text. According to Pieters and Pizarro, the failure to include in those European agreements a prohibition of discrimination on grounds of nationality, potentially capable of being held by the Court to be directly applicable, is probably attributable to the discomfort with which the *Kziber* judgment was received in some Member States (see D. Pieters, 'Enquiry into the legal foundations of a possible extension of Community provisions on social security to third-country nationals legally residing and/or working in the European Union', in the records of the seminar *Social Security in Europe: Equality Between Nationals and Non-Nationals* (Oporto, 10-12 November 1994), Lisbon, 1995, p. 189, in particular at 232; see also S. Pizarro, 'The Agreements on Social Security between the Community and third states: legal basis and analysis', ibid., p. 105, in particular at 115).

53 — See Pieters (*op. cit.*, footnote 52, at pp. 227 and 228), who notes the significant imbalance between the commitments assumed by the contracting parties in relation to social security, drawing attention to the fact that in Decision No 3/80 no mention was even made of any coordination with the Turkish social security scheme and, moreover, the Turkish authorities do not afford reciprocal treatment to Community citizens.

plaintiff, enjoys direct effect is therefore sufficient allow Mrs Sürül to secure effective judicial protection of her right to the allowance and supplementary benefit for her dependant children, provided of course that discriminatory treatment is involved.

47. I thus come to the question whether the difference of treatment complained of by the plaintiff is objectively justified and thus does not offend against the principle of equal treatment. It may be useful to recall in that connection the principles laid down by this Court in implementation of Article 6 (formerly Article 7) of the Treaty regarding the general requirement of non-discrimination on grounds of nationality and in the specific area of equal treatment for workers. On the basis of the Court's case-law, the Member States must in principle afford foreign Community nationals the treatment accorded to their own citizens: which does not mean that different treatment of the two categories, where the situations can be legally distinguished by reference to non-arbitrary and reasonable criteria, may not prove justified and, therefore, be free of discriminatory effects contrary to Community law. [54] In particular, the general prohibition of discrimination on grounds of nationality means that the citizens of other Member States may not be treated differently from those of the host State regarding access to employment and work, with regard in particular to pay, dismissal, re-employment and social security. [55]

Moreover, as this Court has held specifically in relation to social security for migrant workers, with reference to Article 48(2) of the Treaty, 'the principle of equal treatment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result'. [56]

I refer to Article 48(2) of the Treaty because it is relevant to this Opinion: let us consider the aim pursued, in their respective areas of application, by that provision and by Article 3(1) of Decision No 3/80, and let us compare the objectives and the context of the EEC-Turkey Agreement, on the one hand, with those of the Treaty, on the other (see point 43 above). We shall see how the interpretation given by the Court to Article 48(2) of the Treaty in relation to social security may properly be extended to the principle of equal treatment laid down in Article 3(1): the latter provision, though worded differently, is in fact substantially similar in content to the corresponding provision of the Treaty. It will be remembered that, according to the case-law of this Court, 'the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country

54 — See, among many, Case 810/79 *Überschär* [1980] ECR 2747, Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593, Case 308/86 *Criminal proceedings against Lambert* [1988] ECR 4369, Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, Case C-357/89 *Raulin* [1992] ECR I-1027, and Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073.

55 — See, among many, Case 44/72 *Marsman* v *Roscamp* [1972] ECR 1243 and Case 237/83 *Prodest* v *Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153.

56 — See Case 41/84 *Pinna* v *Caisses d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 23. See also, among many, Case 152/73 *Sotgiu* v *Deutchbundespost* [1974] ECR 153, Case 61/77 *Commission* v *Ireland* [1978] ECR 417, Case C-279/93 *Schumacker* [1995] ECR I-225, and Case C-237/94 *O'Flynn* [1996] ECR I-2617. Extension of the prohibition to covert discrimination, in any form, has been affirmed by the Court in relation to the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71 (see Case 237/78 *Cram* v *Toia* [1979] ECR 2645 and Case C-131/96 *Mora Romero* [1997] ECR I-3659).

depends, *inter alia*, on the aim pursued by each provision in its particular context and ... a comparison between the objectives and the context of the agreement and those of the Treaty is of considerable importance in that regard. As Article 31 of the Vienna Convention of 23 May 1969 on the law of Treaties provides: "An international treaty must not be interpreted solely by reference to the terms in which it is worded but also in the light of its objectives"'. [57]

48. If the approach set out in *Pinna* [58] is transposed to the analysis of Article 3(1) of Decision No 3/80, the result is that the Member States cannot avoid the obligation to ensure equal treatment, not even by recourse to measures based on a composite criterion, combining the criterion of the nationality of the beneficiary of a social security benefit with that of the nature (temporary or continuing) of his residence in national territory. Now, that is precisely what the BKGG does: it indirectly draws a distinction — regarding 'access to the benefit of the legislation' — between the treatment afforded to a German or Community national and that accorded to a person who is neither, depending on the type of residence authority held by the person concerned.

