OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 28 May 1998 *

1. Where a Turkish worker is employed and paid normal remuneration under a special publicly-subsidised scheme of ancillary public utility work intended to enable such persons to build up social security contributions and to improve their chances of finding other work, does he belong to the regular labour force of the Member State funding the scheme? This, in essence, is the issue raised in a reference from the Verwaltungsgericht der Freien Hansestadt Bremen (Administrative Court of the Free Hanseatic City of Bremen). The case calls, in particular, for consideration of the relatively recent decision of the Court in *Günaydin*. [1]

2. Articles 48, 49 and 50 of the Treaty establishing the European Community are to guide the Contracting Parties (the Member States and the Community) to the Association Agreement with Turkey [2] 'for the purpose of progressively securing freedom of movement of workers between them'. [3] This does not, of course, mean that Turkish nationals enjoy rights to move freely within the Community, but only that they may acquire certain rights in the host Member State which has admitted them. [4]

3. The third recital in the preamble to Decision No 1/80 of 19 September 1980 of the Council of Association on the development of the Association [5] (hereinafter 'the Decision') states that it is necessary, 'in the social field, ... to improve the treatment accorded workers and members of their families in relation to the arrangements introduced by Decision No 2/76 of the Association Council'. [6] Section 1 of Chapter II of the Decision deals with questions relating to employment and the free movement of workers. In that section, Article 6 of the Decision provides, in

* Original language: English.

1 — Case C-36/96 [1997] ECR I-5143.

2 — Article 12 of 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. 2 (hereinafter 'the Agreement').

3 — The Council of Association is established by Article 6 of the Agreement; Article 22(1) of the Agreement confers upon it the power to take decisions in the cases provided for in the Agreement. Article 12 of the Agreement is supplemented by Article 36 of the Additional Protocol, signed on 23 November 1970, annexed to the Agreement and concluded by Council Regulation (EEC) No 2760/72 of 19 December 1972, OJ 1973 C 113, p. 17, which provides for progressive stages in securing freedom of movement for workers between Member States of the Community and Turkey and states that 'the Council of Association shall decide on the rules necessary to that end'.

4 — *Günaydin*, loc. cit., paragraph 22.

5 — Council of the European Communities, 'EEC-Turkey Association Agreement and Protocols and other basic texts' (Office for Official Publications of the European Communities, Brussels & Luxembourg, 1992), p. 327.

6 — Advocate General Elmer observed in Case C-434/93 *Bozkurt* v *Staatssecretaris van Justitie* [1995] ECR I-1475, hereinafter '*Bozkurt*', paragraph 9 of his Opinion, that the differences between Decision No 2/76 and the Decision 'are a mere matter of wording', though the latter is 'more clearly drafted'.

relevant part, as follows:

'(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: [7]

— shall be entitled in that Member State, after one year's legal employment, [8] 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. Among the other provisions in that section of the Decision, Article 8(1) stipulates that priority be accorded to Turkish workers where Member State authorities authorise a call on non-Community nationals to meet an offer of employment which cannot be met 'by calling on the labour available on the employment market of the Member States'. Article 8(2) states:

'The employment services of the Member States shall endeavour to fill vacant positions which they have registered and which the

7 — Danish: 'med tilknytning til det lovlige arbejdsmarked i en bestemt medlemsstat'; German: 'der dem regulären Arbeitsmarkt eines Mitgliedstaats angehört'; French: 'appartenant au marché régulier de l'emploi d'un État membre'; Italian: 'inserito nel regolare mercato del lavoro di uno Stato membro'; Dutch: 'die tot de legale arbeidsmarkt van een Lid-Staat behoort'. The Decision has not yet been published in the other official languages of the Community.

8 — Danish: 'lovlig beskæftigelse'; German: 'ordnungsgemäße Beschäftigung'; French: 'emploi régulier'; Italian: 'regolare impiego'; Dutch: 'legale arbeid'.

duly registered Community labour force has not been able to fill with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State.'

Reference is also made in Articles 7 and 10 of the Decision to Turkish workers who are duly registered as belonging to the labour force of a Member State, in relation to employment rights of family members and the principle of non-discrimination respectively, while Article 11 establishes equivalent rights for nationals of the Member States duly registered as belonging to the labour force in Turkey.

5. Paragraph 1 of the German Bundessozialhilfegesetz (Federal Law on Social Assistance, hereinafter 'the BSHG') defines social assistance as the grant of maintenance assistance (Lebensunterhalt) and the assistance given to persons in particular circumstances. Its objective is stated to be to permit the beneficiary to live a life compatible with human dignity. Paragraph 19 of the BSHG provides, in relevant part, as follows:

(1) Work opportunities shall be created for people seeking assistance, in particular young people who are unable to find work. In order to create and maintain work opportunities, costs may also be assumed. The work opportunities shall normally be of temporary duration and apt to improve the integration into working life of the person seeking assistance.

