Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 28 February 2019 [1]

Case C-677/17

Mr Çoban
v
Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv)

(Request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands))

(Reference for a preliminary ruling — EEC-Turkey Association Agreement — Additional Protocol — Article 59 — Decision No 3/80 — Social security for migrant workers — Article 6(1) — Waiver of residence clauses — Supplementary benefits granted under national legislation — Withdrawal)

1. It is human nature, after a long absence abroad for work or a mission, to wish to return home. Odysseus refused wealth, and even immortality, to return to Ithaka. [2] More prosaically, both the EU and the EEC-Turkey Association Council legislature borne this homing instinct in mind by adopting provisions entitling a worker to export certain social security benefits if he leaves the Member State in which the institution responsible for providing those benefits is situated.

2. This request for a preliminary ruling concerns the interpretation 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, [3] read in conjunction with Article 59 of the Additional Protocol, signed on 23 November 1970 in Brussels. [4] That decision prohibits, inter alia, the application of residence clauses in relation to the payment of certain types of social security benefits to Turkish workers.

3. The Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands, 'the referring court') enquires as to the relationship between that prohibition and the rule precluding 'more favourable treatment' for Turkish workers compared to nationals of Member States laid down in Article 59 of the Additional Protocol.

1 Original language: English.

2 In *Odyssey Book V*, 136, Calypso says that she had hoped to turn Odysseus into an immortal if he remained on her island. In *Odyssey Book VII*, 313, Alcinous (the ruler of the Phaiacians) offers Odysseus wealth and the hand of his daughter Nausikaa as his son-in-law if he remains.

3 OJ 1983 C 110, p. 60.

4 Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 concluding the additional protocol and the financial protocol signed on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey and relating to the measures to be taken for their implementation (OJ 1977 L 361, p. 60) ('the Additional Protocol').

EU law

The Association Agreement and the Additional Protocol

4. The contracting parties signed the Association Agreement in 1963.[5] In accordance with Article 2(1) thereof, the aim of the Association is 'to promote the continuous and balanced strengthening of trade and economic relations between the [Contracting] 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'.

5. Article 12 is part of Chapter 3 of the Agreement, entitled 'Other economic provisions'. It provides that, 'the Contracting Parties agree to be guided by [Articles 45, 46 and 47 TFEU] for the purpose of progressively securing freedom of movement for workers between them'.

6. Title II of the Additional Protocol contains detailed provisions governing 'Movement of persons and services', Chapter I of which relates to 'Workers'.

7. Article 39 (part of that chapter) states that '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 [EU] and for their families residing [there]'. Such provisions 'must enable workers of Turkish nationality … 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 EU]'.[6] Pursuant to Article 39(4), 'it must be possible to transfer to Turkey old-age pensions, death benefits and invalidity pensions obtained under the measures adopted pursuant to paragraph 2'.

8. Title IV of the Additional Protocol ('General and final provisions') includes Article 59, which provides that 'in the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community'.

9. The Additional Protocol forms an integral part of the Association agreement.[7]

5 Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part (OJ 1973 C 113, p. 1), concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (JO 1964 C 217, p. 3685) ('the Association Agreement').

6 Article 39(1) and (2) respectively.

7 Article 62 of the Additional Protocol.

Decision No 1/80

10. Decision No 1/80 was adopted by the Association Council to promote freedom of movement for workers.[8] Article 6 lays down the conditions for access to employment for Turkish nationals duly registered as belonging to the labour force of a Member State. According to settled case-law, as long as a Turkish worker exercises his right to work under the Association Agreement and Decision No 1/80, he enjoys a concomitant right of residence in the Member State concerned.[9] However, he loses that right should he leave the labour force definitively — for example, because he becomes incapacitated for work.[10]

Decision No 3/80

11. The purpose of Decision No 3/80, adopted on the basis of Article 39 of the Additional Protocol, is to put in place social security measures which enable the movement of Turkish nationals working or having worked in one or more Member States.[11] Decision No 3/80 cross-refers extensively to Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.[12]

12. Article 2 of Decision No 3/80, entitled 'Persons covered', states that the decision applies 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 and to the survivors of those workers.

13. Article 3(1), headed 'Equality of treatment', provides that 'persons resident in the territory of one of the Member States to whom [Decision No 3/80] 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'.

14. In accordance with Article 4 ('Matters covered'):

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

…

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

…

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

…

4. This Decision shall not apply to social and medical assistance …'

8 Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, created under the Agreement establishing an Association between the European Economic Community and Turkey ('Decision No 1/80'). The decision has not been published in the *Official Journal of the European Union* but is available in a useful compilation of relevant texts, published under the authority of the Council in 1992: see https://www.ab.gov.tr/files/ardb/evt/EEC-Turkey_association_agreements_and_protocols_and_other_basic_texts.pdf.

9 See judgment of 20 September 1990, *Sevince*, C-192/89, EU:C:1990:322, paragraph 29.

10 See judgment of 6 June 1995, *Bozkurt*, C-434/93, EU:C:1995:168, paragraph 42.

11 Article 39(1) of the Additional Protocol and the preamble of Decision No 3/80.

12 Regulation of the Council of 14 June 1971 (OJ, English Special Edition 1971(II), p. 416).

15. Article 6(1), first subparagraph, of Decision No 3/80, headed 'Waiving of residence clause …', states: 'Save as otherwise provided in this Decision, invalidity, old-age or survivors' cash benefits and pensions for accidents at work or occupational diseases, acquired under the legislation of one or more Member States, shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated'.

Regulation No 1408/71

16. Regulation No 1408/71 defines the term 'benefits' in Article 1(t) as meaning 'all benefits …, including all elements thereof payable out of public funds, revalorisation increases and supplementary [benefits], subject to the provisions of Title III, as also [sic] lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.[13] Article 4 of that regulation defines the substantive scope of the regulation as covering all legislation concerning 'branches of social security' relating to one of the risks listed in Article 4(1) — including the 'invalidity benefits' referred to in Article 4(1)(b) — but not 'social and medical assistance' (Article 4(4)); and it makes no distinction between contributory and non-contributory schemes (Article 4(2)).

