OPINION OF ADVOCATE GENERAL ELMER

delivered on 16 January 1997 *

1. In this case the Bayerisches Verwaltungsgericht München has asked the Court for 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 'Decision No 1/80'), concerning the right of members of the family of a Turkish worker to take up employment.

The relevant Community rules

2. Under Article 2(1) of the Association Agreement between the European Economic Community and Turkey, [1] the aim of that Agreement 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'.

According to Article 12 of the Agreement, the Parties 'agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the European Economic Community for the purpose of progressively securing freedom of movement for workers between them'.

3. Article 36 of the Additional Protocol to the Association Agreement of 23 November 1970 [2] states that the Council of Association is to decide on the rules necessary to secure freedom of movement for workers between Member States of the Community and Turkey in accordance with the principles set out in Article 12 of the Association Agreement.

4. Pursuant thereto, the Association Council adopted Decision No 1/80 of 19 September 1980, which entered into force on 1 July

* Original language: Danish.

1 — Agreement creating an Association between the European Economic Community and Turkey, signed on 12 September 1963 in Ankara, 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 — OJ 1973 C 113, p. 1.

1980. [3] The following provisions are relevant to this case:

'*Article 7*

The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized 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.

...

Article 11

Nationals of the Member States duly registered as belonging to the labour force in turkey, and members of their families who have been authorized to join them, shall enjoy in that country the rights and advantages referred to in [Article] ... 7 ... if they meet the conditions laid down in [that Article].'

Facts of the case

5. Selma Kadiman (hereinafter 'the wife') was born on 1 November 1970 in Turkey and is a Turkish national. Since 4 November 1985 she has been married to Hakki Kadiman (hereinafter 'the husband'), who was born in 1 August 1964 in Turkey and is also a Turkish national. The husband has lived in the Federal Republic of German since 1977 and since 22 January 1988 has held a permit to reside there for an unlimited period.

6. The wife entered the Federal Republic of Germany on 17 March 1990 on the basis of a visa issued for the purpose of reuniting the family; she established her residence in Ruhpolding, at her husband's address. On 9 July 1990 the Landratsamt Traunstein granted her a residence permit until 14 May 1991. On 16 May 1991 her residence permit was extended until 14 May 1993.

3 — The decision has not been published.

7. On 11 September 1991 the Ruhpolding authorities informed the Landratsamt Traunstein that, according to information supplied by the husband on 7 September 1991, his wife had returned to Turkey. When the Landratsamt Traunstein requested further details, the husband stated on 30 September 1991 that his wife had returned to Turkey, that for approximately five months they had not been living together and that he had begun divorce proceedings in Turkey.

8. By telex of 28 October 1991 the German Consulate General in Istanbul sought leave from the Landratsamt Traunstein to issue an entry visa for the wife, since she had informed them that she had lost her passport during her stay in Turkey. The Landratsamt Traunstein did not object to the issue of an entry visa, since the wife's residence permit did not lapse as a result of the fact that she had lost her passport. On 22 January 1992 the Consulate General accordingly issued the wife with an entry visa.

9. On 4 February 1992 the wife informed the authorities in Ruhpolding that with effect from 1 February 1992 she was living at an address different from that of her husband. On 13 May 1992 she established her residence with effect from 1 April 1992 in Bad Reichenhall.

10. By decision of 4 May 1992 the Landratsamt Traunstein withdrew the wife's residence permit, on the ground that she was not living with the husband. The validity of the residence permit terminated with the notification of the decision, and she was required to leave the country, under threat of expulsion. By decision of 21 May 1992 that decision was, however, cancelled since, having moved to Bad Reichenhall, she then came within the jurisdiction of the Landratsamt Berchtesgadener *Land*.

11. When the Landratsamt Berchtesgadener *Land* was dealing with the case, the wife informed it by an undated letter received at the Landratsamt on 12 July 1992 that after she had entered Germany in 1990 she had lived with her husband until he began to beat and humiliate her. In the course of a holiday spent together in Turkey in September 1991 he stole her passport and returned to Germany without her. After waiting for a while for him to return to pick her up, which he failed to do, she applied for an entry visa. When that visa was issued she went to her husband's address and asked for a reconciliation. However, he beat her and threw her out. Since then she had been living with friends. She had not lived with her husband since September 1991.

12. By decision of 5 January 1993 the Landratsamt Berchtesgadener *Land* decided to withdraw the wife's residence permit, which would otherwise have been valid until

14 May 1993, with effect from notification of the decision, which took place on 26 January 1993. On 2 February 1993 the wife lodged an appeal against that decision. At a hearing in connection with the appeal, the husband declared that he was willing to resume family life with his wife. On 13 May 1993 the Landratsamt Berchtesgadener *Land* issued a residence permit to the wife, which was valid until 14 May 1994.

