# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 18 July 2007 [1]

## I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80') and the question whether au pairs and students carrying on a secondary activity fall within the scope of that provision.

## II — Legal context

### A — *Community law*

2. The Agreement establishing an Association between the European Economic Community and Turkey ('the Association Agreement') was signed in Ankara on 12 September 1963 by the Republic of Turkey of the one part and the Member States of the EEC and the Community of the other part, and was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963. [2]

3. Under Article 36 of the Additional Protocol to the Association Agreement of 23 November 1970, the Association Council is to lay down the rules necessary for the securing by progressive stages of freedom of movement for workers between the Member States of the Community and Turkey on the basis of Article 12 of the Association Agreement.

1 — Original language: German.

2 — JO 1964 No 217, p. 3685; English text of the Agreement in OJ 1977 L 361, p. 29.

4. The Association Council accordingly adopted Decision No 1/80 of 19 September 1980 on the development of the Association. [3]

5. Article 6(1) of Decision No 1/80 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.'

B — *National law*

6. The relevant provisions on entry for au pairs and students may be found in the Immigration Rules, House of Commons Paper 395 ('HC 395').

7. The entry of au pairs is governed by Rules 88 to 93 of HC 395. Rule 88 defines an au pair placement as an arrangement whereby a person aged from 17 to 27 comes to the United Kingdom for the purpose of leaning the English language. An au pair lives for a time as a member of an English-speaking family with appropriate opportunities for study and helps in the family's home for a maximum of five hours a day, with two free days a week, for a reasonable allowance.

3 — The decision was not published in the Official Journal. It is available in *EEC-Turkey Association Agreement and Protocols and Other Basic Texts*, Office for Official Publications of the European Communities, Brussels 1992.

8. A person seeking leave to enter the United Kingdom as an au pair may not, under Rule 89, inter alia intend to stay in the United Kingdom for more than two years as an au pair, and must intend to leave the United Kingdom on completion of the stay as an au pair.

9. Provisions on the entry of students are contained in Rules 57 to 62 of HC 395.

10. Under Rule 57, a person seeking leave to enter the United Kingdom as a student must have been accepted for a course of study and be able and intend to follow a recognised full-time course. He must intend to leave the United Kingdom at the end of his studies, and must not intend to engage in business or take employment, other than part-time or vacation work, for which permission is required.

11. Under Rule 58, a person seeking leave to enter the United Kingdom as a student may be admitted subject to a condition restricting his freedom to take employment. Further details are regulated in Chapter 3, Annex A, Paragraph 4 of the Immigration Directorate's Instructions. Under that provision, a person who has been granted leave to enter or remain as a student subject to a condition restricting his freedom to take employment (rather than prohibiting employment) has a general permission to work, provided that the work does not exceed 20 hours a week during any period in term-time.

## III — Facts and main proceedings

12. The claimants in the main proceedings are Turkish nationals who were given leave to enter the United Kingdom to take up an au pair placement (Ms Payir) or a course of study (Mr Akyuz and Mr Ozturk) there.

13. Ms Payir was given leave to enter the United Kingdom in 2000. That leave included inter alia a condition that she did not take up paid or unpaid employment other than as an au pair. After entering the country she was engaged by two families. She was with the second family from March 2001, and worked for 15 to 25 hours a week in the household and looking after the children. In return she received board and lodging and GBP 70 a week. Ms Payir would like to continue working for that family.

14. Mr Akyuz and Mr Ozturk entered the United Kingdom as students in 1999 and 1997 respectively. They were given leave to enter for that purpose, followed by leave to remain, in which they were allowed to take employment for a maximum in term-time of 20 hours a week. Alongside their studies, they both worked part-time, within the permitted limit, as waiters. Their employers have each offered to continue their employment.

15. The claimants applied to the Secretary of State for the Home Department ('the Secretary of State') for their leave to remain to be varied or extended for the purpose of continuing to be employed in the United Kingdom. They based their applications on Article 6(1) of Decision No 1/80. They submitted that they had worked for the same employer for more than one year, and applied to continue working for that employer.

16. The Secretary of State refused the applications. The grounds for refusal were that students who worked part-time and au pairs could not rely on Article 6(1) of Decision No 1/80. The claimants brought proceedings challenging the refusals. The High Court of England and Wales, Administrative Court, allowed the applications and quashed the Secretary of State's decisions on the ground that the claimants fell within the scope of Article 6(1) of Decision No 1/80. The Secretary of State appealed to the Court of Appeal against the judgments of the Administrative Court.

