JUDGMENT OF THE COURT (Seventh Chamber)

4 October 2007 *

In Case C-349/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Darmstadt (Germany), made by decision of 16 August 2006, received at the Court on 21 August 2006, in the proceedings

Murat Polat

v

Stadt Rüsselsheim,

THE COURT (Seventh Chamber),

composed of J. Klučka, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur) and U. Lõhmus, 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:

— the German Government, by M. Lumma, and C. Schulze-Bahr, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Netherlands Government, by H. Sevenster, then by C. Wissels, acting as Agents,

— the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the United Kingdom Government, by V. Jackson, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz, acting as Agent.

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 59 of the Additional Protocol signed at 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. 17; 'the Additional Protocol') and of Articles 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, of the one part, and by the Member States of the EEC and the Community, of the other part, 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). This reference also concerns the interpretation of Article 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; 'Directive 2004/38').

2 The reference was made in the course of proceedings between Mr Polat, a Turkish national, and Stadt Rüsselsheim regarding a procedure for expulsion from German territory.

Legal framework

EEC-Turkey Association Agreement

3 Article 59 of the Additional Protocol is worded as follows:

'In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community.'

4 Article 7 of Decision No 1/80 states:

'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 Under Article 14(1) of that decision:

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

National law

6 Article 47(1) of the Law on Foreign Nationals (Ausländergesetz, BGBl. 1990 I, p. 1354) provides:

'A foreign national 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 over a period of five years, 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 ... a public order offence ... or a public order offence committed at a prohibited public assembly ...'

The main proceedings and the questions referred

7 It is apparent from the documents before the Court that Mr Polat, born on 25 June 1972, entered Germany, shortly after he was born, to live with his parents in Germany. His father worked, with interruptions, between 1971 and 1991 and has been drawing his old age pension since 1 October 1991.

8 Mr Polat went to school in Germany and obtained a certificate of secondary education in that Member State. Since 11 July 1988 the applicant has held an unlimited residence permit in Germany.

9 From 1989 to 1992 he was employed at Frankfurt airport.

10 From 1 February 1996 to 28 November 1997 Mr Polat completed his military service in Turkey. After his return to Germany he was employed again between 1998 and 2000 and from 1998 to 2006 he lived in his parents' apartment, which he registered as his principal residence in 2000. That same year he paid board to his parents in the amount of EUR 200 per month and received income of between EUR 400 and EUR 1 400 per month. Since 2000 he has been claiming unemployment benefit and since then has only been employed for short periods.

11 While still a minor, Mr Polat infringed the Law on Narcotics and committed theft. After reaching the age of 21 he was convicted 18 times for criminal offences, predominantly in respect of theft and infringements of the Law on Narcotics. At first he was fined, nine times between 1994 and 1995, but was subsequently also sentenced to a number of months' suspended imprisonment, between 1998 and 2004.

12 By letter of 16 July 2001 the national authorities informed him that, by reason of the offences committed, they were intending to order his expulsion from Germany. However, after the applicant was admitted to a drug rehabilitation centre, the authorities withdrew the threat of expulsion.

13 Subsequently, following frequent interruptions of his drug withdrawal treatment and his persistent wrongful conduct, the Amtsgericht Frankfurt am Main and the Amtsgericht Rüsselsheim (Local Courts, Frankfurt am Main and Rüsselsheim) revoked the suspension of the sentences given to Mr Polat and he was imprisoned from 23 June 2004 to 8 February 2006.

14 By decision of 14 October 2004, Stadt Rüsselsheim ordered that Mr Polat be deported from German territory and ordered immediate enforcement of that measure. That decision was based on the fact that the criminal offences committed by Mr Polat and the resulting convictions gave rise to an obligation to expel him under point 1 of Article 47(1) of the Law on Foreign Nationals.

15 The competent administration took the view that Mr Polat had not integrated into German society. The fines imposed, the suspended prison sentences and the warnings from the office responsible for foreign nationals had not prevented him from committing other serious offences. In the view of the administration, he was to be regarded as a repeat offender and his expulsion was necessary and indispensable on specific preventive grounds.

16 After Mr Polat's objection to that expulsion decision was rejected, on 3 August 2005 he brought an action before the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt) claiming that he had only been imprisoned once and that he was actively seeking a place in a medical centre to follow treatment for his drug addiction. In those circumstances, there were realistic prospects of re-socialisation.

17 In those circumstances, the Verwaltungsgericht Darmstadt decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with Article 59 of the Additional Protocol ... for a Turkish national who, as a child, joined his parents who were employed as workers in the Federal Republic of Germany and lived with them as a family, not to lose his right of residence derived from the right under the second [indent] of the first [paragraph] of Article 7 of Decision No 1/80 ... to free access to any paid employment — apart from in cases under Article 14 of [that] Decision ... or where he leaves the host Member State without legitimate reason for a significant period of time — also where he has attained the age of 21 and no longer lives with or is maintained by his parents?

