JUDGMENT OF THE COURT (Second Chamber)

29 September 2011 *

In Case C-187/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 13 April 2010, received at the Court on 16 April 2010, in the proceedings

Baris Unal

v

Staatssecretaris van Justitie,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, A. Arabadjiev, A. Rosas, M. Lõhmus and P. Lindh, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— Mr Unal, by A.H. Hekman and B. Mor-Yazir, advocaten,

— the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

— the European Commission, by G. Rozet and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first indent of Article 6(1) 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 Unal, a Turkish national, and the Staatssecretaris van Justitie (State Secretary for Justice; 'the Staatssecretaris') concerning the latter's decisions, first, to refuse Mr Unal's application for a variation of the restriction placed on his fixed-period residence permit and, second, to withdraw that permit.

Legal context

European Union legislation

The Association Agreement

3 According to Article 2(1) of the Association Agreement, the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, which includes, in relation to the workforce, the progressive securing of freedom of movement for workers, and the abolition of

restrictions on freedom of establishment and on freedom to provide services, with a view to improving the standard of living of the Turkish people and facilitating the accession of the Republic of Turkey to the European Community at a later date.

4 Article 6(1) of Decision No 1/80 is worded as follows:

'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.'

5 Under the first indent of the first paragraph of Article 7 of Decision No 1/80, the members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him, are to 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.

National legislation

6 Under Article 8(a) of 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 Vw 2000'), a foreign national is entitled lawfully to reside in the Netherlands if he has a fixed-period residence permit which has been issued under Article 14 of that law.

7 Article 14(2) of the Vw 2000 provides:

'A fixed-term residence permit shall be granted with restrictions relating to the purpose for which residence has been permitted. Other conditions may be attached to the permit. …'

8 Under Article 16(1)(g) of that law, the Netherlands authorities may refuse an application for a fixed-period residence permit if the applicant fails to comply with the restriction which relates to the purpose for which he wishes to reside in the Netherlands.

9 Article 16a(1) of the Vw 2000 provides that an application for a variation of a fixed-period residence permit may be refused on the grounds set out in Article 16(1)(b) to (g) of that law.

10 Under Article 18(1) of the Vw 2000:

'An application for an extension of the period of validity of a fixed-term residence permit as referred to in Article 14 may be rejected if:

…

(f) the foreign national fails to comply with the restriction subject to which the permit has been granted or with a condition attached thereto;

…'

11 Pursuant to Article 19 of the Vw 2000, a fixed-term residence permit may be withdrawn on the ground referred to in Article 18(1)(f) of that law.

12 Article 3.51(1) of the Decree on foreign nationals of 2000 (Vreemdelingenbesluit 2000, Stb. 2000, No 497; 'the Vb 2000') states:

'A fixed-term residence permit, within the meaning of Article 14 of the [Vw 2000], subject to a restriction relating to continued residence, may be granted to a foreign national who has resided in the Netherlands for three years as the holder of a residence permit in the following cases:

(a) the reunification or formation of a family with a person having a permanent right of residence;

…'

13 Article 3.51(2) of the Vb 2000 provides that a residence permit may be issued where, during the period referred to in Article 3.51(1), there has been compliance with the conditions governing the extension of the period of validity of the original residence permit.

14 Article 4.43(1) of the Vb 2000 provides:

'A foreign national who is lawfully resident within the meaning of Article 8(a) of the [Vw 2000] and who no longer complies with the restriction subject to which his residence permit was issued is required immediately to notify the head of the regional police force for the municipality in which that foreign national resides.'

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

15 Mr Unal entered the Netherlands on 24 February 2004 on the basis of a provisional residence permit. By decision of 2 September 2004, he was issued with a fixed-period residence permit valid from 29 March 2004 for the purpose of residing 'with his partner, A.M. De Sousa van der Molen'. That permit also bore the entry: 'permitted freely to work; work permit not required'.

16 Mr Unal went to live at Ms van der Molen's home in the municipality of 't Zandt (Netherlands).

17 The period of validity of Mr Unal's residence permit was extended, on 26 July 2005, until 21 April 2006 and, on 4 May 2006, until 1 March 2009. The new permits continued to include the condition of residence with his partner and the entry 'permitted freely to work; work permit not required'.

