



Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS

delivered on 12 October 2023¹

Case C-549/22

X

v

Raad van bestuur van de Sociale verzekeringsbank

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

(Reference for a preliminary ruling – External relations – Euro-Mediterranean Association Agreement EU-Algeria – Article 68(4) – Direct effect – Personal scope – Surviving spouse of a worker of Algerian nationality employed in a Member State – Export of a survivors’ benefit to Algeria – Reduction of benefit – Discrimination on grounds of nationality – Objective justification for reduction that reflects differences in living costs)

I. Introduction

1. The appellant, X, resides in Algeria. Since her deceased spouse worked in the Netherlands, she receives a survivors’ benefit from the Sociale verzekeringsbank (Social Insurance Bank, Netherlands) (‘the SVB’). The Netherlands adopted legislation that reduced the amount of survivors’ benefit paid to X on the basis that the cost of living in Algeria was lower than in that Member State. X challenged that reduction in proceedings before the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands). That Court wishes to know whether Article 68(4) of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part (‘the Association Agreement’)² precludes such a reduction.

¹ Original language: English.

² OJ 2005 L 265, p. 2. The Association Agreement was signed on 22 April 2002. It entered into force on 1 September 2005.

II. Legal framework

A. *European Union law*

2. Article 68 of the Association Agreement provides:

'1. Subject to the provisions of the following paragraphs, workers of Algerian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination on grounds of nationality relative to nationals of the Member States in which they are employed.

The term "social security" shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.

These provisions shall not, however, cause the other coordination rules provided for in Community legislation based on Article 42 of the Treaty establishing the European Community to apply, except under the conditions set out in Article 70 of this Agreement.

2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and survivors' benefits, family, sickness and maternity benefits, and medical care for the workers and for members of their families resident in the Community.

3. The workers in question shall receive family allowances for members of their families who are resident in the Community.

4. The workers in question shall be able to transfer freely to Algeria, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits.

...'

3. Under Article 70 of the Association Agreement:

'1. Before the end of the first year following the entry into force of this Agreement, the Association Council shall adopt provisions to implement the principles set out in Article 68.

2. The Association Council shall adopt detailed rules for administrative cooperation providing the necessary management and monitoring guarantees for the application of the provisions referred to in paragraph 1.'

B. *Netherlands law*

4. The order for reference identifies the following provisions of national law as relevant.

5. Article 13(1) of the Algemene Nabestaandenwet (General law on survivors) ('the ANW') states:

'A person shall be deemed to be insured in accordance with the provisions of this Law if he or she:

- (a) is resident;
- (b) is not resident but is subject to wage tax in respect of work carried out in an employment relationship in the Netherlands or on the continental shelf.'

6. Article 14(1) of the ANW states, in so far as is relevant:

'The surviving relative shall be entitled to survivors' benefit if he or she:

- (a) has an unmarried child who is under the age of 18 and is not a member of another person's household; or
- (b) is incapacitated for work.'

7. Article 17(1) of the ANW provides:

'The gross survivors' benefit shall be fixed at such an amount that, after deduction of the wage tax and national insurance contributions that are to be withheld on that amount for a person who has not yet reached retirement age, taking into account only the general tax credit referred to in Article 22 of the Wet op de loonbelasting 1964 (Law of 1964 on wage tax), the net survivors' benefit is equal to 70% of the net minimum wage.'

8. Under Article 17(3) of the ANW:

'For a surviving relative who is living outside the Netherlands, one of the other Member States of the European Union, another State party to the EEA Agreement or Switzerland, the gross survivors' benefit shall be a percentage fixed by ministerial order of the amount determined pursuant to paragraphs 1, 2 or 5. The percentage shall be determined in such a way as to reflect the relationship between the level of costs of the country in which the survivor is resident and that of the Netherlands. The percentage shall not exceed 100.'

9. By Article 32(a)(1) and (2) of the ANW:

'1. No entitlement to the survivors' benefit shall arise for the surviving relative if he or she is not living in the Netherlands on the day of the insured person's death. ...

2. The first paragraph shall not apply if the surviving relative ..., on the day of the insured person's death, is living in a country in which there may exist, pursuant to a treaty or a decision of an international organisation, an entitlement to survivors' benefit ...'

III. The facts of the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

10. On 1 January 2000, the *Wet beperking export uitkeringen* (Law restricting the export of social security benefits) came into force. It introduced the territoriality principle into different areas of social security law. The principal rule is that there is no right to a benefit, or an existing right to a benefit terminates, when the beneficiary lives outside of the Netherlands or ceases to reside in that Member State. There is an exception where an international treaty with the beneficiary's country of residence governs the export of the benefit, thereby allowing checks to be carried out in order to ensure that those benefits are paid lawfully. Such a treaty does not exist between the Netherlands and Algeria.

11. Under transitional arrangements, a survivors' benefit that accrued to a beneficiary before 31 December 1999 could be exported, even to a country with which the Netherlands had not concluded such a treaty.

