JUDGMENT OF THE COURT (Second Chamber)

11 November 2004 *

In Case C-467/02,

REFERENCE for a preliminary ruling under Article 234 EC, from the Verwaltungsgericht Stuttgart (Germany), made by decision of 19 December 2002, received at the Court on 27 December 2002, in the proceedings between:

Inan Cetinkaya

and

Land Baden-Württemberg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: M. Múgica Arzamendi, Principal Administrator,

after considering the observations submitted on behalf of:

— Mr Cetinkaya, by C. Trurnit, Rechtsanwalt,

— the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and A.C. Branco, acting as Agents,

— the Commission of the European Communities, by D. Martin and H. Kreppel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 6, 7 and 14 of Decision No 1/80 of the Association Council of 19 September 1980 on the

development of the Association ('Decision No 1/80'). The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1; 'the Association Agreement').

2 The reference was made in proceedings between Mr Cetinkaya, a Turkish national, and the Land Baden-Württemberg, concerning a procedure for expulsion from German territory.

Legal background

Decision No 1/80

3 Article 6(1) and (2) of Decision No 1/80 provides:

'1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

— shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

— shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

— shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment;

2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.'

4 Article 7 of Decision No 1/80 provides:

'The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:

— shall be entitled — subject to the priority to be given to workers of Member States of the Community — to respond to any offer of employment after they have been legally resident for at least three years in that Member State;

— shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.'

5 Article 14(1) of Decision No 1/80 states:

'The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.'

National legislation

6 Paragraph 47(1) and (2) of the Ausländergesetz (Law on Aliens; 'the AuslG') provides:

'(1) An alien shall be expelled

1. where, after being convicted of one or more intentional offences, he has been definitively sentenced to at least three years' imprisonment or youth custody or

where, after being convicted of a number of intentional offences, he has been definitively sentenced to a number of terms of imprisonment or youth custody amounting to at least three years or where, on the occasion of the most recent definitive conviction, a term of preventive detention was ordered, or

2. where he has been definitively sentenced to an unsuspended term of at least two years' youth custody or to an unsuspended term of imprisonment for an intentional offence under the Law on Narcotics, for a breach of the peace under the conditions specified in the second sentence of Paragraph 125a of the Code of Criminal Procedure or for a breach of the peace committed at a prohibited public assembly or a prohibited procession pursuant to Paragraph 125 of the Code of Criminal Procedure.

(2) An alien shall normally be expelled

1. where he has been definitively sentenced to an unsuspended term of at least two years' youth custody or to an unsuspended term of imprisonment for one or more intentional offences;

2. where, in contravention of the Law on Narcotics, he cultivates, produces, imports, conveys through the territory, exports, sells, puts into circulation by any other means or traffics in narcotics, or aids or abets such acts.'

7 Paragraph 48(1) of the AuslG states:

'(1) An alien who

1. has the right to reside on the territory,

2. has a residence permit of unlimited duration and was born on national territory or entered the national territory as a minor,

3. has a residence permit of unlimited duration and is married to or cohabiting with an alien covered by subparagraph 1 or 2 above,

...

may be expelled only on serious grounds of public security or policy. Those grounds generally exist in the cases covered by in Paragraph 47(1).'

Main proceedings and questions referred to the Court

8 It is apparent from the order for reference that Mr Cetinkaya, the applicant in the main proceedings, was born on 24 January 1979 in Germany, where he has always lived. Since 9 March 1995 he has held an unlimited residence permit in that Member State.

9 In July 1995 Mr Cetinkaya obtained a certificate of secondary education. Two months later he began a traineeship as a carpenter, which he gave up in February of the following year. He then worked, for short periods, for a number of employers. Thus, in the summer of 1996, he worked for several weeks as a waiter in a restaurant. In the autumn of that year, he began a new traineeship, with a view to working in a retail outlet, but gave it up shortly afterwards. He was then employed in a restaurant between November 1996 and January 1997 and then, until June 1998, he was employed by a company, and during August and September 1998 by another company. After a period of unemployment, which lasted until July 1999, Mr Cetinkaya worked for one month as a storekeeper. From 1 August 1999, he worked for a delivery company but left that job after a short time. Finally, he worked as a machine operator but left that post in December 1999.

