

JUDGMENT OF THE COURT (Grand Chamber)
28 April 2004 *

In Case C-373/02,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Sakir Öztürk

and

Pensionsversicherungsanstalt der Arbeiter,

on the interpretation of Article 9 of the Agreement establishing an Association between the European Economic Community and Turkey signed on 12 September 1963 at Ankara by the Republic of Turkey, on the one hand, and the Member States of the EEC and the Community, on the other, which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey (Journal Officiel 1964 217, p. 3685), and of Article 45(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social

* Language of the case: German.

security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann and J. Cunha Rodrigues (Presidents of Chambers), J.-P. Puissechet, R. Schintgen (Rapporteur), F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Öztürk, by P. Guhl, lawyer,

— the Austrian Government, by E. Riedl, acting as Agent,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Commission of the European Communities, by H. Michard and W. Bogensberger, acting as Agents,

having regard to the Report of the Judge-Rapporteur

after hearing the Opinion of the Advocate General at the sitting on 12 February 2004,

gives the following

Judgment

- 1 By order of 17 September 2002, received in the Court on 17 October 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 9 of the Agreement establishing an Association between the European Economic Community and Turkey signed on 12 September 1963 at Ankara by the Republic of Turkey, on the one hand, and the Member States of the EEC and the Community, on the other, which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey (Journal Officiel 1964 217, p. 3685, hereinafter ‘the Association Agreement’), and of Article 45(1) of Council 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; hereinafter ‘Regulation No 1408/71’).

2 Those questions were raised in proceedings between Mr Öztürk and the Pensionsversicherungsanstalt der Arbeiter (Austrian Workers Pension Insurance Office, hereinafter the Austrian pension fund) concerning the latter's refusal to grant him in an early old-age pension in the event of unemployment.

Legal background

The EEC-Turkey Association

3 According to Article 2(1) of the Association Agreement, its purpose is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties. To that end it provides for a preparatory stage to enable the Republic of Turkey, with aid from the Community, to strengthen its economy (Article 3), a transitional stage for the progressive establishment of a customs union and the alignment of economic policies (Article 4) and a final stage based on the customs union and entailing closer coordination of economic policies (Article 5). The latter stage was attained on 31 December 1995 (see Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (OJ 1996 L 35, p. 1)).

4 According to Article 9 of the Association Agreement, which appears in Title II thereof, entitled 'Implementation of the transitional stage':

'The Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to

Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community.’

- 5 Article 12 of the Association Agreement provides:

‘The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.’

- 6 The Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (Journal Officiel 1972 L 293, p. 1, hereinafter ‘the Protocol’) lays down, in Article 1 thereof, the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of the Association Agreement. The Protocol, by virtue of Article 62 thereof, forms an integral part of that agreement.
- 7 The Protocol includes a Title II, entitled ‘Movement of persons and services’, Chapter I of which is concerned with Workers.
- 8 Article 36 lays down the timetable for securing freedom of movement for workers between Member States of the Community and the Republic of Turkey by progressive stages in accordance with the principles set out in Article 12 of the Association Agreement and provides that the Association Council is to decide on the rules necessary to that end.

9 Article 39(1) and (2) of the Protocol are worded as follows:

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

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

10 On the basis of Article 39 of the Protocol, on 19 September 1980 the Association Council adopted Decision No 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60, hereinafter ‘Decision No 3/80’).

11 That decision seeks to coordinate the social security systems of the Member States with a view to giving Turkish workers who are or have been employed in one or more Member States of the Community and the family members and survivors of such workers the right to benefits in the traditional branches of social security.

12 To that end, Decision No 3/80 refers, essentially, to certain provisions of Regulation No 1408/71 and, less frequently, to Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ English Special Edition, 1972(I), p. 159).

13 According to Article 2 of Decision No 3/80, entitled ‘Persons covered’:

‘This Decision shall apply;

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

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

— to the survivors of these workers.’