## IV — Reference for a preliminary ruling and procedure before the Court

17. By order of 15 June 2006 the Court of Appeal referred the following questions to the Court for a preliminary ruling:

'(1) In a case in which:

(a) a Turkish national was granted leave to enter the United Kingdom for two years in order to take up a placement in that country as an "au pair" as defined in the United Kingdom Immigration Rules; and

(b) her leave to enter included permission to be employed in that capacity; and

(c) she was continuously employed in that capacity by the same employer for a period exceeding one year during her leave to enter; and

(d) that employment was a genuine and effective economic activity; and

(e) that employment was in accordance with national laws relating to employment and immigration;

then, was the Turkish national concerned, during that employment:

(i) a worker within the meaning of Article 6 of Decision No 1/80 of the Association Council established by the Association Agreement between the Community and Turkey?

(ii) duly registered as belonging to the labour force of the United Kingdom within the meaning of that Article?

(2) In a case in which:

(a) a Turkish national was granted leave to enter the United Kingdom under its Immigration Rules in order to follow a course of study in that country; and

(b) his leave to enter included permission to be employed in any occupation with a limit during term time of 20 hours work per week; and

(c) he was continuously employed by the same employer for a period exceeding one year during his leave to enter;

(d) that employment was a genuine and effective economic activity; and

(e) that employment was in accordance with national laws relating to employment and immigration;

then, was the Turkish national concerned, during that employment:

(i) a worker within the meaning of Article 6 of Decision No 1/80 of the Association Council established by the Association Agreement between the Community and Turkey?

(ii) duly registered as belonging to the labour force of the United Kingdom within the meaning of that Article?'

18. In addition to the parties to the main proceedings, the Commission of the European Communities, the United Kingdom Government and the German and Netherlands Governments made written and oral submissions in the proceedings before the Court; the Italian Government also submitted written observations.

## V — Assessment

19. To be able to rely on the rights under Article 6(1) of Decision No 1/80, a person must be a Turkish worker, be duly registered as belonging to the labour force of the host Member State, and have been in legal employment there in accordance with the periods of time mentioned in Article 6(1). The national court now asks whether au pairs and students carrying on secondary activities are workers within the meaning of Article 6 and are to be regarded as duly registered as belonging to the labour force. The issue is essentially whether it is relevant for the application of Article 6(1) that the host State has given leave to enter for the purpose of taking up a course of study or, in the case of au pairs, of learning a language.

20. The national court does not expressly ask about the third element in Article 6(1), the concept of 'legal employment'. To give a comprehensive and conclusive answer to the court's question, however, the third element in Article 6 must also be addressed below.

A — *Status of worker*

21. It is settled case-law that, in order to interpret the concept of worker, reference must be made to the interpretation of that concept in Community law. [4] According to that interpretation, the concept has a Community meaning and must not be interpreted narrowly. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. A worker is any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. [5]

1. Au pairs

22. An au pair who, like the claimant Payir, according to the national court, looks after the host family's children and does housework for 25 to 30 hours a week will as a rule have the status of a worker.

23. With a weekly working time of 25 to 30 hours and activities such as child care and housework it cannot be said, with respect either to the duration of the activity or to its content, that there is only a purely marginal and ancillary activity. On the contrary, it is an effective and genuine activity for the purposes of the concept of worker.

24. Nor does the fact that an au pair does not pursue a full-time activity prevent her from having the status of worker. In the context of Article 39 EC the Court has already ruled that a person who only works part-time is to be regarded as a worker. [6] That must also apply in the context of Article 6(1) of Decision No 1/80. The decisive point must, rather, be whether an effective and genuine activity is pursued that is not purely marginal and ancillary.

4 — See Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 23.

5 — See, with reference to Article 6(1) of Decision No 1/80, inter alia Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32, and *Birden*, cited in footnote 4, paragraphs 25 and 28.

6 — See Case 53/81 *Levin* [1982] ECR 1035, paragraph 16, and Case 139/85 *Kempf* [1986] ECR 1741, paragraph 11.

