OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 18 November 1999 *

1. In bringing these proceedings, the Verwaltungsgerichtshof (Higher Administrative Court, Vienna) is requesting an interpretation of the first paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 on the development of the Association (hereinafter, respectively: 'the Decision' and 'the Association Council'),[1] on the right to access to employment for family members of Turkish workers.

I — Relevant Community legislation

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

In accordance with Article 12 of the Agreement, the parties agree '(...) to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them'.

Under Article 36 of the Additional Protocol to the Agreement of 23 December 1970,[3] the Council of Association is to decide on the rules necessary to establish by progressive stages the free movement of workers between Member States of the Community and Turkey in accordance with the principles set out in Article 12 of the Agreement.

3. Pursuant to Article 36, the Association Council adopted the Decision, which came into force on 1 July 1980. Under the first

* Original language: Italian.

1 — The Decision has not been published.

2 — Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 and concluded on behalf of the Community by Council Decision 67/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 2).

3 — OJ 1972 L 293, p. 4.

paragraph of Article 7 of the Decision, which is the relevant provision in this case:

'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'.

II — The facts

4. On 23 September 1983 Mrs Eyüp, a Turkish citizen, married in Lauterach (Austria) a Turkish worker who was duly registered as belonging to the labour force in Austria, and thereby obtained a residence permit for Austria. By a judgment of a Turkish court of 13 November 1985, the marriage was legally dissolved. Mr and Mrs Eyüp, however, continued to live together in Austria in a relationship resembling marriage. Four of the couple's seven children were born during the period when they were cohabiting, but not married, which lasted until 7 May 1993 when Mrs Eyüp remarried her ex-husband in Egg, Austria. After the second marriage the children were recognised by the husband ('legitimation by subsequent marriage of the parents').

5. On 23 April 1997, Mrs Eyüp, the applicant in the main action, applied to the Austrian authorities for a certificate that she fulfilled the requirements under the *second indent* of the first paragraph of Article 7 of the Decision. The request was dismissed by decision of 24 September 1997. Various grounds were given for the refusal: that she did not satisfy the minimum residence requirement laid down by the Decision; that a 'cohabitee' was neither a 'spouse' nor a 'family member' of a Turkish worker; that account could therefore not be taken of the period of more than seven years between the divorce and the second marriage; and that the divorce had ended the validity of the residence period (about two years) of the first marriage, so that that period could not be aggregated with the period since the second marriage (about four years).

6. In challenging the decision to dismiss the application, Mrs Eyüp also applied to the Verwaltungsgericht for an emergency declaration of her right to take up paid

employment until such time as her rights were definitively established.

7. After bringing the present proceedings and having resided legally in Austria with her husband for more than five years from the date of the second marriage, Mrs Eyüp obtained her work permit on 5 November 1998 in accordance with the *second indent* of the first paragraph of Article 7 of the Decision.

III — Questions for preliminary ruling

8. The referring court puts the following questions to the Court for a preliminary ruling:

'(1) Is the concept of members of the family in the first paragraph of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey to be interpreted as meaning that the partner (in a relationship resembling marriage with no formal matrimonial bond) of a Turkish worker also meets the relevant objective requirements?

(2) If a partner is not to be regarded as a member of the family:

Is the second indent of the first paragraph of Article 7 of Decision No 1/80 to be interpreted as meaning that, to meet the objective requirements, the formal matrimonial bond between the Turkish worker and the family member must have lasted for five years without interruption, or is it permissible for periods during which there is a formal matrimonial bond with a partner to be interrupted by many years of cohabitation with the same partner?

(3) Is the second indent of the first paragraph of Article 7 of Decision No 1/80 to be interpreted as meaning that the formal dissolution of the matrimonial bond (for instance by divorce) with the Turkish worker extinguishes all previous periods of compliance, as a member of the family, with the conditions as to time?

(4) Does Community law require that the (directly effective) rights deriving from Articles 6 and 7 of Decision No 1/80 in a Member State for the group of people designated therein be safeguarded by providing provisional legal protection in certain cases in the form of positive (prescriptive) interim measures?