14 Paragraph 1 of Article 3 of Decision No 3/80, which is entitled Equality of treatment and repeats the wording of Article 3(1) of Regulation No 1408/71, provides:

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

15 Paragraph 1 of Article 4 of Decision No 3/80, entitled ‘Matters covered’, provides:

‘This Decision shall apply to all legislation concerning the following branches of social security:

(a) ...

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

(c) old-age benefits;

...

(g) unemployment benefits;

...’

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

17 According to Article 32 of Decision No 3/80:

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

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

19 To date, the Council of the European Union has not adopted that proposal for a regulation.

Regulation No 1408/71

20 According to Article 45(1) of Regulation No 1408/71:

‘Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme

within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had completed under its own legislation.'

The Austrian legislation

- 21 Paragraph 253a of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security), as in force on 1 January 2000 (hereinafter the ASVG), guarantees the grant, under certain conditions, of an early old-age pension, particularly in cases of long-term unemployment. Subparagraph 1 of that provision is worded as follows:

'Entitlement to an early old-age pension in the event of unemployment shall accrue to insured men on reaching the age of 60 and to insured women on reaching the age of 55 provided that:

1. the person insured proves that he or she has received unemployment benefits during the qualifying period;
2. the person insured has, by the qualifying date, paid at least 180 compulsory monthly old-age insurance contributions;

3. the person insured has met the requirement laid down in Paragraph 253b(1) (4) by the qualifying date (Paragraph 223(2)) and has drawn a minimum 52 weeks of unemployment cash benefits from the unemployment insurance scheme ... within the 15 months preceding the qualifying date (Paragraph 223(2)) ...'

- 22 When the beneficiary attains the normal retirement age laid down in Paragraph 253 of the ASVG (65 for men and 60 for women), the pension is paid as an old-age pension pursuant to Paragraph 253a(5) of the same law.

The social security agreement between Austria and Germany

- 23 The Agreement between the Republic of Austria and the Federal Republic of Germany concerning Social Security (BGBl. III, 1998/138, hereinafter 'the bilateral agreement'), which entered into force on 1 October 1998, is, by virtue of Article 2(1) thereof, 'applicable to the legislation relating to the matters covered' by Regulation No 1408/71, 'with the exception of unemployment insurance'.

- 24 Under Article 3 of the bilateral agreement:

'(1) The present agreement shall apply to the persons to whom ... Regulation [No 1408/71] applies.

(2) The present agreement shall also apply to the persons to whom ... Regulation [No 1408/71] does not apply and

- (a) who are or have been subject to the legislation of one or both Contracting States, or
- (b) who are members of the family or survivors of a person mentioned in (a) above.'

25 Article 5(1) and (2) of the bilateral agreement provide:

- '(1) Regulation [No 1408/71], the implementing regulation and the agreements for its implementation shall apply by analogy to the persons mentioned in Article 3(2) in relations between the two Contracting States, unless otherwise provided in this agreement.
- (2) Articles 3 and 10 of Regulation [No 1408/71] shall apply to the persons mentioned in Article 3(2) only if they are nationals of the Contracting States, refugees or stateless persons, or family members or survivors of such persons.'

The main proceedings and the questions referred to the Court

26 Mr Öztürk, who is of Turkish nationality, was born in 1939 and now lives in Germany. He worked in Austria from 1966 to 1970, then in Germany. From 20 July 1998 to 31 December 1999, he was unemployed in Germany and received unemployment benefit from the Arbeitsamt Bremen (Employment Office, Bremen).