25. An au pair will generally also be subject to the instructions of the host family as regards her activity.

26. It is questionable whether classification as a worker is precluded by the fact that an au pair receives her remuneration in the form of board and lodging with a sum of money in addition. The claimant Payir receives, as remuneration for her activity, board and lodging and GBP 70 a week.

27. In its case-law on Article 39 EC, the Court has already held that it is not relevant, for determining whether someone is to be regarded as a worker, that his remuneration is paid in the form of board and lodging and pocket money. [7]

28. For the interpretation of the concept of worker within the meaning of Article 6 of Decision No 1/80, the Court refers, in accordance with settled case-law, to the interpretation of that concept in the context of Article 39 EC. There is no reason why it should be of relevance for the concept of worker in the context of Decision No 1/80 — unlike in the context of Article 39 EC — that the remuneration is paid in the form of board and lodging and pocket money.

29. Nor does any different assessment of the status of worker of an au pair follow from the particular context of au pair placements. Employment as an au pair is admittedly intended primarily for the acquisition and improvement of foreign language knowledge by the au pair and for cultural exchange. For an au pair, the au pair placement is thus associated particularly with benefits that go beyond the remuneration for her activities that she receives in the form of board and lodging and pocket money. An au pair's status of worker cannot, however, be excluded on the ground of that circumstance alone. Other employment relationships too may be associated with benefits for the worker that go beyond the remuneration received. In the case of work abroad, for example, that may also be the opportunity to learn a language, or generally the benefit represented by the acquisition of professional experience abroad.

30. A further particularity of an au pair placement may be that special importance is attached to integration in the host family, as the Italian Government has also pointed out. In this respect a parallel may be drawn with

7 — See Case 196/87 *Steymann* [1988] ECR 6159, paragraph 12, and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 22.

the Court's case-law on the status of workers of members of the family. In connection with the question of whether a person employed by a member of his family is to be regarded as a worker within the meaning of the Treaty, the Court has focused decisively on the existence of a relationship of subordination characteristic of an employment relationship. [8]

31. An au pair will therefore as a rule have to be regarded as a worker within the meaning of Article 6 of Decision No 1/80. [9]

32. It remains to point out, in conclusion, that an au pair relationship may take different forms. Whether an au pair thus satisfies the criteria of the concept of worker depends on the specific format of the individual case. It is therefore within the jurisdiction of the national courts to determine conclusively whether the criteria described above for determining the status of worker are satisfied in the particular case.

2. Students

33. Students who, like the claimants Akyuz and Ozturk, work for 20 hours a week as waiters and receive a usual remuneration in return are workers within the meaning of Article 6(1) of Regulation No 1/80. They carry on an effective and genuine activity, in which they are subject to instructions, and in return for which they receive remuneration. That they only work part-time does not preclude them from having the status of workers. [10] Although an activity of 20 hours a week is not a full-time activity, it cannot be described as purely marginal and ancillary.

34. Students who carry on an activity alongside their studies are thus as a rule to be classified as workers, unless their activity is one that is purely marginal and ancillary. [11]

3. Parallels to the *Bettray* case

35. The national court refers to the Court's judgment in *Bettray* and asks whether that judgment may be taken as a general statement

8 — See Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 15.

9 — See, in the context of Article 39 EC, the Opinion of Advocate General Trabucchi in Case 118/75 *Watson* [1976] ECR 1201, point 2.

10 — See point 24 above.

11 — See also Advocate General Alber, who stated in his Opinion in Case C-184/99 *Grzelczyk* [2001] ECR I-6193, point 70 et seq., that students who carry on secondary activities are workers within the meaning of the EC Treaty.

that the Member States can create schemes that pursue a dominant social purpose, with the consequence that an activity within such a system is not to be regarded as employment for the purposes of Article 6(1) of Decision No 1/80. Permission for students to carry on a secondary activity or the possibility of working as an au pair might be regarded as such a scheme.

36. The Court held in *Bettray* that activities which are solely a means of rehabilitation or reintegration in working life for the persons concerned cannot be regarded as effective and genuine economic activities. [12] The facts of *Bettray* concerned a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, were unable by reason of personal circumstances to work under normal conditions; furthermore, the person concerned had not been selected on the basis of his ability to perform a certain activity, but had, on the contrary, performed activities adapted to his physical and mental possibilities, in the framework of undertakings or work associations created specifically in order to achieve a social objective.