In the event that the answer to Question 1 is negative:

(2) Does a Turkish national, whose legal status under the second indent of the first [paragraph] of Article 7 of Decision No 1/80 has been terminated on the basis of the conditions set out in Question 1, reacquire that legal status if, after reaching the age of 21, he returns to live in his parents' household for a period of more than three years, is permitted to live there free of charge and is given lodging, and the mother has minimal employment (as a cleaning lady generally for 30 to 70 hours per month and at times 20 hours per month) during that period?

In the event that the answer to Question 2 is affirmative:

(3) Does the legal position change if the family member has a number of courses of residential treatments (30 August 2001 to 20 June 2002, 2 October 2003 to 8 January 2004) during the period of residence with the worker?

(4) Does the legal position change if the Turkish national has regular personal income of at least EUR 400 to EUR 1 400 per month during the period of residence with the worker?

In the event that the continuance of a legal status under the second indent of the first [paragraph] of Article 7 of Decision No 1/80 is to be assumed (if the answer to Question 1 is affirmative or the answer to Question 2 is affirmative and the answers to Questions 3 and 4 are negative):

(5) May a Turkish national, whose legal status derives from the second indent of the first [paragraph] of Article 7 of Decision No 1/80 and who has lived in the federal territory since 1972, rely on the special protection against expulsion under Article 28(3)(a) of Directive 2004/38/EC ...?

(6) Does the legal position change if the Turkish national, within the 10 years prior to the issue of the expulsion order, resided in Turkey from 1 February 1996 to 28 November 1997 for the purpose of performing his military service?

In the event that the answer to Question 5 is negative or the answer to Question 6 is affirmative:

(7) May a Turkish national, whose legal status derives from the second indent of the first [paragraph] of Article 7 of Decision No 1/80 and who has lived in the federal territory since 1972, rely on the special protection against expulsion under Article 28(2) of Directive 2004/38/EC?

In the event that the answer to Question 7 is negative:

(8) May a Turkish national, whose legal status derives from the second indent of the first [paragraph] of Article 7 of Decision No 1/80, rely on the special protection against expulsion under Article 28(1) of Directive 2004/38/EC?

In the event that the continuance of a legal status under the second indent of the first [paragraph] of Article 7 of Decision No 1/80 ...:

(9) Can a number of minor offences (essentially offences against property), which, taken individually, are not sufficient to form the basis of an actual and sufficiently serious danger to a fundamental interest of society, justify expulsion because of their great number, if further offences are likely and no measures are taken against German nationals in the same circumstances?'

The questions referred

The first question

18 This question, since it seeks essentially to determine the grounds on which a Turkish national such as Mr Polat may lose the rights conferred on him in the host Member State by the second indent of the first paragraph of Article 7 of Decision No 1/80 to free access to any paid employment of his choice and, accordingly, to residence, has the same legal and factual background as the question which gave rise to the judgment of 18 July 2007 in Case C-325/05 *Derin* [2007] ECR I-6495.

19 Those two questions, which were referred by the same national court, are based on the same reasoning and are worded identically.

20 Consequently, the first question referred in the present case must be answered in the same way as the first question referred in *Derin*.

21 The answer to the first question must therefore be that a Turkish national, who was authorised while he was a child to enter the territory of a Member State in order to join his family and who has acquired the right of free access to any paid employment of his choice under the second indent of the first paragraph of Article 7 of Decision No 1/80, loses the right of residence in the host Member State which is a corollary of that right of free access only in two situations, that is:

— in the circumstances provided for in Article 14(1) of that decision, or

— if he leaves the territory of the Member State concerned for a significant length of time without legitimate reason,

even though he is over 21 years of age, is no longer dependent on his parents, but lives independently in the Member State concerned, and was not available to join the labour force for several years because he was during that period serving an unsuspended sentence of imprisonment.

In a situation such as that of the applicant in the main proceedings such an interpretation is not inconsistent with the requirements of Article 59 of the Additional Protocol.

The second to fourth questions

22 In the light of the answer to the first question there is no need to rule on the second, third and fourth questions.

Questions five to eight

23 By these questions, which need to be examined together, the national court asks, essentially, whether a person in the Mr Polat's situation may rely on the rights resulting from Article 28 of Directive 2004/38.