Throughout Mr Sürül's period of study and training, to facilitate which the German authorities had granted him and his wife an *Aufenthaltsbewilligung*, all the conditions were satisfied for the plaintiff in this case to receive the allowance and supplementary allowance for dependent children. Those benefits were withheld from Mrs Sürül only because she is a citizen of a third country. The Commission has correctly pointed out that, in contrast to non-Community foreign nationals in the same position as the plaintiff, German citizens residing temporarily in Germany are in all circumstances entitled to family benefits: they satisfy by definition the requirement laid down for that purpose by the BKGG of being authorised to stay in national territory on a continuing and permanent basis.

Having regard to the purpose of the benefits at issue, which is to alleviate — for the benefit of all families residing in Germany — the financial burdens involved in educating

57 — See Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 and 12. Applying the principle mentioned, the Court held that the first paragraph of Article 18 of the EEC-Austria Free Trade Agreement of 22 July 1972 was to be interpreted differently from Article 95 of the Treaty, even though the object of both provisions was the prohibition of any direct or indirect fiscal discrimination against goods either from the other contracting party or from the other Member States. According to the Court, Article 95 should be interpreted in the light of the purpose of the Treaty, including, first, the establishment of a common market in which any impediment to trade was removed with a view to merging the national markets into a single market as similar as possible to a genuine internal market. In contrast, the EEC-Austria Free Trade Agreement, including the first paragraph of Article 18, pursued more limited purposes: namely, consolidation and extension of economic relations between the contracting parties and the harmonious development of commerce between the EEC and Austria, in compliance with fair conditions of competition. Consequently, the Court concluded that the first paragraph of Article 18 of the EEC-Austria Free Trade Agreement did not preclude national legislation which penalised infringements relating to the payment of VAT more severely in the case of imports than in the case of transfers of goods within the country, even where that difference was disproportionate in view of the diversity of the two types of infringement (see paragraphs 14 to 21 of the judgment). See also the judgment in Case 17/81 *Pabst & Richarz*, cited in footnote 12 above; and Case C-163/90 *Legros* [1992] ECR I-4625, in which the Court held that the EEC-Sweden Agreement, pursuing consolidation and extension of economic relations between the contracting parties, in particular by removal of barriers to trade in accordance with the GATT provisions concerning the establishment of free trade areas, would be deprived of much of its effectiveness if the concept of 'charge having an equivalent effect', forming part of the prohibition of the collection of such charges referred to in Article 6 of the agreement in question, were interpreted as having a more limited scope than the same term appearing in Articles 9, 12 and 13 of the EEC Treaty.

58 — See footnote 56 above and the corresponding part of the main text.

children, the abovementioned difference of treatment based (indirectly) on nationality *through the criterion of the nature of residence* appears to be arbitrary and in any event not in harmony with the purposes pursued by the national legislature. The discrimination introduced with effect from 1 January 1994 by the German law, to the detriment of non-Community foreign nationals, is based on the implicit but clear assumption that the existence and extent of the costs of educating children borne by families ordinarily resident in Germany, and therefore the requirement that financial support from the State should be available, must vary according to the nationality of the parent responsible for providing education and — where the parent is a foreigner — according to the type of residence authority which he holds, which may or may not be permanent. The distinguishing criterion adopted is not, in my opinion, justified, in view of the almost generally recognised principle that the responsibility of the modern social State for social security in its own territory is not restricted to its own citizens. [59] An allowance for dependent children is needed by all resident families for the period of their residence in Germany. It is no accident that the same automatic mechanism (payment of contributions for three years under the compulsory invalidity and old-age insurance scheme) provided for by the Social Security Code for the education of children and for the benefit of the parent responsible for that activity (see point 12 above) is linked with the requirement of *habitual residence* in German territory and not to nationality or the type of authority allowing such residence. The distinction between parents of German nationality (who are granted the benefit even if they are only provisionally or temporarily resident in national territory) and parents legally authorised to reside for a limited period which cannot be extended (who are necessarily non-Community foreign nationals) thus appears to have no reasonable or convincing justification.