12. On 1 July 2012, the *Wet woonlandbeginsel in de sociale zekerheid* (Law on country-of-residence principle in social security) ('the *Wwsz*') entered into force. According to its explanatory memorandum, the *Wwsz* aims to restrict the export, or payment abroad, of social security benefits outside the European Union. To that end, it amended Article 17(3) of the ANW.³ The *Wwsz* aims to ensure that benefits calculated by reference to the Netherlands minimum wage, or that cover certain costs, are in line with the cost of living in a country to which they are exported. Beneficiaries who do not reside in the Netherlands, another Member State, a State party to the European Economic Area Agreement, or Switzerland, are thus paid a benefit calculated as a percentage of the amount of survivors' benefit that they would receive if they lived in the Netherlands.

13. For beneficiaries residing in the Netherlands, the maximum amount of survivors' benefit is 70% of the Netherlands legal monthly minimum wage. For beneficiaries residing in Algeria, the level of benefit was 60% of the level applicable in the Netherlands from 2013 and 40% from 2016.⁴ Those percentages seek to reflect the cost of living in Algeria relative to that in the Netherlands.

14. The appellant's late husband was an employee in the Netherlands. Under the ANW the appellant was entitled to a survivors' benefit from 1 January 1999. Pursuant to the transitional arrangements,⁵ from 1 January 2000 that benefit was exported to Algeria, her country of residence. By decision of 19 September 2018, the SVB informed the appellant that, with effect from 1 January 2013, her survivors' benefit would be reduced so as to reflect the cost of living in Algeria. In her appeal to the referring court, X maintains that she is unable to support herself as a result of that reduction.

15. According to the referring court's settled case-law, the reduction of a benefit due to the application of the country-of-residence principle is a restriction on the export of that benefit. The SVB takes the position that Article 68(4) of the Association Agreement does not preclude such a restriction because it does not contain a clear and precisely defined obligation to permit the export of benefits. Article 68(4) of the Association Agreement therefore does not have direct

³ Point 8 of the present Opinion takes account of that amendment.

⁴ Article 1 of the *Regeling woonlandbeginsel in de sociale zekerheid 2012* (Regulation of 2012 on the country-of-residence principle in social security) and the annex to that regulation.

⁵ See point 11 of the present Opinion.

effect. That position is consonant with Article 70 of the Association Agreement, which provides that Article 68 thereof merely sets out general principles for the Association Council to implement, which it has not done.

16. The referring court observes that the interpretation of Article 68(4) of the Association Agreement is relevant to the export of benefits to Algeria and to the export of benefits to other countries with which the European Union has concluded agreements that contain a similar clause.⁶ That court also notes that the Netherlands law that adjusts the level of survivors' benefit to the cost of living in the country where the beneficiary resides may be incompatible with such clauses. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 68(4) of the Association Agreement be interpreted as applying to a survivor of a deceased worker who resides in Algeria and who wishes to export her survivors' benefit to Algeria?

If so,

(2) Must Article 68(4) of the Association Agreement, having regard to its wording and to its purpose and nature, be interpreted as having direct effect, so that persons to whom that provision applies are entitled to rely on it directly before the Member States' courts to have rules of national law which are contrary to it disapplied?

If so,

(3) Must Article 68(4) of the Association Agreement be interpreted as precluding the application of the country-of-residence principle, as referred to in Article 17(3) of the [ANW], which results in a restriction on the export of the survivors' benefit to Algeria?'

17. The SVB, the Netherlands Government and the European Commission filed written observations and responded to the Court's written and oral questions at the hearing on 28 June 2023.

IV. Analysis

A. *The parties' observations*

18. The SVB submits that Article 68(4) of the Association Agreement has the purpose to ensure that currency restrictions do not impede the transfer of pensions and annuities by 'workers'. Because of the express reference to 'workers', members of a worker's family – such as a widow or widower – are not within the personal scope of that provision.

⁶ See Article 65(4) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (OJ 1998 L 97, p. 2); Article 65(4) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2000 L 70, p. 2); and Article 64(1), second indent, of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (OJ 2000 L 147, p. 3).

19. According to the SVB, Article 68(4) of the Association Agreement does not have direct effect because it does not impose a clear and precisely defined obligation on institutions responsible for the provision of pensions or annuities to transfer the full amount of a benefit to the surviving spouse of a worker resident in Algeria. It follows from Article 70 of the Association Agreement that further implementing measures are required to give effect to Article 68(4). Even if the latter provision had direct effect, neither its text nor its context precludes an adjustment of the rate of a survivors' benefit in order to reflect the lower cost of living in Algeria as compared to the Netherlands. The Netherlands Government shares those views.⁷

20. In support of their view that Article 68(4) of the Association Agreement does not have direct effect, the SVB and the Netherlands Government refer to Article 7 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,⁸ entitled 'Waiving of residence rules'. It states that 'unless otherwise provided for by this Regulation, 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/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated'.⁹ The SVB submits that that provision is similar to the waiving-of-residence clause in the first subparagraph of Article 6(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families ('Decision No 3/80').¹⁰ The SVB and the Netherlands Government submit that Article 68(4) of the Association Agreement cannot be equated with a waiving-of-residence clause since it is drafted in different and more ambiguous terms.