- 27 As at 1 January 2000, Mr Öztürk had paid 377 monthly contributions in respect of compulsory old-age insurance (323 in Germany and 54 in Austria).
- 28 He was granted an early old-age pension under the German scheme as from 1 January 2000.
- 29 However, by decision of 10 April 2000, the Austrian pension fund refused to grant Mr Öztürk an early old-age pension in the event of unemployment under Paragraph 253a of the ASVG on the ground that, during the 15 months immediately preceding the qualifying date, namely 1 January 2000, he had not received unemployment benefit in Austria and he could not claim to be in a factual situation whereby he was deemed to be in receipt of such a benefit.
- 30 Mr Öztürk's appeal against that decision was dismissed by the court of first instance on the ground that, in essence, Paragraph 253a of the ASVG reflected the situation on the Austrian labour market, and the fact that Mr Öztürk received a pecuniary unemployment insurance benefit in Germany did not mean that he could be deemed to be in receipt of an Austrian unemployment insurance benefit. Neither the bilateral agreement nor Regulation No 1408/71 left room for any other conclusion.
- 31 The judgment at first instance was upheld on appeal. Mr Öztürk then appealed on a point of law to the Oberster Gerichtshof.
- 32 That court seeks clarification as to whether the fact of not taking account of periods during which the claimant received a pecuniary unemployment benefit in another Member State for the purpose of granting entitlement to a pension under

Paragraph 253a of the ASVG constitutes indirect discrimination against the claimant in the main proceedings, contrary to Article 9 of the Association Agreement. The national court refers, in that connection, to the judgment in Case C-277/94 *Taflan-Met and Others* [1996] ECR I-4085, paragraph 38, in which the Court held that so long as implementing measures have not been adopted by the Council, Articles 12 and 13 of Decision No 3/80, which contain rules on the aggregation of insurance periods, do not have direct effect, and to Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 64, in which the Court nevertheless held that the lack of implementing measures does not stand in the way of application of the principle of equal treatment in the field of social security laid down in Article 3 (1) of Decision No 3/80 (see also, to that effect, Joined Cases C-102/98 and C-211/98 *Kocak and Örs* [2000] ECR I-1287, paragraphs 35 and 36).

33 In the present case, the Oberster Gerichtshof takes as a starting point the principle that Mr Öztürk cannot validly rely on the prohibition of discrimination on grounds of nationality laid down in Article 3(1) of Decision No 3/80 because that provision relates only to the situation of a Turkish national in the Member State in which he resides. It would, however, be possible for him validly to rely on the general prohibition of discrimination on grounds of nationality laid down in Article 9 of the Association Agreement.

34 The national court refers, however, to Case 20/75 *D'Amico* [1975] ECR 891, in which, in relation to facts comparable to those of the case now before it, the Court of Justice held that there was no indirect discrimination and that Article 45(1) of Regulation No 1408/71 does not prohibit a rule of national law which requires, for the acquisition of the right to an early retirement pension, that the person concerned must have been unemployed for a certain time and thus have been available to the employment office of the Member State in question. The referring court wonders, nevertheless, whether that judgment is still relevant in view, in particular, of developments in the case-law of the Court regarding the assimilation of factual situations, on the basis of the principle of non-discrimination.

- 35 If the Court were to consider that Article 9 of the Association Agreement cannot be validly relied on as a basis for Mr Öztürk's claims, the question would remain, according to the national court, whether Mr Öztürk may, for that purpose, invoke the bilateral agreement and Regulation No 1408/71. Having regard to the case-law of the Court on the admissibility of requests for preliminary rulings (see, in particular, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 16 to 18, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 18 to 26, and Case C-130/95 *Giloy* [1997] ECR I-4291, paragraphs 20 to 29), the Court of Justice has jurisdiction to rule as to the interpretation of Article 45(1) of Regulation No 1408/71 for the purposes of resolving the dispute in the main proceedings.
- 36 In those circumstances, the Oberster Gerichtshof stayed the proceedings pending a preliminary ruling from the Court on the following questions:
- '1. Is the law concerning the association between the European Economic Community and Turkey (in particular Article 9 of the [Association Agreement]) to be interpreted as precluding a rule of a Member State which requires inter alia, as a condition of entitlement to an early old-age pension in the event of unemployment, that the worker concerned must have drawn a cash benefit on account of his unemployment from the unemployment insurance scheme of that Member State within a certain period prior to the qualifying date?