49. In view of the foregoing considerations, and provided that the plaintiff in the main proceedings is deemed to enjoy the status of worker or member of a worker's family, [60] I suggest that the Court answer the first question from the Sozialgericht in the affirmative.

(iii) *The answer to the second and third preliminary questions*

50. As I have already indicated, the wording of the first preliminary question in this case presupposes that the person applying for the family benefit at issue is one of the persons to whom Decision No 3/80 applies. Specifically in order to allow the national court to ascertain whether or not Mrs Sürül can be classified as a 'worker' or 'member of a worker's family', so as to be able to enforce her right to equal treatment in the German courts, this Court is asked in the two remaining

59 — V. B. Baron von Maydell B., 'Treatment of Third-Country Nationals in the Member States of the European Union and the European Economic Area in Terms of Social Law (General Report)', in records of the seminar *Social Security in Europe*, cited in footnote 52 above, p. 137, and particularly p. 149.

60 — That the principle of equal treatment laid down in Decision No 3/80 must apply also to family members of a worker 'who reside in the territory of one of the Member States' is apparent from the clear wording of the second indent of Article 2 of that decision and also from the analogous application of the principles laid down by the Court regarding family members of a worker who are living with him, in the judgment in Case C-126/95 *Hallouzi-Choho* (cited in footnote 43 above).

questions to interpret Article 2 in conjunction with Article 1(b) of that decision.

51. As far as Article 1(b) is concerned, I will refer to the observations of Advocates General Fennelly and Van Gerven regarding the similar provision contained in Article 1(a) of Regulation No 1408/71: [61] as a result of the need to use a single concept of 'worker' for a large number of social security systems, [62] the legislation contains a long and complex article, and the relationship between its various indents is not self-evident. [63] Article 1(a) of Regulation No 1408/71 codifies a principle laid down by this Court in relation to the earlier Regulation No 3/58 on social security for migrant workers, according to which the notion of employed worker necessarily had a Community meaning, referring to all those who, under whatever description, are covered by the various systems of social security. [64]

52. I mentioned earlier (see points 25 to 28 above) that, according to the German Government, the applicant is not one of the persons to whom Decision No 3/80 applies *for the purposes of payment of family benefits under German legislation*. In its view, she is not covered either under the first ('workers') or under the second indent ('members of the families of these workers') of Article 2 of the decision. Neither Mr nor Mrs Sürül was compulsorily insured against the risk of unemployment or obtained, as a result of such insurance, cash benefits under a sickness and insurance scheme or similar benefits. Accordingly, they do not satisfy the requirements of Annex I, point I(C), of Regulation No 1408/71. [65] That annex, it is maintained, is indirectly referred to by Article 1(b)(ii), second indent, of Decision No 3/80, through Article 25(1) thereof.

53. In *Merino García* [66] the Court held that the expression 'employed persons', for the purposes of entitlement to family benefits

61 — See footnote 5 above and the corresponding part of the main text.

62 — See the Opinion of Advocate General Van Gerven of 14 March 1989 in Case 388/87 *Bestuur van de Nieuwe Algemene Bedrijfsvereniging* v *Warmerdam-Steggerda* [1989] ECR I-1212, paragraph 6.

63 — See the Opinion of Advocate General Fennelly of 6 March 1997 in Case C-266/95 (cited above in footnote 15, [1997] ECR I-3282), point 17.

64 — See the Opinion of Advocate General Tesauro of 22 February 1990 in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1764, point 14.

65 — See footnote 19 above and the corresponding part of the main text.