21. At the hearing, the SVB and the Netherlands Government submitted that Article 68(1) of the Association Agreement does not apply to a beneficiary who resides in Algeria since both the text of that provision and the Court's case-law indicate that provision applies exclusively in an intra-European Union context. In any event, Article 17(3) of the ANW does not discriminate on grounds of nationality, either directly or indirectly, because the cost of living for Netherlands residents and Algerian residents is not comparable. It is therefore appropriate to treat those two categories of persons differently.

22. The Commission submits that the personal scope of Article 68(4) of the Association Agreement includes the widowed spouse of a worker, who resides in Algeria and wishes to export her survivors' benefit to that country. That interpretation is in line with the aim and context of the Association Agreement. While Article 68(4) of the Association Agreement is sufficiently clear and precise to have direct effect, the Commission infers from the words 'at the rates applied by virtue of the legislation of the debtor Member State or States' that that provision does not preclude the transfer of a survivors' benefit at a reduced rate in order to reflect the lower

⁷ The Netherlands Government does not take a position on the first question.

⁸ OJ 2004 L 166, p. 1.

⁹ Article 70 of Regulation No 883/2004 states that Article 7 thereof shall not apply to special non-contributory cash benefits listed in Annex X to that regulation. In the case of the Netherlands, the listed benefits are those payable under the *Wet werk en arbeidsondersteuning jonggehandicapten van 24 april 1997 (Wet Wajong)* (Work and Employment Support for Disabled Young Persons Act of 24 April 1997) and under the *Toeslagenwet van 6 november 1986 (TW)* (Supplementary Benefits Act of 6 November 1986).

¹⁰ OJ 1983 C 110, p. 60. Article 6(1) of that decision provides: '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. The provisions of the first subparagraph shall also apply to lump-sum benefits granted in the case of the remarriage of a surviving spouse who was entitled to a survivors' pension.'

cost of living in Algeria. At the hearing, the Commission clarified that it considers that the ANW may operate to the disadvantage of more Algerian nationals than Netherlands nationals, but that any such difference in treatment is objectively justified and therefore not prohibited by the Association Agreement.

B. Assessment

23. By its three questions, the referring court asks the Court to interpret Article 68(4) of the Association Agreement. The first question concerns the personal scope of that provision, in particular whether it applies to the surviving spouse of a worker who resides in Algeria; the second question seeks to ascertain whether that provision has direct effect; and, the third question, whether it precludes the reduction of a survivors' benefit in order to reflect the cost of living in Algeria.

24. Before addressing those questions, two general issues arise for consideration. The first concerns the impact of Council Decision of 21 October 2010 on the position to be taken by the European Union within the Association Council set up by the [Association Agreement] with regard to the adoption of provisions on the coordination of social security systems ('Council Decision 2010/699').¹¹ The second concerns the SVB's submission that the aim of Article 68(4) of the Association Agreement is limited to removing currency restrictions.

1. The impact of Council Decision 2010/699

25. Article 94 of the Association Agreement gives the Association Council – which consists of members of the Council of the European Union and of the Commission, on the one hand, and of members of the Government of Algeria, on the other – the power to take decisions for the purpose of attaining the objectives of that agreement. The Association Council adopts its decisions and recommendations by mutual agreement.¹²

26. Under the third subparagraph of Article 68(1) of the Association Agreement, the provisions of that article shall not result in the application of other coordination rules provided for in EU legislation based on Article 42 EC,¹³ except under the conditions set out in Article 70 thereof, that is, by way of implementing provisions adopted by the Association Council.

27. On 21 October 2010, Council Decision 2010/699 was adopted. It sets out the position that the European Union expects to take in the Association Council for the implementation of Articles 68 to 71 of the Association Agreement.¹⁴ The draft implementing decision defines key terms such as

¹¹ OJ 2010 L 306, p. 14.

¹² Article 10(1) of Decision No 1/2007 of the EU-Algeria Association Council of 24 April 2007 laying down the Association Council's rules of procedure (OJ 2007 L 111, p. 74).

¹³ Regulation No 883/2004, which coordinates Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively, was adopted on the basis of Article 42 EC, now Article 48 TFEU.

¹⁴ See the draft decision of the Association Council that is attached to Council Decision 2010/699 ('the draft implementing decision').

'worker', 'member of the family', 'benefits' and 'exportable benefits'. Article 4(1) of the draft implementing decision, which implements Article 68(4) of the Association Agreement, is entitled 'Waiving of Residence Clauses' and states:

'Exportable benefits within the meaning of Article 1(1)(i) to which persons as referred to in Article 2(a) and (c) are entitled shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the beneficiary is residing: (i) for the purpose of a benefit under the legislation of the Member State, within the territory of Algeria; or (ii) for the purpose of a benefit under the legislation of Algeria, within the territory of a Member State'.

28. What impact, if any, do those provisions of the draft implementing decision have for the interpretation of Article 68(4) of the Association Agreement?