(2) If an opportunity of performing ancillary, public utility work is created for the person seeking assistance, he may be granted either the usual remuneration or maintenance assistance plus appropriate expenses. Work offered will be ancillary only if it would not otherwise be done, or not on that scale or at that time. The requirement for the work offered to be ancillary may be disregarded in individual cases if this helps to promote integration into working life or if it is made necessary by the entitled person's and his family's particular circumstances.

(3) If maintenance assistance is granted under subparagraph (2) above, no contract of employment for the purpose of employment law and no employment relationship for the purpose of statutory health and pension insurance will arise. However, the provisions on protection at work shall apply.

Paragraph 25 of the BSHG, in the version applicable up to 1 August 1996, denied the right to maintenance assistance to any person who refused to undertake reasonable work or to accept a reasonable activity.

6. Mehmet Birden (hereinafter 'the applicant') is a Turkish national. He moved to Germany in 1990 and, in January 1992, married a German national. As a result, he was granted a residence permit, valid until 29 June 1995, and an unconditional work permit. He failed to find work and eventually came to live on social assistance. On 3 January 1994, the applicant was engaged on a one-year contract as a semi-skilled odd-job man with the Kulturzentrum (Cultural Centre) Lagerhaus Bremen-Ostertor e. V. This contract was extended until the end of 1995 by a further one-year contract concluded on 2 January 1995. The applicant was required to work for 38.5 hours per week. His remuneration was that of a particular category of worker (salary group 2a, step 1), determined in accordance with the Manteltarifvertrag für Arbeiter der Länder (Collective pay agreement for workers of the Regions). Income tax, the solidarity surcharge and contributions for healthcare, pension and unemployment insurance were deducted from his pay, resulting in net pay of DM 2 155.70 per month. The plaintiff did not receive maintenance assistance during the period covered by the contracts.

7. The contracts in question were arranged and funded by the social services authorities of the Free Hanseatic City of Bremen (Freie Hansestadt Bremen), under a programme called 'Werkstatt Bremen' ('Workshop Bremen'). Werkstatt Bremen is intended, in accordance with Paragraph 19(2) of the BSHG, to provide work for a period of up to two years to recipients of social assistance who have no right to benefits from the Bundesanstalt für Arbeit (Federal Labour Office), in order to assist them in entering or re-entering the labour market. The payment of social insurance contributions affords participants the right subsequently to draw unemployment benefit or unemployment assistance under the Arbeitsförderungsgesetz (Law on Promotion of Employment). Werkstatt Bremen may provide up to 100% of the labour costs undertaken by employers. It appears that posts may also be co-financed by Werkstatt Bremen and employers. [9] The employers are normally public or public-interest bodies, although the latter may, it seems, be formed by associations of private individuals. [10]

8. The applicant's marriage was dissolved on 10 June 1995. His application of 14 June 1995 to the immigration authorities of the defendant in the main proceedings, the Stadtgemeinde Bremen (City of Bremen, hereinafter 'the defendant'), to have his residence permit extended beyond 29 June of that year was rejected by a decision of 15 August 1995, due to his divorce. The applicant has no entitlement under national-law provisions to remain in Germany. [11] Article 6(1) of the Decision was considered to be inapplicable to him because he was not employed as a duly registered member of the labour force. At the

9 — Statement by the agent for Germany at the oral hearing.

10 — Ibid.

11 — The Ausländergesetz (Law on Foreigners) and the Arbeitsaufenthaltsverordnung (Residence for Work Regulations).

beginning of 1996, the Cultural Centre offered the applicant a further contract of employment of indefinite duration, for 12 hours' work a week, outside the framework of the Werkstatt Bremen scheme. He could not conclude this contract because he did not possess a residence permit. The applicant's administrative appeal was rejected on 28 March 1996 on the same grounds as his initial application.

9. On 9 April 1996 the applicant commenced the present proceedings before the Verwaltungsgericht der Freien Hansestadt Bremen (hereinafter 'the national court'), seeking the annulment of the decisions of 15 August 1995 and 28 March 1996 and the extension of the validity of his residence permit on the basis of Article 6(1) of the Decision. The defendant argued that fixed-term work contracts under Paragraph 19 of the BSHG are available only to recipients of social assistance who are not entitled to unemployment benefit and who lack significant qualifications. Such posts were not, therefore, comparable to those on the normal labour market.

10. The national court deems the material time for assessing the entitlements of the applicant to be some time in the summer of 1995 (14 June, 29 June or 15 August); in any event, it does not consider the offer of a job commencing in 1996 to be material. It stayed the proceedings and referred the following question for a preliminary ruling pursuant to Article 177 of the Treaty establishing the European Community (hereinafter 'the Treaty'):

'Is a Turkish worker a duly registered member of the labour force of a Member State, within the meaning of Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council on the development of the Association, if he has a job sponsored by that Member State with public funds and requiring payment of social security contributions which is meant to enable him to enter or re-enter working life and which, on account of the purpose of the State sponsorship, may only be offered (pursuant to Paragraph 19(2) of the Bundessozialhilfegesetz) to a limited group of persons?'

11. Written and oral observations have been submitted by the applicant, the Federal Republic of Germany, the Hellenic Republic and the Commission of the European Communities. Written observations were also submitted by the French Republic.