66 — Judgment of 12 June 1997 (cited above in footnote 15). Mr Merino García, a worker of Spanish nationality who had emigrated to Germany, had applied to the BfA under German law for family allowances for his children residing in Spain for the period from January 1986 to December 1988. Under the BKGG, persons domiciled or residing in German territory are entitled to family allowances for children and persons assimilated thereto; however, for the above purposes children domiciled or residing outside Germany do not qualify, without prejudice to the relevant Community legislation. The right to receive such benefits is granted *as from the beginning* of the month in which the conditions for entitlement are fulfilled and *until the end* of the month in which those conditions cease to be fulfilled. Merino García had taken unpaid leave in 1986 (from 20 January to 2 March) and in 1987 (from 13 January to 2 March). In cases of unpaid leave, the German law provides, first, that an employee remains insured under the German sickness insurance scheme for a maximum period of three weeks. Secondly, for the purposes of computation of periods conferring entitlement to unemployment benefit, account is also taken of periods in which wages are not paid, provided that each period does not exceed four weeks; where the period is longer, the employment relationship is deemed to be interrupted as from the beginning of the relevant period. Since Mr Merino García continued to be covered by compulsory sickness insurance, and therefore continued to fall within the definition of 'employed person' under Article 1(a)(i) of Regulation No 1408/71, until the end of the third week reckoned from the beginning of each period of unpaid leave, he retained entitlement to family benefits for the whole period to which his application referred, including those two periods of unpaid leave.

under the relevant German legislation and in accordance with Article 73 of Regulation No 1408/71, [67] covers only persons who fall within the definition resulting from the combined provisions of Article 1(a)(ii) of Regulation No 1408/71 [68] and Annex I, point I(C), to which that provision refers. According to the Court, the broad interpretation which, in accordance with the objective of free movement pursued by the Community, is to be attributed to the concept of employed person for the purposes of Regulation No 1408/71, cannot go so far as to deprive of all effectiveness the provisions of Annex I, by which the Community legislature determined which employed persons may avail themselves of the provisions of Chapter 7 of Title III of that regulation. [69] For my part, in my Opinion in the *Stöber and Piosa Pereira* cases, I observed that 'The combined effect of the rules set out in the regulation and those contained in the annex, in my view, brings out the fact that there is a very precise consequential connection between the type of social security benefit sought by the worker (in this case, family allowances) and the criteria which the worker must satisfy in order to be recognised as being entitled to the benefit'. [70] Therefore, Mr Merino García would have been entitled to the benefits at issue only for the period over which he had paid contributions for unemployment insurance; that period included the two periods of unpaid leave in their entirety, but excluded two full calendar months (February 1996 and February 1997). [71]

54. The Court observed however, that, Mr Merino García remained insured in Germany against the risk of sickness even for the period comprising the two calendar months at issue. Although the plaintiff did not fall within the definition of employed person for the purpose of entitlement to family benefits under the national legislation in question, his situation benefited from the prohibition of any discrimination — patent or disguised — [72] based on nationality 'as regards employment, remuneration and other conditions of work and employment' referred to in Article 48(2) of the Treaty.

Consequently, the Court held to be incompatible with Article 48(2) national legislation like the BKGG, which — whilst recognising that workers whose children are domiciled or habitually resident in the territory of the competent Member State are entitled to family allowances even for the full calendar months following within an extended period of unpaid leave — prevents those benefits, in respect of that period, from accruing to an employed person whose children are domiciled in

67 — Article 73 of Regulation No 1408/71, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989, amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 331, p. 1) is entitled 'employed or self-employed persons the members of whose families reside in a Member State other than the competent State'. That article provides that an employed or self-employed person subject to the legislation of a Member State is to be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State. As the Court observed in *Merino García*, it is clear from the wording of that provision that it does not itself confer an entitlement to family benefits, such benefits being granted on the basis of the relevant provisions of national law (judgment cited in footnote 15 above, paragraph 29).

68 — The provisions of which are repeated in Article 1(b)(ii) of Decision No 3/80 (see footnote 5 above).

69 — *Merino García*, cited in footnote 15 above, paragraph 25.

70 — See the Opinion of Advocate General La Pergola of 6 June 1996 in Joined Cases C-4/95 and C-5/95 (cited in footnote 14 above, [1997] ECR I-513, point 28).

71 — See footnote 66 above and the corresponding part of the main text.