10 The order for reference also states that Mr Cetinkaya's parents and five older sisters, three of whom have acquired German nationality, also live in Germany, where his father was employed until he reached retirement age. Mr Cetinkaya's parents and his two sisters who still hold Turkish nationality have applied for German nationality by naturalisation.

11 It is also apparent from the order for reference that Mr Cetinkaya was sentenced in Germany on 1 August 1996 to 48 hours' community service after being convicted of five counts of robbery with accomplices, extortion with accomplices and attempted extortion with accomplices; on 15 April 1997 to two weeks' youth custody, which took his previous conviction into account; on 24 March 1998, to six months' youth custody, suspended, for assault committed with accomplices; on 26 October 1999, to two years' youth custody, which took his previous conviction into account, for trafficking in large quantities of narcotics; and, on 26 September 2000, to three years' youth custody, which took his previous two convictions into account, on 102 counts

of illegal acquisition of and trafficking in narcotics, two counts of illegal possession of and trafficking in large quantities of narcotics and illegal importation of large quantities of narcotics and trafficking in narcotics.

12 Mr Cetinkaya was arrested on 7 January 2000 and detained in a juvenile detention centre. He was released on 22 January 2001 after following a drug detoxication course. After first giving up two unsuccessful courses of treatment, Mr Cetinkaya on 10 September 2001 began a new course of treatment at a detoxication centre, which he successfully completed in the summer of 2002. By judicial order of 20 August 2002, the remainder of his sentence was suspended in accordance with the Betäubungsmittelgesetz (Law on Narcotics) which, according to the national court's remarks, requires that the interests of public security also be taken into account.

13 Since August 2002, Mr Cetinkaya has resumed his secondary education and has done night duty twice a week at a detoxication centre.

14 On 3 November 2000, the competent administrative authority, the Regierungspräsidium Stuttgart, notified Mr Cetinkaya that he was to be immediately expelled from Germany and threatened to deport him to Turkey forthwith. According to the Regierungspräsidium Stuttgart, there were serious grounds of public security and policy, within the meaning of the third sentence of Paragraph 48(1), in conjunction with point 1 of Paragraph 47(1), of the AuslG which justified a legal presumption in favour of expulsion. The expulsion was deemed necessary on specific and general preventive grounds and was not considered contrary to Article 7 of Decision No 1/80 because, owing to Mr Cetinkaya's imprisonment and the detoxication course that he was required to follow, he would no longer be available for work. Even if he were able to rely on a right to remain under Article 7 of Decision No 1/80, the conditions laid down in Article 14 of that decision would be satisfied in any event.

15 On 8 December 2000, Mr Cetinkaya brought an action against that order before the national court.

16 On 3 September 2002, the Regierungspräsidium Stuttgart amended the above-mentioned order and allowed Mr Cetinkaya to choose a date before 4 October 2002 on which to leave the territory voluntarily. As grounds for the amendment, the Regierungspräsidium stated that Mr Cetinkaya had been released from custody on 22 January 2001 in order to undergo a course of detoxication and for that reason it was now necessary only to set a date for his voluntary departure from the territory.

17 On 6 June 2002, Mr Cetinkaya also brought an action against that decision before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart), which, after joining the two sets of proceedings in question, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does a child born on Federal territory to a Turkish worker duly registered as belonging to the labour force fall within the scope of the first paragraph of Article 7 of Decision No 1/80 ... where from birth to at least the time of attaining his majority his residence was (initially) authorised solely on grounds of maintaining family unity or, in the absence of authorisation, was not terminated solely on those grounds?

2. Can the right of family members to access the labour force and to the grant of extended residence under the second indent of the first paragraph of Article 7 be limited only by application of Article 14 of Decision No 1/80?

3. Does a sentence of three years' youth custody entail definitive exclusion from the labour force and thus loss of the rights derived from the second indent of the first paragraph of Article 7 even if there is a real possibility that only part of the sentence will have to be served but that if released early on licence the person concerned will be required to undergo a course of detoxication and during the period of that treatment will not be available to the labour force?