(5) If Question 4 is answered in the affirmative:

Is there a need for positive (prescriptive) interim measures on the basis of Community law to the effect that in certain cases (where an applicant invokes rights under Articles 6 and 7 of Decision No 1/80) the freedom of movement sought on the basis of the Association Agreement is provisionally granted for the duration of the proceedings before the competent administrative authority, before the court reviewing the decision of that authority or before the Court of Justice of the European Communities when a question is referred for a preliminary ruling, until legal protection is finally granted, to prevent serious and irreparable damage, and does the fact that a binding decision as to whether the objective requirements are met for freedom of movement under the Association Agreement is not taken immediately, but at a later date in certain cases, constitute such damage?'

IV — Legal analysis

9. A preliminary point to note is that the Commission of the European Communities ('the Commission') has made an initial observation which might suggest that the above questions are not relevant; when Mrs Eyüp brought her case, she had already spent more than three years with her husband. She therefore satisfied the conditions set out in the *first indent* of the first paragraph of Article 7, so that the right claimed by her should have been recognised independently of the questions put by the referring court. The documents before the Court show that there is a further point, however, in that Mrs Eyüp was applying for a document certifying her 'full' rights of access to any paid employment of her choice within the meaning of the *second indent* of Article 7(1). She was not therefore simply claiming the right to *respond* to an offer of employment subject to the priority to be given to workers of Member States within the meaning of the *first indent* of the first paragraph of Article 7. This is the relevance of the questions referred by the national court, which I shall now consider.

10. As a further preliminary point, the Commission raised doubts as to the relevance of the first three questions submitted for preliminary ruling by virtue of the fact that nearly five years, that is to say the minimum period stipulated in the *second indent* of the first paragraph of Article 7, had elapsed between the date of the second marriage and the point at which the reference by the Verwaltungsgerichtshof was lodged at the Court. The Commission observed that essentially Mrs Eyüp now fulfilled the conditions entitling her to be issued with a work permit and, as it emerged at the hearing, it is indeed the case that she obtained that work permit a few months after this case was entered in the register. However, as the Austrian Government has observed, it might be important to have a reply to the first three

questions in relation to any action for damages brought by Mrs Eyüp against the Austrian administration. [4]

(1) *First question*

11. In the first question, the referring court asks whether the expression 'members of the family' contained in the first paragraph of Article 7 of the Decision includes the extra-marital cohabitee of a Turkish worker. If that were so, then for the purposes of calculating the time requirements laid down by that provision, a cohabitee would be classed in the same category as a person with whom the Turkish worker had a formal matrimonial bond; thus, in this case, the *entire* period of cohabitation of Mr and Mrs Eyüp between 1983 (date of the first marriage) and 1997 (date of the application for a work permit) could be taken into account.

12. As the Austrian, United Kingdom and German Governments, and the Commission, have pointed out in these proceedings, when interpreting the first paragraph of Article 7 of the Decision, account must in principle be taken of the Treaty rules on the free movement of workers. That is established by Article 12 of the Agreement, to which the Court has referred on a number of occasions in order to interpret the provisions of the Decision on social issues, including those which are the subject of the first three questions here. [5] Clearly, secondary legislation adopted in order to implement the Treaty, namely Council Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers within the Community ('the Regulation'), is also relevant. [6]

13. Under Article 10 of the Regulation, the 'spouse' appears amongst those members of the family of the migrant worker who have the right to settle with him in the host Member State [Article 10(1)(a)]. In its judgment in *Reed*, [7] in 1986, the Court held that '*in the absence of any indication of a general social development* [in the Member States] which would justify a broad construction, and in the absence of any indication to the contrary in the Regulation, it must be held that the term

4 — In my opinion, moreover, on the basis of what Mrs Eyüp has stated with regard to criminal sanctions against any person offering employment to a Turkish citizen without a work permit (see paragraph 36 below), a reply to the three first questions might be decisive in the context of possible criminal proceedings brought against any person who employed the applicant between April 1997 (date of the application for a work permit) and June 1999 (date of its issue).

