JUDGMENT OF THE COURT (Fifth Chamber)

7 July 2005 *

In Case C-383/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 4 September 2003, received at the Court on 12 September 2003, in the proceedings

Ergül Dogan

v

Sicherheitsdirektion für das Bundesland Vorarlberg,

THE COURT (Fifth Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, R. Schintgen (Rapporteur) and P. Kūris, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Dogan, by A. Summer, N. Schertler and N. Stieger, Rechtsanwälte,

— the Austrian Government, by E. Riedl, acting as Agent,

— the German Government, by A. Tiemann, acting as Agent,

— the Commission of the European Communities, by G. Rozet and H. Kreppel, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 6 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).

2 The reference was made in the course of proceedings between Mr Dogan, a Turkish national, and the Sicherheitsdirektion für das Bundesland Vorarlberg (Police Headquarters, Land Vorarlberg) concerning proceedings for expulsion from Austrian territory.

Law

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

'(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 In accordance with Article 7 of Decision No 1/80:

'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 According to Article 14(1) of Decision No 1/80:

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

The main proceedings and the question referred for a preliminary ruling

6 It is stated in the file that Mr Dogan, who was born in 1948, is challenging a permanent ban on residence in Austrian territory, issued against him on 24 May 2000 by the Sicherheitsdirektion für das Bundesland Vorarlberg.

7 At the time that order was made, Mr Dogan had lived in Austria for some 27 years and had been legally employed there for many years. He is married and has four children. In 1975/76 his family was authorised to join him in the host Member State.

8 Having been found guilty of a serious offence, Mr Dogan was arrested on 10 August 1998 and sentenced, by judgment of 9 March 1999, to three years in prison, which he has now served.

9 The contested order is based on that criminal conviction. According to Paragraph 36 of the Austrian Law on aliens (BGBl. I, 1997/75), the conditions for a residence ban are fulfilled where an alien has been sentenced by a national court to an unconditional term of imprisonment in excess of three months. Since Mr Dogan's appeal against the permanent ban on residence did not have suspensory effect, he was obliged to leave Austria.

10 The national court held that until Mr Dogan was detained in custody he had acquired the rights laid down in the third indent of Article 6(1) of Decision No 1/80 because he had worked legally in Austria for more than four years.

11 However, the national court considers that Mr Dogan may have forfeited those rights as a result of his imprisonment. In that regard it wishes to know whether, following the judgment in Case C-340/97 *Nazli* [2000] ECR I-957, it must be held that not only detention pending trial but, more generally, any sentence of imprisonment even for a substantial period amounting to three years, as in this case, constitutes only a temporary interruption of a Turkish worker's membership of the labour force of the host Member State which does not affect the rights he has acquired as long as he finds paid employment within a reasonable time after his release, or whether, on the contrary, the failure to work on account of a criminal conviction followed by a period of imprisonment constitutes unemployment which is not 'involuntary', within the meaning of the second sentence of Article 6(2) of Decision No 1/80, on the ground that it is due to the blameworthy conduct of the

person concerned and which, therefore, leads to forfeiture of the rights which the worker already enjoys.

12 Taking the view that in those circumstances the resolution of the dispute requires an interpretation of Community law, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 6(2) of Decision No 1/80 ... to be interpreted as meaning that a Turkish national forfeits the rights acquired under Article 6(1) of Decision No 1/80 if he is held in custody under a prison sentence for a period of three years?'

The question referred for a preliminary ruling

13 In order to answer that question effectively, it must be recalled from the outset that it is clear from the wording of Article 6(1) of Decision No 1/80 that, unlike the first and second indents of that article, which merely set out the arrangements under which a Turkish national who has lawfully entered the territory of a Member State and has been authorised to work there may work in the host Member State by continuing to work for the same employer after one year's legal employment (first indent) or by responding, after three years of legal employment and subject to the priority to be given to workers from the Member States, to an offer of employment

made by another employer for the same occupation (second indent), the third indent confers on a Turkish worker not only the right to respond to a prior offer of employment but also the unconditional right to seek and take up any employment freely chosen by the person concerned (Case C-171/95 *Tetik* [1997] ECR I-329, paragraph 26, and *Nazli*, paragraph 27).

14 As regards the position of a Turkish worker who, like Mr Dogan, enjoys in the host Member State, after four years of legal employment, 'the right of free access to any paid employment of his choice' in that Member State, in accordance with the third indent of Article 6(1), the Court has repeatedly held not only that the direct effect of that provision means that the person concerned derives an individual employment right directly from Decision No 1/80, but also that to be effective that right necessarily implies a concomitant right of residence which does not depend on the continuing existence of the conditions for access to those rights (see Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 29 and 31; Case C-237/91 *Kus* [1992] ECR I-6781, paragraph 33; *Tetik*, paragraphs 26, 30 and 31; and *Nazli*, paragraphs 28 and 40; see also, by analogy, concerning the second indent of the first sentence of Article 7 of Decision No 1/80, Case C-329/97 *Ergat* [2000] ECR I-1487, paragraph 40, and Case C-467/02 *Cetinkaya* [2004] ECR I-10895, paragraph 31; and, concerning the second sentence of Article 7, Case C-355/93 *Eroglu* [1994] ECR I-5113, paragraph 20, and Case C-210/97 *Akman* [1998] ECR I-7519, paragraph 24).