4. Where it results from an (unsuspended) sentence of imprisonment, does the loss of a job or, where the person concerned is unemployed, the impossibility of applying for a job constitute by that fact itself voluntary unemployment for the purposes of the second sentence of Article 6(2) of Decision No 1/80 which does not prevent the loss of the rights conferred by Article 6(1) and Article 7(1) of Decision No 1/80?

5. Does this apply also where it may be assumed that the person will be released after a reasonable and foreseeable time, but must then undergo a course of detoxication and will not be able to take up employment until he has obtained a higher qualification?

6. Is Article 14(1) of Decision No 1/80 to be interpreted as meaning that a change in the circumstances of the person or persons concerned which has come about after the most recent administrative decision and which no longer allows a limitation under Article 14 of Decision No 1/80 must be taken into account in judicial proceedings?'

The questions referred by the national court

First question

18 By its first question, the national court is essentially asking whether the first paragraph of Article 7 of Decision No 1/80 must be interpreted as applying to a person who has attained his majority and is the child of a Turkish worker duly registered as belonging to the labour force of the host Member State, even though the person concerned was born in and has always resided in that State.

19 The national court is seeking to ascertain whether the fact that Mr Cetinkaya was born in and has always lived in the host Member State and thus has not been 'authorised to join' the worker in question within the meaning of that provision has an effect on its application.

20 As maintained in all the observations submitted to the Court, that question must be answered in the negative.

21 It cannot be concluded from the fact that the first paragraph of Article 7 of Decision No 1/80 expressly addresses only the situation where members of the worker's family 'have been authorised to join him' that the authors of that decision intended to exclude from the rights set out therein a member of the family who was born on the territory of the host Member State and who, accordingly, has not had to request authorisation under the provisions on family reunification to join the Turkish worker in the host Member State.

22 The requirement that family members obtain authorisation to join the Turkish worker is explained by the fact that the provisions concerning the Association between the European Economic Community and the Republic of Turkey ('the EEC-Turkey Agreement') do not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment, so that the first admission of such nationals to the territory of a Member State is, as a rule, governed exclusively by that State's own domestic law (see, inter alia, Case C 275/02 *Ayaz* [2004] not yet published in the ECR, paragraph 35).

23 Inasmuch as that requirement is thus intended to exclude from the scope of the first paragraph of Article 7 of Decision No 1/80 members of a Turkish worker's family who have entered and reside in the host Member State in breach of that Member State's legislation, it cannot validly be raised as against a member of that family who, as in the case before the national court, was born and has always lived in that Member State and who therefore did not require authorisation to join the worker concerned.

24 Nor is there any reason to consider that the authors of Decision No 1/80 intended to differentiate between the children of Turkish workers on the basis of their place of birth in such a way as to deprive those born in the host Member State, in contrast to family members who had to obtain authorisation to join the worker concerned, of the rights of access to employment and residence deriving from Article 7 of that decision.

25 That interpretation is the only one to ensure the coherence of the system and to permit the unqualified realisation of the objective pursued by the first paragraph of Article 7, which is to create conditions conducive to family reunification in the host Member State, first by enabling family members to be with a migrant worker and

then after some time by consolidating their position there by granting them the right to obtain employment in that State (see, in particular, Case C-351/95 *Kadiman* [1997] ECR I-2133, paragraphs 34 to 36, and *Ayaz*, paragraph 41).

26 The child of a Turkish worker referred to in the first paragraph of Article 7 of Decision No 1/80 may thus claim the benefit of that provision even though he was born in and has always lived in the host Member State.

27 However, the German Government questions whether Mr Cetinkaya meets a further condition for the application of the first paragraph of Article 7, namely that his father must be a worker 'duly registered as belonging to the labour force'. It maintains that the Turkish worker from whom rights derive must satisfy the conditions set out in the first paragraph of Article 7 of Decision No 1/80 at the time of the period of residence in respect of which the family member who has not completed a course of vocational training seeks to benefit from the rights conferred by that provision. The order for reference does not state whether Mr Cetinkaya's father ceased to be a worker before or after the expulsion order was made or whether his mother was employed.