17. Article 10(1) provides that '… invalidity … cash benefits … acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated'. Its wording thus clearly served as a model for the first subparagraph of Article 6(1) of Decision No 3/80.

18. That prohibition does not apply, by virtue of the combination of Articles 4(2a)(a) and 10a(1) of Regulation No 1408/71, both inserted by Council Regulation (EEC) No 1247/92,[14] to certain special non-contributory cash benefits ('SNCCBs'). Provided that an SNCCB is mentioned in Annex IIa to Regulation No 1408/71, receipt of that benefit may be limited to the territory of the Member State granting it. In other words, SNCCBs are *not* exportable. Annex IIa includes, for the Netherlands, the Toeslagenwet of 6 November 1986 (Supplementary Benefits Act, 'the TW').[15]

19. Decision No 3/80 was *not* amended to include an equivalent provision to Article 10a(1) of Regulation No 1408/71.

Regulation No 883/2004

20. Regulation No 883/2004 aims to coordinate measures to guarantee that the right to free movement of persons can be exercised effectively.[16]

13 'as also' in the English text is, I think, a mistranslation of 'ainsi que' ('and also') in the French text. Regulation No 1408/71 was in principle repealed by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1). At the material time, it was the version of Regulation No 883/2004 as amended by Commission Regulation (EU) No 1372/2013 of 19 December 2013 (OJ 2013 L 346, p. 27) that was applicable. Notwithstanding its repeal for most purposes, Regulation No 1408/71 was last amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 amending Regulation No 1408/71 (OJ 2008 L 177, p. 1).

14 Council Regulation of 30 April 1992 (OJ 1992 L 136, p. 1). The new Article 4(2a) brought special non-contributory cash benefits, as then covered by the rules in Article 10a, within the scope of Regulation No 1408/71. In *Snares* (judgment of 4 November 1997, C-20/96, EU:C:1997:518), the first case dealing with the new Article 10a, the Court explained that once a benefit is listed in Annex IIa to Regulation No 1408/71, that establishes that the benefit in question falls within the scope of Article 10a of Regulation No 1408/71 *and* that 'the wording of Article 10a implies that the benefits to which it refers also come within Article 4(2a) of Regulation No 1408/71, as amended by Regulation No 1247/92' *and* is 'governed exclusively by the coordination rules of Article 10a' (at paragraphs 30 to 32).

15 The TW was added to that list by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations No 1408/71 and (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ 2005 L 117, p. 1).

16 Recital 45.

21. Article 2 defines the personal scope of the regulation as applying 'to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors'.

22. Article 3 defines the material scope of the regulation as follows:

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

…

(c) invalidity benefits;

…

2. Unless otherwise provided for in Annex XI, [17] [Regulation No 883/2004] shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. [Regulation No 883/2004] shall also apply to the special non-contributory cash benefits covered by Article 70.

…'

23. Article 7, on the waiving of residence rules, mirrors Article 10 of Regulation No 1408/71 and states that 'unless otherwise provided for by [Regulation No 883/2004], cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated'.

24. Article 70 (the opening article of Chapter 9, entitled 'Special non-contributory cash benefits') contains a more elaborate version of Article 10a of Regulation No 1408/71 and states:

'1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, "special non-contributory cash benefits" means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

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

17 That annex contains special provisions for the application of the legislation of the Member States.

and

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

and

(c) are listed in Annex X.

3. Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

25. By way of derogation from the general rule in Article 7, an SNCCB listed in Annex X is therefore non-exportable under Regulation No 883/2004, just as it was under Article 10a of Regulation No 1408/71.

26. Article 90(1) of Regulation No 883/2004 provides that Regulation No 1408/71 is repealed from the date of application of the former, but that it 'shall remain in force and shall continue to have legal effect' for the purposes of '(c) … agreements which contain a reference to Regulation (EEC) No 1408/71, for as long as those agreements have not been modified in the light of this Regulation'.

27. Annex X to Regulation No 883/2004 lists the various SNCCBs and includes, for the Netherlands, the TW.

28. In 2012 the Council adopted Decision 2012/776/EU with the intention of updating Decision No 3/80. Annexed to that decision was a new 'draft decision of the EU-Turkey Association Council with regard to the adoption of provisions on the coordination of social security systems'.[18] However, so far as I am aware, that draft decision has not been adopted by the Association Council. In consequence, Decision No 3/80 has *not* yet been amended to include an equivalent provision to Article 70 of Regulation No 883/2004.

Regulation (EU) No 1231/2010

29. Regulation No 1231/2010 extends the regime applicable under Regulation No 883/2004 to third-country nationals as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.[19]

18 Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems (OJ 2012 L 340, p. 19).

19 Article 1 of Regulation of the European Parliament and of the Council of 24 November 2010 extending Regulation No 883/2004 and Regulation No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1).

Netherlands law

The TW

30. Under the TW, individuals are eligible to receive a supplementary benefit to increase their income to a level that (at the maximum) is equal to the minimum wage applicable in the Netherlands ('the supplementary benefit'). The award of that supplementary benefit is conditional upon the individual concerned being covered by an employees' insurance scheme, such as incapacity to work. [20]

31. Article 4a, inserted into the TW by the Wet beperking export uitkeringen of 27 May 1999 (the Law on the restriction of payment abroad of social security benefits: 'the Wet BEU') with effect from 1 January 2000, provides:

'1. The person referred to in Article 2 shall not be entitled to an allowance during the period in which he does not reside in the Netherlands.

2. The person referred to in Article 2, who is not entitled to an allowance under the first paragraph, shall be entitled to an allowance from the date on which he resides in the Netherlands if he meets the conditions referred to in Article 2(1), (2) or (3).'

The Remigratiewet

32. The Remigratiewet (Law on Remigration) provides, inter alia, for financial assistance to be given to certain categories of persons who wish to leave the Netherlands and relocate to their country of origin. Article 8(1) of that law provides that individuals who have left the Netherlands to return to their country of origin may return to the Netherlands within one year of the date on which they settled in the country of destination.