37. However, the Court subsequently emphasised the uniqueness of the situation at issue in *Bettray*, and held that the decision in *Bettray* could be explained only by the particular characteristics of that case and did not follow the general trend of the case-law on the interpretation of the concept of worker in Community law; the judgment could not therefore be applied to situations whose features were not comparable to those of the *Bettray* case. [13]

38. The activities carried on by au pairs and students are, however, as a rule effective and genuine economic activities. The particular characteristics of the *Bettray* case are not present in the case of students and au pairs. Consequently, also from *Bettray* it does not follow that au pairs and students carrying on secondary activities do not have the status of workers.

B — *Legal employment*

39. The expression 'legal employment' presupposes, according to the case-law, a stable and secure situation of the person

12 — Case 344/87 *Bettray* [1989] ECR 1621, paragraph 17.

13 — See *Birden*, cited in footnote 4, paragraph 31.

concerned as a member of the labour force of a Member State, and hence the existence of an undisputed right of residence. [14] The person concerned must not be in a merely precarious situation which could be called into question at any time. [15]

40. As the national court states, the claimants in these proceedings had a right of residence during the time of their employment. Au pairs and students are, moreover, in principle not in a situation which is precarious and can be called into question at any time.

41. The Netherlands Government has indeed rightly emphasised that a student's stay in the host Member State for the purpose of studying is limited in time by the length of the course of study. That does not, however, mean that the student's residence can be characterised as precarious and liable to be called into question at any time.

42. The Court has already held that it is not relevant to the classification as 'legal employment' that the worker was notified, on receiving permission to enter the territory of the host Member State, that his residence and his employment were subject to the observance of certain conditions regarding duration and substance. [16]

43. So the mere fact that the residence in the host State is intended to last only for a specified period of time does not mean that the residence is to be described as insecure and precarious.

44. Rather, according to the Court's case-law, a precarious situation in the labour market is, for example, a period during which, because of the suspensive effect of his appeal against the refusal of a right of residence, a worker could provisionally reside and be employed in the Member State in question until the determination of the case. [17]

45. The situation of an au pair or student cannot, however, be compared to that situation.

14 — See Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 30; Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraph 26; and Case C-237/91 *Kus* [1992] ECR I-6781, paragraphs 12 and 22.

15 — See *Kurz*, cited in footnote 5, paragraph 49.

16 — See Case C-98/96 *Ertanir* [1997] ECR I-5179, paragraph 58.

17 — See *Sevince*, cited in footnote 14, paragraph 31, and *Kus*, cited in footnote 14, paragraph 13, in which it was held that staying in the host State during the procedure for granting a right of residence also did not fulfil that condition.

C — *Registration as belonging to the labour force*

46. It is settled case-law that the phrase 'duly registered as belonging to the labour force' in Article 6(1) of Decision No 1/80 means that the employment relationship must be located within the territory of a Member State or retain a sufficiently close link with that territory. [18]

47. It was uncertain whether the requirement of being *duly registered* as belonging to the labour force imposed conditions going beyond the requirement of legal employment. In *Birden* the Court held that it did not. [19] The Court said in that case that the terms used in the German language version — 'regulär' and 'ordnungsgemäß', corresponding to the English 'duly registered' and 'legal' — are synonymous.

48. The concept of being 'duly registered as belonging to the labour force' therefore refers to all workers who have complied with the laws and regulations of the host Member State and are therefore entitled to pursue an occupation there. [20]

49. According to the case-law of the Court, the concept of being 'duly registered as belonging to the labour force' also cannot therefore be interpreted as applying to the labour market in general as opposed to a restricted market with a specific social objective. [21]

50. That activities as an au pair and the activities generally pursued by students as secondary activities alongside their studies as a rule have special features — in that they have a specific social objective, since they (also) serve for language learning by au pairs or the financing of studies — does not therefore affect the fact that they are activities of persons 'duly registered as belonging to the labour force' within the meaning of Article 6 of Decision No 1/80.

D — *Interim conclusion*

51. Both students and au pairs thus prima facie satisfy the conditions of Article 6(1) of Decision No 1/80.

18 — See Case C-36/96 *Günaydin* [1997] ECR I-5143, paragraph 29; *Birden*, cited in footnote 4, paragraph 33; and *Ertanir*, cited in footnote 16, paragraph 39.