If the answer to the first question is in the negative:

2. Is Article 45(1) of Regulation ... No 1408/71 ... to be interpreted as precluding a rule of a Member State which requires inter alia, as a condition of entitlement to an early old-age pension in the event of unemployment, that the worker concerned must have drawn a cash benefit on account of his unemployment from the unemployment insurance scheme of that Member State within a certain period prior to the qualifying date?'

The first question

37 By its first question, the national court seeks in essence to ascertain whether Article 9 of the Association Agreement or Article 3(1) of Decision No 3/80 must be interpreted as precluding the application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon the claimant's having received, within a certain period prior to his application for a pension, unemployment insurance benefits from that Member State alone.

Observations submitted to the Court

38 Mr Öztürk states that the Federal Republic of Germany and the Republic Austria have almost identical legislation enabling an unemployed worker of a specified age who has no realistic opportunity of re-entering the labour market to take early retirement. He states that he receives in Germany, where he worked most recently, an old-age pension of that kind, the amount of which was calculated on the basis of insurance periods completed by him in that Member State. If, as he requests, such a pension is also granted to him in Austria, the amount of that second benefit would be calculated on the basis of the periods completed in Austria.

39 Mr Öztürk considers that he is the victim of discrimination prohibited by the Association Agreement by reason of the fact that he was employed in more than one Member State. If he had worked, until the date on which he became unemployed, solely in one of the two Member States, he would have received, under the legislation of the Member State concerned, an early pension of an amount corresponding to the entire period for which he had worked.

- 40 The Austrian Government considers that it is appropriate to refer to Article 3(1) of Decision No 3/80 rather than to Article 9 of the Association Agreement, in so far as the first of those two provisions contains a non-discrimination rule specific to the field of social security (see *Kocak and Örs*, cited above, paragraph 36).
- 41 The Austrian Government does not agree with the interpretation put forward by the national court to the effect that Article 3(1) of Decision No 3/80 applies only within the territory in which the Turkish national concerned resides. In its view, the scope of that provision is identical to that of Article 3(1) of Regulation No 1408/71. For the application of the latter provision, it is of little importance whether or not the Member State in which the claimant resides and the one under whose legislation the non-discrimination rule is invoked are the same (see, to that effect, Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraphs 23 to 35).
- 42 According to the Austrian Government, Article 3(1) of Decision 3/80 does not prohibit a refusal to take account of periods in which unemployment benefits are paid in another Member State for the purposes of determining entitlement to an early retirement pension. The result of taking the opposite view would be that all coordinating measures forming part of national social security schemes, such as the rule on the aggregation of insurance periods, would be regarded as measures intended to combat covert discrimination. However, no such broad definition of the concept of indirect discrimination was adopted by the Court in its judgment in *Taflan-Met and Others*, cited above, which was specifically concerned with a refusal to aggregate insurance periods completed in another Member State. Accordingly, there is no indirect discrimination in the case before the national court.
- 43 That position is, in its view, supported by the *D'Amico* judgment, cited above, which relates to a situation similar to that at issue in the main proceedings and in which the Court examined the question solely from the viewpoint of the aggregation of insurance periods provided for in Article 45 of Regulation No 1408/71.

44 The German Government submits that the national legislation at issue in the main proceedings does not involve discrimination contrary to Article 3(1) of Decision No 3/80. That legislation is applicable regardless of the nationality of the claimant and pursues a legitimate objective of combating unemployment for the benefit of people whose reintegration into the national labour market is very unlikely. In those circumstances, it is not appropriate to extend the benefit of that legislation to people residing in a Member State other than the Republic of Austria who are not covered by Austrian unemployment insurance and do not form part of the Austrian labour market. Moreover, Community law has recognised the territorial nature of unemployment benefits.

45 According to the German Government, the *D'Amico* judgment supports that analysis and is still relevant today, notwithstanding any developments which may have occurred in the meantime in the context of attainment of the internal market, since a single European labour market does not exist today to any greater extent than it did in 1975 when that judgment was delivered.

