Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 21 June 2012 [1]

Case C-268/11

Atilla Gülbahce
v
Freie und Hansestadt Hamburg

(Reference for a preliminary ruling from the Hamburgisches Oberverwaltungsgericht (Germany))

(Decision No 1/80 of the EEC-Turkey Association Council — Principle of non-discrimination as regards conditions of work — Grant to a Turkish worker of a residence permit for a fixed period and of a work permit for an unlimited period — Withdrawal, with retroactive effect, of decisions extending the duration of the residence permit — Conditions on which the right of residence under Article 10(1) of Decision No 1/80 is based, having regard to the work permit issued for an unlimited period)

1. In this case, the Court is asked by the Hamburgisches Oberverwaltungsgericht (Hamburg Higher Administrative Court) (Germany) to interpret, once again, Decision No 1/80 of the Association Council [2] of 19 September 1980 on the development of the Association. [3]

2. The facts of this case concern a Turkish national who entered German territory with a family reunification visa and, on that basis, obtained a residence permit. That worker was also issued with a work permit for an unlimited period. The main question in this case is whether the authorities of a Member State are entitled, under the provisions of Decision No 1/80, to withdraw the residence permit issued to a Turkish national 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, namely, cohabitation with his spouse.

3. This question will lead me to examine, firstly, whether the applicant in the main proceedings can rely on the rights which derive from the first indent of Article 6(1) of the decision in order to contest the retroactive withdrawal and extend his residence permit. That provision entitles Turkish migrant workers, after one year's legal employment in the labour force of the host Member State, to renew their permit to work with the same employer.

1 — Original language: French.

2 — The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey signed on 12 September 1963 in Ankara by the Republic of Turkey, of the one part, and the EEC Member States and the Community, of the other part. The Agreement was 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').

3 — Decision No 1/80 can be found in *EEC-Turkey Association Agreement and Protocols and other Basic Texts*, Office for Official Publications of the European Communities, Brussels, 1992.

4. Then, secondly, I shall go on to explain the scope of Article 10(1) of the decision, which provides that the Member States of the European Union are, as regards remuneration and other conditions of work, to grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and EU workers. In particular, the referring court is unclear whether a Turkish worker who has been issued with a work permit for an unlimited period may legitimately rely on that provision in order to extend his residence permit even where he does not fulfil the conditions laid down in Article 6(1) of Decision No 1/80.

5. In fact, the Court will be called upon here to rule whether Article 10(1) of Decision No 1/80 concerns only the conditions for the taking-up of employment by Turkish nationals duly registered as belonging to the labour force, the conditions of access to that labour force and the acquisition of the residence permit needed for that purpose, in that they are governed only by Article 6(1) of the decision, or whether the prohibition on discrimination laid down in Article 10(1) of the decision also affects the conditions of access to employment of Turkish workers and, consequently, their right of residence.

6. In this Opinion, I shall propose that the Court rule that Article 6(1) of Decision No 1/80 must be interpreted as meaning that a Member State may not withdraw 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 that provision.

7. I shall then explain why I consider that Article 10(1) of the decision must be interpreted as meaning that a Turkish worker who has been issued with a work permit of unlimited duration and who does not fulfil the conditions laid down in Article 6(1) of the decision cannot rely on that initial provision in order to obtain an extension of his residence permit in the territory of the host Member State.

I – Legal framework

A – *EU law*

1. The Association Agreement

8. With the aim of regulating freedom of movement for Turkish workers in the territory of the Community, an association agreement was concluded on 12 September 1963 between the Community and the Republic of Turkey. 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 the accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people’. [4]

9. The progressive achievement of freedom of movement for Turkish workers which is the aim of that agreement must occur according to the methods determined by the Association Council, which has the task of ensuring the implementation and the progressive development of the Association. [5]

4 — Article 2(1) of the Association Agreement.

5 — Article 6 of the Association Agreement.

2. Decision No 1/80

10. Thus the Association Council adopted Decision No 1/80, the aim of which was, in particular, to improve the legal situation of workers and members of their families compared with the regime established by Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 12 of the Association Agreement. That decision granted Turkish workers an increasing right of access to employment in the host Member State and also gave the children of such workers a right to education in that State.

11. The provisions applicable to the rights of Turkish workers are set out in Article 6(1) of Decision No 1/80, which 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.'

12. Article 10(1) of Decision No 1/80 provides that the Member States are, as regards remuneration and other conditions of work, to grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and EU workers.

13. Under Article 13 of that decision:

'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.'