19 — See *Birden*, cited in footnote 4, paragraph 47 et seq., referring to the various language versions of Decision No 1/80.

20 — See *Birden*, cited in footnote 4, paragraph 51; Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 31; and Case C-4/05 *Güzeli* [2006] ECR I-10279, paragraph 32.

21 — See *Birden*, cited in footnote 4, paragraph 51.

E — *Purpose of entry*

52. The factual situations in these cases present a special feature, however: the Member States which have taken part in the proceedings emphasise that leave to enter in each case was not granted for the purpose of taking up an activity in the labour market. Students are allowed to enter for the purpose of study and are permitted to take up an activity only secondarily to finance their studies. Leave is given to an au pair for the purposes of language-learning and cultural exchange.

53. It must therefore be examined what consequences the purpose of stay which applied at the time of entry to the host State may have for the interpretation of the concept of worker within the meaning of Article 6(1) of Decision No 1/80.

1. Students

54. The Member States which have taken part in the proceedings are of the view that Turkish nationals who have been given leave to enter for the purpose of study, even if they carry on secondary activities, in principle do not fall within the scope of Article 6(1) of Decision No 1/80. They say that Article 6(1) applies only to persons who have been admitted precisely as workers.

55. The Netherlands and German Governments refer in this connection to Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. [22] Article 17(1) of that directive requires the Member States to allow students from non-member countries to carry on a secondary activity for not less than 10 hours a week, or the equivalent in days or months per year.

56. It might be concluded from the scheme of Directive 2004/114 that the Community legislature regards students who carry on a secondary activity not as workers but still exclusively as students, so that students could not be classified as workers in the context of Decision No 1/80 either.

57. That argument is not convincing, however. First, Directive 2004/114 — which is incidentally not binding on the

22 — OJ 2004 L 375, p. 12, 'Directive 2004/114'.

United Kingdom [23] — expressly provides in Article 4(1) that the directive is without prejudice to more favourable provisions in bilateral agreements. That being so, a restrictive interpretation of a bilateral provision cannot follow from the directive. Second, the two instruments regulate a different subject-matter. In so far as Directive 2004/114 regulates the minimum extent to which students are to be given the right to carry on a secondary activity, no conclusions may be drawn as to the interpretation and application of Article 6(1) of Decision No 1/80.

58. In connection with Directive 2004/114 the German and Netherlands Governments have, however, additionally pointed out that, if Article 6(1) of Decision No 1/80 is applicable to students who carry on a secondary activity alongside their studies, the obligation on Member States under the directive to allow students to carry on a secondary activity would have the consequence that every Turkish student would have the opportunity to obtain the benefit of the rights under Article 6(1) of the decision. A Member State's decision to admit a Turkish national for the purpose of study would, via the provision in Article 17(1) of the directive, have the consequence that the student — if during the course of his studies, which will normally exceed the threshold in Article 6(1) of Decision No 1/80, he makes use of his right to carry on a secondary activity — would directly obtain a permanent right of residence.

59. The Member States refer in this respect to the Court's case-law according to which the decision on the first admission and first employment of a national, and hence the decision on whether a Turkish national obtains the possibility of acquiring successively the rights under Article 6(1), is a matter for the Member States. [24]

60. As a result of the obligation in the directive to allow Turkish students a secondary activity, the Member States can no longer decide autonomously on a student's *first* employment. If it were further assumed that Article 6(1) of the decision applied, a Turkish student would then be able to acquire permanent residence for the purpose of carrying on an economic activity, without the host State as a rule having any discretion regarding the question of the economic activity and continued residence for the purpose of economic activity. The Member States point out that the only regulatory instrument of labour market policy remaining to them, with respect to Turkish students and their possible entry to the labour market made available by Article 6 of the decision, would be to regulate more closely, and possibly to reduce distinctly, the number of Turkish nationals allowed to enter for the purpose of studying.

23 — See recital 25 in the preamble to Directive 2004/114.

24 — See inter alia *Nazli*, cited in footnote 20, paragraph 29, *Ertanir*, cited in footnote 16, paragraph 23, and *Kus*, cited in footnote 14, paragraph 25.

