OPINION OF ADVOCATE GENERAL ELMER
delivered on 6 March 1997 *

Introduction

1. In this case the Oberverwaltungsgericht Berlin has asked the Court for an interpretation of the term 'legal employment' in Decision No 1/80 of the EEC-Turkey Association Council in relation to a residence permit fraudulently obtained.

The relevant Community rules

2. Under Article 2(1) of the Association Agreement between the European Economic Community and Turkey, [1] the aim of that Agreement is 'to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'.

Under Article 12 of the Agreement, the parties 'agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the European Economic Community for the purpose of progressively securing freedom of movement for workers between them'.

3. Article 36 of the Additional Protocol to the Agreement of 23 November 1970 [2] states that the Council of Association is to decide on the rules necessary to secure freedom of movement for workers between Member States of the Community and Turkey in accordance with the principles set out in Article 12 of the Association Agreement.

4. Pursuant thereto, the Council of Association adopted Decision No 1/80 of 19 September 1980, which entered into force on

* Original language: Danish.

1 — Agreement creating an Association between the European Economic Community and Turkey, signed on 12 September 1963 in Ankara, 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).

2 — OJ 1973 C 113, p. 1.

1 July 1980. [3] The provisions in Chapter II, Section 1, in Decision No 1/80, which includes Articles 6-16, concern employment and the free movement of workers.

Article 6(1) of Decision No 1/80 is worded as follows:

'... 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 ..., 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.'

3 — The decision has not been published.

5. Article 14(1) of Decision No 1/80 further provides that:

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

Facts of the case

6. Suat Kol, who is a Turkish national born in 1966, entered the Federal Republic of Germany on 15 February 1988. In his application for a residence permit he stated that he had entered the country on a permanent basis in order to marry a German citizen. The marriage took place on 9 May 1988. Since it was suspected that it was a marriage of convenience, he was provisionally registered by the immigration authorities with a view to further investigation. Subsequently he was issued with a residence permit of limited duration until 20 March 1989. That permit was extended several times.

At a hearing on 2 May 1991 for the purpose of obtaining a permanent residence permit, Suat Kol and his German wife declared that

they lived together as man and wife in the marital home. On that basis Suat Kol was issued with a residence permit of unlimited duration.

That declaration was not, however, correct, since it was subsequently shown that the wife had already commenced divorce proceedings in April 1990 and that the couple had ceased to cohabit long before the declaration made on 2 May 1991. The marriage was dissolved on 14 February 1992.

7. By judgment of the Amtsgericht Tiergarten Berlin of 29 November 1993, Suat Kol was fined for having made a false declaration in order to obtain a residence permit. His former wife was convicted of aiding and abetting him.

8. Suat Kol produced evidence to the German authorities that he had been employed during his time in Germany over the following periods: (1) 3 April 1989 to 31 December 1989 and 7 February 1990 at Bosch-Siemens-Hausgeräte; (2) 15 June 1990 to 6 July 1993, 6 September 1993 [4] to 8 February 1994 and from 24 March 1994 at Enver Kol's snack-bar.

9. By decision of the Landeseinwohneramt Berlin of 7 July 1994, Suat Kol was expelled from Germany for having obtained a residence permit of unlimited duration on the basis of incorrect information furnished to the authorities. His unlawful conduct was held to justify expulsion on grounds of public security and public policy, with the aim of discouraging other foreigners from similar unlawful conduct.

By order of 12 May 1995, the Verwaltungsgericht Berlin rejected an application from Suat Kol seeking suspension of the expulsion decision on the ground that Article 6(1) of Decision No 1/80 cannot require a higher degree of protection against expulsion than the general rules in the applicable legislation concerning aliens.

Suat Kol appealed against that decision to the Oberverwaltungsgericht Berlin. In that connection he claimed that on the basis of the periods of employment he had completed in Germany, pursuant to Article 6(1) of Decision No 1/80 he was entitled to a residence permit and that expulsion based solely on general grounds of a preventative nature was incompatible with Article 14(1) of Decision No 1/80.

4 — The order for reference states 6.9.1990. It appears, however, from the documents in the case that the correct date is 6.9.1993.