Facts, procedure and the questions referred

33. Mr Çoban was born on 20 February 1951 and is a Turkish national registered as belonging to the labour force of the Netherlands within the meaning of Article 6 of Decision No 1/80. He worked as an international chauffeur until 11 September 2006, when he stopped work due to illness. He obtained an EU long-term residence permit on 18 December 2006.

34. On 8 September 2008 he was awarded a benefit under the Wet werk en inkomen naar arbeidsvermogen (Law on Work and Income — Employment Capacity) corresponding to an incapacity assessed at 45% to 55% according to the relevant national scale. From January 2012 he was also awarded a supplementary benefit of EUR 940.25 gross per month under the TW in order to ensure that he would have an income equivalent to the minimum wage in the Netherlands. At the material time, in accordance with Article 4a of the TW, an individual was eligible for that benefit only if he lived in the Netherlands.

35. On 10 February 2014, Mr Çoban informed the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Schemes Implementing Body, 'the Uwv') that he intended to settle in Turkey as of 1 April 2014. By decision of 12 February 2014, the Uwv terminated Mr Çoban's supplementary benefit under the TW as of the date of his departure. He did not lodge an appeal against that decision, which therefore became definitive.

20 Article 1(1)(d) of the TW. The TW itself is founded on the Wet op de arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work, 'the WAO') which formed the background to judgments of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346 ('*Akdas*'), and of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8 ('*Demirci*').

36. In the context of moving back to Turkey Mr Çoban requested and was awarded certain remigration benefits. He relocated to Turkey on 18 March 2014. At that time he still held an EU long-term residence permit.

37. On 9 July 2014 Mr Çoban reapplied, from Turkey, for the supplementary benefit under the TW. It is not entirely clear from the order for reference whether this was a 'new' application for that benefit or an application to have his acquired right to the benefit recognised and the benefit reinstated.[21] By decision of 1 August 2014, the Uwv rejected that application. On 20 October 2014, the Uwv confirmed that decision on the grounds that Mr Çoban was no longer eligible to receive the supplementary benefit: he did not live in the Netherlands and therefore did not comply with the residence condition in Article 4a of the TW.

38. Mr Çoban's appeal against the Uwv's decision was dismissed by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands).

39. Mr Çoban appealed against that judgment to the referring court. That court observes that Mr Çoban left the Netherlands of his own volition and at a time when the residence requirement under Article 4a of the TW had already been introduced. At the time when Mr Çoban made a request for the supplementary benefit from Turkey, and at the point when that benefit was refused, he would still have been able to return to the Netherlands on the basis of his EU residence permit.[22] Against that background, the referring court entertains doubts as to how the Court's existing case-law should be applied to Mr Çoban.[23] Accordingly, it has referred the following question for a preliminary ruling:

'Must Article 6(1) of Decision No 3/80, having regard to Article 59 of the Additional Protocol, be interpreted as precluding a legislative provision of a Member State such as Article 4a of the [TW], under which a supplementary benefit which has been awarded is withdrawn if the beneficiary moves to Turkey, even if that beneficiary left the territory of the Member State on his own initiative? Is it significant in this regard that, at the time of departure, the person concerned no longer has a right of residence under the law of the [EEC-Turkey] Association, but does hold a long-term EU residence permit? Is it significant in this regard that the person concerned has the opportunity, under national rules, to return within a year of his departure in order to regain the supplementary benefit, and that this possibility continues for as long as he holds a long-term resident's EU residence permit?'

40. Written observations were submitted by the Uwv, the Netherlands Government and the European Commission. At the hearing on 3 October 2018 Mr Çoban, the Uwv, the Netherlands Government and the Commission made oral submissions.

Preliminary observations

41. The supplementary benefit under the TW is an SNCCB within the meaning of Article 70 of Regulation No 883/2004 and is listed in Annex X thereto. It is therefore, contrary to the general rule laid down in Article 7 thereof, a non-exportable benefit for the purposes of that regulation. Regulation No 883/2004 thus maintains the non-exportability of the TW first 'carved out' by Article 10a of and Annex IIa to Regulation No 1408/71. That regime extends to third-country nationals and their families resident in the EU by virtue of Article 1 of Regulation No 1231/2010.[24]

21 See point 60 et seq. below.

22 The referring court observes here that Mr Çoban lost his right to stay in the Netherlands under EEC-Turkey Association law when he left the labour market of that Member State definitively; but that he could still return under the Law on Remigration within a year.

23 Namely *Akdas* and *Demirci*.

24 See points 18, 23, 26 and 27 above.

42. The special arrangements for SNCCBs flow from the fact that the Court had in the past accepted that the grant of benefits closely linked with the social environment could be made subject to a condition of residence in the Member State of the competent institution.[25] The Opinion of Advocate General Léger in *Snares*, to which I gratefully refer, contains a detailed analysis of the reason for the amendments and the changes that they brought about.[26]

43. The references in Decision No 3/80 to Regulation No 1408/71 have not been updated or modified. That is the case, notably, for Article 1(a) of Decision No 3/80, which defines a number of terms including 'benefits' by reference to that regulation. By virtue of Article 90(1) of Regulation No 883/2004, Decision No 3/80 should therefore continue to be interpreted by reference to Regulation No 1408/71.[27] Crucially, moreover, Decision No 3/80 does *not* contain provisions — equivalent to Articles 4(2a) and 10a of Regulation No 1408/71, as perpetuated by Articles 3(3) and 70 of Regulation No 883/2004 — that refer expressly to SNCCBs as such, bring them within the scope of the regulation and then, by way of derogation to the general rule, make such benefits non-exportable. Decision No 3/80 *only* contains the general rule that the benefits that it identifies *are* exportable.

44. Finally, I note that the Court has already ruled that Article 6(1) of Decision No 3/80 has direct effect, so that Turkish nationals to whom that provision applies are entitled to rely on it directly before the Member States' courts to have contrary rules of national law disapplied. The wording of Article 6(1) prohibits the Member States in clear, precise and unconditional terms from reducing, modifying, suspending, withdrawing or confiscating certain benefits by reason of the fact that the recipient resides in Turkey or in another Member State.[28]

Assessment

45. Does the first subparagraph of Article 6(1) of Decision No 3/80, even if read in conjunction with Article 59 of the Additional Protocol, preclude national legislation from withdrawing a supplementary benefit such as the one under the TW if the beneficiary voluntarily moves to Turkey but holds an EU long-term residence permit authorising him to return to the Netherlands and receive that benefit again?