18 On 8 May 2006 Mr Unal entered into a temporary employment contract to work as a production worker in an undertaking in Nunspeet (Netherlands), located some 150 kilometres from his place of residence in 't Zandt. A new contract, valid up to 21 November 2008, was entered into with the same temporary work agency on 21 November 2007. On the basis of that contract, Mr Unal continued to work for the same undertaking in Nunspeet.

19 On 4 June 2007, Mr Unal submitted an application to have the restriction 'to reside with his partner A.M. De Sousa van der Molen' in his permit amended to 'continued residence'.

20 On 28 December 2007, the Staatssecretaris refused that application on the ground that, as from 2 April 2007, Mr Unal was no longer in compliance with the conditions which followed from the restriction subject to which his fixed-term residence permit had been issued to him. The Staatssecretaris took the position that the relationship between Mr Unal and Ms van der Molen had ended on 2 April 2007 given that, on that date, Mr Unal had moved into an apartment in Lelystad (Netherlands), whereas Ms Van der Molen was still registered in the municipal database for the municipality of 't Zandt.

21 In a further decision delivered on 7 February 2008, the Staatssecretaris found that, in so far as Mr Unal had, on 2 April 2007, been legally employed for a period of less than one year with the same employer, he was not entitled to continued residence on the basis of Decision No 1/80. Consequently, his residence permit was withdrawn, with retroactive effect from 2 April 2007.

22 By decision of 31 July 2008, the Staatssecretaris dismissed the objections lodged by Mr Unal against the decisions of 28 December 2007 and 7 February 2008. He expressed the view, inter alia, that it was not possible to accept Mr Unal's statement that he and his former partner had gone to live together in Lelystad and that Ms van der Molen had retained her apartment in 't Zandt in case Lelystad might not be to her liking, inasmuch as that statement was not supported by objectively verifiable evidence. A written declaration, submitted by Mr Unal and drawn up by his former partner, confirming that their relationship had ended only at a later stage, was not regarded as sufficient evidence.

23 By decision of 6 July 2009, the Rechtbank 's-Gravenhage (District Court, The Hague) declared unfounded the action brought by Mr Unal against the decision dismissing his objection. Mr Unal thereupon appealed against that decision to the Raad van State (Council of State).

24 The Raad van State points out that it is unsure whether it is able to dispose of the case in the main proceedings on the basis of the judgment in Case C-337/07 *Altun* [2008] ECR I-10323. In that judgment, the Court held that the withdrawal of a residence permit had no effect as regards the right of residence of the members of the family of a worker, for the purpose of the application of the first indent of the first paragraph of Article 7 of Decision No 1/80, if, on the date of that withdrawal, those family members had already acquired the aforementioned right of residence. Any other interpretation would be contrary to the principle of legal certainty.

25 The Raad van State is unsure whether that case-law applies to the consequences of the withdrawal, with retroactive effect, of a Turkish worker's residence permit, bearing in mind also that in the present case there is no question of fraudulent conduct on that person's part.

26 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the first indent of Article 6(1) of Decision No 1/80 …, having regard also to the principle of legal certainty, in a situation in which there is no question of fraudulent conduct, preclude the competent national authorities from withdrawing, after the expiry of the one-year period referred to in the aforementioned first indent of Article 6(1), the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which the residence permit had been issued under national law?'

The question referred for a preliminary ruling

27 By its question the national court asks, in essence, whether the first indent of Article 6(1) of Decision No 1/80 is to be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with

retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the part of that worker and that withdrawal occurs after the expiry of the one-year period of legal employment provided for in the aforementioned first indent of Article 6(1).

28 The rights which are conferred on Turkish workers by the provisions set out in Article 6(1) of Decision No 1/80 are progressively extended in proportion to the duration of lawful paid employment and are intended to consolidate progressively the position of the persons concerned in the host Member State (see, inter alia, Case C-230/03 *Sedef* [2006] ECR I-157, paragraph 34).

29 As is apparent from the first indent of Article 6(1) of Decision No 1/80, after one year's legal employment, a Turkish worker is entitled to continue in paid employment with the same employer.