5 — See Judgments in Case C-434/93 *Bozkurt* v *Staatsecretaris* [1995] ECR I-1475, paragraphs 19 and 20; Case C-171/95 *Tetik* v *Berlin* [1997] ECR I-329, paragraph 20; and Case C-351/95 *Kadiman* v *Freistaat Bayern* [1997] ECR I-2133, paragraph 30.

6 — OJ, English Special Edition 1968 (II), p. 475.

7 — Judgment in Case 59/85 *Netherlands* v *Reed* [1986] ECR 1283.

"spouse" in Article 10 of the Regulation refers to a marital relationship only'. [8]

14. On the basis of Community law as it now stands concerning the free movement of Community workers, the intervening governments and the Commission have therefore maintained that the expression 'family member' in the first paragraph of Article 7 includes only the spouse of a Turkish worker, that is the person with whom the Turkish worker has a formal marriage bond.

15. Mrs Eyüp has, it is true, provided no concrete information on any 'general social development' within the Community which might in effect justify a broader interpretation of the expression 'family member', and thus of the word 'spouse', than that given by the Court in *Reed*. She does, however, put forward a 'progressive' interpretation of the first paragraph of Article 7, whereby the 'family' of a migrant Turkish worker includes a cohabitee. Mrs Eyüp points out in particular that a number of years have passed since the Regulation was adopted and since the *Reed* judgment. She has also invoked Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the Convention'). Under that article, '[e]veryone has the right to respect for his private and family life, his home and his correspondence'.

16. The case-law of the Court confirms that the Convention may justifiably be referred to as an aid to the interpretation of the first paragraph of Article 7. When examining Article 10(3) of the Regulation, [9] which is closely linked to Article 10(1), [10] the full Court ruled that '(it) must also be interpreted in the light of the requirement of respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms'. [11] That criterion for interpretation appears to be in line with the Court's settled case-law that 'fundamental rights form an integral part of the general principles of law whose observance

8 — Paragraph 15 (emphasis added). In *Reed*, the Court made a ruling on the meaning of the word 'spouse' where it appears in Article 10 of the Regulation, that is to say, concerning residence rights of members of a migrant worker's family. In this case we are concerned instead with their right to take up employment in the host Member State. This distinction does not appear to preclude a similar solution as there is a further provision — in addition to Article 10 of the Regulation and similar to the first paragraph of Article 7 of the Decision — Article 11. Article 11 provides for the right of family members of the migrant worker to work in the host State and mentions, in particular, 'the spouse' (see also paragraph 17 of this Opinion).

9 — Under which, '[f]or the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed (...)'.

10 — As I have stated earlier, any interpretation of the provisions on social issues of the Decision should be based on Article 10 and the other articles of the Regulation [see Article 12 of the Agreement (see paragraph 12 of this Opinion) and the case-law cited in footnote 5].

11 — Case 249/86 *Commission* v *Germany* [1989] ECR 1263, paragraph 10.

the Court ensures';[12] in that context the Court has stated that 'the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms] has special significance'.[13] In the eyes of the Court, respect for human rights is of such importance as to constitute a *condition of the lawfulness of Community acts*.[14] The concept is also referred to in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU) according to which 'the Union shall *respect* fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) as general principles of Community law' (emphasis added).

17. In response to Mrs Eyüp's reference to the Convention, the United Kingdom Government has argued that, whilst the Convention is concerned with 'civil' rights, the first paragraph of Article 7 of the Decision is concerned with a right of an 'economic' nature. Although that observation is correct, it does not permit the applicant's argument to be dismissed. That 'economic' right has the merit of constituting *added value* over and above the civil and social protection of the family unit under Article 8 of the Convention. As the Court held in *Kadiman*, the first paragraph of Article 7 'is designed to create *conditions conducive to family unity* in the host Member State, *first* by enabling family members to be with a migrant worker and *then by consolidating* their position by granting them the right to obtain employment in that State'.[15] In the opinion of Advocate General Léger, '[s]ince the *Kadiman* judgment... [it has been clearly established that the first paragraph of Article 7 of Decision 1/80]... aims to create conditions conducive to family unity'.[16] In my opinion, therefore, reference to the case-law of the European Court of Human Rights ('the ECHR') on Article 8(1) of the Convention in order to interpret the first paragraph of Article 7 — a provision which deals with a fundamental right such as non-interference in family life — is entirely justified.