Questions referred for a preliminary ruling

10. By order of 11 August 1995 the national court stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1) Are periods of employment spent in a Member State by a Turkish worker on the basis of a residence permit obtained by wilful and criminal deceit to be recognized as legal employment within the meaning of Article 6(1) of Decision No 1/80 of the EEC-Turkey Council of Association?

2) If Question 1 is answered in the affirmative:

Is the termination of residence of such a worker by virtue of an expulsion order made solely on general grounds of a preventative nature with a view to deterring other aliens compatible with Article 14(1) of the abovementioned decision?'

Analysis

11. It appears from the order for reference that Suat Kol was employed for approximately nine months by Bosch-Siemens Hausgeräte. He cannot, therefore, on the basis of that period of employment, rely on the first indent of Article 6(1) of Decision No 1/80, since it requires one year's employment for the same employer. Suat Kol was, however, employed for more than one year (from 15 June 1990 to 6 July 1993, from 6 September 1993 to 8 February 1994 and from 24 March 1994 onwards) by Enver Kol. His residence and working permits were, however, in the period after 2 May 1991, obtained fraudulently. At that time Suat Kol had been employed for approximately 10 and a half months by Enver Kol. In those circumstances, by its first question the national court seeks to ascertain whether Article 6(1) in Decision No 1/80 should be interpreted as meaning that periods of employment completed by a Turkish worker in a Member State on the basis of a residence permit obtained fraudulently can be regarded as 'legal employment'.

12. Suat Kol claims that the first question must be answered in the affirmative, since during his periods of employment in Germany he was in possession of both a valid residence permit and a valid work permit.

13. The United Kingdom, the French, Spanish and German Governments and the Commission all take the view that a Turkish worker cannot rely on the provisions of Article 6(1) of Decision No 1/80 where the formal right to reside in a Member State during the relevant periods of employment was obtained fraudulently.

14. Article 6(1) of Decision No 1/80 has direct effect. [5] On its wording the provision concerns solely entitlement to take up employment, but it follows from the Court's consistent case-law that in connection with that right to take up employment there is a derived right of residence. [6]

15. Thus in Case C-434/95 *Bozkurt* [7] the Court held that:

'The legality of employment engaged in over a certain period must be determined in the light of the legislation of the host State governing the conditions under which the Turkish worker entered the national territory and is employed there.

...

Article 6(1) of Decision No 1/80 does not subject recognition of those rights to the condition that Turkish nationals must establish the legality of their employment by possession of any specific administrative document, such as a work permit or residence permit, issued by the authorities of the host country.

It follows that the rights conferred under Article 6(1) on Turkish nationals who are already duly integrated into the labour force of a Member State are accorded to such nationals irrespective of whether or not the competent authorities have issued administrative documents which, in this context, can only be declaratory of the existence of those rights and cannot constitute a condition for their existence.'

16. The right to work during the period before a Turkish worker can rely on the provisions in Decision No 1/80 is thus conditional on a right of residence already acquired under the law of the Member State in question. Whether and on what conditions a Turkish worker has a right of residence must be decided under national law. What is determinant in that connection is whether, under the Member State's substantive rules, the person in question is lawfully in the country. A formal residence and work permit are of no consequence.

5 — Case C-192/89 *Sevince* [1990] ECR I-3461.

6 — See footnote 5.

7 — Case C-434/93 *Bozkurt* v *Staatssecretaris van Justitie* [1995] ECR 1475.

17. The Court has twice had occasion to interpret the expression 'legal employment' in Article 6(1) of Decision No 1/80.

In its judgment in Case C-192/89 *Sevince*, [8] which concerned a Turkish worker who was able to continue in employment only because of the suspensive effect of a case brought by him, which he lost, the Court found that in such a case there was no 'legal employment' within the meaning of Article 6(1) of Decision No 1/80, since that 'presupposes a stable and secure situation as a member of the labour force'. [9]

Nor in its judgment in Case C-237/91 *Kus* v *Landeshauptstadt Wiesbaden* [10] did the Court find that there was 'legal employment', since '... legal employment ... presupposes a stable and secure situation as a member of the labour force and, by virtue of this, implies the existence of an undisputed right of residence ...'. That case concerned a Turkish worker who, during a period in which, by the operation of the suspensive effect of an appeal which he had brought against a decision refusing him a right to remain, was provisionally allowed to remain in the Member State in question and engage in employment until a final decision was reached in his case.