61. The Commission too, at the hearing, answered the question of the consequences following from the interaction of Decision No 1/80 and Directive 2004/114. However, in so far as the Commission submitted that with an activity of 10 hours a week the status of worker might not be accepted, that argument cannot be followed, in the light of the considerations set out above in connection with the discussion of the concept of worker. Activity even of 10 hours a week constitutes an effective and genuine activity that is not on so small a scale as to be purely marginal and ancillary, as defined by the Court.

62. The question whether the specific purpose of the entry of students and the fact that the activity has been permitted only on a secondary basis for the financing of studies are of relevance in interpreting the concept of worker in the context of Article 6(1) of Decision No 1/80 is instead to be answered on the basis of an interpretation focused on the spirit and purpose of the decision.

63. The Court — as already stated above — in principle interprets the concept of worker within the meaning of Article 6(1) of Decision No 1/80 in parallel to the principles recognised in the context of Articles 39 EC and 40 EC. In so doing it relies on Article 12 of the Association Agreement, in which the contracting parties agreed to be guided by Articles 48, 49 and 50 of the EC Treaty (now Article 39 et seq. EC) for the purpose of progressively securing freedom of movement for workers between them. [25]

64. In the context of Article 39 EC, the Court has ruled that it is the content of the work performed, not the motives for taking up work, that is decisive for Community law. [26]

65. The Court has also held, however, that the principles recognised in the context of Article 39 EC are to be transferred to the rights conferred by Decision No 1/80 only *so far as possible*. [27] That was already an indication that the spirit and purpose of Article 6(1) and the particular objectives of the Association Agreement must be taken into account when interpreting the decision. [28]

25 — The Court also mentions in this connection Article 36 of the Additional Protocol signed on 23 November 1970, annexed to the Association Agreement and concluded by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60).

26 — See *Levin*, cited in footnote 6, paragraph 21.

27 — See *Kurz*, cited in footnote 5, paragraph 30; *Nazli*, cited in footnote 20, paragraph 55; *Bozkurt*, cited in footnote 14, paragraph 20; and Case C-171/95 *Tetik* [1997] ECR I-329, paragraph 20.

28 — For a clear differentiation between the purpose of the Association Agreement and Article 39 EC, see the Opinion of Advocate General Geelhoed of 12 September 2006 in Case C-16/05 *Tum & Dari*.

66. The Court has repeatedly held that the employment rights, and hence the residence rights, conferred by Article 6(1) of Decision No 1/80 are intended to consolidate progressively the position of the persons concerned in the host Member State. [29]

67. The intention of Article 6(1) is therefore to confer on a migrant worker who becomes increasingly integrated into the labour market of the host State rights of residence graduated accordingly. Those rights of employment and residence laid down in Article 6(1) thus protect the legitimate expectations of Turkish workers who enter the labour market of the Member States. The stronger their integration into the labour market, and the greater their need for certainty of planning and for protection of their confidence in the permanence of their situation, the further their rights under Article 6(1) extend.

68. A student who has entered a Member State in order to study and pursues an activity only on a secondary basis does not, however, present a comparable interest and need for protection. The purpose of his entering the country is to study. A student thus has no comparable need for the protection of legitimate expectations, security of planning, and consolidation of his position in the host State.

69. In a teleological interpretation of Article 6 of Decision No 1/80, the spirit and purpose of the Association Agreement as a whole must also be taken into consideration. An interpretation derived from the wording of Article 6 which runs counter to the aims of the Association Agreement cannot be valid.

70. In accordance with Article 2(1) of the Association Agreement, the aim of the 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'.

71. It may be seen that it is detrimental in many ways to the achievement of those aims if students who carry on a secondary activity fall within the scope of Article 6(1) of Decision No 1/80 with the conse-

29 — See inter alia Case C-230/03 *Sedef* [2006] ECR I-157, paragraph 34, and *Tetik*, cited in footnote 27, paragraph 21.

quence that, if during their studies they have worked in compliance with the conditions in Article 6(1), under the third indent of Article 6(1) they have free access to any employment of their choice after four years' legal employment.

72. With respect to the admission of Turkish students to study in the Member States, the essential focus of the promotion of the 'accelerated development of the Turkish economy' and the improvement of 'the level of employment and the living conditions of the Turkish people' is the training of young Turkish academics who, after completing their studies, make use of the knowledge and skills they have acquired in economic life and in research and teaching in their home country, pass them on, and thus contribute them to Turkish society.