The scope of the prohibition laid down in Article 6(1) of Decision No 3/80

46. The aim of Article 6(1) of Decision No 3/80 is to consolidate progressively the position of Turkish workers in the host Member State. In that respect, it complements Decision No 1/80 which is essentially aimed at the progressive integration of those workers into the labour force of the host Member State.[29]

47. The personal scope of Decision No 3/80 includes workers who are Turkish nationals and are, or have been, subject to the legislation of one of the Member States.[30] The Court has already held in *Akdas and Others* that that includes Turkish workers 'who now reside in Turkey' and 'receive cash invalidity benefits acquired under the legislation of a Member State'.[31] It is common ground that Mr Çoban comes within the personal scope of Decision No 3/80 and thus of Article 6(1) thereof.

25 See judgment of 27 September 1988, *Lenoir*, 313/86, EU:C:1988:452, paragraph 16, confirmed in judgment of 4 November 1997, *Snares*, C-20/96, EU:C:1997:518, paragraphs 42 and 43.

26 See Opinion in *Snares*, C-20/96, EU:C:1997:227, points 11 to 20.

27 See point 26 above.

28 Judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraphs 67 to 73.

29 Judgment of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraphs 48 and 49.

30 Article 2 of Decision No 3/80.

31 Judgment of 26 May 2011, C-485/07, EU:C:2011:346, paragraph 79.

48. Next, I should examine briefly the material scope of that provision.

49. It appears from the order for reference that the basic benefit corresponding to Mr Çoban's incapacity has not been withdrawn. What has been withdrawn is the supplementary benefit that he previously received under the TW, whose purpose was to increase his income to the level of the minimum wage in the Netherlands.

50. Is a supplementary benefit under the TW an 'invalidity benefit' within the meaning of Article 6(1) of Decision No 3/80?

51. The referring court is of the view that the supplementary benefit is an invalidity benefit within the meaning of that provision. Indeed, the Court's judgments in *Akdas* and in *Demirci* interpreting Article 6(1) of Decision No 3/80 concerned precisely the same benefit. [32]

52. I confess that I am not so sure that the supplementary benefit under the TW is actually covered by Decision No 3/80.

53. First, I recall that SNCCBs were brought within the scope of Regulation No 1408/71 by the amendments introduced by Regulation No 1247/92. Those amendments included both Article 4(2a)(a) (which expressly brings SNCCBs within the scope of Regulation No 1408/71 and describes them as being intended 'to provide supplementary, substitute or ancillary cover') and Article 10a (the rule on the non-exportability of SNCCBs). No equivalent changes were, however, made to Decision No 3/80 so as to include SNCCBs within its scope.

54. Second, Article 4 of Decision No 3/80 defines the matters covered by that decision and explains, in Article 4(1)(b), that invalidity benefits include 'those intended for the maintenance or improvement of earning capacity'. However, that is precisely what the supplementary benefit under the TW does *not* do. It has nothing to do with earning capacity. It improves the recipient's *income level*.

55. Third, Article 4(4) of Decision No 3/80 expressly states that the decision 'shall not apply to social assistance' — yet the purpose of an SNCCB such as the supplementary benefit under the TW (as distinct from the invalidity benefit itself) is at least in part social.

56. Those elements might be thought to militate against considering that an SNCCB falls within the scope of Decision No 3/80 at all. However, since the Court in both *Akdas* and *Demirci* has already treated the very same benefit under the TW as falling *within* Decision No 3/80 I shall proceed on the basis that it is indeed an 'invalidity benefit' within the meaning of Article 6(1) of Decision No 3/80. [33]

57. Is an application for the supplementary benefit under the TW covered by Article 6(1) of Decision No 3/80 when it is submitted after relocation to Turkey, either as a new application for the benefit or as an application for its reinstatement?

32 Judgments of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraphs 47 and 48, and of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraphs 38 and 39. In *Akdas and Others*, paragraph 54, the Court cites the view of the referring court that the supplementary benefit paid under the TW, the award of which does not depend on an individual assessment of the personal needs of the applicant, must be treated as an invalidity benefit within the meaning of Article 4(1)(b) of Decision No 3/80 and that it falls within the material scope thereof.

33 In judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346 (at paragraph 77), the Court records that 'it is accepted by the parties' that a benefit such as the supplementary benefit under the TW falls within Article 4(1)(b) of Decision No 3/80 and is therefore covered by the prohibition in Article 6(1) thereof. Probably in consequence, the question was not touched upon, by either the Advocate General or the Court, in *Demirci* (judgment of 14 January 2015, C-171/13, EU:C:2015:8).

58. It is clear from the wording of Article 6(1) of Decision No 3/80 that benefits falling within the material scope of that provision and '*acquired* under the legislation of one or more Member States' (emphasis added) cannot be subject to 'any reduction, modification, suspension, withdrawal or confiscation' because the beneficiary resides in Turkey or in the territory of another Member State.

59. Furthermore, Article 39(4) of the Additional Protocol (the legal basis for Decision No 3/80)[34] refers solely to the possibility to '*transfer* to Turkey … invalidity pensions *obtained* under the measures adopted …' (emphasis added).

60. It follows logically that an application to *reinstate* entitlement to a benefit previously acquired would be covered by Article 6(1) of Decision No 3/80; but that, conversely, a new application seeking to *establish* entitlement to a benefit would not be. It is for the national court, as sole judge of fact, to determine definitively into which of those two categories Mr Çoban's application of 9 July 2014 from Turkey falls. I add only that an application for *reinstatement* must necessarily fall within Decision No 3/80 inasmuch as reinstatement is the obvious remedy for a wrongful termination of a benefit.