18. According to what may now be regarded as established case-law of the

12 — Opinion 2/94 of 28 March 1996 (ECR I-1759, paragraph 33). Amongst the many judgments of the Court, see, for example, those in Case 44/79 *Hauer* v *Rheinland Pfalz* [1979] ECR 3727, paragraph 17; Case 63/83 *Regina* v *Kirk* [1984] ECR 2689, paragraph 22; Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 17; Case C-415/93 *ASBL* v *Bosman* [1995] ECR I-4921, paragraph 79; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] (ECR I-4539, paragraph 37).

13 — Opinion 2/94, paragraph 33.

14 — Opinion 2/94, paragraph 34.

15 — Paragraph 36 (emphasis added). Also in *Kadiman* it is stated that the purpose of the first paragraph of Article 7 'is to favour employment and residence of Turkish workers duly registered as belonging to the labour force of a Member State *by ensuring that their family links are maintained there*' (paragraph 34; emphasis added). In *Commission* v *Germany* (see footnote 11), the Court observed that '[i]t is apparent from the provisions of the regulation, *taken as a whole*, that in order to facilitate the movement of members of workers' families the Council took into account, *first*, the importance for the worker, *from a human point of view*, of having his entire family with him (...)' (paragraph 11; emphasis added). As I pointed out earlier (see note 8), the provisions 'taken as a whole' include not only a provision which ensures the worker's family is kept together in the host State (see Article 10 of the Regulation), but also one which provides for the right of family members to undertake work (see Article 11 of the Regulation).

16 — Opinion of 9 July 1998 in Case C-210/97 *Akman* v *Oberkreisdirektor* [1998] ECR I-7519; on the same issue see paragraphs 37 and 43; see also Case C-355/93 *Eroglu* v *Baden-Württemberg* [1994] ECR I-5113, paragraph 22.

ECHR,[17] the expression 'family', within the meaning of Article 8(1) of the Convention, goes beyond a group of persons linked by a formal bond (for example, by marriage or the status of a legitimate child).[18] According to the ECHR, Article 8(1) does not distinguish between the 'natural' family and the 'legitimate' family. That court has repeatedly equated *de facto* family relations to the concept of the 'family' and the status of those who belong to it, and attaches particular importance to the factors which ensure the actual, concrete existence of a bond linking members of a family unit. These include the stability of the relationship, a prolonged period of cohabitation,[19] the fact of having had children in the course of the relationship[20] and reciprocal economic dependence.

19. Regarding the possible extension of the scope of the first paragraph of Article 7 to the cohabitee of a migrant worker, on the basis of the European Convention on Human Rights, the United Kingdom Government has urged caution and argued that due attention should be given to balancing the interests of the Turkish worker and members of his family with those of the population of the host Member State. Article 8(2) of the Convention appears to me to be clearly relevant here. That provision contains a series of exceptions to the prohibition on public authorities interfering in the family life of any person. As the United Kingdom Government points out, those exceptions included measures linked to the economic well-being of the country. In this case, the relevance of referring to these requirements is clearly linked to the 'economic' nature of the right provided for by the first paragraph of Article 7; opening up the employment market of the Member States to a *wide* circle of family members of Turkish workers resident there could be contrary to the interests of Community citizens seeking to enter the same market.

20. In seeking to prevent the first paragraph of Article 7 of the Decision from being interpreted more broadly than it was interpreted by the Court of Justice in *Reed* (see paragraph 13 above), the United Kingdom Government has cited the caution shown by the ECHR in assessing whether a given measure by the public authorities constitutes a breach of the fundamental right enshrined in Article 8(1) of the Convention. On that point, the case-law of the ECHR does lay emphasis on the propor-

17 — On this point, see, for example, G. Cohen-Jonathan, *Respect for Private Life and Family Life*, in R.S.J. Macdonald-F. Matscher-H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht, 1993, p. 405, in particular pp. 434-436, and M.W. Janis-R.S. Kay-A.W. Bradley, *European Human Rights: text and materials*, Oxford, 1996, pp. 240-243.