28 That line of argument must be rejected.

29 It cannot be inferred from the wording of the first paragraph of Article 7 of Decision No 1/80 that the family members to whom it refers would lose the rights conferred on them by that provision solely because, at a specific time, the worker concerned ceased to belong to the labour force of the host State.

30 As the Court has observed, Member States are no longer entitled to attach conditions to the residence of a member of a Turkish worker's family beyond the period of three years provided for in the first indent of the first paragraph of Article 7 of Decision No 1/80 during which the person concerned must, in principle, actually live with that worker; and that must a fortiori be the case for a migrant Turkish person who satisfies the conditions laid down in the second indent of the first paragraph of Article 7 of Decision No 1/80 (see, in particular, Case C-329/97 *Ergat* [2000] ECR I-1487, paragraphs 37 to 39).

31 Thus, as regards family members covered by the first paragraph of Article 7 of Decision No 1/80 who, like Mr Cetinkaya, enjoy, after five years' legal residence with the worker, the right of free access to employment in the host Member State under the second indent of that provision, not only does the direct effect of that provision mean that the persons concerned derive an individual employment right directly from Decision No 1/80 but also the effectiveness of that right necessarily implies a concomitant right of residence which is also founded on Community law and is independent of the continuing existence of the conditions for access to those rights (see, in particular, *Ergat*, paragraph 40).

32 In those circumstances, the rights conferred by the first paragraph of Article 7 of Decision No 1/80 may be exercised by the family member after the period of residence, of three and five years respectively, with the Turkish worker duly registered as belonging to the labour force of the host Member State, even if, after those periods of residence, the worker himself no longer belongs to the labour force of that Member State, inter alia because he has exercised his retirement rights.

33 Therefore, the fact that when, in a case such as that before the national court, a member of the family of a Turkish worker who has actually lived with that worker during the five-year period provided for in the second indent of the first paragraph of Article 7 of Decision No 1/80 asserts the rights provided for in the first paragraph

of Article 7 of Decision No 1/80 that worker no longer belongs to the labour force of the host Member State does not deprive the family member concerned of the benefit of those rights.

34 In those circumstances, the answer to the first question must be that the first paragraph of Article 7 of Decision No 1/80 must be interpreted as applying to a person who has attained his majority and is the child of a Turkish worker duly registered as belonging to the labour force of the host Member State, even though that person was born in and has always resided in the host State.

Second question

35 It is apparent from the order for reference that by this question the national court is essentially asking whether the first paragraph of Article 7 of Decision No 1/80 precludes the rights conferred by that provision on a Turkish national in Mr Cetinkaya's situation from being limited after the imposition of a custodial sentence followed by a course of treatment for drug addiction, on the ground of prolonged absence from the labour force.

36 The Court has already held that the limits to the right of residence, as the corollary of the right to have access to the employment market and take up employment, are of two kinds. First, Article 14(1) of Decision No 1/80 itself provides Member States with the possibility of placing restrictions on the presence of a migrant Turk in the host Member State in individual and appropriately justified cases, where, through his own conduct, he constitutes a genuine and serious threat to public order, public security or public health. Second, a family member, duly authorised to join a Turkish worker in a Member State, who leaves the territory of the host State for a significant length of time without legitimate reason as a rule loses the legal status he acquired under the first paragraph of Article 7 of Decision No 1/80 (see *Ergat*, paragraphs 45, 46 and 48).

37 As the Advocate General has stated at point 40 of his Opinion, although *Ergat* concerned the situation of a family member who had joined the worker in the host State, the interpretation of the first paragraph of Article 7 of Decision No 1/80 given in that judgment must apply a fortiori in a situation where, as in the main proceedings, the family member concerned was born and has always resided in the host Member State.

38 It follows that the first paragraph of Article 7 of Decision No 1/80 must be interpreted as meaning that the rights which that provision confers on members of the family of a Turkish worker who fulfils the minimum residence condition may be limited only on the basis of Article 14 of Decision No 1/80, namely on grounds of public policy, public security or public health, or because the person concerned has left the host State for a significant length of time without legitimate reason.