29. Council Decision 2010/699 was adopted on the basis of Article 79(2)(b) TFEU, read in conjunction with Article 218(9) thereof, which provides for the adoption of decisions establishing the positions that the European Union may adopt in a body set up by an agreement with third countries. By the fourth paragraph of Article 288 TFEU, 'a decision shall be binding in its entirety'. The Court has held that such decisions are binding on the Member States when they negotiate the terms of a final implementing decision.¹⁵

30. Article 1 of Council Decision 2010/699 states that the position to be taken by the European Union within the Association Council concerning the implementation of Article 70 of the Association Agreement shall be based on the draft implementing decision attached thereto. The words 'shall be based on' indicate that the position of the European Union may differ from the draft implementing decision in some respects. Considering that Council Decision 2010/699 was adopted over a decade ago, such a scenario is conceivable.

31. Article 11 of the draft implementing decision provides that rights shall not be acquired thereunder for the period prior to the date of its entry into force. As point 25 of the present Opinion observes, the draft implementing decision does not have binding force until it is adopted by the competent legislator, that is to say the Association Council.¹⁶

32. In the light of the foregoing, I consider that one cannot assume that Article 68(4) of the Association Agreement has the same meaning as Article 4(1) of the draft implementing decision, since such an assumption would bypass the legislative process and prejudge its outcome.¹⁷ At most, the draft implementing decision may provide guidance on the interpretation of Article 68(4) of the Association Agreement, but it cannot override the terms in which that provision is expressed.¹⁸ That observation applies equally to the Proposal for a Council Decision on the position to be taken by the Community within the Association Council created by the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, with regard to the adoption of provisions on the coordination of social security systems, which the order for reference mentions.¹⁹

¹⁵ See, by analogy, judgment of 27 March 2019, *Commission v Germany* (C-620/16, EU:C:2019:256, paragraph 78).

¹⁶ See also the preamble to, and Article 13 of, the draft implementing decision.

¹⁷ See, by analogy, judgment of 26 May 2011, *Akdas and Others* (C-485/07, EU:C:2011:346, paragraph 91).

¹⁸ See point 39 of the present Opinion.

¹⁹ COM(2007) 790 final of 12 December 2007 ('the Proposal for a Council decision on the coordination of the social security systems of Algeria and the European Union').

2. *The aim of Article 68(4) of the Association Agreement*

33. The SVB submits that the aim of this provision is limited to the abolition of currency restrictions in connection with the transfer of pensions and annuities.

34. Article 68(4) of the Association Agreement does not expressly propound that aim. The issue arises as to whether the SVB's interpretation may find support by way of a contextual analysis. Article 1(2) of the Association Agreement states that the agreement aims, inter alia, to promote trade and the expansion of harmonious economic and social relations between the contracting parties. Title VI of that agreement is headed 'Social and cultural cooperation'. Chapter 1 thereof addresses the rights of workers. Its provisions relate to, and aim to achieve progress in, the field of movement of workers and equal treatment and social integration for Algerian and EU nationals residing legally in their host States' territories.²⁰

35. Article 67(1) provides that, as regards working conditions, remuneration and dismissal, each Member State shall accord to workers of Algerian nationality employed in its territory treatment free from any discrimination on grounds of nationality relative to its own nationals. Article 67(3) imposes a reciprocal obligation on Algeria.

36. By Article 68(1) of the Association Agreement workers of Algerian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination on grounds of nationality relative to nationals of the Member States in which they are employed. Social security specifically includes survivors' benefits. Article 68(1) of the Association Agreement is expressed to be subject to the subsequent paragraphs of Article 68.

37. Article 68(2) of the Association Agreement provides that periods of insurance, employment or residence completed by workers in the various Member States shall be added together for the purpose of pensions and annuities, including in respect of 'survivors' benefits'. Article 68(4) of the Association Agreement refers to the free transfer of pensions and annuities to Algeria in respect of 'survivor status'. Article 68(5) imposes reciprocal obligations on Algeria in respect of Member State nationals.

38. It follows that Articles 67 and 68 in Chapter 1 of Title VI of the Association Agreement focus on the movement of workers and their equal treatment in comparison with Member State nationals, as the Proposal for a Council Decision on the coordination of social security systems of Algeria and the European Union and the draft implementing decision confirm.²¹ Chapter 1 of Title IV of the Association Agreement addresses current payments and capital movements. One might anticipate that that chapter would contain provisions requiring the lifting of currency restrictions.

²⁰ The Association Agreement was preceded by the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria (OJ 1978 L 263, p. 2), which entered into force on 1 November 1978. That agreement included similar provisions on labour relations, namely Articles 38 and 39 in Title III, which is entitled 'Cooperation in the field of labour'. Article 39(4), which corresponds to Article 68(4) of the Association Agreement, provided: 'The workers in question shall be able to transfer freely to Algeria at the rates applied by virtue of the law of the debtor Member State or States, any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease.' The only material difference between the two articles is the exclusion of special non-contributory benefits from the scope of Article 68(4) of the Association Agreement.

²¹ See the section of the Explanatory Memorandum to that proposal entitled 'Impact assessment': 'The aim of [Articles 67 to 71] in the social security field is that a worker from the associated country concerned can receive certain social security benefits provided under the legislation of the Member State(s) to which he is or has been subject.'