18 — See judgments of 13 June 1979, Marckx, Series A, no. 31, paragraph 31 (where it was held that a mother and her illegitimate child constituted a family with the right to the protection guaranteed by Article 8 of the Convention); 18 December 1986, Johnston, Series A, no. 112, paragraphs 55 and 56 (the ruling declared that Article 8 of the Convention was applicable to a family made up of a child and its unmarried parents who had been living together for 15 years, one of whom was still bound in marriage to a third person with whom he had had three children); 21 June 1988, Berrehab, Series A, no. 138, paragraph 21 (where, on the basis of frequent contact with the daughter, the ECHR recognised the existence of a family bond between father and daughter, despite the fact that the daughter was born after the divorce of her parents); 26 May 1994, Keegan, Series A, no. 290, paragraph 44, and 20 September 1994, Kroon, Series A, no. 297-C, paragraph 30 (in which the ECHR, citing the case-law mentioned in this footnote, declared that a couple bound by marriage or by circumstances constitutes a family in either case within the meaning of Article 8 of the Convention).

19 — In *Johnston* the fact that the couple had lived together for 15 years (paragraph 56) was decisive.

20 — In *Kroon*, for the purposes of determining the existence of a 'family', the ECHR held the fact that the couple had produced four children to be decisive, although the father did not live with his 'companion', the mother of the children (paragraph 30).

tionality of measures alleged to be in breach of the right to family life without interference. [21] The criterion of proportionality is applied in each case in the light of the different interests at stake.

21. In this case, to some extent, the balance of interests has already been taken into account by the Community legislature, which has provided favourably for family members of Turkish workers. The first paragraph of Article 7 of the Decision establishes the right of such family members to access to paid employment in the host State. In establishing this right, the legislature undoubtedly took the economic interests of Community citizens into account; the first indent requires that the person concerned cohabit with the Turkish worker for at least three years, and even thereafter the family member's right of access to paid employment remains subject to the condition that priority be given to workers of Member States of the Community; in the second indent, the required period of cohabitation for the family member is set at five years.

22. Balancing the opposing interests of the family concerned and the population of the host State is also contemplated from a second point of view which is complementary to the first. As I said, under the first paragraph of Article 7, the legislature considered 'family members' of a Turkish worker should have the right of access to paid employment in the host Member State. What now needs to be established is whether, in this case, the fact of not extending this 'economic' right to a cohabitee constitutes a breach of the (civil) right to family unity which the first paragraph of Article 7 is intended to favour. [22] What is important in this case is to establish whether the interests of the population of the Member States — as mentioned by the United Kingdom Government — should, or should not, give way to the interests inherent in Mrs Eyüp's claim. According to the criterion adopted by the ECHR, such an examination should be conducted by reference to the principle of proportionality; the concept of 'family member' within the meaning of the first paragraph of Article 7 should not be interpreted so widely as to leave no room for the interests, including the economic interests, of the Member States and of the Community nationals residing in those States.

23. In cases where the ECHR has included 'natural families' in the concept of 'the family' as envisaged by Article 8 of the Convention, it has always relied on the serious and stable nature of the bond between the parties which in particular cases has led it to that conclusion on the basis of its interpretation (see paragraph 18). [23] In this case, I have no difficulty in recognising that, during the entire period

21 — See, for example, *Keegan*, paragraph 49, and *Kroon*, paragraph 31, and the judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali*, Series A, no. 94, paragraph 67 and 68.

22 — See passage from *Kadiman* cited in paragraph 17.

23 — In *Kadiman* this Court seems to have adopted a similar position: 'the practical effect of Article 7 [of the Decision] requires (...) that the unity of the family (...) should be evidenced *for a specified period* by *actual cohabitation [by the person concerned] in a household* with the worker' (paragraph 40; emphasis added).