12. The applicant reiterates the argument he submitted to the national court, namely that a person belongs to the labour force of a Member State for the purposes of Article 6(1) of the Decision by virtue of his lawful participation in economic life through the exercise of an occupational activity for reward, subject to the deductions applicable to all workers. For such labour-market participa-

tion to be 'regular', it is necessary only that an employment be neither illegal nor fictional. It is immaterial whether that employment is publicly funded in order to facilitate the integration into the labour market of a limited number of beneficiaries of social assistance.

13. France contends that the applicant's employment is of an ancillary, non-commercial kind which, being devoted to public-interest tasks which are funded with public money for social purposes, does not constitute participation in the regular labour force. It refers to the statement in *Bozkurt* that the legality of employment must be 'determined in the light of the legislation of the host State governing the conditions under which the Turkish worker entered the territory and is employed there' [12] and adds that Paragraph 19(3) of the BSHG indicates that, as a matter of German law, no employment relationship exists for the purposes of employment law or of health and pension insurance. [13] Equivalent programmes in France are more properly qualified as being educational in character, despite the framework of an employment contract.

14. Germany submits that social employment schemes designed to assist the integration of a restricted category of persons into the labour market do not give rise to the status of worker in Community law. [14] However, the real issue is not whether the applicant is a worker, but whether he belongs to the regular labour market. Article 6(1) of the Decision should be read as referring to the *general* employment market, in which all normal workers can participate without restriction. Irrespective of the status of the applicant in German employment law and of the attempt to make posts under the programme correspond as much as possible to 'normal' employment, his employment was of an essentially social and 'artificial' character. The judgment in *Bozkurt* states that the Turkish worker's position must be appreciated in the light of national law regarding his conditions of employment, and that his situation in the labour force, for the purposes of Article 6(1), must be stable and secure. [15] This criterion is not satisfied by a temporary work contract. Furthermore, the applicant's employment was concerned with merely marginal tasks for which there was no market demand and which would not otherwise have been performed, and for which the salary had, therefore, to be paid from public funds. His employer was not in competition with other market actors, as the development of a labour market parallel to the general market was not permitted.

15. Greece argues that it is necessary to examine, in any given case, whether the host

12 — Loc. cit., paragraph 27.

13 — This appears, from a reading of Germany's observations, to be based on a misconstruction of the BSHG, as this status is denied only if the participant in the employment scheme continued to receive social assistance during this period, which did not occur in the present case.

14 — Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621 (hereinafter '*Bettray*'), paragraphs 17 to 19.

15 — Ibid., paragraphs 26 and 27.

Member State *intended* at the outset to integrate a Turkish worker into its labour market. [16] Employment under the BSHG was not intended to permit the direct entry of the applicant to the German labour force, but rather to ensure he was not dependent on social assistance and to integrate him eventually into the normal labour market. Greece also argued at the oral hearing that the applicant's work had no real economic value, that it was unstable and insecure because merely temporary, and that it did not satisfy the criteria mentioned by the Court in *Günaydin* [17] distinguishing a normal employment relationship from a publicly-funded training programme.

16. The Commission proposes a three-part test for the application of Article 6(1) of the Decision. One of these is the subject of the question referred and the Commission does not think the applicant satisfies it. Regarding the first part of the test, the question whether the applicant is a worker, the Commission argues for as full as possible an analogy with Article 48 of the Treaty, [18] and for a restrictive reading of *Bettray* due to the special circumstances of that case (a drug addict participating in a work scheme specially designed for persons who were incapable of undertaking normal work). The applicant satisfied the normal Article 48 conditions of subordination to and remuneration by an employer, and his work had a certain value and was more than merely marginal.

17. The third part of the test, the requirement in the indents of Article 6(1) that a Turkish national be in legal employment for one of three specified periods, is also satisfied in the present case.

18. However, the second part, that in the main clause of Article 6(1) of the Decision regarding registration as belonging to the labour force, is not satisfied, in the Commission's view. This cannot refer to a requirement that such labour-market participation be merely legal, as this is governed by the condition of legal employment. It must, therefore, be understood as referring to a real economic activity, rather than an artificial one which is wholly financed with public money for social purposes and which is not exposed to economic competition. The Commission points out that this condition was absent from Decision No 2/76, and was omitted from more recent association agreements with the countries of central and eastern Europe, which otherwise establish more limited rights to freedom of movement for workers than do the Agreement and the Decision.

16 — It relies on the fact that Member States can determine the conditions on which Turkish nationals enter their labour markets: see Case C-237/91 *Kus* v *Landeshauptstadt Wiesbaden* [1992] ECR I-6781 (hereinafter '*Kus*'), paragraph 25.

17 — Loc. cit., paragraphs 33 and 34.

18 — *Bozkurt*, loc. cit., paragraph 20; Case C-171/95 *Tetik* v *Land Berlin* [1997] ECR I-329 (hereinafter '*Tetik*'), paragraph 28.