61. A further difficulty needs, however, to be addressed. The order for reference makes it clear that Mr Çoban was indeed receiving the supplementary benefit under the TW from January 2012 until it was withdrawn by decision of 12 February 2014 as from 1 April 2014 (the date on which Mr Çoban had informed the Uwv that he would relocate to Turkey). Mr Çoban did not appeal against that decision, which thus became definitive.

62. The referring court nevertheless takes the view that, to the extent that Mr Çoban's present claim can be understood as seeking to have his supplementary benefit under the TW *reinstated*, he is reasserting his *acquired right* to that benefit (and, in effect, asking the Uwv to reconsider its decision of 12 February 2014 terminating payment of that benefit).[35] Again, it is for the national court to determine under national law whether Mr Çoban's omission to appeal against the Uwv's decision of 12 February 2014 is an impediment to considering that his present action involves a claim to an acquired right to the benefit. It would seem from the order for reference that under national law, it is *not* an impediment and that Mr Çoban may indeed so found his claim.

63. On that basis, it follows that the circumstances of Mr Çoban's case do fall within the scope of the prohibition laid down in Article 6(1) of Decision No 3/80.

64. I now turn to the remaining (important) questions with which the Court will have to grapple. Is Mr Çoban's directly effective right to rely upon Article 6(1) of Decision No 3/80 undermined by the twin facts that he held an EU long-term resident's permit and that his relocation to Turkey was voluntary? And does Article 59 of the Additional Protocol operate so as to override that right?

65. In order to answer those questions, it is first necessary to examine with care the Court's two contrasting judgments in *Akdas* and in *Demirci*.

34 See Article 39(1) of the Additional Protocol and the preamble to Decision No 3/80.

35 That statement (at point 5 of the order for reference in the present case) is repeated at point 4.4 of the same court's subsequent order for reference in Case C-257/18 *Güler* (pending). Indeed, the referring court there highlights the fact that Mr Çoban *does* have an acquired right to the supplementary benefit, 'whilst in Güler's case that is doubtful' as one of its reasons for making the further reference to this Court under Article 267 TFEU.

The judgments in Akdas and Demirci

66. In *Akdas*, the claimants were all Turkish nationals who had become incapacitated for work and who had applied for and obtained, whilst still resident in the Netherlands, payment of both an invalidity benefit under the WAO and a supplementary benefit under the TW in the version in force before 2000. They returned to Turkey to be close to their families, retaining the award of those two benefits pursuant to Article 39(4) of the Additional Protocol. However, once the amended version of the TW entered into force on 1 January 2000, the competent national authorities phased out payment of the supplementary benefit under the TW.

67. The Court reviewed the introduction of Article 10a into Regulation No 1408/71 and the consequent non-exportability arrangements for SNCCBs such as the supplementary benefit payable under the TW.[36] It went on to conclude that allowing the claimants to continue to receive that benefit was *not* incompatible with Article 59 of the Additional Protocol.

68. First, Article 39(4) of the Additional Protocol expressly provided for exportability of benefits (and Article 6(1) of Decision No 3/80 duly reflected that provision). Second, the claimants came within the scope of Article 2 of Decision No 3/80 as Turkish workers. Third, applying the rules on SNCCBs in Regulation No 1408/71 in the context of Decision No 3/80 would amount to *amending* that decision, a power reserved to the Association Council under Articles 8 and 22 of the Association Agreement. Fourth, the situation of the claimants could not usefully be compared to that of EU citizens, given that the latter were entitled to move and reside in the territory of the Member States and enjoy the freedom not only to leave a Member State in the first place, but also to return to it.[37]

69. In contrast, in *Demirci* the Court held that Mr Demirci and his colleagues could *not* rely on Decision No 3/80 to object to the residence requirement imposed by the national legislation as a condition for receiving a supplementary benefit under the TW.

70. The claimants in that case all held dual Turkish and Dutch nationality. Like Mr Akdas and his colleagues, they became incapacitated and unable to work. They too were awarded both the main invalidity benefit under the WAO and the supplementary benefit under the TW in the version in force before 2000. They too returned to Turkey to be close to their families, retaining the award of those two benefits pursuant to Article 39(4) of the Additional Protocol. However, once the amended version of the TW entered into force on 1 January 2000, the competent national authorities similarly decided to phase out payment to them of the supplementary benefit under the TW. They challenged those decisions.

71. In distinguishing *Akdas*, the Court pointed out that the fact that Mr Demirci and his colleagues had acquired the nationality of the host Member State as Turkish workers '[put] them in a very specific situation, especially given the objectives of the EEC-Turkey Association regime'. Acquisition of the nationality of the host Member State represents, in principle, the most accomplished level of integration of the Turkish worker in the host Member State. Acquisition of that second nationality entailed the legal consequences arising both from the possession of that nationality and also, as a corollary, from citizenship of the Union, including in particular the right to reside and move freely in the Member States. There was 'accordingly nothing justifying the proposition that a Turkish national, whose legal regime has necessarily changed at the time of acquisition of the nationality of the host Member State, should not be treated by that State exclusively as one of its own nationals for the purposes of paying out a benefit such as that at issue in the main proceedings'.[38]

36 Judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraphs 84 to 87.

37 Judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraphs 88 to 95.

38 Judgment of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraphs 53 to 57.

72. The Court considered that were Mr Demirci and his colleagues to be able to retain the supplementary benefit under the TW, they would enjoy a twofold, unjustifiable difference in treatment. Because they had Dutch nationality, they would be treated more favourably than workers who only held Turkish nationality and who no longer enjoyed a right of residence in the Netherlands because they were no longer duly registered as belonging to the labour force of that State. They would also be in a more favourable position than nationals of the host Member State or another Member State who would, admittedly, enjoy favourable terms of right to reside and free movement within the Union, but who remained subject to the requirement to reside in the territory of the Kingdom of the Netherlands in order to receive the supplementary benefit. That result was precluded by Article 59 of the Additional Protocol.