when Mr and Mrs Eyüp were living together, they demonstrated an emotional bond characterised by a strong degree of stability, and continued to live under the same roof without any interruption, so far as I have been informed. Indeed, that stability is demonstrated by the fact that they later remarried (in 1997 the total period of time during which they had lived together exceeded 13 years). Furthermore, during those seven and a half years Mr and Mrs Eyüp had four of their seven children. These were later recognised as legitimate children following the second marriage. Besides providing for his children, the father also provided for their mother (his cohabitee) who, it appears from the case-file, in her turn, was mainly concerned with looking after the children in the family home. Moreover, the ECHR has recognised the existence of 'a family' (within the meaning of the Convention) on the basis of circumstances displaying a lesser degree of stability. For example, in *Kroon* (see footnote 18), the mere fact of four children being born was considered decisive, even though the father did *not* live with his 'companion', and he had never been married to her. [24]

24. On that basis, it must be concluded that to extend the circle of 'family members' of the Turkish worker who have the right to access to employment in the host State within the meaning of the first paragraph of Article 7 so as to include the cohabitee of that worker contradicts neither the spirit nor the purpose of the provision. That serves as a general principle. What is important here, however, is to give due consideration to the undisputed facts and characteristics of this case. If one is to follow the reasoning behind the case-law of the ECHR — and, as I have indicated, I am inclined to do so — the exclusion of Mrs Eyüp (over the seven years in question) from the category of the 'family members' of a person who, at the time when she applied for the work permit, had once again become her lawful husband, might constitute a breach of a fundamental right of hers. In my opinion, to assimilate Mrs Eyüp to a 'family member' (or 'spouse') of the Turkish worker during the period in which she cohabited with her ex-husband does not disproportionately compromise 'the economic well-being' of Community nationals residing in Austria. That solution appears to me to take reasonable account of the arguments of those wishing to limit the concept of 'family member' to a spouse with whom the Turkish worker has a formal marriage bond, and also of the requirement underlying the arguments of the intervening governments that the right conferred by the first paragraph of Article 7 should not be extended indiscriminately to any person simply claiming to be 'cohabiting' with a Turkish worker resident in a Member State.

25. At this point, I should, however, put forward a further consideration and detail.

24 — See footnote 30.

The reply I have proposed to the first question does not deal with the issue of whether Mrs Eyüp, in the seven years during which she continued to live with her ex-husband, enjoyed the status of a person 'authorised to join a Turkish worker duly registered as belonging to the labour force' in Austria. Yet, on reading the legislation cited in the order for reference, this question inevitably arises. It cannot be left unresolved. It is important to establish whether the applicant — if she is to be considered, as I feel she should, as a 'family member' within the meaning of Community law — satisfied the remaining requirements under the first paragraph of Article 7 of the Decision. It should be noted that on the matter of the 'possibility' (not the 'right') of family members of a Turkish worker being authorised to join him in the host State, the first paragraph of Article 7 of the Decision does not prejudice the competence of Member States. [25] The referring court informs us only that, by reason of the (first) marriage (celebrated in Lauterach), Mrs Eyüp was authorised to stay in Austria as the spouse of a Turkish worker duly registered as belonging to the labour force of that country. What we are not informed of, however, is what effects Austrian law assigns to the loss of that status. In other words, it is not clear from the file of this case whether the divorce, which took place after two years, deprived Mrs Eyüp of that status — which she acquired by virtue of her marriage — as a person 'authorised to join a Turkish worker duly registered as belonging to the labour force' in the Member State concerned. If that were so, the answer to the first question (whatever it might be) would seem to be devoid of relevance as, during the period of cohabitation, Mrs Eyüp would not in any case have been able to satisfy fully the requirements under the first paragraph of Article 7 of the Decision.

26. Finally — assuming Austrian law makes residence authorisation, initially granted to allow the person to join a Turkish worker, dependent on remaining married (see the preceding paragraph) — the order for reference does not make it clear from what date the divorce decree, pronounced in November 1985 by a Turkish court, acquired legal force in the Austrian legal system. If that decree was not pronounced or transcribed in Austria until just before the second marriage, it may be that the residence authorisation granted to Mrs Eyüp after the first marriage continued to have effect even after the divorce decree. According to the explanations provided by the Austrian Government at the hearing, Mrs Eyüp's residency in Austria after the divorce was based not on her status as a family member authorised to join a Turkish worker within the meaning of the first paragraph of Article 7 of the Decision, but on her status as a worker from a non-member country with sufficient means of subsistence, whatever their origin.

