Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 November 2013 *

(Reference for a preliminary ruling — EEC-Turkey Association Agreement — Article 13 of Decision No 1/80 of the Association Council — 'Standstill' clauses — 'Legally resident')

In Case C-225/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 9 May 2012, received at the Court on 14 May 2012, in the proceedings

C. Demir

v

Staatssecretaris van Justitie,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2013,

after considering the observations submitted on behalf of:

— C. Demir, by J.P. Sanchez Montoto, advocaat,

— the Netherlands Government, by M. Noort, B. Koopman and C. Wissels, acting as Agents,

— the German Government, by T. Henze, J. Möller and A. Wiedmann, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Urbani Neri, avvocato dello Stato,

— the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2013,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13 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) ('the Association Agreement').

2 The reference has been made in proceedings between Mr Demir and the Staatssecretaris van Justitie (State Secretary for Justice) (the 'Staatssecretaris'), concerning the refusal of an application for a residence permit.

Legal context

EU legislation

The Association Agreement

3 The Association Agreement is intended, in accordance with Article 2(1) thereof, 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.

4 According to Article 12 of that agreement, '[t]he Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them'.

5 Article 22(1) of the agreement states:

'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken. …'

Decision No 1/80

6 Under the heading 'Questions relating to employment and the free movement of workers', Section 1 of Chapter II of Decision No 1/80 contains Articles 6 to 16.

7 Article 6 of that decision provides:

'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.

3. The procedures for applying paragraphs 1 and 2 shall be those established under national rules.'

8 Article 13 of the decision is worded as follows:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

9 Article 14 of the decision provides that:

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

2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community, where such legislation or agreements provide for more favourable arrangements for their nationals.'

10 In accordance with Article 16(1) of Decision No 1/80, the provisions of Section 1 of Chapter II thereof are applicable from 1 December 1980.

Netherlands law

11 On 1 December 1980, the admission of foreign nationals to, and their residence in, the Netherlands was governed by the Law on foreign nationals (Vreemdelingenwet) (Stb. 1965, No 40) and by the decree implementing that law (Vreemdelingenbesluit, Stb. 1966, No 387).

12 Under Article 41(1)(c) of that decree, foreign nationals wishing to reside in the Netherlands for more than three months were required to be in possession, for admission to the Netherlands, of a valid passport containing a valid temporary residence permit. The purpose of the requirement of a residence permit was, inter alia, to prevent unauthorised entry and residence in the Netherlands.

13 Following a judgment from the Raad van State (Council of State) decided under the above national provisions, the failure to hold a temporary residence permit could not lead to a refusal of a residence permit if, at the time of the application, all the other conditions had been met. However, failing such a residence permit, entry and residence in the Netherlands were considered irregular.

14 On 1 April 2001, the Law providing for a comprehensive review of the Law on Foreign Nationals (Wet tot algehele herziening van de Vreemdelingenwet) of 23 November 2000 (Stb. 2000, No 495) (the 'Law of 2000') and the Decree on foreign nationals (Vreemdelingenbesluit, Stb. 2000, No 497) (the 'Decree of 2000') entered into force.

15 Article 1(h) of the Law of 2000 provides:

'Within the meaning of the present Law and of the provisions adopted on the basis thereof:

…

h) "temporary residence permit" shall mean a visa for a stay of more than three months applied for in person by the foreign national at, and issued by, a diplomatic mission or consulate of the Netherlands in the country of origin or permanent residence, or failing that, the nearest country in which a mission is established or by the office of the Governor of the Netherlands Antilles or by the office of the Governor of Aruba after prior authorisation has been obtained from the Minister for Foreign Affairs.'

16 Article 8(a) and (f) of that law states:

'A foreign national is legally resident in the Netherlands only:

(a) if he holds a fixed-term residence permit as referred to in Article 14 of that law.

…

(f) if, pending the decision on an application for a residence permit referred to in Articles 14 and 28, a provision adopted on the basis of that application or a court order provides that the deportation of the applicant should be deferred until a decision has been taken on the application.'

17 Article 16(1)(a) of that law states:

'An application for an ordinary fixed-term residence permit may be refused if:

(a) the foreign national does not hold a valid temporary residence permit which was granted on the basis of the same objective as that of the application for the residence permit'.

18 According to Article 3.1(1) of the Decree of 2000, a foreign national who has made an application for a residence permit is not to be deported, unless that application, according to the Minister, merely repeats an earlier application.

19 Article 3.71 of that decree provides:

'(1) The application for a fixed term residence permit, referred to in Article 14 of the Law of 2000, is dismissed if the foreign national does not hold a valid temporary residence permit.

…

(4) Our minister may choose not to apply subparagraph (1) if he considers that its application would lead to manifestly and gravely unjust situations.'

20 Failing a temporary residence permit, entry into and residence in the Netherlands are considered unlawful. In accordance with the Circular of 2000 relating to foreign nationals (Vreemdelingencirculaire 2000), the obligation to apply for a temporary residence permit before arrival in the Netherlands allows the authorities to check that the foreign applicant meets all the conditions for the grant of that authorisation prior to his entry into national territory.