39 Therefore, the answer to the second question must be that the first paragraph of Article 7 of Decision No 1/80 precludes the rights conferred by that provision on a Turkish national in Mr Cetinkaya's situation from being limited after the imposition of a custodial sentence followed by a course of detoxication, on the ground of prolonged absence from the labour force.

Third, fourth and fifth questions

40 In the light of the answer to the second question, there is no need to answer the third, fourth and fifth questions, which proceed from the premiss that the rights which the member of the Turkish worker's family derives from the first paragraph of Article 7 of Decision No 1/80 may be limited on grounds other than, first, those set

out in Article 14 of Decision No 1/80 and, second, the fact that the person concerned has left the host State for a significant length of time without legitimate reason.

Sixth question

41 By this question, the national court is essentially asking whether Article 14 of Decision No 1/80 must be interpreted as precluding national courts, when reviewing the lawfulness of the expulsion of a Turkish national, from not taking into consideration factual matters which occurred after the final decision of the competent authorities and which no longer justify a limitation of the rights of the person concerned within the meaning of that provision.

42 The Court has deduced from, first, the very wording of Article 12 of the Association Agreement and Article 36 of the Additional Protocol, which was signed in 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 (OJ 1973 C 113, p. 18) and, second, the objective of Decision No 1/80, that the principles laid down in Article 48 of the EC Treaty (now, after amendment, Article 39 EC), Article 49 of the EC Treaty (now, after amendment, Article 40 EC) and Article 50 of the EC Treaty (now Article 41 EC) must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by that decision (see, in particular, *Ayaz*, paragraph 44).

43 It follows that, when determining the scope of the public policy exception provided for in Article 14(1) of Decision No 1/80, reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a Member State of the Community. Such an approach

is all the more justified because Article 14(1) is formulated in almost identical terms to Article 48(3) of the Treaty (Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 56).

44 As regards, more specifically, Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-64, p. 117), the Court has held that, for the purpose of deciding whether the national of another Member state may be expelled in application of the exception on grounds of public policy, the competent national authorities must assess, on a case-by-case basis, whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a present threat to the requirements of public policy. No more specific information as to the date to be used as a reference when determining the 'presence' of the threat is evident from the wording of Article 3 of Directive 64/221 or the Court's case-law (Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others* [2004] ECR I-5257, paragraph 77).

45 In *Orfanopoulos and Others* (paragraph 82), the Court held that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy.

46 As already stated at paragraphs 42 and 43 of this judgment, Article 14(1) of Decision No 1/80 imposes on the competent national authorities limits analogous to those which apply to such a measure affecting a national of a Member State and that

provision does not, any more than does Directive 64/221, provide any information as to the date that should be used as a reference for determining the continuing presence of the threat.

47 Therefore, having regard to the principles applicable in relation to freedom of movement for workers and extended to Turkish workers who enjoy the rights recognised by Decision No 1/80, national courts must take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy.

48 The answer to the sixth question must therefore be Article 14 of Decision No 1/80 precludes national courts, when reviewing the lawfulness of the expulsion of a Turkish national, from not taking into consideration factual matters which occurred after the final decision of the competent authorities and which no longer justify a limitation of the rights of the person concerned within the meaning of that provision.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. **The first paragraph of Article 7 of Decision No 1/80 of 19 September 1980 on the development of the Association adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey must be interpreted as applying to a person who has attained his majority and is the child of a Turkish worker duly registered as belonging to the labour force of the host Member State, even though that person was born in and has always resided in the host State.**

2. **The first paragraph of Article 7 of Decision No 1/80 precludes the rights conferred by that provision on a Turkish national in Mr Cetinkaya's situation from being limited, after the imposition of a custodial sentence followed by a course of detoxication, on the ground of prolonged absence from the labour force.**

3. **Article 14 of Decision No 1/80 precludes national courts, when reviewing the lawfulness of the expulsion of a Turkish national, from not taking into consideration factual matters which occurred after the final decision of the competent authorities and which no longer justify a limitation of the rights of the person concerned within the meaning of that provision.**

Signatures.