13. At a hearing on 5 January 1993 the wife admitted that the couple's stated willingness to resume married life had been purely for the benefit of the authorities. By decision of 13 October 1993 the Landratsamt Berchtesgadener *Land* withdrew the wife's residence permit with effect from notification of the decision, and required her to leave the country.

14. On 9 November 1993 the wife appealed against that decision. By decision of 25 April 1994 that appeal was dismissed. On 24 May 1994 the wife then brought proceedings in the Bayerisches Verwaltungsgericht München.

15. On 12 January 1995 the husband withdrew his declaration of February 1993. He stated that the wife had sought him out at the end of January 1993 and asked him for help since she had problems with the immigration authorities. He subsequently told the authorities that he wanted to resume family life with his wife. That did not, however, take place. He continued in his intention to obtain a divorce from the wife in Turkey.

16. By decision of 13 January 1995 the Landratsamt Berchtesgadener *Land* confirmed the decision to withdraw the wife's residence permit and required her to leave the country. Among the grounds given was that she had no entitlement under the provisions of Decision No 1/80.

17. Finally, before the Bayerisches Verwaltungsgericht München, the wife sought annulment of the decision of 13 January 1995, on the basis that under the first paragraph of Article 7 of Decision No 1/80 she was entitled to a residence permit.

Questions referred for a preliminary ruling

18. By order of 14 June 1995 the Bayerisches Verwaltungsgericht München stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the applicability of the first paragraph of Article 7 of Decision No 1/80 ... presuppose that the family must still be living together at the time when the other conditions are fulfilled?

(2) Does the applicability of the first indent of the first paragraph of Article 7 of Decision No 1/80 presuppose three years' uninterrupted legal residence in a Member State of the Community?

(3) Is a voluntary or forced intermediate stay of five months in Turkey to be counted towards the period of three years' legal residence within the meaning of the first indent of the first paragraph of Article 7 of Decision No 1/80?'

Procedure before the Court of Justice

19. It appears from the order for reference that the Bayerisches Verwaltungsgericht München found that the wife's stay in Germany was interrupted from September 1991 to February 1992, when she certainly was entitled to be resident in Germany but was *de facto* in Turkey. In that connection the court found that during their holiday together, the husband had taken her passport and in that way had prevented her from returning to Germany.

20. The national court further found that the wife's stay in Germany was not lawful during the period in respect of which her residence permit had been withdrawn, in other words from 26 January 1993 to 14 May 1993. In consequence, in the view of the national court, she could only be regarded as having been legally resident for at least three years provided it was possible to add together the periods before and after that interruption of legal residence. In that connection the national court found that the residence permit issued to the wife on 13 May 1993 was not obtained by deception, since even though she was still being humiliated and beaten by her husband, at that time the wife had the intention of resuming married life with him.

21. The wife claims that she is still married to her husband, that she has been resident in Germany for more than three years and had a right of residence there. The conditions for deriving entitlement from the first indent of the first paragraph of Article 7 are therefore satisfied.

22. The German and Netherlands Governments state that a Member State may require a member of a Turkish worker's family who obtains a residence permit for the purpose of reuniting the family actually to live with the Turkish worker in question in order to derive entitlement from the first indent of the first paragraph of Article 7.

23. The Commission states that, before any reply is given to the questions submitted by the national court, consideration should first be given to whether there is a requirement that the family should live together during the period of three years referred to in the provision. In the Commission's view, it is not contrary to the first indent of paragraph 1 of Article 7 for a Member State to require that the family member and the Turkish worker should live together as a family during the three years referred to in the provision.

24. The French Government states that it is a prerequisite of entitlement under the first indent of paragraph 1 of Article 7 of Decision No 1/80 that in the said three-year period the parties should have lived together as a family.

Analysis

25. By its first question, the national court seeks essentially to obtain the Court's view as to whether, under the first indent of the first paragraph of Article 7 of Decision No 1/80, there is a requirement that the family live together in the period referred to in the provision before there is any right to take up employment on the basis of that provision. The national court expresses that as a question whether, under the provision, there is a requirement 'that the family must *still* be living together at the time when the other conditions are fulfilled'. That formulation of the question must be viewed in relation to the fact that the married couple in the case before the national court *de facto* lived together as a married couple from 17 March 1990 until September 1991, when the husband discontinued their life together before the period of at least three years referred to in the first indent of the first paragraph of Article 7 had expired.