Analysis

19. It is worth restating at the outset the general approach taken by the Court to the interpretation and application of Article 6 of the Decision. The Court has consistently held that Article 6(1) of the Decision has direct effect in the Member States and that Turkish nationals who satisfy its conditions may therefore rely directly on the rights given them by the various indents of that provision. [19]

20. In the light of the statement in the third recital to its preamble that the Decision seeks to improve the treatment accorded to workers and their families in the social field, the provisions of Section 1 of Chapter II of the Decision, of which Article 6 forms part, constitute a further stage in securing freedom of movement for workers on the basis of Articles 48, 49 and 50 of the Treaty. The Court has accordingly considered it essential that the principles enshrined in those Treaty articles be interpreted, so far as possible, to extend to Turkish workers who enjoy the rights conferred by the Decision. [20] However, the Decision does 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, but merely regulates, in Article 6, the situation of Turkish workers already integrated into the labour force of the host Member State. [21]

21. I now turn to the criteria to be satisfied by a Turkish national in order to benefit from Article 6(1) of the Decision. On a simple reading of the text, these are three in number, which are essentially those proposed by the Commission. [22] First, the Turkish national must be a 'worker'. Secondly, he must be 'duly registered as belonging to the labour force of a Member State'. Translating freely from the French, German and Italian versions of the Decision, he must belong to the *regular* employment market of a Member State, or, having regard to the Danish and Dutch versions, to the *legal* employment market. Thirdly, he must be legally employed for one of three possible periods, each of which gives rise to certain rights of access to further employment. In the present case, the applicant claims one year's legal employment, which would entitle him to the renewal of his permit to work for the same employer, provided the contested second criterion is met.

22. All three semantically distinct criteria entail some connection with work or employment. It is not surprising, therefore, that, in

19 — Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 26; Case C-355/93 *Eroglu* v *Land Baden-Württemberg* [1994] ECR I-5113 (hereinafter '*Eroglu*'), paragraph 11; *Günaydin*, loc. cit., paragraph 24; Case C-98/96 *Ertanir* [1997] ECR I-5179, paragraph 24.

20 — *Bozkurt*, loc. cit., paragraphs 14, 19 and 20; *Tetik*, loc. cit., paragraph 20; *Günaydin*, loc. cit., paragraphs 20 and 21; *Ertanir*, cited immediately above, paragraphs 20 and 21.

21 — *Kus*, loc. cit., paragraph 25; *Günaydin*, loc. cit., paragraph 23; *Ertanir*, loc. cit., paragraph 23.

22 — See also the Opinion of Advocate General Darmon in *Eroglu*, loc. cit., paragraph 19.

practice, the Court has on occasion simultaneously assessed the fulfilment of more than one of these criteria, or has read one in the light of another. Thus, in *Sevince*, the Court stated that legal employment 'presupposes a stable and secure situation as a member of the labour force', [23] which appears to duplicate, in part, the second criterion. [24] The Court probably approached the issue as one relating to legal employment because it was necessary to determine whether periods of employment while the worker's situation in the labour force was unstable and insecure could be counted in order to build up entitlements under Article 6(1). The condition of a stable and secure situation is not satisfied if the right of residence of the Turkish national is merely provisional, pending a final decision on initial refusal of a residence permit, [25] or if his residence permit was obtained by fraud. [26]

23. The grounds on which the Court decides whether a Turkish national is a worker will often, in the absence of special circumstances, also be sufficient for the second and third criteria to be satisfied. Thus, in *Günaydin* and in *Ertanir*, there was no dispute that the Turkish nationals in question were workers, but the Court employed a test very similar to that used to define a worker under Article 48 of the Treaty, developed in cases such as *Lawrie-Blum* v *Land Baden-Württemberg* [27] and *Le Manoir*, [28] to address the second requirement of Article 6(1), that of being duly registered as belonging to the labour force of a Member State. It stated that 'it should be ascertained whether the worker is bound by an employment relationship covering a genuine and effective economic activity pursued for the benefit and under the direction of another person for remuneration'. [29]

24. None the less, each of the three criteria in Article 6(1) of the Decision has, in my view, distinct features, which I shall now attempt to sketch in general terms before addressing the particular circumstances of the present case. Broadly speaking, the test employed under Article 48 of the Treaty should serve to determine whether a Turkish national is a worker. This is consistent with the requirement that, pursuant to Article 12 of the Agreement, the Decision be interpreted, as far as possible, in the light of the Treaty provisions on freedom of movement for workers. This, of course, also entails determining the effect of Article 48 cases such as *Bettray* [30] in the context of the Decision.

23 — Loc. cit., paragraph 30; repeated in *Bozkurt*, loc. cit., paragraph 26.

24 — In a further example, Advocate General Darmon seems to have merged the second and third criteria in *Eroglu*, loc. cit., paragraph 41 of his Opinion, where he stated that what matters, when deciding if a worker is duly registered as belonging to the labour force, 'is that the worker's position should be "*in order*" as regards the laws of the host Member State', thus appearing to refer to the German text of Article 6(1) regarding legal employment ('*ordnungsgemäße* Beschäftigung', emphasis added in both cases).

25 — Ibid., paragraph 31.

26 — Case C-285/95 *Kol* v *Land Berlin* [1997] ECR I-3069.