Article 59 of the Additional Protocol

73. The Additional Protocol is primary law within the hierarchy of EEC-Turkey Association law (Article 62 of the Additional Protocol). Decisions adopted by the Association Council exercising delegated powers must therefore be interpreted in a manner that is consistent with the 'not more favourable treatment' rule that it lays down. I have suggested elsewhere that Article 59 of the Additional Protocol reflects the principle that membership of the European Union is the deepest and most special relationship that a State can obtain; and that any other relationship between a third country and the European Union must necessarily, in consequence, be less privileged. [39]

74. As its wording makes clear, Article 59 of the Additional Protocol concerns the rights and obligations of the Member States and Turkey. It does not explicitly address the rights and obligations of individual citizens. That said, Article 59 indubitably can and does serve as a principle of interpretation, leading the Court to examine comparators and to conclude in favour of one possible reading of the text of a lower-ranking instrument (such as Decision No 3/80) rather than another. The case-law applying Article 59 confirms its importance in that role where two situations involving EU nationals and Turkish nationals may usefully be compared. Thus, the Court has consistently held, in the context of free movement of workers and Decision No 1/80, that Article 59 of the Additional Protocol prohibits Turkish nationals from being put in a more favourable position than EU citizens. [40] However, on a number of occasions the Court has refused to compare the situation of family members of Turkish workers, deriving rights from Article 7 of Decision No 1/80, to that of family members of EU citizens, because (having examined the respective legal situations) the Court found that they could not usefully be compared, having regard to their significant differences. [41]

75. I thus agree wholeheartedly with my colleague Advocate General Wahl's analysis in *Demirci*: 'As the considerations of the Court in *Akdas* make clear, Article 59 of the Additional Protocol operates as a "mechanism of last resort" to ensure that the interpretation of the provisions of the EEC-Turkey Association regime does not unduly treat EU nationals less favourably than Turkish nationals. Article 59 does not, however, constitute an overarching non-discrimination clause that may be invoked by EU nationals in all circumstances where Turkish nationals are afforded rights under the EEC-Turkey Association regime that EU nationals do not enjoy'. [42]

76. Is Mr Çoban's situation properly to be assimilated to that of the claimants in *Akdas*, or the claimants in *Demirci*?

39 See my Opinion in *Yön*, C-123/17, EU:C:2018:267, points 89 and 90.

40 See, inter alia, judgment of 29 April 2010, *Commission* v *Netherlands*, C-92/07, EU:C:2010:228, paragraph 62 and the case-law cited.

41 See, inter alia, judgments of 18 July 2007, *Derin*, C-325/05, EU:C:2007:442, paragraphs 58 to 69, in particular paragraph 68, and of 22 December 2010, *Bozkurt*, C-303/08, EU:C:2010:800, paragraph 45. See, in the same vein, my Opinion in *Pehlivan*, C-484/07, EU:C:2010:410, point 63: it is necessary to have regard to the overall picture.

42 Opinion of Advocate General Wahl in *Demirci and Others*, C-171/13, EU:C:2014:2073, point 43.

77. As the referring court helpfully points out,[43] Mr Çoban lost his right to reside in the Netherlands under the Association Agreement when he left the labour force definitively.[44] He stopped work due to illness on 11 September 2006. However, he obtained an EU long-term residence permit on 18 December 2006 and held that permit when he decided to relocate to Turkey with effect from 1 April 2014. He was entitled under the Law on Remigration to change his mind and to return to the Netherlands within a year of relocating.

78. In what follows, I confine my analysis to the rights conferred by such a permit under EU law and to its limitations. I do not know whether the permit held by Mr Çoban granted any additional rights under national law; and in my view that is, in any event, irrelevant. What matters here is whether, by virtue of the rights granted to him *under EU law*, his position may (or may not) properly be compared to that of a Dutch national and/or another EU citizen. If that comparison is legitimate, then — like the Turkish-Dutch dual nationality claimants in *Demirci* — his right to continue to receive the benefit under the TW (which he would otherwise be able to assert) is overridden by Article 59 of the Additional Protocol.

79. I examine first, and briefly, the issue of voluntary versus non-voluntary relocation, before turning to whether the situation of the holder of an EU long-term residence permit is to be assimilated to that of a Dutch national and/or another EU citizen.

80. Decision No 3/80 draws no distinction between the different reasons why a worker who is a Turkish national and who is, or who has been, subject to the legislation of one or more Member States might wish to move either to Turkey or, indeed, to another Member State.[45] Its purpose is to ensure that the Turkish worker, his EU-resident family members and his survivors can, whatever the surrounding circumstances, retain the benefit of the social security protection to which that Turkish worker has contributed during his working life. Save as otherwise provided (and there *is* no relevant 'other' or 'special' provision in Decision No 3/80), the Turkish worker is meant to 'be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State' (Article 3(1)).

81. Article 6(1) then manifestly envisages the possibility that a person covered under the decision (as listed in Article 2) who is in receipt of three identified acquired benefits ('invalidity, old-age or survivors' cash benefits and pensions for accidents at work or occupational disease') may want or need to move. Persons in receipt of such benefits are, precisely, persons who may well not be able to work, or not be able to look after themselves unaided. Article 6(1) therefore clearly and expressly states that those benefits, on which — obviously — they are going to need to rely if they do move 'shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated'.

82. Moving elsewhere, in other words, is *not* meant to lead to loss of benefit. The natural conclusion to draw is that Decision No 3/80 envisages a whole range of possible scenarios for moving; and that the reason for the move is irrelevant. Let me suggest one (not implausible) scenario as an illustration. Suppose that the worker in question has retired and is getting old and infirm. He is now, unfortunately, a widower, with no one in the Member State where he lives to help look after him. He has an extended family back in Turkey, but also a daughter living with her family in a neighbouring Member State. He can choose to stay put where he is, isolated and without support. He can choose to join his daughter and her family. He can choose to return to Turkey. It seems to me that it would be

43 See point 38 above and the text of the question referred.

44 See point 9 above.

45 See Article 2 (persons covered) read in conjunction with Article 6 (waiver of residence clause). The persons covered under Article 2 also include the members of the families of such workers resident in the territory of one of the Member States and such workers' survivors.

both artificial and invidious to suggest that, if he decides to relocate either to that other Member State or to Turkey (options 2 and 3), the 'voluntariness' of that decision takes him outwith the scope of Article 6 — or, indeed, of Decision No 3/80 as a whole. That cannot be the prism through which Article 6(1) should be viewed.