30 According to the case-law of the Court, that right, in order to be effective, necessarily implies a concomitant right of residence for the person concerned (see, inter alia, Case C-383/03 *Dogan* [2005] ECR I-6237, paragraph 14).

31 The legality of the employment of a Turkish national in the host Member State, within the meaning of the first indent of Article 6(1) of Decision No 1/80, 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-237/91 *Kus* [1992] ECR I-6781, paragraph 22, and *Altun*, paragraph 53).

32 In the present case, it is common ground that the one-year period of legal employment referred to in the first indent of Article 6(1) of Decision No 1/80 began to run on 8 May 2006, the date on which Mr Unal began his work in paid employment. The decision of the Staatssecretaris refusing to vary the restriction in his permit 'to reside with his partner A.M. De Sousa van der Molen' was taken on 28 December 2007, that is to say, more than one and a half years after Mr Unal had commenced his paid employment with the same employer. However, that refusal was based on the fact that, given that the relationship between Mr Unal and Ms van der Molen had ended on 2 April 2007, Mr Unal was, as of that date, no longer in compliance with the conditions subject to which his residence permit had been issued to him.

33 Both the decision of 28 December 2007 and that of 7 February 2008, which withdrew his residence permit, were thus effective retroactively from 2 April 2007, that is to say, before Mr Unal had completed one year of legal employment in the Netherlands.

34 The Netherlands Government submits that Mr Unal is not in a position to benefit from the rights which derive from the first indent of Article 6(1) of Decision No 1/80.

35 According to that government, if a Turkish worker no longer complies, in the course of the first year of employment, with the conditions subject to which his residence permit has been issued to him, his right of residence is no longer uncontested. Consequently, as from that point in time, the periods of work completed by that worker cannot be taken into account for the purpose of the acquisition of the rights referred to in the first indent of Article 6(1) of Decision No 1/80. Mr Unal, it is submitted, therefore does not comply with the condition of one year's legal employment for the purposes of the Court's case-law.

36 Such an argument cannot be accepted.

37 It is important to bear in mind that, in the case which gave rise to the judgment in *Kus*, the Court was called upon to rule on whether a Turkish national who had obtained a permit to reside on the territory of a Member State in order there to marry a national of that Member State and who had worked there for more than one year for the same employer under a valid work permit was entitled, under the first indent of Article 6(1) of Decision No 1/80, to renewal of his work permit even though, at the time of determination of his renewal application, his marriage had already been dissolved.

38 In that judgment, the Court stated first of all that, under the first indent of Article 6(1) of Decision No 1/80, a Turkish worker needs only to have been in legal employment for more than one year in order to be entitled to the renewal of his permit to work for the same employer, since that provision does not make that right dependant on any other condition, such as the circumstances under which the right of entry and residence was obtained (*Kus*, paragraph 21).

39 On the basis of that finding, the Court held that a Turkish worker who has been employed for more than one year under a valid work permit had to be regarded as fulfilling the conditions laid down in the first indent of Article 6(1) of Decision No 1/80, even though his residence permit had initially been granted to him for a purpose other than that of engaging in paid employment (*Kus*, paragraph 23).

40 It is thus necessary to determine whether the period of employment completed by Mr Unal from 8 May 2006 to 7 May 2007 permits the inference that he satisfies the condition of one year's legal employment within the meaning of the first indent of Article 6(1) of Decision No 1/80, even though the relationship between Mr Unal and Ms van der Molen ostensibly ended on 2 April 2007.

41 As European Union law stands at present, Decision No 1/80 does not encroach upon the competence of the Member States to refuse Turkish nationals the right of entry into their territories and to take up first employment there. Nor does that decision preclude those Member States, in principle, from regulating the conditions under which those persons work for up to one year as provided for in the first indent of Article 6(1) of Decision No 1/80 (see Case C-36/96 *Günaydin* [1997] ECR I-5143, paragraph 36).

42 Article 6(1) of Decision No 1/80 cannot, however, be construed as permitting a Member State to modify unilaterally the scope of the system of gradual integration of Turkish workers in the host Member State's labour force, by denying a worker who has been permitted to enter its territory and who has lawfully pursued a genuine and effective economic activity for a continuous period of more than one year with the same employer the rights which the three indents of that provision confer on him progressively according to the duration of his employment (see Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 37).