27 — Case C-66/85 [1986] ECR 2121.

28 — Case C-27/91 [1991] ECR I-5531, paragraph 7.

29 — *Günaydin*, loc. cit., paragraph 31; see also *Ertanir*, loc. cit., paragraph 43. See also the Opinion of Advocate General Darmon in *Eroglu*, loc. cit., paragraph 30, where he uses essentially the same test to decide if a Turkish national is a worker.

30 — Loc. cit.

25. *Bettray* concerned a drug addict who participated in an employment scheme under the Netherlands' Social Employment Law run for persons 'who, for an indefinite period, [were] unable, by reason of circumstances related to their situation, ... to work under normal conditions'. [31] The Court stated that '[n]either the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker'. [32] However, where undertakings or work associations were created solely in order to run activities as 'a means of rehabilitation or integration for the persons concerned', and where the activities were 'adapted to the physical and mental possibilities of each person' in order to maintain, re-establish or develop their capacity for work, rather than those persons having been 'selected on the basis of their capacity to perform a certain activity', it could not be said that there existed an effective or genuine economic activity. [33] As the test of labour-force membership in *Günaydin* is in most respects identical to the Community-law definition of a worker, and the Court in that case qualified the test by reference to vocational training and to programmes of integration into the workforce, it is more appropriate to consider the concrete application of *Bettray* in my discussion below of the former case in the context of the second criterion.

26. Looking briefly at the third criterion of legal employment, and provided that the second criterion, which is crucial in this case, has been satisfied, this would appear to require, in addition, merely that the employment for one of the specified periods was not illegal, in the sense of having been criminal, contrary to any conditions attached to a residence permit or otherwise unlawful. [34] There is no suggestion that the applicant fails to fulfil this criterion.

27. The issue in the present case has focused on the second criterion in Article 6(1) of the Decision, that of the due registration of the worker as belonging to the (regular or legal) labour force of a Member State. [35] Certain of the elements required to fulfil this criterion have already been identified in the case-law. Of course, the task will always fall to the national court to determine, in the light of the case-law of the Court, and of the interpretation furnished in any preliminary ruling, whether an individual case fulfils this criterion. It must first be determined whether the legal relationship of employment of the person concerned can be located within the territory of a Member State or retains a sufficiently close link with that territory. [36] As we have seen, the worker's situation as a member of the labour force must also be stable and secure, in particular regarding the authorisa-

31 — Ibid., paragraph 5.

32 — Ibid., paragraph 15.

33 — Ibid., paragraphs 17 and 19.

34 — See the Opinions of Advocate General Elmer in *Bozkurt*, loc. cit., paragraph 21, and in *Günaydin*, loc. cit., paragraph 24.

35 — At various points in the original English text of this Opinion, I include references, in parenthesis, to the regular or legal labour force or employment market, in order to draw together the various nuances of the different language versions of the Decision.

36 — *Bozkurt*, loc. cit., paragraphs 22 and 23; *Günaydin*, loc. cit., paragraph 29: *Ertanir*, loc. cit., paragraph 39.

tion for his residence in the Member State in question before the acquisition of residence rights ancillary to rights under Article 6(1). [37] Neither of these conditions presents a problem in the present case. The temporary character of the applicant's contract should not be taken, in my view, as indicating that his situation in the labour market was unstable or insecure. As developed in the case-law, that criterion relates to the worker's position on the labour market as a whole, due, in particular, to difficulties regarding the authorisation of residence, rather than to the nature of a particular employment contract.

28. It has been argued, chiefly in the light of one possible construction of the French and German texts of Article 6(1) of the Decision, that the requirement that workers belong to the 'regular' employment market [38] must be read as referring to a supposedly 'normal' or 'general' employment market, rather than an 'artificial' one; and, in particular, that the normal character of a given post is to be determined by reference to whether it is publicly funded, whether it has essentially social objectives such as the integration of workers in the market, whether the tasks in question are marginal or ancillary ones, performed in the public interest, and which would not normally be performed pursuant to the free-market principles of supply and demand, whether it is removed from the scope of normal competition between undertakings and between workers, and whether it is merely temporary in character.

29. A test with some of these detailed characteristics, which I will discuss further below, was developed by the Court in *Günaydin*, where the Court spoke of the existence of 'a normal employment relationship'. [39] As will be seen, I do not think a normal employment relationship can be automatically equated with what has been contended to be the normal employment market. However, it is important to identify why that test was developed. In the light of the scheme of the Decision and of the case-law, the essential element of the criterion of being 'duly registered as belonging to the [regular or legal] labour force' is, in my view, that the worker in question be employed or available for employment, and that he have completed the applicable formalities required by national law. [40]

30. The requirement that the Turkish worker comply with such formalities reflects the express requirement of registration in the English version of Article 6(1), and also provides a persuasive alternative construction of the term 'regular' which appears in certain other language versions. A reading of Article 6(1) of the Decision in the light of Article 8 shows that the requirement of registration is part of a general scheme to supervise and coordinate offers of employment and the labour available. This impression is reinforced by the reference in the second indent of Article 6(1) to Turkish workers' entitlement after three years of legal employment, and subject to Community preference, to take up certain posts which 'are registered with the employment authorities of that State'. The

37 — *Sevince*, cited and discussed above, paragraph 30.