39. The exclusion of special non-contributory benefits in Article 68(4) of the Association Agreement would, moreover, be illogical if that provision's sole aim was limited to removing currency restrictions. Those benefits were excluded from the application of waiving-of-residence clauses in Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community²² and from Regulation No 883/2004.²³ That fact provides further support for the position that Article 68(4) of the Association Agreement addresses all issues related to the transferability of pensions and annuities in the light of the beneficiary's place of residence, and is not limited to the removal of currency restrictions. In that context it is also relevant that neither the Proposal for a Council decision on the coordination of social security systems of Algeria and the European Union nor the draft implementing decision expressly refer to the removal of currency restrictions.

40. In the light of the foregoing, it is implausible that the aim of Article 68(4) of the Association Agreement is limited to the removal of currency restrictions in respect of pensions or annuities transferred to Algeria.

3. The first question: does the survivor of a worker come within the personal scope of Article 68(4) of the Association Agreement?

41. The referring court asks whether the term 'workers' in Article 68(4) of the Association Agreement includes the widowed spouse of a worker, such as the appellant.

42. As is apparent from the order for reference, the parties to the main proceedings consider that the benefit in question falls within the material scope of Article 68 of the Association Agreement. They also consider that it is not a special non-contributory benefit for the purposes of Article 68(4) of that agreement.

43. Survivors' benefits and pensions pursue two main objectives. First, they protect widows or widowers from the risk of poverty by compensating for sharp drops in disposable income to low absolute levels. That is the principal objective of the survivors' benefit in question. Second, they contribute to ensuring against a decrease in disposable income relative to the situation prevailing before the death of a spouse, in the same way that old-age pensions help avoid a sharp drop in income upon retirement. Those consumption-smoothing objectives thus aim at maintaining beneficiaries' living standards.

44. By their nature, survivor status and survivors' benefits arise on the death of a worker and accrue to a survivor. To the extent that Article 68(4) of the Association Agreement refers to the free transferability of pensions and annuities in respect of survivor status, that provision would be deprived of its useful effect were survivors of workers who are entitled to survivors' benefits excluded from its personal scope. It would also be illogical if, having been able to add up periods of

²² OJ 1971 L 149, p. 2; see Article 4(2a), Article 10a(1) of, and Annex IIa to, that regulation, following amendment by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1). Regulation No 1408/71 applied to nationals of third countries by virtue of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provision solely on the ground of their nationality (OJ 2003 L 124, p. 1).

²³ See Articles 7 and 70 of, and Annex X to, that regulation, which applies to nationals of third countries by virtue of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) 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).

insurance, employment or residence for the purpose of pensions and annuities in respect of survivors' benefits pursuant to Article 68(2) of the Association Agreement, only the worker enjoyed the right to transfer those benefits to Algeria.²⁴

45. The ability to transfer pensions or annuities in respect of old age or invalidity to Algeria is particularly relevant to retired workers of Algerian nationality, or their widowed spouses. That free transferability is likely to incentivise workers of Algerian nationality to take up employment in a Member State. The same applies to the widowed spouse of such a worker who has an expectation that he or she can transfer a survivors' benefit to Algeria. An interpretation according to which the surviving spouse of a worker falls within the personal scope of Article 68(4) of the Association Agreement thus facilitates the movement of workers.

46. Whilst Article 68(4) of the Association Agreement does not expressly impose requirements that relate to the beneficiary's country of residence, there is no doubt that the ability to transfer pensions or annuities 'to Algeria' captures the circumstances of a survivor of a worker of Algerian nationality who is entitled to a survivors' benefit in a Member State and moves to reside in Algeria. There is no other plausible explanation for the use of those words in that provision.

47. Finally, the SVB's observation that Article 68(4) of the Association Agreement imposes a requirement for the survivor to reside in a Member State because Article 68(1) thereof refers to workers of Algerian nationality employed in a Member State and 'any members of their families living with them' is unconvincing because it would deprive the words 'to transfer freely to Algeria' in Article 68(4) of their ordinary meaning and divest that provision of its useful effect.

48. In the light of the foregoing, I propose that the Court interpret Article 68(4) of the Association Agreement so that the surviving spouse of an Algerian worker who resides in Algeria falls within the personal scope of that provision.

4. The second question: does Article 68(4) of the Association Agreement have direct effect?

49. According to settled case-law, a provision in an agreement between the European Union and a non-member country has direct effect when it contains a clear and precise obligation that is not subject, in its implementation or effects, to the adoption of any subsequent measure. That requires an examination of the text of the provision and the subject matter and nature of the agreement, including its purpose.²⁵

50. Points 34 to 40 of the present Opinion explain that Article 68(4) of the Association Agreement imposes an obligation on Member States to permit the free transfer of pensions and annuities in respect of survivor status. Points 41 to 48 of the present Opinion demonstrate that the only plausible interpretation of that provision is that the widowed spouse of a worker of Algerian nationality residing in Algeria comes within its personal scope. According to the text of Article 68(4) of the Association Agreement, such an individual must therefore be able to transfer freely to Algeria, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of survivor status.

²⁴ See, by analogy, judgment of 5 April 1995, *Krid* (C-103/94, EU:C:1995:97, paragraph 40).

²⁵ See, for example, judgments of 5 April 1995, *Krid* (C-103/94, EU:C:1995:97, paragraphs 21 to 24 and the case-law cited), and of 16 June 1998, *Racke* (C-162/96, EU:C:1998:293, paragraph 31 and the case-law cited).