8 — See footnote 5.
9 — Paragraph 30.
10 — [1992] ECR I-6781.

18. The Court has thus held that periods of employment completed solely on the basis of a provisional right of residence valid until the outcome of legal proceedings cannot be regarded as periods of legal employment. In the present case the situation is different, since Suat Kol — albeit as a result of fraud — was, during the period at issue, in possession of a permanent residence permit, which only lapsed when there was a subsequent expulsion decision. Formally, Suat Kol's situation as a member of the German labour force was not therefore provisional. Since, however, the residence permit was obtained fraudulently, under German law it was open to challenge.

When the German immigration authorities discovered the fraud, the residence permit was withdrawn and Suat Kol expelled. The point in time at which the German authorities withdrew Suat Kol's residence permit was purely fortuitous and depended solely on when the authorities discovered that the residence permit was issued as a result of fraud. Suat Kol's residence permit could thus be withdrawn at any time after the fraudulent declaration.

19. It can scarcely be in accordance with the purpose of the provision in Article 6(1) of Decision No 1/80 for such fortuitous circumstances to determine whether the requirement of one year's 'legal employment' is satisfied. The simple fact is that the German immigrational authorities would not have issued a residence permit to Suat Kol

on 2 May 1991 if he had been truthful about his marriage.

In my view, this situation must therefore be assessed in the same way as in the *Sevince* and *Kus* cases, so that the period between issue of a residence permit on the basis of the false declaration of cohabitation on 2 May 1991 and the expulsion on 7 July 1994 cannot be regarded as being a period in which Suat Kol's situation as a member of the labour force was permanent and not solely provisional, since his formal right of residence was open to challenge. In the contrary case, a final legal decision refusing him a right of residence under German law would be rendered nugatory and enable him to acquire the rights provided for in Article 6(1) during a period in which he did not fulfil the conditions laid down therein. To allow Suat Kol to use fraud on the German immigration authorities to render lawful his employment after 2 May 1991 would be to reward culpable conduct, which would encourage, rather than discourage, others to give fraudulent declarations to the immigration authorities of the Member States.

20. In accordance therewith, the Court has stated: [11]

'The reason for which, in ... its judgment in *Sevince*, the Court declined to regard as periods of legal employment those completed while the decision refusing the person concerned the right of residence was suspended as a consequence of the proceedings brought by him against that decision was to prevent a Turkish worker from being able to contrive to fulfil that condition and, as a result, to obtain the grant of the right of residence inherent in the right, under the third indent of Article 6(1) of Decision No 1/80, of free access to any paid employment, during a period when he enjoyed a right of residence only provisionally pending the outcome of the dispute.

That reason retains its validity so long as it is not definitively established that during the period in question the person concerned had a legal right of residence. Otherwise, a judicial decision finally refusing him that right would be rendered nugatory, and he would thus have been enabled to acquire the rights provided for in the third indent of Article 6(1) during a period when he did not fulfil the conditions laid down in that provision.'

21. Lastly, the purpose of Article 6(1) of Decision No 1/80 must also lead to the above result. The purpose of the advantages in relation to legal employment set out in the provision is to ensure that Turkish workers who are already duly registered as belonging to the labour force in a Member State are further integrated in the Member State in question. That consideration of integration would have a contrary effect if a Turkish worker could, by fraudulent means, procure for himself a legal position which could only be limited under the conditions referred to in Article 14.

11 — See footnote 10.

22. The reply to the first question should accordingly, in my view, be that Article 6(1) of Decision No 1/80 must be interpreted to the effect that the periods of employment completed by a Turkish worker in a Member State on the basis of a residence permit obtained by fraud cannot be regarded as 'legal employment'. It is for the national courts to assess whether, in the specific case, there has been fraud.

23. Since the first question should be answered as set out above, there is no need to take a position on the second question.

Conclusion

24. In the light of the foregoing, I would propose that the Court answer the questions referred to it as follows:

Article 6(1) of Decision No 1/80 of 19 September 1980 adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, should be interpreted to the effect that the periods of employment completed by a Turkish worker in a Member State on the basis of a residence permit obtained by fraud cannot be regarded as 'legal employment'.