38 — This qualification is also found in the Italian version of the Decision.

39 — Loc. cit., paragraph 33.

40 — See the passage cited below from *Tetik*, loc. cit., at paragraph 32 of this Opinion.

application of the rule in Article 10 on non-discrimination as regards remuneration and other conditions of work is also facilitated by the registration of Turkish workers. Article 6(2) of the Decision presupposes that an involuntarily unemployed Turkish worker, whose periods of unemployment are 'duly certified by the relevant authorities', remains, at least for a time, duly registered as belonging to the (regular or legal) labour force of a Member State, because it permits rights acquired as the result of the preceding period of employment to be retained. A reading of the term 'régulier' in the French version as relating to compliance with formalities imposed by law or regulation is supported by the use of the same term for the third criterion, 'emploi régulier', rendered in English as 'legal employment'. The French version of Article 8 of the Decision also refers to 'chômage régulier'. Whatever distinction can be made between persons employed in 'regular' free-market jobs and those with other employments, no such distinction can operate regarding the unemployed. Furthermore, the references to the legal employment market in the Danish and Dutch versions of Article 6(1) of the Decision imply that that condition is concerned with compliance with formal legal requirements, rather than with the 'laws' of the market.

31. This approach is also reflected in the case-law of the Court. In *Bozkurt*, the Court stated that Article 6(2) of the Decision 'necessarily presupposes fitness to continue working' [41] and that, 'in the case of long-lasting incapacity for work [as in that case], the worker is no longer available as a member of the labour force at all and there is no objectively justified reason for guaranteeing him the right of access to the labour force and an ancillary right of residence'. [42] Whether by reason of total and permanent incapacity for work, or of other factors such as retirement, Article 6 of the Decision 'does not ... cover the situation of a Turkish worker who has definitively ceased to belong to the labour force'. [43]

32. In *Tetik*, the Court stated that a Turkish worker who, after four years' employment, voluntarily left his work to seek other employment in the Member State in question, 'cannot automatically be treated as having definitively left the labour force of that State, provided, however, that he continues to be duly registered as belonging to the labour force of the Member State in question, within the meaning of the first phrase of Article 6(1)'. [44] The Court continued:

'Where a Turkish worker was unable to enter into a new employment relationship immediately after having abandoned his previous employment, as in the main proceedings, that condition continues, in principle, to be satisfied only in so far as the person who finds

41 — Loc. cit., paragraph 38.

42 — Ibid., paragraph 36, to be read in the light of paragraph 37 approving this argument by Germany.

43 — Ibid., paragraph 39.

44 — Loc. cit., paragraph 40.

himself without employment satisfies all the formalities that may be required in the Member State in question, for instance by registering as a person seeking employment and remaining available to the employment authorities of that State for the requisite period.

That requirement also makes it possible to ensure that during the reasonable period which he must be granted in order to allow him to enter into a new employment relationship the Turkish national does not abuse his right of residence in the Member State concerned but does in fact seek new employment.' [45]

33. It emerges from this case-law, and from a reading of Article 6(1) in its legislative context, that the criterion that Turkish workers be duly registered as belonging to a Member State's labour force comprises linked formal and substantive elements. The worker must comply with all formalities regarding registration as an employed or (during a reasonable time period) unemployed person, and he must be available for and seeking work if not actually employed.

34. This brings me to consider *Günaydin*. In its judgment in *Günaydin*, the Court identified criteria which are, in part, of greater apparent relevance to the very different facts of the present case than to the result ultimately reached in that case. *Günaydin* concerned the refusal of a permanent residence permit to a Turkish worker who was permitted to enter Germany to study, and later to stay on solely in order to be trained and to gain experience at the factory of a German company. During his four years' employment, he became a valued member of the factory staff, a member whom it would be impossible to replace.

35. Advocate General Elmer argued for a distinction to be drawn between, on the one hand, employment and, on the other, training of a theoretical or educational nature, with those engaged in the latter activity not being regarded as forming part of the labour force. [46] The concept of being duly registered as belonging to the labour force of a Member State had, in his view, to be broad enough to include work involving elements of training. Advocate General Elmer proposed that paid employment be deemed to fall outside that concept only in the case of practical work performed in the context of a training course in the strict sense. [47] All the indications were, he thought, that Mr Günaydin was engaged in ordinary work rather than, for example, apprentice training, as he had been recruited under the general conditions of the labour market, received a normal salary, did not receive a State training allowance, and had been recruited for a number of years. [48]

45 — Ibid., paragraphs 41 and 42; see also paragraph 46.

46 — Loc. cit., paragraphs 17 and 18 of his Opinion.

47 — Ibid., paragraph 22.

48 — Ibid., paragraph 23.