51. The phrase 'must be able to transfer freely, at the rates applied by virtue of the legislation of the debtor Member State or States' must be given its ordinary meaning. The ability to do something freely means that it can be done without constraint or control. Member States may not, therefore, place obstacles in the way of a beneficiary who wishes to transfer a pension or annuity, or impose material constraints on him or her in that context.

52. It is, however, also clear that the phrase 'at the rates applied by virtue of the legislation of the debtor Member State' qualifies the free transferability of the pensions and annuities that it governs. It affords Member States a degree of discretion in that they may legislate to adjust the level of the pension or annuity that may be transferred to Algeria.²⁶

53. According to the SVB, Article 68(4) of the Association Agreement cannot have direct effect because it does not impose any obligations on the Member States' competent authorities. Article 67(1) states that 'each Member State shall accord to workers of Algerian nationality ... treatment which is free from any discrimination based on nationality, ..., relative to its own nationals'. It is clear from the material scope of Article 68(4) of the Association Agreement that, just as with Article 67(1) thereof, the Member States must implement that provision and ensure that their competent authorities comply therewith.²⁷ I therefore find the SVB's submission under this heading unconvincing.

54. The SVB and the Netherlands Government submit that, since the waiving-of-residence clauses in Article 7 of Regulation No 883/2004 and Article 6(1) of Decision No 3/80 are more clear and precise than those in Article 68(4) of the Association Agreement, the latter provision cannot have direct effect. I am also unconvinced by that submission. The fact that other clauses are drafted differently cannot have a bearing on whether Article 68(4) of the Association Agreement imposes a clear and precise obligation.

55. According to settled case-law, the fact that Article 70 of the Association Agreement stipulates that, following the entry into force of the agreement, the Association Council shall adopt provisions to implement the principles set out in Article 68, does not preclude the direct effect of Article 68(4).²⁸ The SVB's submissions in that regard are thus also unconvincing.

56. I therefore advise the Court that, in the light of the text of Article 68(4) of the Association Agreement, read in the context in which it was entered into, that provision has direct effect so that persons to whom it applies are entitled to rely upon it directly before the courts of the Member States.

²⁶ It may be worth pointing out, first, that the Dutch-language version of that phrase uses the word '*koers*', which is almost invariably used to refer to a conversion rate, as in '*wisselkoers*' (rate of exchange), or to the market value of shares and securities traded on a stock exchange. Other language versions follow the English-language version more closely by using the equivalent word for 'rate', in the sense of 'amount', 'tariff' or 'price'.

²⁷ The recitals of the Association Agreement include a commitment that the Member States wish to achieve fully the objectives of the association between them by implementing the relevant provisions of the agreement.

²⁸ See, by analogy, judgments of 31 January 1991, *Kziber* (C-18/90, EU:C:1991:36, paragraph 19); of 5 April 1995, *Krid* (C-103/94, EU:C:1995:97, paragraphs 21 to 24 and the case-law cited); and order of 13 June 2006, *Echouikh* (C-336/05, EU:C:2006:394, paragraph 41 and the case-law cited).

5. *The third question: does Article 68(4) of the Association Agreement preclude a reduction in a survivors' benefit to reflect the fact that the cost of living in Algeria is lower than in the Netherlands?*

57. The third question brings into focus the phrase 'at the rates applied by virtue of the legislation of the debtor Member State or States' in Article 68(4) of the Association Agreement. That phrase indicates that Member States have a discretion to adjust the level of pensions and annuities on their transfer to Algeria.²⁹

58. Article 68(4) of the Association Agreement establishes the principle that pensions and annuities are freely transferable to Algeria. As point 51 of the present Opinion observes, the ability to do something freely means that Member States may not put obstacles in the way of a beneficiary who wishes to transfer a pension or annuity, or impose material constraints in that regard.

59. Were it possible for a Member State to reduce a pension or annuity to a nominal amount on its transfer, Article 68(4) of the Association Agreement would be deprived of its purpose and useful effect,³⁰ and the achievement of the aim of the Association Agreement to progressively facilitate the movement of workers compromised.³¹ The free transferability of pensions and annuities is also likely to contribute to improving living standards in Algeria. That is a relevant consideration since the second recital of the Association Agreement states that the European Union and its Member States wish to establish relations based on, inter alia, solidarity and co-development.

60. It is nevertheless important to recognise that the object and purpose of the Association Agreement are far more limited than those of Articles 45 to 48 TFEU, which govern the free movement of workers within the European Union. According to settled case-law, even where the provisions of an agreement are in terms similar to those expressed in the EU Treaties, that does not justify the application of the case-law applicable in an intra-European Union context to the provisions of that agreement.³² The objective set out in Article 48 TFEU finds concrete expression within the European Union in, inter alia, Article 7 of Regulation No 883/2004,³³ which does not apply in the present context³⁴ and which the third paragraph of Article 68(1) of the Association Agreement excludes expressly. It is also relevant that the Association Council has not adopted implementing measures that include a waiving-of-residence clause similar to that in the first paragraph of Article 6(1) of Decision No 3/80. As a consequence, the conclusions that the

²⁹ See point 52 of the present Opinion. I agree with the referring court's case-law, mentioned in point 15 of the present Opinion, according to which a reduction in the amount of the pension or annuity is a restriction on its export.