27. Clearly it is for the referring court to examine the questions put in paragraphs 25 and 26. Only if these are resolved favourably for the applicant can the reply pro-

25 — See *Kadiman*, paragraphs 32 and 35.

posed in response to the first question be applied.

(2) *The second and third questions*

28. In the alternative, should the Court reply to the first question in the negative, the Verwaltungsgerichtshof asks in the next two questions whether, for the purpose of satisfying the time conditions under the second indent of the first paragraph of Article 7 of the Decision, it is possible to aggregate two periods of marital status — separated by a period of cohabitation in a relationship similar to marriage — *between the same persons*. Essentially the Court is being asked whether a divorce followed by an uninterrupted period of cohabitation until the second marriage can be considered as *interrupting* rather than *suspending* the running of the five-year period needed for family members of a migrant Turkish worker to gain the right to take up employment in the host State.

29. According to the intervening governments and the Commission, if one considers the status of spouse as being essential in order to complete the period prescribed by the second indent of the first paragraph of Article 7 of the Decision, and thus a negative response is given to the first question, it must be concluded that loss of that status through divorce necessarily entails the extinction of the period of marriage before the divorce. They maintain, in other words, that the spouses' choice to dissolve their marriage — even if followed, as in this case, by an uninterrupted period of cohabitation and by a second marriage between the same persons — interrupts, and does not merely suspend, the running of the period prescribed by the second indent of the first paragraph of Article 7. The intervening governments and the Commission rely principally on *Kadiman*, in which the Court ruled that — apart from brief stays (such as holidays or family visits) or involuntary stays in the country of origin — the first paragraph of Article 7 of the Decision requires a member of the Turkish worker's family to reside *uninterruptedly* in the host Member State for the prescribed period.

30. The aim of the first paragraph of the Decision is to establish conditions conducive to *unity of the family* in the host Member State by allowing the migrant worker to have his family with him. Once that has happened, family unity is consolidated by the right to take up employment, a right accorded to the family members themselves '[i]n order to deepen the integration of a migrant Turkish worker's family unit in the host Member State'.[26] As I have said, this 'consolidation' of the

26 — *Kadiman*, paragraph 35; on a similar point, see *Commission* v *Germany*, end of paragraph 11.

unity of the family constitutes a corollary, or, rather, it attributes added value to that fundamental right to family life free from interference by the public authorities (see Article 8(1) of the Convention).

31. Mrs Eyüp maintains that what is important is the 'humun aspect' of a Turkish worker duly registered as belonging to the labour force of a Member State, as well as the spirit and the aims of the provision under consideration. This position seems right to me and appears to be corroborated by the abovementioned case-law of the ECHR on Article 8 of the Convention (see footnote 18), in which the ECHR demonstrated that it gives legal effects — or the right to enjoy a family life free of interference — to 'family' bonds of a particularly serious and stable nature. I also believe that the particular features of the case at issue merit an individual outcome. Mrs Eyüp never stopped living with her ex-husband and the cohabitation was not typical of a separated couple living under the same roof, as the couple produced four children during the period of cohabitation. The case-file does not indicate that there were any interruptions at all in the period of cohabitation. Given, then, that the aim of the first paragraph of Article 7 of the Decision is to favour 'effective unity of the family' in the host Member State of the Turkish worker and of his family,[27] the case lends itself to a different conclusion from that proposed by the intervening governments and the Commission.

27 — *Kadiman*, paragraph 46.

32. I could endorse their opinions if Mr Eyüp had married a *different* person, thus establishing a *new* family and other emotional bonds. In such a case, the periods of residence of the two families could not be aggregated. A similar conclusion might also be adopted if Mr Eyüp, although some years later remarrying his first wife, had lived in the meantime with another woman and possibly married her (later divorcing her also). Conversely, as Mrs Eyüp's lawyer suggested at the hearing, Mrs Eyüp might, after divorcing her first husband, have married another man, perhaps producing children for him, and later remarried her first husband. Either of these cases could — even according to Mrs Eyüp's lawyer — have given rise to a real 'interruption' in the couple's life together, that is to say a situation in which for a certain period Mr and Mrs Eyüp ceased even *de facto* to live solely in the family they originally founded.