B – *National law*

14. Paragraph 19(1), first subparagraph, points 1 and 4, of the Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Law on the Entry and Residence of Foreign Nationals in Federal Territory) of 9 July 1990[6] provides that, should the matrimonial cohabitation cease to exist, the spouse's residence permit will be extended as an independent right of residence unconnected with the ground for granting right of residence mentioned in Paragraph 17(1) of the Ausländergesetz, where the matrimonial cohabitation legally existed for at least two years in Federal territory and where the foreigner was, until the conditions mentioned in points 1 and 3 were fulfilled, in possession of the residence permit or authorisation, unless he was unable to request extension of the residence permit in time for reasons beyond his control.

6 — BGBl. 1990 I, p. 1354; the 'Ausländergesetz'.

15. Paragraph 23(1), point 1, of the Ausländergesetz provides that a residence permit must be granted, under Paragraph 17(1) thereof, to the foreign spouse of a German national where the latter is habitually resident in Federal territory.

16. Under Paragraph 4(1) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the Residence, Gainful Employment and Integration of Foreign Nationals in Federal Territory) of 30 July 2004,[7] in order to enter and reside in Federal territory, foreigners must possess a residence permit unless the law of the European Union or a national regulation provides otherwise or a right of residence exists by virtue of the Association Agreement.

17. Under Paragraph 4(2) of the Aufenthaltsgesetz, a residence permit authorises the taking-up of paid employment where that is provided by that law or where the residence permit expressly allows the taking-up of such employment. Each residence permit must state whether the taking-up of paid employment has been authorised. A foreigner who is not in possession of a residence permit for the purposes of taking up employment cannot be authorised to take up employment unless the Bundesagentur für Arbeit (Federal Labour Agency) has indicated its agreement or a regulation provides that taking up such employment without that agency's authorisation is lawful. The restrictions imposed on the issue of the authorisation by that agency must be mentioned in the residence permit.

18. Paragraph 4(5) of the Aufenthaltsgesetz states that a foreigner who has a right of residence under the Association Agreement is required to prove the existence of that right by furnishing the evidence that he has a residence permit if he does not possess either a national or an EU permanent residence permit. The residence permit is issued on request.

19. According to Paragraph 39 of the Aufenthaltsgesetz, a residence permit authorising a foreigner to take up employment may be issued only with the agreement of the Bundesagentur für Arbeit, unless otherwise provided for by regulation. The agreement may be given where provided for by inter-State agreement, by law or by regulation. Paragraph 50(1) of the Aufenthaltsgesetz states that a foreigner is required to leave Federal territory when he is not or is no longer in possession of the necessary residence permit and he does not have, or no longer has, a right of residence under the Association Agreement.

20. Under Paragraph 105(2) of the Aufenthaltsgesetz, a work permit issued before the entry into force of that law is to be regarded as constituting unrestricted authorisation by the Bundesagentur für Arbeit to take up employment.

C – *The Eddline El-Yassini and Gattoussi case-law*

21. In *Eddline El-Yassini* and *Gattoussi*,[8] the Court has already given a ruling on a matter similar to the one raised by the referring court in this case, but in a different legal context. In fact, the legal framework for those cases was, respectively, the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco[9] and the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part.[10]

7 — BGBl. 2004 I, p. 1950, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162; the 'Aufenthaltsgesetz').

8 — Case C-416/96 [1999] ECR I-1209 and Case C-97/05 [2006] ECR I-11917, respectively.

9 — This agreement was signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1, the 'EEC-Morocco Agreement').

10 — This agreement was concluded in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC, ECSC of the Council and the Commission of 26 January 1998 (OJ 1998 L 97, p. 1, 'the Euro-Mediterranean Agreement').

22. In both cases, by curtailing the right to remain, the host Member State restricted the right accorded to a national of a non-member country to engage in employment, even though the person had been granted that right through the issue of a work permit. [11]

23. Mr El-Yassini, after marrying a British national, obtained a United Kingdom residence permit in 1991 which was valid for a period of twelve months. He was in paid employment from the time of his marriage. After separating from his wife, Mr El-Yassini requested an extension of his residence permit in 1992, on the basis, in particular, of the first paragraph of Article 40 of the EEC-Morocco Agreement, under which the treatment accorded by each Member State to workers of Moroccan nationality employed in its territory was to be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals. Mr El-Yassini's application was refused by the Secretary of State for the Home Department, on the ground inter alia that the words 'as regards working conditions or remuneration' used in that provision do not relate to a Moroccan worker's right of residence in the host Member State and cannot therefore be construed as conferring on such a worker the right to continue working in that State after his residence permit has expired.