72 — See footnote 56 above and the corresponding part of the main text.

another Member State (in other words, typically, a migrant worker). [73]

55. The importance of the *Stöber and Piosa Pereira* and *Merino García* judgments to the present case seems to be this: in those judgments the Court upheld the alternative nature of the definitions contained in Article 1 of Regulation No 1408/71 *whenever it is necessary to safeguard the effectiveness of any special basis of definition introduced by the Community legislature in order to identify the persons entitled to a given category of social security benefits.*

Precisely that eventuality arose in both of the cases just referred to: under Annex I, point I(C), of Regulation No 1408/71, the exportability of family benefits is recognised in Germany only for those workers who form part of the body of persons covered by the German social security scheme by paying contributions to a particular compulsory insurance scheme (the unemployment scheme for employed persons, pension insurance or old-age insurance for self-employed persons). The will of the Community legislature must be respected, observed the Court, and that is why a person who is voluntarily or compulsorily insured against *other* contingencies must not be allowed to obtain German family benefits by relying on one of the other definitions of 'employed person' (or, as the case may be, 'self-employed person') contained in Article 1(a) of Regulation No 1408/71.

56. From the same judgments, however, a further principle can in my opinion be inferred: where the Member States do not intend to limit the benefit of family allowances only to persons belonging to a mutually supporting community, involving an insurance scheme covering an expressly specified risk, there is no reason not to consider the circle of persons entitled to the benefit as extending to all workers, in the widest sense of that term. That term refers, in the case of employed workers, to all persons insured under one of the social security schemes mentioned in Article 1(a) of Regulation No 1408/71, against the contingencies and under the conditions indicated in that provision. [74]

57. Let us now consider what answer may be given to the second and third questions in this case. It is important not to lose sight of one fact: it is true that Article 25(1) of Decision No 3/80 provides that, for the purposes of implementing the decision, Annex I to Regulation No 1408/71 'is to be applicable'; however, point I(C) of the annex in question is applicable where 'the competent institution for granting family benefits *in accordance with Chapter 7 of Title III of the regulation*

73 — See *Merino García* (cited in footnote 15 above), paragraphs 33 to 36. I should also point out that the Court reached a similar conclusion regarding the expression *self-employed person* in Article 73 of Regulation No 1408/71 and held that the same German legislation was incompatible with the rule requiring equal treatment, laid down in Article 52 of the Treaty, in its earlier judgment in *Stöber and Piosa Pereira*, also referred to above (see footnote 14 above).

74 — See the judgment in Case C-266/95 (cited in footnote 15 above), paragraph 22.

[No 1408/71] is a German institution' (emphasis added).

In order to identify the persons to whom Decision No 3/80 applies, the reference to Annex I in Article 25(1) must therefore properly be understood as limited *only to situations governed by the provisions of Chapter 7 of Title III of Regulation No 1408/71*. Such situations are those in which generally the problem arises of ensuring for workers, when they move within the Community, the rights and advantages already acquired, or in any event those in which some intra-Community element is necessary. [75] More specifically they involve: (a) the right to aggregate periods of insurance, employment or self-employment accrued in another Member State, where the availability of family benefits is made subject by the competent Member State to the completion of minimum periods (Article 72), (b) the right of an entirely unemployed person who was formerly employed in another Member State to receive the benefits in question for members of his family residing in the Member State in which he presently resides (Article 72a), (c) the right of the worker to benefits for members of his family who reside in a Member State other than the competent Member State (Article 73), [76] and (d) the right of an unemployed worker in receipt of unemployment benefit to the family benefits provided for by the legislation of the competent Member State for members of his family residing in another Member State (Article 74).

58. However, on close examination, none of the situations mentioned above arises in this case: Mrs Sürül is merely asking for application of the national provision to her situation *as if she possessed German nationality (or that of another Member State)* and seeks to enforce a right deriving directly and solely from the BKGG. In order to obtain the allowance and supplementary allowance for dependent children, the plaintiff — by contrast with Messrs Stöber, Piosa Pereira and Merino García — does not invoke a Community provision coordinating the laws of the Member States, such as a specific provision of Regulation No 1408/71 (for example, Article 72 concerning aggregation, to which Article 18 of Decision No 3/80 expressly refers 'for the acquisition of the right to [family] benefits') or of Regulation No 574/72. In the absence of any intra-Community element, the reference to Annex I to Regulation No 1408/71 seems to me to be entirely relevant. The definition of the persons to whom the relevant legislation applies — having been adopted by the Community legislature specifically with reference to the family benefits paid by the competent German authorities and to the situations in which a problem arises of coordination of national social security legislation — cannot therefore be valid for the present case.

75 — See Case C-153/91 *Petit* [1992] ECR I-4973 and the Opinion of Advocate General Jacobs of 2 May 1996 in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, point 41.