46 According to the Commission, reference must be made to Article 9 of the Association Agreement, which is directly applicable. As regards Article 3(1) of Decision No 3/80, it is applicable only in the host Member State of the Turkish national concerned.

47 The Commission submits that Article 9 of the Association Agreement precludes any refusal by the competent institution of a Member State to take account, as if dealing with benefits provided under the legislation of that State, of periods during which a Turkish national has received unemployment benefits in another Member State for the purpose of acquiring entitlement to an early old-age pension. Such a refusal would constitute indirect discrimination.

- 48 The Commission refers, in that connection, to the recent case-law of the Court, post-dating the *D'Amico* judgment, concerning the assimilation of events occurring in any of the Member States for the purposes of establishing entitlement to social security benefits, such case-law reflecting the principle of equal treatment.

Findings of the Court

- 49 It must be borne in mind that Article 9 of the Association Agreement prohibits any discrimination on grounds of nationality within the scope of that agreement, without prejudice to any special provisions which may be laid down by the Association Council. This means that, as in the case of the relationship between Article 12 EC and the special provisions of the EC Treaty or of secondary law, Article 9 of that agreement does not apply independently if the Association Council has adopted a specific non-discrimination rule, such as Article 3(1) of Decision 3/80 in the particular field of social security (see, to that effect, *Kocak and Örs*, paragraph 36).
- 50 Consequently, it is appropriate in this case to verify first whether it is possible to invoke the principle of equal treatment laid down in Article 3(1) of Decision No 3/80 in circumstances such as those of the main proceedings, where the Turkish national concerned lives in a Member State other than the one against which that rule is invoked.
- 51 In that connection, as correctly pointed out by the Austrian Government and by the Advocate General in point 28 of his Opinion, it cannot be inferred either from the wording of Article 3(1) of Decision No 3/80, which is based on that of Article 3(1) of Regulation No 1408/71, or from the purpose of the first of those two provisions that the latter imposes only on the Member State of residence the obligation to ensure, when applying its domestic legislation, that Turkish

nationals enjoy equal treatment in matters of social security without any distinction based on nationality. Such an obligation also attaches to the other Member States in which a Turkish national has acquired social security rights or completed periods of insurance, residence or employment.

52 That interpretation is supported by Article 2 of the Decision No 3/80, which defines the scope of that decision as including in particular workers 'who are or have been subject to the legislation of one or more Member States'.

53 It follows, in this case, that Mr Öztürk is entitled to rely on Article 3(1) of Decision No 3/80 against the Austrian authorities, on the basis of the periods of insurance completed by him in Austria before he moved to Germany, for the purposes of securing entitlement to a pension, notwithstanding the fact that at present he resides in the latter Member State.

54 As regards, second, the scope of the principle of non-discrimination on grounds of nationality embodied in Article 3(1) of Decision No 3/80, it must be borne in mind that, according to settled case-law, the rule of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (*Kocak and Örs*, paragraph 39).

55 It is true that legislation of the kind at issue in the main proceedings applies regardless of the nationality of the workers concerned.

- 56 However, the requirement of having benefited from Austrian unemployment insurance for a certain period prior to the qualifying date, which that legislation imposes as a precondition for entitlement to an early old-age pension, can be more easily fulfilled by Austrian workers than by Turkish migrant workers who have worked in Austria.
- 57 It is not necessary in that respect to find that the domestic provision in question does in practice affect a substantially higher proportion of such migrant workers. It is sufficient that it is liable to have such an effect (see, by analogy, Case C-237/94 *O’Flynn* [1996] ECR I-2617, paragraph 21).
- 58 Legislation of the kind at issue in the main proceedings thus gives rise to unequal treatment, albeit not based directly on nationality.
- 59 However, before any decision is given as to possible justification for such inequality, it is appropriate to consider, in the third place, whether the application of the principle of non-discrimination, as embodied in Article 3(1) of Decision No 3/80, is sufficient by itself to eliminate the adverse effects on Turkish nationals of legislation of the kind at issue in the main proceedings, having regard to the fact that, in paragraph 38 of *Taflan-Met*, it was held that, for so long as supplementary measures of the kind set out in Regulation No 574/72, which are essential for the implementation of that decision, have not been adopted by the Council, the provisions thereof do not have direct effect in the territory of the Member States and cannot therefore be relied on before national courts (see also, to that effect, *Sürül*, cited above, paragraph 54).