83. I therefore conclude that, although the Court mentioned voluntary exercise of free movement rights as an EU citizen to buttress its reasoning in *Demirci*, it cannot have intended in so doing to make 'voluntariness of departure' from the Member State that granted the benefit the determining factor which, if demonstrated, strips the Turkish recipient of social security benefits and thus of the protection afforded by Article 6(1) of Decision No 3/80.

84. I now turn, therefore, to the question of the relative status and rights of the holder of an EU long-term resident's permit as compared to those of (a) a Dutch national and (b) a national of another Member State who is therefore an EU citizen.

85. Council Directive 2003/109/EC is intended to grant third-country nationals who have resided legally in the EU for at least five years and who hold a long-term residence permit 'a set of uniform rights which are as near as possible' to those enjoyed by citizens of the European Union (recital 2).[46] Recital 7 explains that, to *acquire* long-term residence status, 'third-country nationals should prove that they have adequate resources and sickness insurance, to avoid becoming a burden for the Member State. Member States, when making an assessment of the possession of stable and regular resources may take into account factors such as contributions to the pension system and fulfilment of tax obligations'. Effect is given to that recital by Article 5(1)(a) and (b), which set self-sufficiency *without* recourse to the social security system and possession of sickness insurance as preconditions for acquiring long-term residence status.

86. Article 8(1) provides that long-term residence status shall be permanent, subject to Article 9. The grounds for withdrawal or loss of such status enumerated in the latter provision include, in addition to certain public policy reasons, 'absence from the territory of the [EU] for a period of 12 consecutive months' (Article 9(1)(c)). Article 11 lays down the right to equal treatment with nationals of the Member State concerned, but also contains a number of derogations from that principle. In particular, Article 11(4) provides that 'Member States may limit equal treatment in respect of social assistance and social protection to core benefits'.[47]

87. Curiously, Directive 2003/109 does not appear to deal with the question of what happens — that is, what are the respective rights of the third-country national and of the Member State that is hosting him — if the person concerned becomes permanently dependent on social security eked out by social assistance for support; or indeed if he becomes destitute.

88. It seems clear that Mr Çoban would have qualified (and presumably did qualify) for an EU long-term residence permit by virtue of his work as an international chauffeur. He obtained his permit very shortly (about three months) after initially stopping work.[48] At that stage, his future prospects — not least, whether or not he would in fact be able to resume his work — may well not have been entirely clear. I note that it was not until nearly two years later (on 8 September 2008), that he was assessed at between 45% and 55% incapacity and awarded his incapacity benefit.[49]

46 Directive of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

47 As to the meaning of 'core benefits', see judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 91. *Member States may* ' *limit the equal treatment enjoyed by holders of the status* conferred by Directive 2003/109, with the exception of social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health' (emphasis added).

48 See point 33 above.

49 See point 34 above.

89. At the time when the Uwv withdrew Mr Çoban's benefit under the TW, was he in an equivalent position to that of either a Dutch national (like Mr Demirci and his colleagues) or of a national of another EU Member State who is therefore, through that nationality, an EU citizen?

90. It seems obvious that, vis-à-vis the Netherlands, Mr Çoban's position cannot usefully be compared with that of a Dutch national. Mr Demirci and his colleagues were in their (adopted) home country. By acquiring Dutch nationality, they had 'attained the most accomplished level of integration of the Turkish worker in the host Member State'.[50] They are Dutch. Mr Çoban has not taken that fundamental step.

91. In the alternative, should Mr Çoban's position be compared with an EU citizen, also holding long-term resident status in the Netherlands, who moves elsewhere and thereby forfeits his right to payment of the supplementary benefit under the TW?

92. As a matter of principle, it is almost axiomatic that, however favourable the position of a third-country national who has attained EU long-term resident status may be when compared to the less secure position of a third-country national who has *not* yet achieved that status,[51] it cannot be as good as the position of someone who is an EU citizen.

93. Citizenship of the Union, as the Court has held in a long line of cases stretching back to *Grzelczyk*, is 'destined to become the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[52] Mr Grzelczyk was able to claim the Belgian 'minimex' — a 'social advantage' within the meaning of Regulation (EEC) No 1612/68[53] — during the final year of his studies *not* by virtue of (EEC) secondary legislation, but by virtue of the solidarity owed to a fellow citizen of the Union. A Belgian student in the same position could have accessed the 'minimex' for financial support. Therefore, so could Mr Grzelczyk.[54]

94. EU long-term resident status for a third-country national grants no such Treaty-based right to fill in lacunae in, or nuance the interpretation of, EU secondary legislation. It is therefore intrinsically unlikely that that status will truly be equivalent to the status of an EU citizen.

95. It seems to me that in at least two respects, Mr Çoban's position on 1 April 2014 may fairly be described as being more precarious than that of an EU citizen. The first concerns his continuing financial security once he became permanently incapacitated for work; the second the limited duration of his right to retain his EU long-term resident status if he left the Netherlands and relocated to Turkey.

50 Judgment of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraph 53.

51 The status is, unquestionably, very favourable. Advocate General Szpunar describes it thus in *P and S*, C-579/13, EU:C:2015:39, points 29 to 31: '… Directive 2003/109 establishes for third-country nationals who have been legally resident within the European Union for at least five years a *specific legal status deriving exclusively from EU law*, namely long-term resident status. The introduction of that status creates for foreign nationals an *alternative to citizenship* for the purposes of participation in the social and economic life of the European Union, which in the legal literature is termed *"denizenship", as opposed to "citizenship"*. In matters not governed by EU law, the status of third-country nationals resident within the European Union continues to be *subject to the national law of the Member States*' (emphasis added).

52 Judgment of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31.

53 Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475). Judgment of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 27. However, Mr Grzelczyk did not fall within that regulation, because he did not qualify as a 'worker': see paragraphs 15 and 16 of the judgment.

54 Judgment of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 29. As to the effectiveness of EU citizenship rights under the Treaty in overriding limitations in secondary legislation, see paragraphs 30 to 36 of the judgment.