76 — That, it will be remembered, was the provision the application of which was at issue in *Stöber and Piosa Pereira* and *Merino García* (see footnotes 14, 15 and 67 above and the corresponding parts of the main text).

59. Moreover, as recognised by the German Government itself, no special arrangements for applying the BKGG are contained in the Annex to Decision No 3/80, which merely indicates in Part II the 'other events' against which a 'worker' must be insured under a social security scheme applicable to all residents, in Denmark, Ireland and the United Kingdom. The German authorities' argument — that the Association Council introduced a *lex specialis* in this area which takes precedence over the general provisions of Article 1(b) of Decision No 3/80, and of which the effectiveness should be guaranteed (see point 26 above) — does not appear to be supported by the legislation. Therefore, in contrast to the *Stöber and Piosa Pereira* and *Merino García* cases, since entitlement to the social security benefit at issue is not conditional upon affiliation of the person entitled to a specific insurance scheme, there is no need here to avoid the illogical solution which would be arrived at if the availability of that right to the person concerned were at the same time recognised by another route. [77]

60. In the absence of an express provision like that in Annex I, point I(C), of Regulation No 1408/71 (not relevant to this Opinion — see points 57 and 58 above), the (presumed) rule of strict correspondence between the definitions contained in Article 1(b)(i) and (ii) of Decision No 3/80, on the one hand, and the independent systems and specific risks determined by the competent Member State, on the other, seems to be inapplicable to the case of the German family benefits scheme. As is apparent from the order for reference, for the specific purposes of the payment of such benefits, the persons entitled are not required to be affiliated and contribute to a *specifically designated* (compulsory or voluntary) insurance scheme: it is no accident that the system applies to all residents regardless of their status as employed persons. If that is the case, whoever forms part *on any basis* of the mutually supporting community covered by the German social security scheme must necessarily fall within the concept of 'worker' for the purposes of the dependent child allowance.

61. That requirement is satisfied by both the plaintiff and her husband. During the material period (that is, as from 1 January 1994), both were compulsorily assured against contingencies corresponding to the branches of a social security scheme applicable to employed persons, notwithstanding that they did not make direct payment of their contributions (although they each did, fictitiously, through a third party: see points 12 and 13 above). The BKGG considered Mrs Sürül as covered by compulsory statutory invalidity and old-age insurance for three years; Mr Sürül had compulsory insurance against accidents at work, the contributions being paid by his employer. I do not see any reason why these situations could not and should not confer on the persons concerned full membership of the mutually supporting community covered by the German social security scheme, in contrast to the compulsory insurance against unemployment within the field of application of Regulation No 1408/71.

77 — See my Opinion in Joined Cases C-4/95 and C-5/95 (cited in footnote 70 above), point 31.

62. I consider therefore that, under Article 1(b)(i) of Decision No 3/80, Mrs Sürül comes within the concept of worker also for the purposes of the branch of social security relating to family benefits, even though that is, and can only be, different from the one relating to the contingencies for which she was automatically insured. Similarly, Mr Sürül, who is actually in employment, is to be classified as a 'worker' within the meaning of the same provision. Conversely, no importance can be attached, in particular, to the minimum number of hours which he devotes to his employment [78] or to the amount of his remuneration. [79] Therefore, in the period following the three years spent educating her child, Mrs Sürül had (and still has) the status of 'family member of a worker'; and that is so even if she was not (and is not) any longer covered by a system of compulsory social security or an optional insurance.

63. The solution proposed here does not in any way encroach upon the principles laid down by the Court in *Stöber and Piosa Pereira* and *Merino García*. Also, in circumstances like those of this case, to keep to a limited concept of 'worker' would certainly be tantamount to unjustifiably limiting the right of Turkish citizens to move, with or without their families, within the Community for the purposes of employment; that would involve denying adequate protection for Turkish workers subject to the legislation of a Member State, in breach of the purpose and spirit of Decision No 3/80 and the EEC-Turkey Agreement with which it is linked.