36. I have already observed that, in *Günaydin*, the Court applied, as one criterion for whether a worker belongs to the labour force of a Member State, the test of 'whether the worker is bound by an employment relationship covering a genuine and effective economic activity pursued for the benefit and under the direction of another person for remuneration'. [49] It is in the context of a distinction between vocational training [50] and a Turkish worker's membership of the labour force that the Court stated:

'Nevertheless, in a case such as that at issue in the main proceedings, a Turkish worker who, at the end of his vocational training, is in paid employment with the sole purpose of becoming acquainted with and preparing for work in a managerial capacity in one of the subsidiaries of the undertaking which employs him must be considered to be bound by a normal employment relationship where, in genuinely and effectively pursuing an economic activity for the benefit of and under the direction of his employer, he is entitled to the same conditions of work and pay as those which may be claimed by workers who pursue within the undertaking in question identical or similar activities, so that his situation is not objectively different from that of those other workers.' [51]

37. In other words, the mere fact that the employment is solely designed to qualify the worker for work elsewhere in the undertaking does not deprive it of the character of an 'employment relationship'. The Court's approach clearly restricts, none the less, the simple application of the Community-law definition of workers to the second criterion in Article 6(1) of the Decision, in so far as pay levels and working conditions are deemed to be a relevant factor in assessing the existence of an employment relationship. The relevance of pay levels was expressly disavowed by the Court, in the Article 48 context, in *Lawrie-Blum*. [52] The divergence is explicable by the fact that, contrary to the position in that case, the Court in *Günaydin* apparently viewed activity which would enable the person involved to be deemed to be a worker in a Community context as falling outside the scope of due registration as a member of the (regular or legal) labour force under Article 6(1) of the Decision where it was undertaken within the framework of 'specific vocational training'. [53]

49 — Ibid., paragraph 31. It is clear that this does not purport to be a complete enunciation of the test of being duly registered as belonging to the (regular) labour force, in so far as it may suffice, in a particular case, for a Turkish worker to be seeking such work though temporarily unemployed.

50 — See the first sentence of paragraph 33, as well as the statement in paragraph 32 that Member States could restrict Turkish nationals' rights to enter and reside in their territory to the pursuit of specific vocational training, in particular in the context of a contract of apprenticeship.

51 — Ibid., paragraph 33.

52 — Loc. cit., paragraph 21. The trainee at issue in *Le Manoir*, loc. cit., was deemed to be a worker even though she did not receive the minimum index-linked wage.

53 — *Günaydin*, loc. cit., paragraph 32.

38. It should also be noted that the Court's conception of 'a normal employment relationship' in *Günaydin* is in no way connected with the actual economic value of the work in question, other than in so far as this is reflected in the pay awarded for it. There is no attempt to distinguish between tasks which are performed in response to the free play of the principle of supply and demand and those which have a public-interest content. The approach suggested by the Commission and the Member States who submitted observations, looking beyond the existence of an economic activity and of an employment relationship of subordination and remuneration with a particular employer, which can be verified in each case, to the sustainability of that relationship in free-market conditions in the supposedly normal employment market, would be hopelessly unworkable in practice. It would ignore the fact that, in addition to public and charitable endeavour as such, much apparently market-oriented economic activity depends on public subventions or contracts, the public provision of infrastructure, the public provision of trained labour, and so on, so that 'normal' market conditions, in this broader sense, are not easy to identify in the context of an individual case. In any event, the approach advocated does not appear to me to reflect the Danish, English and Dutch texts of the Decision.

39. The Court continued in *Günaydin*:

'In this connection, it is for the national court to determine whether that condition is satisfied and, in particular, whether the worker has been employed on the basis of national legislation derogating from Community law and intended specifically to integrate him into the labour force and whether he receives in return for his services remuneration at the level which is usually paid, by the employer concerned or in the sector in question, to persons pursuing identical or comparable activities and which is not preponderantly financed from the public purse in the context of a specific programme for the integration of the person concerned into the workforce.' [54]

40. The reference to national derogating legislation appears to accord some significance to the status of a post in national employment law. [55] The references to the intention 'specifically to integrate him into the labour force' and, more especially, to remuneration 'which is not preponderantly financed from the public purse in the context of a specific programme for the integration of the person concerned into the workforce', seem out of context in the circumstances of *Günaydin*. There was no suggestion that Mr Günaydin was employed under any such legislation or such programme.

54 — Ibid., paragraph 34.

55 — The reference in the English version of the judgment to employment 'on the basis of national legislation derogating from Community law' appears to be a mistranslation of the original German reference to a person who is not employed 'aufgrund einer nationalen Sonderregelung', which was rendered in French as employment 'sur la base d'une réglementation nationale dérogatoire au droit commun'.

41. The Court stated in the operative part of its judgment in *Günaydin* that Article 6(1) of the Decision 'is to be interpreted as meaning that a Turkish national who has been lawfully employed in a Member State for an uninterrupted period of more than three years in a genuine and effective economic activity for the same employer and whose employment status is not objectively different to that of other employees employed by the same employer or in the sector concerned and exercising identical or comparable duties is duly registered as belonging to the labour force of that State and is legally employed within the meaning of that provision'.