³⁰ See, by analogy, judgments of 31 January 1991, *Kziber* (C-18/90, EU:C:1991:36, paragraph 18), and of 8 May 2003, *Deutscher Handballbund* (C-438/00, EU:C:2003:255, paragraph 29 and the case-law cited).

³¹ See point 45 of the present Opinion. I am not persuaded by the Netherlands Government's submission that the object and purpose of the Association Agreement in this context is to remove administrative obstacles.

³² See, for example, judgments of 9 February 1982, *Polydor and RSO Records* (270/80, EU:C:1982:43, paragraphs 14 and 15), and of 12 November 2009, *Grimme* (C-351/08, EU:C:2009:697, paragraph 29 and the case-law cited).

³³ Judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraphs 51 and 52 and the case-law cited).

³⁴ In contrast to the situation that pertained, for example, in the circumstances of the judgment of 21 March 2018, *Klein Schiphorst* (C-551/16, EU:C:2018:200, paragraphs 28 and 29).

Court has drawn in the case-law relating to the interpretation of those provisions³⁵ do not apply in the present case, and it is the text of Article 68(4) of the Association Agreement and the context in which it appears that are to be taken into account.

61. Article 68(4) of the Association Agreement falls to be interpreted in the light of Article 68(1) thereof, according to which workers of Algerian nationality shall enjoy treatment, in the field of social security, free from any discrimination on grounds of nationality relative to nationals of the Member States in which they are employed. At the hearing, the interested parties were invited to address the question as to whether the relevant national law gives rise to indirect discrimination on grounds of nationality contrary to Article 68(1) of the Association Agreement. According to settled case-law, the principle of equal treatment on grounds of nationality requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is justified.³⁶

62. Under Article 17(3) of the ANW, if a survivor moves to Algeria, the amount received by way of survivors' benefit is adjusted by the application of a percentage reduction. That adjustment affects those who reside in Algeria regardless of whether they have Algerian or Netherlands nationality, or both. Viewed from that perspective, there is no difference in treatment.

63. Bearing in mind that the aim of the national legislation is to ensure that survivors receive a basic level of income to provide for their living costs, and that the comparability of situations must be examined having regard, inter alia, to the object of the rules establishing the difference in treatment,³⁷ it is arguable that – as the SVB and the Netherlands Government submitted at the hearing – beneficiaries living in Algeria are not in a comparable situation to those living in the Netherlands and, therefore, there is neither direct nor indirect discrimination.

64. As the Commission observed, however, when considered in absolute monetary terms, the reduction of the benefit constitutes a difference in treatment between those who continue to reside in the Netherlands and those who live in, or move to, Algeria. Although the national legislation makes no distinction on grounds of nationality, in practice it is likely to affect mainly Algerian nationals, since the survivors of workers of Algerian nationality who are entitled to the survivors' benefit in question are more likely to reside in Algeria than Netherlands nationals. That gives rise to indirect discrimination on grounds of nationality, unless the measure is justified by objectives independent of the nationality of the workers concerned and is proportionate to a legitimate aim.³⁸

65. Be that as it may, I am not convinced that Article 68(1) of the Association Agreement applies to the transfer of pensions and annuities to beneficiaries resident in Algeria and that it therefore prohibits direct or indirect discrimination on grounds of nationality in that context. First, Article 68(1) of the Association Agreement relates to the equal treatment of workers of Algerian

³⁵ See judgments of 2 March 1999, *Eddline El-Yassini* (C-416/96, EU:C:1999:107, paragraph 61); of 16 September 2015, *Commission v Slovakia* (C-361/13, EU:C:2015:601, paragraph 32); and of 16 June 2022, *Commission v Austria (Indexation of family benefits)* (C-328/20, EU:C:2022:468, paragraphs 43, 46, 47 and 50 and the case-law cited). Those judgments confirm that Article 67 of Regulation No 883/2004 must be interpreted as requiring a strict equivalence between the amount of family benefits provided by a Member State to workers whose family members reside in that Member State, and the amounts provided to workers whose family members reside in another Member State. Differences in purchasing power cannot justify payment of a different amount of benefits to persons who fall within the first of these categories.

³⁶ See, for example and by analogy, judgment of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 70 and the case-law cited).

³⁷ See, by analogy, judgment of 18 November 2010, *Kleist* (C-356/09, EU:C:2010:703, paragraph 34 and the case-law cited).

³⁸ See, by analogy, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraphs 26 to 29 and 39 and the case-law cited), and of 23 May 1996, *O'Flynn* (C-237/94, EU:C:1996:206, paragraphs 18 to 23 and the case-law cited).

nationality employed in the territory of the Member States and any members of their families living with them. According to its text and the Court's case-law,³⁹ that provision prohibits discrimination on grounds of nationality within the Member States. Second, that provision is expressly subject to the paragraphs that follow it, including Article 68(4) of the Association Agreement. It is therefore reasonable to interpret Article 68(4) of the Association Agreement as qualifying the right to equal treatment in Article 68(1) thereof. Third, the personal scope of Article 68(4) of the Association Agreement is confined to workers of Algerian nationality and their surviving spouses. It does not mention Member State nationals. It in effect grants a privilege to the former that Member States are not obliged to afford to their own nationals.