96. As to the first, it is clear from the judgments in *Dano*[55] and *Alimanovic*[56] that under certain circumstances a Member State is entitled to limit access to SNCCBs even for *EU citizens* who are lawfully present on its territory, up to the point when those citizens acquire the right of permanent residence.[57] So far as I am aware, there is as yet no case-law of the Court dealing with the question of whether a third-country national who has obtained EU long-term resident status and who subsequently becomes financially totally dependent on a mixture of a social security benefit and an SNCCB for his economic subsistence may count upon maintaining his status, and with it the continuation of those benefits, for the rest of his life. It would be bold to assert that that would self-evidently be the case.[58]

97. As to the second, it is clear from the wording of Article 9(1)(c) of Directive 2003/109 that a third-country national 'shall no longer be entitled to maintain long-term resident status … in the event of absence from the territory of the [EU] for a period of 12 consecutive months'. After that point, he will be in the same position as any other third-country national seeking to (re-)enter the European Union.[59] *Ex hypothesi*, on the facts of the present case (Mr Çoban has between 45% and 55% incapacity) such a person will not be able to avail of the preferential treatment afforded to a Turkish national wishing to (re-)join the labour force of a Member State under the Association Agreement (and he would not, in any event, have equivalent EU free movement rights to those of an EU citizen).[60]

98. In contrast, an EU citizen who has long-term resident status and who chooses to leave the Netherlands (and thereby foregoes his right to receive the supplementary benefit under the TW) will indeed eventually lose his long-term residence status — after two years rather than after 12 months[61] — but he will, of course, be able to re-enter the Netherlands at will.[62]

99. In *Demirci*, the Court prefaced its detailed analysis of why — unlike the claimants in *Akdas* — those dual Turkish-Dutch nationals could not rely on Decision No 3/80 in order to retain their supplementary benefit under the TW with the words 'the fact that the respondents in the main proceedings acquired the nationality of the host Member State as Turkish workers puts them in *a very specific situation*' (emphasis added).[63]

100. It is, however, clear that Mr Çoban is *not* in an equivalent 'very specific situation'. He does not hold dual Turkish-Dutch nationality. He is not a national of another EU Member State. He holds a single nationality: Turkish. In my view, the material set out at point 84 et seq. above demonstrates that his situation cannot properly be compared with that of a Dutch national and/or an EU citizen. It follows that Article 59 of the Additional Protocol does not operate so as to deprive him of the directly effective rights under Article 6(1) of Decision No 3/80 on which he would otherwise be able to rely.

55 Judgment of 11 November 2014, C-333/13, EU:C:2014:2358.

56 Judgment of 15 September 2015, C-67/14, EU:C:2015:597.

57 See judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, paragraphs 68 to 74. Ms Dano held a (national) residence certificate of unlimited duration but could not yet claim a right of residence under Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ('the Citizens' Rights Directive') (OJ 2004 L 158, p. 77) (see paragraphs 26 and 44 of the judgment respectively).

58 In that connection, see judgments of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78, and of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraphs 57 to 59 and 62. The text of Directive 2003/109 does not answer this question: see point 87 above.

59 It may not be coincidental that the Law on Remigration allows a Turkish worker who has relocated to Turkey to change his mind and return to the Netherlands provided that he does so within one year of the date on which he settled in the country of destination: see point 32 above.

60 See judgment of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraph 56: 'in contrast to nationals of Member States, Turkish workers are not entitled to move freely within the Community but benefit only from certain rights in the host Member State (see judgments in *Tetik*, C-171/95, EU:C:1997:31, paragraph 29, and *Derin*, C-325/05, EU:C:2007:442, paragraph 66)'.

61 See Article 16(4) of the Citizens' Rights Directive.

62 See Article 5(1) of the Citizens' Rights Directive.

63 Judgment of 14 January 2015, *Demirci and Others*, C-171/13, EU:C:2015:8, paragraph 53.

Postscript

101. It will be clear from the analysis that I have set out that the root cause of the uncertainty that has led to the present litigation is the fact that Decision No 3/80 mirrors the version of Regulation No 1408/71 that was in force *before it was amended* so as to render SNCCBs non-exportable.[64] In *Akdas* and again in *Demirci*, the Court has proceeded on the basis that SNCCBs are covered by Decision No 3/80.[65]

102. Whilst Article 59 of the Additional Protocol serves as a valuable interpretative tool,[66] and may therefore intervene in specific circumstances to preclude reliance upon Decision No 3/80, its functions and powers do not extend to re-writing Decision No 3/80 so as to 'carve out' the very SNCCBs that the Court has said are covered by that instrument. The power to amend or reframe Decision No 3/80 lies with the Association Council.[67] If for policy reasons it is thought desirable to preclude Turkish nationals from retaining their right to an SNCCB if they relocate away from the host Member State, and unless the Court revisits the premiss on which *Akdas* and *Demirci* were based,[68] only the legislative path remains by which to attain that result.

Conclusion

103. I therefore propose that the Court should answer the question referred by the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) as follows:

Article 6(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families may be relied upon directly by a former worker who does not hold, in addition to Turkish nationality, the nationality of a Member State and who is the beneficiary of a supplementary benefit under the Toeslagenwet to retain that benefit if he relocates to Turkey. That result is not precluded by Article 59 of the Additional Protocol signed on 23 November 1970 in Brussels. It is immaterial whether that person (a) moves to Turkey of his own volition or (b) enjoys, as a third-country national, the status of an EU long-term resident, so that he would be able to return to, and resume residence in, the host Member State within 12 months.

64 See point 53 above. The Court in judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, was clearly aware of the mismatch between Decision No 3/80 and the amended version of Regulation No 1408/71: see paragraphs 83 to 86 of the judgment in that case.

65 See judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraph 77.

66 See point 73 et seq. above.

67 Judgment of 26 May 2011, *Akdas and Others*, C-485/07, EU:C:2011:346, paragraph 91.

68 Were the Court to wish to revisit that premiss I would respectfully suggest that the appropriate place for such a *revirement* of the established case-law would be the Grand Chamber.