60 That applies to the rule on aggregation of insurance periods in the various branches of social security referred to in Article 4(1) of Decision No 3/80. On the other hand, Article 3(1) of that decision lays down, within the scope thereof, a precise and unconditional principle such as is capable of being applied by a national court (see *Sürül*, paragraphs 62 to 74).

61 According to the Austrian Government, for the purpose of determining entitlement to an early old-age pension in a Member State for a Turkish worker, the inclusion of periods in which unemployment benefits are paid in another Member State necessitates recourse to technical rules for the aggregation of insurance period contained in Decision No 3/80, they being rules to which specifically, according to the *Taflan-Met* judgment, no direct effect has been attributed and which therefore cannot be invoked before the national courts.

62 However, that interpretation cannot be upheld.

63 As the Advocate General observed in points 71 and 72 of his Opinion, this case is not concerned with a problem of the inclusion of periods of contributions to old-age insurance, on whose completion the acquisition of entitlement to an Austrian pension or the calculation of its amount is conditional.

64 On the contrary, the sole issue in the case in the main proceedings is the taking into account of a minimum qualifying period during which the worker concerned must have received unemployment benefits as a precondition for the possibility of claiming an early old-age pension in the event of unemployment.

- 65 However, such a period cannot be regarded as an insurance period covered by the technical rules for the aggregation of periods completed in different Member States for the purposes of acquiring, retaining or recovering pension rights. Given that its purpose is to ensure that the person concerned has in fact been seeking employment for a certain period and has encountered difficulties in securing reintegration into the labour market, it is a condition separate from that relating to the award, in the strict sense, of pension rights, the application of which is wholly subject to compliance with the principle of non-discrimination laid down in Article 3(1) of Decision No 3/80 (see, by analogy, the order of 12 February 2003 in Case C- 23/02 *Alami* [2003] ECR I-1399, paragraph 38).
- 66 Lastly, it is appropriate to consider whether the difference of treatment established in paragraphs 56 to 58 of this judgment can be objectively justified, as contended by the German Government, by a legitimate social policy objective, in so far as the early old-age pension in the event of unemployment should be seen as a social-protection measure for the benefit of unemployed people, in the context of the employment situation in the Member State concerned. In such circumstances there is no need, it is contended, to take account of periods of unemployment spent in another Member State.
- 67 In that regard, it must be stated that, whilst it is true that a benefit such as the one at issue in the main proceedings is awarded to a worker whose reintegration into active life is difficult and is indeed associated with a national employment policy, it does not thereby constitute an unemployment benefit but is an old-age pension. Admittedly, entitlement to that pension is recognised before the person concerned has reached retirement age provided that he has been unemployed for a long period. However, the amount of that benefit is calculated on the basis of the periods for which the insured person has contributed to the old-age insurance scheme of the Member State concerned.
- 68 In view of the foregoing considerations, the answer to the first question must be that Article 3(1) of Decision No 3/80 must be interpreted as precluding the

application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon fulfilment of the requirement that the person concerned has received, within a certain period prior to his application for the pension, unemployment insurance benefits from that Member State alone.

The second question

69 In view of the answer given to the first question, it is unnecessary to answer the second question.

Costs

70 The costs incurred by the Austrian and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Grand Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by decision of 17 September 2002, hereby rules:

Article 3(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families must be interpreted as precluding the application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon fulfilment of the requirement that the person concerned has received, within a certain period prior to his application for the pension, unemployment insurance benefits from that Member State alone.

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Puissochet
Schintgen	Macken	Colneric
von Bahr	Lenaerts	

Delivered in open court in Luxembourg on 28 April 2004.

R. Grass

V. Skouris

Registrar

President