42. The central element of the test propounded in *Günaydin* is, thus, that the employment relationship at issue should cover 'genuine and effective economic activity', the same test as was used by the Court in *Bettray*. Its application in that case excluded persons who were indefinitely unable to work under normal conditions, and who were employed under the Social Employment Law, from consideration as workers for the purposes of Community law. In that case, as in this, the employment scheme was financed from the public purse (although the Court stated in *Bettray* that this was not normally relevant).

43. It is for the national court to assess whether the work performed by the applicant at the Cultural Centre constitutes 'genuine and effective economic activity', having regard to the questions whether the work was essentially rehabilitative, as in *Bettray*, and whether it merely constituted a form of 'specific vocational training'. None of the indicia mentioned by the Court in paragraph 34 of its judgment in *Günaydin* should be decisive on its own, nor should they necessarily be considered to be exhaustive. Thus, while the fact of public funding is an important element, the national court should also consider whether the work performed provides genuine benefit to the employer and, as the Court indicated in *Günaydin*, whether the pay and conditions, including provisions for deduction of social and other contributions, are the same as or similar to those claimed by workers in the same sector of employment. The restricted pool from which participants in the Werkstatt Bremen scheme are drawn is not, in my view, material if the objective characteristics of the work they engage in are similar to those of the activities of other workers. [56] It is relevant, I think, that the applicant was paid a wage determined in accordance with a public-sector collective pay agreement and his pay was subjected to deductions for income tax, the solidarity surcharge and contributions for health-care, pension and unemployment insurance. Furthermore, it appears that the applicant enjoyed the status of an employee under national employment law — the derogation from national employment law under Paragraph 19(3) of the BSHG seems to apply only to persons in receipt of maintenance assistance.

44. I do not think decisive weight should be given either to the fact that the work under

56 — *Ertanir*, loc. cit., paragraphs 42 to 44.

the scheme is to be ancillary, i. e. work that would not be performed without the scheme, as this, as I have said, widens the perspective from the character of the individual employment relationship to an appreciation of the general free-market sustainability of a post, which is not warranted by the text or scheme of the Decision or by the case-law. It cannot be suggested that an odd-job man or caretaker does not perform in principle useful and valuable work. Similarly, although the fact that an employment scheme has as its objective the integration of participants into the workforce may raise the possibility that a worker is not yet available for work or able to engage in effective and genuine economic activity, or is engaged merely in a form of specific vocational training, the objective of rehabilitation and integration would, in my view, be decisive only if the facts approximated to *Bettray*.

45. There are numerous possible points of distinction from the type of rehabilitation programme at issue in *Bettray*. Although the applicant suffers from a lack of formal qualifications, there is no suggestion that he is indefinitely unable to work, that his employer was established with the sole purpose of employing people in his position, or that his employment at the Cultural Centre was devised more by reference to his capabilities than to the Centre's needs. While the scheme in which he participated has a programme which is protective of those involved and results merely in the payment of maintenance assistance, his own participation was part of a more general work-experience programme, at normal rates of pay, with a view to seeking further employment immediately after its completion. The fact that the applicant was offered further similar work by the Cultural Centre after the end of the Werkstatt Bremen scheme is also relevant, even though the Centre was not, apparently, originally able to afford to take him on full-time outside the framework of that scheme.

46. Regarding whether the applicant's employment is to be viewed merely as a form of specific vocational training with a practical element, it is noteworthy that he was engaged in tasks which were presumably of economic value to his employer. There does not appear to have been a formal vocational training component of an educational or theoretical kind. [57] The primary method of serving the objective of integration in the labour force appears to be through experience of the workplace. Furthermore, Germany stated that activities under the Werkstatt Bremen scheme, in the framework provided by Paragraph 19 of the BSHG, were designed to resemble as closely as possible ordinary employment conditions, so that there may have been no apparent difference in practice between the applicant's position and that of other workers.

47. In short, I would answer the question referred by the national court to the effect that a Turkish worker, such as the applicant, who was legally employed as an odd-job man under a scheme established pursuant to Paragraph 19 of the BSHG funded preponderantly from the public purse should be

57 — See the Opinion of Advocate General Elmer in *Günaydin*, loc. cit., paragraph 18.

considered a duly registered member of the labour force of the Member State in question if his work constituted a genuine and effective economic activity, if it provided a genuine benefit for the employer comparable to that of other employees exercising similar or comparable duties, and if the remuneration and other conditions were comparable to those claimed by workers employed by the same employer or in the same sector.

Conclusion

48. Therefore, I propose that the Court answer as follows the question referred by the Verwaltungsgericht der Freien Hansestadt Bremen:

A Turkish worker who is legally employed under a scheme established with a view to improving the integration of the participants into working life which is funded preponderantly from the public purse should be considered to be duly registered as belonging to the labour force of the Member State in question for the purposes of Article 6(1) of Decision No 1/80 of 19 September 1980 of the Council of Association on the development of the Association if his work constitutes a genuine and effective economic activity, if it provides a genuine benefit for the employer comparable to that of other employees exercising similar or comparable duties, and if the remuneration and other conditions are comparable to those claimed by workers employed by the same employer or in the same sector.