15 It is only during the phase in which rights are acquired on an incremental basis in accordance with the length of the paid legal employment as set out in the three indents of Article 6(1) of Decision No 1/80 and, therefore, only for the purpose of calculating the various periods of employment necessary for that purpose, that Article 6(2) lays down the effects on those periods of the various causes of interruption of employment (see, to that effect, Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraph 38; *Tetik*, paragraphs 36 to 39; and *Nazli*, paragraph 40).

16 From the time the Turkish worker has satisfied the conditions laid down in the third indent of Article 6(1) of Decision No 1/80 and, therefore, already enjoys the unconditional right laid down by that provision to free access to the paid employment of his choice and the concomitant right of residence, Article 6(2) is no longer applicable.

17 It follows that, contrary to the opinion put forward by the Austrian and German Governments, the interpretation of the rights conferred by the third indent of Article 6(1) of Decision No 1/80 cannot depend on the fact that imprisonment is not referred to in Article 6(2). In the same way, the argument put forward by the Austrian and German Governments that the Turkish worker is responsible for his absence from the labour market during his imprisonment so that the period of unemployment which results from that imprisonment cannot be regarded as 'involuntary', within the meaning of the second sentence of Article 6(2), is irrelevant.

18 It is settled case-law that, in order not to deprive of their substance the rights derived by a Turkish worker from the third indent of Article 6(1) of Decision No 1/80, that provision must be interpreted as not relating merely to engaging in employment but as granting a Turkish worker already duly integrated into the labour force of the host Member State an unconditional right to employment which necessarily implies the right to cease employment in order to seek other employment which he may freely choose (*Nazli*, paragraph 35). Unlike the first and second indents, the third indent does not require an uninterrupted period of employment.

19 From that, the Court concludes that a Turkish worker is entitled to a temporary interruption of his employment relationship. In spite of such an interruption he continues to be duly registered as belonging to the labour force in the host Member State, within the meaning of Article 6(1) of Decision No 1/80, during the period which is reasonably necessary for him to find other paid employment. He may therefore claim an extension of his residence permit in that Member State in order to exercise his right to free access to any paid employment of his choice, provided that he does in fact try to find a new job and, if appropriate, registers with the employment services in order to find another job within a reasonable time (see, to that effect, *Tetik*, paragraphs 30, 31, 41, 46 and 48, and *Nazli*, paragraphs 38 and 40).

20 That interpretation, based on the system put in place by Article 6(1) of Decision No 1/80, and the effectiveness of the rights to employment and residence conferred on Turkish workers by the third indent of that provision, must apply regardless of the cause of the absence of the person concerned from the labour force of the host Member State, provided that that absence is temporary.

21 Where, as in the main proceedings, the failure to work arises from the worker's imprisonment, the detailed rules set out in Decision No 1/80 are, as a rule, irrelevant since the absence of the Turkish national concerned from the labour market is for a limited period.

22 As is clear from Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 50, the reasoning in *Nazli* cannot therefore be understood as being limited to the particular circumstances of that case, depending on the fact that the worker in question had been detained pending trial for more than a year and then given a suspended sentence. On the contrary, the same reasoning is applicable in its entirety, for the same reasons, to a temporary absence from the labour force due to the completion of a prison sentence. More particularly, the fact that the imprisonment prevents the person concerned from working, even

for a long period, is irrelevant if it does not preclude his subsequent return to working life.

23 In those circumstances, except where the person concerned has definitively ceased to be duly registered as belonging to the labour force of the host Member State because objectively he no longer has any chance of rejoining the labour force or has exceeded a reasonable time-limit for finding new employment after the end of his prison term, the national authorities can restrict the rights which he derives from Article 6(1), third indent, of Decision No 1/80 as regards residence and employment only on the basis of Article 14(1) of that decision (see *Nazli*, paragraph 44).

24 It must be added that it is already clear from the case-law that an expulsion measure based on Article 14 may be issued only if the personal conduct of the person concerned indicates a specific risk of new and serious prejudice to the requirements of public policy. Consequently, such a measure cannot be ordered automatically as a result of a criminal conviction and on the basis of general preventive grounds (see *Nazli*, paragraphs 61, 63 and 64).

25 Having regard to all of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that a Turkish national who enjoys the right of free access to any paid employment of his choice under the third indent of Article 6(1) of Decision No 1/80 does not forfeit that right because he is not in employment during his imprisonment, even for several years, if his absence from the labour market of the host Member State is only temporary.

The employment rights conferred by that provision on the person concerned and the concomitant right of residence may be limited only on grounds of public policy, public security and public health pursuant to Article 14(1) of Decision No 1/80, or

on account of the fact that the Turkish national concerned has failed to find new paid employment within a reasonable time after his release.

Costs

26 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 (Fifth Chamber) hereby rules:

A Turkish national who enjoys the right of free access to any paid employment of his choice under the third indent of Article 6(1) 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, does not forfeit that right because he is not in employment during his imprisonment, even for several years, if his absence from the labour market of the host Member State is only temporary.

The employment rights conferred by that provision on the person concerned and the concomitant right of residence may be limited only on grounds of public policy, public security and public health pursuant to Article 14(1) of Decision No 1/80, or on account of the fact that the Turkish national concerned has failed to find new paid employment within a reasonable time after his release.

[Signatures]