73. It would run counter to this aim pursued jointly by the parties to the Association Agreement if the interpretation of Article 6 of Decision No 1/80 were based on an understanding of the provision which, by including students financing their studies by secondary activities, ultimately gave them the possibility of obtaining an often attractive stay in the host State by overcoming minor obstacles. Instead of returning to their country of origin and putting their acquired knowledge and skills into practice there, it would be to be feared that many Turkish students would, if the provision were understood in that way, make use of the opportunity of staying in the host State in order to work there. The Association Agreement's aim of accelerating the development of the Turkish economy and improving the living conditions of the Turkish people would thereby be jeopardised.

74. In relation to the interpretation of the concept of worker, a complete parallelism of the interpretation of the concept in Article 39 EC and Article 6 of Decision No 1/80 must therefore be ruled out. Turkish nationals who come to a Member State to study and are allowed to take up a secondary activity alongside their studies in order to finance them do not fall within the scope of Article 6(1) of Decision No 1/80, even if, looking at their secondary activity in isolation, they possess all the qualities of a worker within the meaning of Article 39 EC.

75. That interpretation also leads to positive consequences from other points of view, both for the Turkish students concerned and with respect to the aims pursued by the Association Agreement as a whole. Since a limitation of student numbers on the basis of labour market policy considerations is not necessary, the possibility of studying in a Member State is open to a greater number of Turkish

students. The possibility of being allowed to work to a considerable extent alongside the studies, and hence the possibility of financing the studies in the host State oneself, furthermore ensure that not only students with a prosperous family background can come to the Member States to study.

76. The above conclusion is not contradicted by the Court's case-law according to which temporal limitations imposed by the Member States or statements made by the worker on entry that he will leave the country again after a certain time are immaterial in the context of Article 6(1) of Decision No 1/80. The Court was correct to state that the scope of Article 6 would be exposed to the arbitrariness of the Member States if those limitations or statements were allowed to affect the application of Article 6. The present situation is different, however, since, as the Netherlands Government rightly submits, the residence of students is by definition limited in time to the duration of the course of study, so that the limitation is not connected in any way with the periods specified in Article 6.

77. The decisions of the Court in which it explained, with respect to certain factual situations, that the Member States may not refuse to extend the employment and residence right on the ground that entry and stay were permitted for reasons other than taking up paid employment [30] do not contradict the interpretation I have put forward. It is not possible to derive from the Court's observations on these — different — factual situations any general principle that the purpose of the leave to enter and stay originally granted must without exception be disregarded. On the contrary, by its decisions holding that the principles relating to Article 39 EC are to be transferred *so far as possible* in the interpretation of Decision No 1/80, the Court has in fact stated that, instead of a schematic generalisation, the specific situation must be taken into account in each case.

78. One of the decided cases, for example, concerned a Turkish worker who had been allowed to enter a Member State and take up employment there in order to obtain professional experience with his Turkish employer's parent undertaking. [31] In contrast to the situation in the present case, in which entry was for the purpose of study, in that case a worker entered precisely for the purpose of taking up employment, so that the only issue to be decided was the significance to be attached to the motives for taking up the employment. In so far as the Court held that the motivation for taking up the first employment was of no relevance, no conclusion may be drawn from that decision as to the present set of facts.

30 — See *Günaydin*, cited in footnote 18, paragraph 52; *Kus*, cited in footnote 14, paragraph 52; and *Kurz*, cited in footnote 5, paragraph 56.

31 — *Günaydin*, cited in footnote 18.

79. In another case, a Turkish national had been allowed to enter the country for the purpose of marriage, and after being divorced he then applied for his right of employment and residence to be extended. [32] Again, in so far as the Court found, in relation to these facts, that the extension could not be refused on the ground that entry had been permitted for reasons other than the taking up of paid employment, no conclusion may be drawn from this decision as to the present set of facts. Entry for the purpose of marriage is not comparable to entry for the purpose of study, if only because entry for marriage by definition does not aim at a stay for a limited period of time, and residence is instead intended to be permanent, so that there is a corresponding legitimate expectation to be protected. Entry for the purpose of marriage is not therefore comparable with entry for the purpose of taking up studies, and equal treatment with respect to Article 6 is not required.