24 According to that court, the application of Directive 2004/38 is justified by the fact that the Court of Justice interpreted Article 14 of Decision No 1/80 in the light of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination 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 1963-1964, p. 117). Since that directive has been replaced by Directive 2004/38 and according to Article 38(3) of the latter directive, references made to the repealed provisions and directives are to be construed as being made to Directive 2004/38, reference must now be made to that latter directive to determine the scope of Article 14 of Decision No 1/80.

25 It must be pointed out that, in accordance with Article 38(2) of Directive 2004/38, Directive 64/221 was repealed with effect from 30 April 2006.

26 Given that the decision to expulse Mr Polat was adopted on 4 October 2004 and the action before the national court was brought on 3 August 2005, it must be held that Directive 64/221 was still in force at the time of the events in the main proceedings.

27 Since Directive 2004/38 is thus not applicable to the case in the main proceedings, it is not necessary to answer questions five to eight.

The ninth question

28 By this question the national court essentially asks whether Article 14(1) of Decision No 1/80 must be interpreted as precluding that a number of minor offences which, taken individually, are not sufficient to constitute a genuine and sufficiently serious

threat to a fundamental interest of society may justify a measure ordering expulsion of a Turkish national if further offences are likely and a criminal conviction is not accompanied by any other measure in respect of German nationals in the same circumstances.

29 According to settled case-law, the principles laid down in Articles 39 EC to 41 EC must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by Decision No 1/80 (see, inter alia, Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraphs 14, 19 and 20, and Case C-467/02 *Cetinkaya* [2004] ECR I-10895, paragraph 42).

30 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 39(3) EC (Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 56, and *Cetinkaya*, paragraph 43).

31 According to Article 3(1) of Directive 64/221, measures taken on grounds of public policy or of public security are to be based exclusively on the personal conduct of the individual concerned. Article 3(2) of that directive states that previous criminal convictions do not in themselves constitute grounds for the taking of such measures.

32 The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 24; and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383, paragraph 41).

33 The Court has always emphasised that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly, and that its scope cannot be determined unilaterally by the Member States (Case 36/75 *Rutili* [1975] ECR 1219, paragraph 27; *Bouchereau*, paragraph 33; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 34; and *Commission* v *Netherlands*, paragraph 42).

34 According to settled case-law, reliance by a national authority on the concept of public policy presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to a fundamental interest of society (*Rutili*, paragraph 27; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66; and *Commission* v *Germany*, paragraph 35).

35 More particularly, the Court has already held that a Turkish national can be denied, by means of expulsion, the rights which he derives directly from Decision No 1/80 only if that measure is justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy. Such a measure can thus not be ordered automatically on general preventive grounds following a criminal conviction (*Nazli*, paragraphs 61 and 63, and Case C-383/03 *Dogan* [2005] ECR I-6237, paragraph 24).

36 In that regard, the existence of several criminal convictions is, in itself, irrelevant.

37 Moreover, it is apparent from the order of reference that a criminal conviction is not coupled with any additional sanction for German nationals who have committed offences similar to those at the origin of the expulsion decision at issue in the main proceedings.

38 In that regard, it is sufficient to note that the reservations contained in Articles 39 EC and 46 EC permit Member States to adopt, with respect to nationals of other Member States, and in particular on grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto (Case 41/74 *van Duyn* [1974] ECR 1337, paragraphs 22 and 23; Joined Cases 115/81 and 116/81 *Adoui and Cornualille* [1982] ECR 1665, paragraph 7; *Calfa*, paragraph 20; and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 40).

39 In the light of the above considerations, the answer to the ninth question must be that Article 14(1) of Decision No 1/80 must be interpreted as not precluding the taking of an expulsion measure against a Turkish national who has been the subject of several criminal convictions, provided that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society. It is for the national court to determine whether that is the case in the main proceedings.

Costs

40 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 (Seventh Chamber) hereby rules:

1. **A Turkish national, who was authorised while he was a child to enter the territory of a Member State in order to join his family and who has acquired the right of free access to any paid employment of his choice under the second indent of 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 Association Agreement between the European Economic Community and Turkey, loses the right of residence in the host Member State which is a corollary of that right of free access only in two situations, that is:**

   — **in the circumstances provided for in Article 14(1) of that decision, or**

   — **if he leaves the territory of the Member State concerned for a significant length of time without legitimate reason,**

even though he is over 21 years of age, is no longer dependent on his parents, but lives independently in the Member State concerned, and was not available to join the labour force for several years because he was during that period serving an unsuspended sentence of imprisonment.

Such an interpretation is not inconsistent with the requirements of Article 59 of the Additional Protocol signed at 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.

2. **Article 14(1) of Decision No 1/80 must be interpreted as not precluding the taking of an expulsion measure against a Turkish national who has been the subject of several criminal convictions, provided that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society. It is for the national court to determine whether that is the case in the main proceedings.**

[Signatures]