43 Such an interpretation would render Decision No 1/80 meaningless and deprive it of any practical effect (see Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 55).

44 The wording of Article 6(1) of Decision No 1/80 is general and unconditional in that it does not permit the Member States to restrict the rights which that provision confers directly on Turkish workers (see, inter alia, *Birden*, paragraph 38).

45 In that context, the Court has already held that periods in which a Turkish national is employed under a residence permit which was issued to him only as a result of fraudulent conduct which has led to his conviction are not based on a stable situation

and that such employment cannot be regarded as having been secure in view of the fact that, during the periods in question, the person concerned was not legally entitled to a residence permit (see, inter alia, Case C-285/95 *Kol* [1997] ECR I-3069, paragraph 27, and Case C-37/98 *Savas* [2000] ECR I-2927, paragraph 61).

46 Likewise, a Turkish worker does not fulfil the requirement of having been engaged in legal employment in the host Member State where he was employed on the basis of a right of residence conferred on him only by the operation of national legislation permitting provisional residence in that State pending completion of the procedure for the grant of a residence permit (see, to that effect, Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 31, and *Kus*, paragraph 18).

47 It is apparent from paragraphs 45 and 46 of the present judgment that the employment of a Turkish national under a residence permit which was issued to him as a result of fraudulent conduct which has led to a conviction or under a provisional residence permit which is valid only pending a final decision on his right of residence cannot give rise to any rights in favour of that national under Article 6(1) of Decision No 1/80.

48 However, in the case in the main proceedings, it is apparent from the order for reference and from the actual wording of the question referred that there is no question of fraudulent conduct on the part of Mr Unal.

49 Furthermore, he did not have, in the Netherlands, a provisional residence permit, but rather a residence permit which allowed him to engage freely in paid employment. It is common ground that Mr Unal complied with the conditions laid down by law or regulation in the host Member State as far as entry into its territory and employment were concerned.

50 In those circumstances, and as has been pointed out by the Advocate General at point 52 of her Opinion, not to accept that Mr Unal has been legally employed in the Netherlands for more than one year would be contrary to the general principle of respect for acquired rights upheld by the case-law of the Court. According to that principle, in the case where a Turkish national may legitimately rely on rights pursuant to a provision of Decision No 1/80, those rights are no longer dependent on the continuing existence of the circumstances which gave rise to them, as no condition of that nature is laid down by that decision (see Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 41).

51 That finding is, moreover, supported by the case-law of the Court as set out in *Altun*. In that judgment the Court ruled that, given the connection which exists between the rights which the Turkish worker has by virtue of Decision No 1/80 and those on which the members of his family who have been allowed to join him may rely on the basis of Article 7 thereof, fraudulent conduct by that worker is capable of having effects as regards the legal rights of the members of his family. However, the Court stated that those effects must be determined with regard to the date on which the national authorities of the host Member State adopted a decision to withdraw the residence permit of that worker (*Altun*, paragraphs 56 and 57). As is apparent from paragraph 59 of that judgment, the competent authorities are therefore required to ascertain whether those family members have, as at that date, acquired an autonomous right of access to the employment market of the host Member State and, as a corollary, a right to reside there. The Court added in paragraph 60 of that judgment that any other solution would be contrary to the principle of legal certainty.

52 Consequently, the periods of employment which were completed by the appellant in the main proceedings after he had obtained a residence permit must be regarded as satisfying the condition of one year's legal employment within the meaning of the first indent of Article 6(1) of Decision No 1/80.

53 In the light of the foregoing, the answer to the question referred is that the first indent of Article 6(1) of Decision No 1/80 must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the part of that worker and that withdrawal occurs after the expiry of the one-year period of legal employment provided for in the first indent of Article 6(1) of Decision No 1/80.

Costs

54 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:

The first indent of Article 6(1) of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the

part of that worker and that withdrawal occurs after the expiry of the one-year period of legal employment provided for in the first indent of Article 6(1) of Decision No 1/80.

[Signatures]