26. The first indent of the first paragraph of Article 7 must be regarded as having direct effect. [4] On its wording the provision concerns solely entitlement to take up employment, but it follows from the Court's consistent case-law that in connection with that right to take up employment there is a derived right to residence. [5]

27. There are certain discrepancies between the various language versions of the first indent of the first paragraph of Article 7 of Decision No 1/80. The wording of, for example, the Danish version of the first indent of the first paragraph of Article 7 could thus give rise to doubt as to its interpretation with regard to whether the family is required to live together in the specified period as a precondition for obtaining entitlement to take up employment as laid down in the provision. The provision states that the members of the family 'who have been authorized to join him', but in Danish: 'såfremt de har fået tilladelse til at flytte til *den pågældende medlemsstat*' — literally, in English, 'provided they have been authorized to move to *the Member State in question*', are to be entitled to take up employment 'after they have been legally resident for at least three years *in that Member State*' (in Danish: 'efter at have haft lovlig bopæl *dér* i mindst tre år' — literally, in English

4 — See Case C-192/89 *Sevince* [1990] ECR I-3461 and Case C-355/93 *Eroglu* [1994] ECR I-5113.

5 — See footnote 4.

'after they have been legally resident *there* for at least three years' (emphasis added). The expression 'bopæl dér' (residence there) refers, in the Danish version, to the words 'den pågældende medlemsstat' (the Member State in question), and the provision can therefore be understood at first glance to mean that it is sufficient if the family member has been lawfully resident in the same Member State as the worker for three years, and that there is no requirement that the family member and the worker should live together.

28. That lack of clarity in certain language versions must, however be compared with Article 11 of the Decision, which deals with the corresponding question of the right to take up employment in Turkey of members of the family of nationals of the Member States who are employed in Turkey. Article 11 provides expressly that members of the families of nationals of the Member States who are employed in Turkey are only to obtain the same right to take up employment in Turkey provided, in Danish, they 'bor sammen med dem' (live with them, i. e. the workers). If it is a precondition for a member of the family of a national of a Member State to acquire certain rights in Turkey that the member of the family should live with the worker in Turkey, from the point of view of general reciprocity it is natural to conclude that the same requirement must apply when the question arises of the conditions under which members of the family of a Turkish national working in a Member State obtain the same rights in that Member State.

29. The fact that the first indent of paragraph 1 of Article 7 contains a requirement that the family should live together is also made expressly clear in the formulations of other language versions. The French version of the first indent of the first paragraph of Article 7, refers to those members of the family authorized 'à le rejoindre', the German version to those authorized 'zu ihm zu ziehen' and the English version to those authorized 'to join him'. The same expressions are, moreover, used in Article 11 in those versions: see the French version, 'ont été autorisés à les rejoindre'; the German version, 'die Genehmigung erhalten haben, zu ihnen zu ziehen'; and the English version, 'have been authorized to join them'.

30. The actual considerations underlying paragraph 1 of Article 7 too suggest that the right to take up employment is conditional on the family living together in the period referred to. The right conferred on the persons concerned by the provision is given to them precisely in their capacity as *family* members, and the aim of the provision is thus to ensure that the members of the family of Turkish workers in the Community authorized by a Member State to reunite the family, acquire after a certain time the right to respond to offers of employment. At the same time there is a requirement that a married couple should live under the same roof, which is necessary to prevent circumvention of the halt to immigration by means of sham marriages.

31. As regards the more detailed content of the requirement that the family should live together, it can hardly, in my view, be required that the family member and worker should permanently live under the same

roof. For example, it must be possible for the family member to respond to an offer of employment somewhere in the Member State other than where the worker is resident and on workdays or for shorter periods to remain in that place, for example by renting a room or a flat, so that family life is resumed at weekends or on holidays. Many nationals of the Member States have to arrange their lives in that way and it is despite everything easier to commute between Munich and Rosenheim than between Munich and Konya. It must presumably also be possible for the family member to visit family, for instance in Turkey, to undertake business trips abroad or, in a case of sickness or accident, to remain in another country for a period of treatment.

32. In the circumstances of this case, however, there is no reason to examine any further the various issues to which the requirement that the family should live together might give rise in practice. It has been stated in this case that even if it were assumed that the couple continued to live together in the period of five months when the wife was in Turkey after September 1991, she was legally resident with her husband for a period that was shorter than the period of three years required under the first indent of the first paragraph of Article 7. On that ground alone she has no entitlement under that provision.

33. There is accordingly no reason to examine whether the requirement that the family live together continues to apply after the expiry of the period of three years or to examine the other issues raised by the national court.

Conclusion

34. In the light of the foregoing, I would propose that the Court answer the questions referred to it as follows:

The first 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 established by the Association Agreement between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, must be interpreted to the effect that a member of the family of a Turkish worker duly registered as belonging to the labour force in a Member State is entitled to respond to any offer of employment only if he or she has been living as a legal resident with the worker in question for at least three years.