80. Finally, in the *Kurz* case, leave to enter was given for the purpose of training as a plumber. [33] Only at first sight does that situation bear a certain resemblance to entry for the purpose of study, in that each concerns entry for the purpose of training. The decisive difference between the two forms of training, which also justifies the differing importance of the original purpose of entry for deciding on an extension of residence or the application of Article 6(1) of Decision No 1/80, is, however, the closeness of vocational training to economic activity, as a result of which — in particular because of the extensive practical work and the organisation of the training relationship — vocational training ultimately appears as a stage in working life. Entry for the purpose of taking up a training course ultimately constitutes entry for the purpose of taking up employment. This factual situation too is therefore not comparable with entry for the purpose of study, from the point of view of classification in Article 6.

81. Nor does a different conclusion follow from the Court's judgment in *Eroglu*, [34] which concerned the right of residence granted by Article 7(2) of Decision No 1/80. Article 7(2) confers on the children of Turkish workers who have completed a course of vocational training in the host country the right to respond to any offer of employment there, irrespective of the length of time they have been resident there, provided one of their parents has been legally employed in the State concerned for at least three years. In so far as the Court expressly held in that decision that the purpose for which the person concerned was given leave to enter and stay is not relevant to the exercise of that right, that correctly takes account of the aim pursued by Article 7(2) or by the Association Agreement, namely to provide security, reliability and stability for the families of Turkish workers working in the host State. Article 7(2) thus

32 — *Kus*, cited in footnote 14.

33 — *Kurz*, cited in footnote 5.

34 — Case C-355/93 *Eroglu* [1994] ECR I-5113.

concerns the particular situation of the children of Turkish workers who have completed vocational training in the host State. In this connection it would not be compatible with the objectives mentioned to allow continued residence only to the persons who were originally given leave to enter for the purpose of family reunion and not to those who were given leave for the purpose of studies. There are no comparable interests, however, to make the purpose of the original entry appear irrelevant in the case of the general provision of Article 6(1). The Court's case-law on Article 7(2) does not therefore prevent the taking into account of the purpose of entry in the context of Article 6(1).

2. Au pairs

82. The last question to be answered is whether there must also be a teleological restriction, in the context of the concept of worker in Article 6(1) of Decision No 1/80, in the case of entry for the purpose of taking up an au pair placement, which — as shown above — will often in the particular case satisfy the requirements of the concept of worker within the meaning of Article 39 EC.

83. In this respect, however — in contrast to entry for the purpose of study — no reasons can be seen for an understanding of the concept of worker that differs, in view of the spirit and purpose of the Association Agreement, from the concept in Article 39 EC. On the contrary, the taking up of an au pair activity already constitutes in itself the taking up of an economic activity. That a particular motive for taking up that economic activity cannot affect classification as a worker in the context of Article 6 has been stated by the Court — as already demonstrated — in the *Kurz* and *Günaydin* judgments concerning vocational training and the acquisition of professional experience with the parent company. That the stay as an au pair is intended precisely for the acquisition of cultural experience and deepening of linguistic knowledge cannot thus have any effect on classification as a worker.

84. Nor is there reason to fear that restrictions by Member States of au pair placements to a maximum of one year, which might be occasioned by the above classification in view of the provision in Article 6(1) of Decision No 1/80, will have negative effects on the cultural exchange intended by the Association Agreement. Even according to the basic idea of the au pair concept, the aims pursued by an au pair placement will normally be achieved during a stay limited to one year.

F — *Interim conclusion*

85. A Turkish national who has entered a Member State for the purpose of following a course of studies and carries on a secondary activity to finance his studies does not fall within the scope of Article 6(1) of Decision No 1/80. Entry for the purpose of taking up an au pair placement, on the other hand, does not mean that the person concerned is outside the scope of Article 6(1).

## VI — Conclusion

86. In the light of the above considerations, I propose that the Court should give the following answer to the Court of Appeal:

'(1) A Turkish national who has been given leave to enter a Member State in order to take up an au pair placement is duly registered as belonging to the labour market and falls within the scope of Article 6(1) of Decision No 1/80 if he carries on an effective and genuine activity for and under the direction of another person in return for which he receives remuneration.

(2) A Turkish national who has been given leave to enter a Member State for the purpose of following a course of studies there and carries on a secondary activity alongside his studies does not fall within the scope of Article 6(1) of Decision No 1/80.'