21 According to the Law on the employment of foreign workers (Wet arbeid buitenlandse werknemers), in force until 1 September 1995, employers were forbidden from employing a foreign national without the authorisation of the relevant minister; both the employer and the foreign national had to apply for an employment permit. For the purposes of that law or the provisions passed in pursuance thereof, a person lawfully residing in the Netherlands who had been granted a declaration issued by the relevant minister as a result of, in particular, his being authorised, in accordance with the law relating to foreign nationals, to reside in the Netherlands with a Dutch national living in the Netherlands, was not considered a foreign national.

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 Mr Demir was born on 25 September 1973 and is of Turkish nationality. He arrived for the first time in the Netherlands on 1 October 1990. After being deported, he returned to that Member State and made, on 4 November 1992, an application for residence in order to live in the Netherlands with a Dutch national.

23 Despite the dismissal of his application and the appeal brought subsequently, Mr Demir, on 19 April 1993, made a new application for a residence permit in order to live in the Netherlands with his spouse of Dutch nationality. That application was granted; he received a residence permit for the period from 7 May to 19 September 1993, extended, subsequently, to 18 July 1995.

24 During that period, Mr Demir worked for several employers for a total period of more than 10 months without being paid by any single employer for at least one year.

25 Following the spouses' separation, Mr Demir made, between 1995 and 2002, several applications for a residence permit in which he relied on various grounds. None of these applications was granted; none of the appeals brought against the dismissals was successful.

26 On 1 February 2007, Mr Demir concluded an employment contract of three years' duration with a Dutch undertaking. For the purpose of that employment, the Centrum voor Werk en Inkomen (Centre for Work and Income), by decision of 2 January 2008, granted that employer an employment permit valid from 7 January to 7 December 2008. The period of validity of that permit was not later extended.

27 On 13 February 2007, Mr Demir brought an application for an ordinary fixed-term residence permit in view of paid employment. By decision of 26 April 2007, the Staatsecretaris dismissed the application, and, on 10 September 2007, confirmed that dismissal.

28 The grounds for the Staatsecretaris's decisions were that Mr Demir did not hold a valid temporary residence permit, did not belong to one of the categories of foreign nationals exempt from the requirement of holding a residence permit and did not meet the condition laid down at the first subparagraph of Article 6(1) of Decision No 1/80 of having been employed by the same employer for one year.

29 By judgment of 16 June 2008, the Rechtbank 's-Gravenhage (District court of The Hague) upheld the Staatsecretaris's decision and dismissed the appeal brought by Mr Demir. That court found, inter alia, that as Mr Demir did not hold a temporary residence permit, his position was irregular, and he could therefore not avail himself of Article 13 of Decision No 1/80.

30 Mr Demir appealed against that judgment to the referring court.

31 In those circumstances, the Raad van State decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 13 of Decision No 1/80 to be interpreted as meaning that it is applicable to a substantive and/or formal condition governing first admission into a Member State, even if the purpose of such a condition - [as] in the present case, the possession of a temporary residence permit - is also to prevent illegal entry and residence before the submission of an application for a residence permit and can, therefore, be regarded as a measure to be made more stringent, in accordance with the wording of paragraph 85 of the judgment in Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301?

2. (a) How much weight is to be given in that regard to the requirement of legal residence laid down in Article 13 of Decision No 1/80?

(b) Is it relevant, in the context of that assessment, that, under national law, the very submission of an application renders residence legal so long as that application has not been refused, or is the only relevant factor simply that residence before the submission of an application is considered illegal under national law?'

The questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 13 of Decision No 1/80 must be interpreted as meaning that the 'standstill' clause in that provision refers to substantive and/or procedural conditions in relation to first admission into the territory of a Member State, including where those conditions also seek to prevent, before the making of an application for a residence permit, unlawful entry and residence.

33 At the outset, it should be noted that it is settled case-law that the 'standstill' clause enacted in that article prohibits generally the introduction of any new national measure having the object or effect of making the exercise by a Turkish national in its territory of the freedom of movement for workers subject to conditions more restrictive than those which applied at the time when Decision No 1/80 entered into force with regard to the Member State concerned (see Case C-242/06 *Sahin* [2009] ECR I-8465, paragraph 63 and the case-law cited).

34 It has also been recognised that that provision precludes the introduction into Member States' legislation, as from the date of entry into force in the Member State concerned of Decision No 1/80, of any new restrictions of the exercise of the free movement of workers, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that Member State of Turkish nationals intending to exercise that freedom (see, to that effect, Case C-92/07 *Commission* v *Netherlands* [2010] ECR I-3683, paragraph 49).

35 According to the case-law, 'legally', as provided for in Article 13 of Decision No 1/80, means that the Turkish worker or member of his family must have complied with the rules of the host Member State as to entry, residence and, where appropriate, employment, with the result that he is lawfully present in the territory of that State. Accordingly, Article 13 is of no assistance to a Turkish national whose position is not lawful (see, to that effect, *Sahin*, paragraph 53).

36 Thus, it has been held that the competent national authorities are entitled, even after the entry into force of that decision, to make more stringent the measures that may be taken against Turkish nationals whose position is not lawful (*Abatay and Others*, paragraph 85).