66. In order to resolve the question posed in points 57 to 60 of the present Opinion, namely how the right of a worker of Algerian nationality to freely transfer a pension or annuity to Algeria may be reconciled with Member States' right to set the rate of those pensions and annuities on their transfer, I consider that it is necessary to assess whether Article 17(3) of the ANW is objectively justified and to ascertain whether it strikes at the very substance of the right of free transfer which Article 68(4) of the Association Agreement grants to workers of Algerian nationality and to their survivors resident in Algeria, by making the exercise of that right impossible or excessively difficult.⁴⁰

67. As appears from the order for reference, all Netherlands residents are insured for the purposes of the ANW. A survivors' benefit accrues to the survivor of an insured person if the survivor resides in the Netherlands on the day of the death of the insured person. The survivor must be below pensionable age and (i) have an unmarried child who is under the age of 18 who does not belong to the household of another person, or (ii) have a work incapacity. The Netherlands Government explained at the hearing that the level of the benefit does not depend on the value of any contribution made by a worker. As was also confirmed at the hearing, the level of benefit is adjusted to reflect changes in the beneficiary's income. The maximum amount is 70% of the net monthly minimum wage in the Netherlands. The benefit is adjusted to take account of changes in the minimum wage which, in turn, is updated regularly to reflect, inter alia, the rate of inflation in the Netherlands, namely increases in the price of goods and services.⁴¹

68. It is clear from the foregoing that the aim of survivors' benefit is to ensure that a survivor who is not yet entitled to an old-age pension and is responsible for a child, or is less well able to work due to a disability, receives a basic income that is in line with the cost of living. Under the national legislation, if a survivor moves to Algeria, the survivors' benefit is adjusted to reflect the lower cost of living in that country.⁴² A beneficiary residing in Algeria and a beneficiary residing in the Netherlands thus receive a comparable level of income in terms of purchasing power in their respective countries. In conformity with the aim of the national legislation, they each receive an income that is intended to ensure that they are able to meet their basic needs.

³⁹ See, by analogy, the case-law cited in footnote 28 to the present Opinion; judgment of 20 March 2001, *Fahmi and Esmoris Cerdeiro-Pinedo Amado* (C-33/99, EU:C:2001:176, paragraphs 56 to 58 and the case-law cited); and order of 17 April 2007, *El Youssfi* (C-276/06, EU:C:2007:215, paragraph 69 and the case-law cited).

⁴⁰ See, by analogy, judgment of 27 September 2001, *Gloszczuk* (C-63/99, EU:C:2001:488, paragraph 56).

⁴¹ According to information available on the SVB website, in the first six months of 2023 the maximum net amount of that benefit was approximately EUR 1000 per month.

⁴² There are no indications in the order for reference that the reduction at issue does not accurately reflect the difference in the cost of living as between the Netherlands and Algeria. Cost indices vary depending on the source consulted. According to Worlddata, the Netherlands recently ranked 23rd, with a cost index (as compared to the United States of America) of 90.0, while Algeria ranked 87th, with a cost index of 28.8.

69. In principle, a 60% reduction of a pension or annuity on its transfer to a third country imposes a material constraint on a beneficiary. In the present circumstances, however, it appears that, subject to verification by the national court, under the ANW the beneficiary is entitled to, and can expect to receive, a basic level of income that reflects the cost of living in his or her country of residence. It is therefore neither unreasonable nor unexpected that the benefit in question may be adjusted to reflect the lower cost of living in a given third country. In my view, that consideration is an objective criterion capable of justifying the restriction in question, which is, moreover, not prohibited under Article 68(1) of the Association Agreement or any other provision thereof, and which – in the particular circumstances under consideration – does not strike at the very substance of the right of free transfer which Article 68(4) of the Association Agreement grants to workers of Algerian nationality or their survivors.

70. I therefore advise the Court that, taking into account that the object and purpose of the Association Agreement are more limited than those set out in Articles 45 to 48 TFEU, Article 68(4) of the Association Agreement does not preclude the adjustment of a survivors' benefit that aims to provide recipients with a basic income that is in line with the cost of living, provided that the adjustment accurately reflects differences in living costs. That outcome achieves an appropriate balance between the right to freely transfer pensions and annuities to Algeria and the Member States' discretion to determine the rates applicable to that transfer.

C. Conclusion

71. In the light of the foregoing, I propose that the Court answer the questions asked by the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) as follows:

Article 68(4) of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, must be interpreted as meaning that:

- (1) it includes within its personal scope a survivor, who resides in Algeria, of a worker of Algerian nationality; and
- (2) it has direct effect, so that persons to whom that provision applies are entitled to rely upon it directly before the Member States' courts; and
- (3) it does not preclude a national law pursuant to which a survivors' benefit, the level of which is determined by reference to the cost of living in a Member State and which aims to provide beneficiaries with a basic level of income, is adjusted to reflect the lower cost of living in Algeria.