33. I need hardly add that the facts of the main proceedings are quite different. The facts in this case are such that, should the Court reply to the first question in the negative, a period of extramarital cohabitation between two ex-spouses who subsequently remarry must produce different legal effects from those likely to result from situations such as those envisaged in the previous paragraph. Such a period must constitute a 'suspension' and not an 'interruption' of the five-year period laid down by the provision under consideration.

Indeed, on close examination, the solution that I propose in relation to the second and third questions tempers what is proposed in the first. It is a solution which allows the interests at stake to be balanced, while at the same time more effectively taking into account the interests of Community workers, and accordingly I would propose it as the minimum solution. If it were not adopted, there is the risk, in my opinion, that the rights of the person concerned under the first paragraph of Article 7 may be undermined, assuming, of course, she satisfies the other requirements of that provision. Consequently, there would be a real risk of undermining the fundamental right protected by Article 8 of the Convention.

34. Furthermore, the solution proposed does not appear to deviate from the decision of the Court in *Kadiman*, cited by the intervening governments and by the Commission. Mrs Kadiman, a Turkish national, was forced to remain in Turkey for approximately four months after going there on holiday with her husband, as he had taken away her passport before returning alone to Germany where both of them resided. The Court decided that that interruption in their cohabitation, which was beyond her control, should be treated as *equivalent* to a period in which the family member in question was actually living with the Turkish worker.[28] That shows the Court's willingness to take exceptional situations into account so as to reach conclusions designed not to betray the spirit of the first paragraph of Article 7 of the Decision. With reference to the second and third questions, even if it were not possible to consider the period of extramarital cohabitation as equivalent to one of married cohabitation (as I propose as my main argument in reply to the first question), I am of the opinion that — in accordance with what I consider is shown by *Kadiman* — the Eyüps' period of extramarital cohabitation (in the particular circumstances described) should be taken into account for the purpose of 'aggregating' the first period of marriage with the second.

(3) *The fourth and fifth questions*

35. In the last two questions for preliminary ruling, the referring court asks the Court of Justice about the form and scope of emergency measures that might be adopted to protect temporarily the rights deriving in particular from Article 7 of the Decision.

36. To illustrate the importance of a reply to those questions, Mrs Eyüp reiterated the

28 — *Kadiman*, paragraphs 46-49.

need for an interim order by the referring court which would, albeit provisionally, recognise her right to a work permit. While waiting for a decision in the main proceedings, and in the absence of such an order, Mrs Eyüp would in effect be denied any possibility of employment, because, in Austria, unlawfully employing a non-Community citizen constitutes a criminal offence.

37. According to the United Kingdom Government and the Commission, the facts occurring immediately after the lodging of the order for reference on 5 March 1998 make it unnecessary to answer the last two questions. On 7 May 1998, Mr and Mrs Eyüp completed five years' uninterrupted marital cohabitation since their second marriage. Secondly, on 5 November 1998, Mrs Eyüp finally obtained the work permit she was waiting for, presumably on the basis of having satisfied the time requirements under the second indent of the first paragraph of Article 7 of the Decision.

38. In line with the United Kingdom Government and the Commission, I think it neither helpful nor necessary to deal with the fourth and fifth questions, concerning the interim measures which the national court might provisionally adopt in order to protect a right established by Community law, as in Mrs Eyüp's case that right has now undeniably been given final recognition. Even the Austrian authorities recognised it when they issued the work permit in November 1998.

V— Conclusion

39. I therefore consider that the questions referred by the Verwaltungsgerichtshof, Vienna, should be answered as follows:

(1) The concept of 'members of the family' in the first paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey includes the extra-marital cohabitee of a

Turkish worker, provided there is a serious and stable family bond between the two people, such as that occurring when, after divorcing, the couple lives together without interruptions and then remarries.

(2) and (3) The requirement under the second indent of the first pararaph of Article 7 of Decision No 1/80 for a minimum cohabitation period of five years is satisfied where a Turkish worker has married, divorced and subsequently remarried the same person, if the spouses have in fact continued to cohabit between the two marriages and the length of the periods of marital cohabitation, taken together, amounts to at least five years.