37 The referring court asks whether the mere fact that the purpose of a substantive and/or procedural condition relating to first admission into the territory of a Member State is, inter alia, to prevent, before an application for a residence permit is made, unlawful entry and residence, may preclude the application of the 'standstill' clause set out in Article 13 of the decision on the ground that it constitutes a measure that can be made more stringent, within the meaning of the case-law cited in the preceding paragraph.

38 As appears from paragraph 36 above, the adoption of such measures presupposes that the position of the Turkish nationals to whom they apply is not lawful, so that, whilst those measures may apply to the effects of such unlawfulness without falling outside the scope of the 'standstill' clause set out in Article 13 of Decision No 1/80, they must not seek to define the unlawfulness itself.

39 Where a measure taken by a host Member State, after that decision, seeks to define the criteria for the lawfulness of the Turkish nationals' situation, by adopting or amending the substantive and/or procedural conditions relating to entry, residence and, where applicable, employment, of those nationals in its territory, and where those conditions constitute a new restriction of the exercise of the freedom of movement of Turkish workers, within the meaning of the 'standstill' clause referred to in Article 13, the mere fact that the purpose of the measure is to prevent, before an application for a residence permit is made, unlawful entry and residence, does not preclude the application of that clause.

40 Such a restriction, whose purpose or effect is to make the exercise by a Turkish national of the freedom of movement of workers in national territory subject to conditions more restrictive than those applicable at the date of entry into force of Decision No 1/80, is prohibited, unless it falls within the restrictions referred to in Article 14 of that decision or in so far as it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.

41 In that regard, whilst the objective of preventing unlawful entry and residence constitutes an overriding reason in the public interest, it is important too that the measure at issue should be suitable for securing the attainment of that objective and that it does not go beyond what is necessary in order to attain it.

42 In the light of the foregoing, the answer to the first question is that Article 13 of Decision No 1/80 must be interpreted as meaning that where a measure taken by a host Member State seeks to define the criteria for the lawfulness of the Turkish nationals' situation, by adopting or amending the substantive and/or procedural conditions relating to entry, residence and, where applicable, employment, of those nationals in its territory, and where those conditions constitute a new restriction of the exercise of the freedom of movement of Turkish workers, within the meaning of the 'standstill' clause set out in Article 13, the mere fact that the purpose of the measure is to prevent, before an application for a residence permit is made, unlawful entry and residence, does not preclude the application of that clause.

The second question

43 By its second question, the referring court asks, in essence, whether Article 13 of Decision No 1/80 must be interpreted as meaning that 'legally resident' includes holding a temporary residence permit, which is valid only pending a final decision on the right of residence.

44 In that regard, as has been noted at paragraph 35 of the present judgment, 'legally', as provided for in Article 13 of Decision No 1/80, means that the Turkish worker or member of his family must have complied with the rules of the host Member State relating to entry, residence and, where applicable, employment, with the result that he is lawfully present in the territory of that State.

45 That concept has been clarified at paragraph 84 of the judgment in *Abatay and Others*, by reference to the closely related concept of 'legal employment' used in Article 6(1) of Decision No 1/80.

46 The Court has previously found that 'legal employment' presupposes a stable and secure situation as a member of the labour force of that Member State and, by virtue of this, implies an undisputed right of residence (Case C-268/11 *Gülbahce* [2012] ECR, paragraph 39 and the case-law cited).

47 Thus, a Turkish national's employment under a temporary residence permit which is valid only pending a final decision on the right of residence may not be classified as 'legal' (see, to that effect, Case C-187/10 *Unal* [2011] ECR I-9045, paragraph 47).

48 It follows that 'legally', within the meaning of Article 13 of that decision, refers to a stable, secure situation in the territory of the Member State which presupposes that the interested party's right of residence is undisputed. Thus, periods of residence or, where applicable, employment, of a Turkish national under cover of a temporary residence permit which is valid only pending a final decision on the right of residence may not be considered 'legal', within the meaning of that article.

49 Therefore, the answer to the second question is that Article 13 of Decision No 1/80 must be interpreted as meaning that holding a temporary residence permit, which is valid only pending a final decision on the right of residence, does not fall within the meaning of 'legally resident'.

Costs

50 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 (Second Chamber) hereby rules:

1. **Article 13 of Decision No 1/80 of the Association Council 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, 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, must be interpreted as meaning that where a measure taken by a host Member State seeks to define the criteria for the lawfulness of the Turkish nationals' situation, by adopting or amending the substantive and/or procedural conditions relating to entry, residence and, where applicable, employment, of those nationals in its territory, and where those conditions constitute a new restriction of the exercise of the freedom of movement of Turkish workers, within the meaning of the 'standstill' clause set out in**

Article 13, the mere fact that the purpose of the measure is to prevent, before an application for a residence permit is made, unlawful entry and residence, does not preclude the application of that clause.

2. **Article 13 of Decision No 1/80, must be interpreted as meaning that holding a temporary residence permit, which is valid only pending a final decision on the right of residence, does not fall within the meaning of 'legally resident'.**

[Signatures]