64. Before setting out my conclusions in the terms indicated thus far, a further consideration is appropriate. I do not deny the fact that the reference to Annex I to Regulation No 1408/71, made in Article 25(1) of Decision No 3/80, allows an interpretation different from the one which seems to me to be the most logical and rigorous (see point 57 above). That is the approach taken by the German authorities (see point 26 above): that reference, it is said, is made solely in order to describe the relevant basis of membership of the national social security system ('any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits'), but does not concern specific situations for which protection is available, provided for in Articles 72 to 74 of that regulation. Even a Turkish citizen who — like the plaintiff in the main proceedings — applies for a family benefit in circumstances not falling within those specific situations, and therefore in the absence of any intra-Community element, should, in other words, satisfy the affiliation condition indicated in that annex before it can be said that the claimed right exists.

65. I consider, however, that there are also arguments of a technical and substantive nature which militate against the latter interpretation. Article 25(1) of Decision No 3/80 refers to Annex I to Regulation No 1408/71 as a whole and in an unqualified manner. Decision No 3/80 thus applies even to Turkish workers moving within the Community (who

78 — Case C-2/89 (cited in footnote 64 above, at p. I-1755), paragraph 10.

79 — Case 53/81 *Levin* [1982] ECR 1035.

'have been ... subject to the legislation of one or more Member States': see the first indent of Article 2) and may therefore find themselves in the specific circumstances governed by Chapter 7 of Title III of the regulation in question. It is therefore only in such circumstances that Annex I to Regulation No 1408/71 can, in my opinion, be considered 'valid' for the purposes of specifically applying Decision No 3/80.

Moreover, by virtue of the case-law of this Court, exceptions to and derogations from the provisions on free movement for workers — including any provisions which restrict the very legislative concept of 'worker', which determines the scope of the fundamental freedom in question — should be interpreted restrictively. [80]

66. If, however, the Court should accept the German Government's argument and hold that, for the purpose of granting the allowance and supplementary allowance for dependent children under the BKGG, Mrs Sürül is not one of the persons to whom Decision No 3/80 applies, that reasoning could not in any event — in my opinion — mean that the plaintiff does not have a legitimate and well-founded claim. The dicta of this Court in *Stöber and Piosa Pereira* and *Merino García* should be borne in mind: Articles 48(2) and 52 of the Treaty are to be interpreted as precluding the application of national legislation which discriminates against migrant workers (whether employed or self-employed) as compared with those who have not availed themselves of the right of freedom of movement, allowing children to be taken into account — as regards recognition of entitlement to family benefits, or for the calculation thereof — only if they reside in the competent Member State.

Transposing that principle to the present case, I would observe that — even if the concept of worker for the purposes of the payment of family benefits by the German institutions did not include a person in the circumstances of Mrs Sürül or her husband — there are no good grounds for denying that they fall within the personal scope of Decision No 3/80, at least as regards the branch of social security corresponding to the contingency against which they were insured (invalidity and old age, in one case, and accidents at work, in the other). Accordingly, their situation would in any event be covered by the prohibition of any discrimination — whether overt or covert — based on nationality, laid down in Article 3(1) of Decision No 3/80. That provision — to which the interpretation of Article 48(2) of the Treaty (see point 47 above) extends and which also (as already observed: see points 38 to 45) has direct effect — precludes national legislation which makes entitlement to a family benefit such as the dependent child allowance provided for by the BKGG, dependent upon possession of a residence authority allowing the holder to reside on an enduring basis on national territory, like the *Aufenthaltsberechtigung* or the *Aufenthaltserlaubnis* provided for by the German law on aliens.

80 — See, among many, Case 139/85 *Kempf* [1986] ECR 1741.

(iv) *Limitation in time of the effects of the judgment to be given*

67. Finally, brief comments are needed on the argument advanced by the French, United Kingdom and Netherlands Governments that the Court — should it adopt the solution proposed by me — should limit the effects in time of its ruling, in keeping with a general principle of legal certainty inherent in the Community order (see point 29 above). It should be borne in mind that this Court, when providing interpretations under Article 177 of the Treaty, may only exceptionally and in clearly defined circumstances — in the actual judgment giving the requested interpretation — restrict for any person concerned the opportunity of relying upon the provisions thus interpreted with a view to calling in question legal relationships established in good faith. As the Court has held, although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past. [81]

The Member States mentioned above have voiced concern that a judgment in line with the present Opinion would call in question an enormous number of legal relationships established in good faith on the basis of the national legislation which has been regarded as being validly in force and took due effect in the past: and that would have extremely destructive retroactive effects on the national social security systems. Although specific evidence has not been produced to the Court to demonstrate that risk of serious economic repercussions, the risk is in my opinion real and genuine. [82]

Moreover, I myself recognise, first, that, until the date of the Court's judgment in *Taflan-Met*, there was objective and significant uncertainty, for the reasons fully discussed in my Opinion in that case, [83] as to whether or not Decision No 3/80 had entered into force. Although determining that Decision No 3/80 took effect on 19 September 1980, the date of its adoption, the judgment in *Taflan-Met* raised no less serious and objective uncertainties regarding a further point: whether that decision — and therefore the principle of non-discrimination embodied in Article 3(1) — could be relied on in the absence of implementing measures adopted by the Council. That continuing state of uncertainty — which in turn has had repercussions on the legitimacy of the relevant legislation of the Member States and the precise extent of the category of Turkish citizens entitled to family benefits paid by a national social security institution

81 — See Case C-163/90 (cited in footnote 57 above), paragraph 30.

82 — See Case C-308/93 (cited above in footnote 35, paragraph 47), in which the Court decided to limit the temporal effect of its judgment, agreeing to the request to that effect made by the governments of the intervening Member States, even though they were not in a position to give even an approximate assessment of the economic consequences which the judgment would have for the funding of national social security systems.

83 — See footnotes 37 and 38 above and the corresponding parts of the main text.

— is destined to cease only when this Court gives an interpretative ruling in the present case.

Therefore, if the Court should agree with the answers which I propose be given to the questions from the Sozialgericht, in my opinion there are imperative considerations of legal certainty such as to justify declaring that the Court's judgment is to take effect only from the date of its delivery, subject to the safeguards made necessary by the principle of full and effective judicial protection for those who, before the date of the judgment, instituted legal proceedings or lodged an equivalent claim.

Conclusion

68. In view of the foregoing considerations, I propose that the Court answer the questions from the Sozialgericht in the following terms:

(1) By virtue of Article 3(1) of Decision No 3/80 the Member States have a clear, precise and unconditional obligation not to apply to Turkish migrant workers, or to members of their families or their survivors, less favourable treatment than that accorded to their own citizens in the branch of social security relating to family benefits.

Pursuant to Articles 3(1) and 4(1)(h) of Decision No 3/80, a Turkish national who is one of the persons to whom that decision applies by virtue of Article 2 thereof, who resides in a Member State and holds a residence authorisation granted for a specific purpose and for a limited period (such as the *Aufenthaltsbewilligung* provided for by the German Law on aliens), is entitled to receive from the competent social security authorities a family benefit such as the dependent child allowance provided for by German law. That entitlement — which individuals may enforce before national courts in the event of its being withheld — arises where the requirements laid down for citizens of the competent Member State are satisfied and it cannot be made conditional upon

possession of a specific residence authority of a kind which allows its holder to reside on an enduring basis on national territory, such as the *Aufenthaltsberechtigung* or the *Aufenthaltserlaubnis* provided for by German law.

(2) By virtue of Article 2 in conjunction with Article 1(b)(i) of Decision No 3/80, a Turkish citizen residing in the territory of a Member State has the status of 'worker' throughout the period during which, under national legislation, the legally prescribed contributions to compulsory invalidity and old-age insurance are deemed to be paid for his benefit whilst a child is receiving education.

(3) By virtue of Article 2 in conjunction with Article 1(b)(i) of Decision No 3/80, a Turkish citizen residing in the territory of a Member State who, in addition to his university studies, works there as an employed person for a maximum of 16 hours a week on the basis of a work permit for casual work and is covered by compulsory insurance against accidents at work, has the status of 'worker'.

In particular, a Turkish citizen who satisfies those conditions (or those indicated in paragraph (2)) has the status of 'worker' also for the purposes of payment of family benefits by a German institution where the entitlement to such benefits derives directly from a provision of the national law of the competent Member State and the person entitled does not rely on a provision coordinating the laws of the Member States provided for in Decision No 3/80.

(4) Article 3(1) of Decision No 3/80 cannot be invoked by a Turkish citizen who is one of the persons to whom that decision applies by virtue of Article 2 thereof in support of an application grant of a family benefit such as the dependent child allowance provided for by German law for a period of his child's education antedating the day of delivery of this judgment, save for those applicants who, before that date, commenced legal proceedings or lodged an equivalent objection against the decision of the competent social security institution which withheld the benefit.