24. Mr Gatoussi, a Tunisian national, after marrying a German national and having been authorised to join her, obtained a residence permit valid for three years, and then a work permit for an unlimited period. Upon learning that Mr Gatoussi was living apart from his wife, the German authorities limited the period of validity of his residence permit and required him to leave German territory, failing which he would be deported to Tunisia. As in *Eddline El-Yassini*, cited above, the national authorities considered that Mr Gattoussi could not claim a right of residence on the basis of Article 64(1) of the Euro-Mediterranean Agreement, under which the treatment accorded by each Member State to workers of Tunisian nationality employed in its territory is to be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals.

25. In both cases, notwithstanding the fact that the applicants had a work permit of unlimited duration and employment, the national authorities refused to extend their right of residence, as the original justification for granting that right no longer existed when the period of validity of their residence permits expired. The question in both cases was therefore whether the first paragraph of Article 40 of the EEC-Morocco Agreement and Article 64(1) of the Euro-Mediterranean Agreement should be interpreted as meaning that they precluded Member States from refusing to issue a residence permit in those circumstances.

26. In *Eddline El-Yassini*, the Court ruled that, 'as Community law stands at present, a Member State is not in principle prohibited from refusing to extend the residence permit of a Moroccan national whom it has previously authorised to enter its territory and to take up gainful employment there, where the initial reason for the grant of his leave to stay no longer exists by the time that his residence permit expires'. [12] It also stated that the 'fact that the adoption of such a measure by the competent national authorities will oblige the person concerned to terminate his employment relationship in the host Member State before the contractual term agreed with his employer comes to an end will not, as a general rule, affect that conclusion'. [13]

27. However, the Court went on, 'the situation would be different if the national court were to find that the host Member State had granted the Moroccan migrant worker specific rights in relation to employment which were more extensive than the rights of residence conferred on him by that State'. [14] That would be so if the host Member State had granted the person concerned a residence

11 — *Gatoussi*, paragraph 31.

12 — *Eddline El-Yassini*, paragraph 62.

13 — Ibid., paragraph 63.

14 — Ibid., paragraph 64.

permit for a period shorter than the duration of his work permit and if, before the work permit expired, it then refused to extend the residence permit without justifying its refusal on grounds relating to the protection of a legitimate national interest, such as public policy, public security or public health. [15]

28. The effectiveness of the first paragraph of Article 40 of the EEC-Morocco Agreement necessarily requires that, where a Moroccan national has been duly authorised to take up gainful employment for a given period on the territory of a Member State, that worker enjoys, throughout that period, the rights which that provision confers on him. [16]

29. The Court applied the same reasoning in the *Gatoussi* judgment. [17]

II – Facts and main proceedings

30. Mr Gülbahce, a Turkish national, entered German territory in February 1996 and filed an application for asylum. In June 1997, he married a German national. His application for asylum was subsequently rejected.

31. Mr Gülbahce returned to his State of origin in May 1998 before re-entering German territory on 8 June of the same year with a visa issued on the ground of family reunification. He stated for this purpose that he was residing at the address which was his wife's address at the time. In July 1998, the office responsible for foreign nationals granted him a residence permit valid for one year. The permit was extended on 17 June 1999 until 2 July 2001. Concurrently, on 29 September 1998, the Bochum (Germany) employment office granted Mr Gülbahce a work permit of unlimited duration.

32. Between February and November 1999, Mr Gülbahce was employed as an assistant worker in the building industry in Hamburg (Germany), then again from September 2000 with various employers, also in Hamburg. Each of the employment contracts lasted for less than a year.

33. On 1 July 2000, Mr Gülbahce applied for allocation of an apartment in Hamburg and in June 2001 he applied to the office responsible for foreign nationals in the Freie und Hansestadt Hamburg for an extension of his residence permit on employment grounds.

34. On 16 August 2001, the Freie und Hansestadt Hamburg granted Mr Gülbahce a residence permit valid for two years, which it last extended for a further two years on 20 January 2004.

35. In July 2005, the Freie und Hansestadt Hamburg learned that, on 2 November 1999, Mr Gülbahce's wife informed the town of Aschersleben (Germany) in writing that she had been living apart from him since 1 October 1999. When questioned by the Freie und Hansestadt Hamburg, Mr Gülbahce stated that he had finally separated from his wife in November 2000 and that, because of his work, he often lived elsewhere in German territory and stayed with his wife only during weekends and rest periods.

36. In December 2005, Mr Gülbahce asked for his residence permit to be extended in respect of his employment from November 2004 with Atla GmbH in Hamburg.

37. By decision of 6 February 2006, which was confirmed by decision of 29 August 2006, the Freie und Hansestadt Hamburg withdrew Mr Gülbahce's residence permits of 16 August 2001 and 20 January 2004 with retroactive effect, refused the application to extend his residence permit and threatened to deport him to Turkey. It stated that Mr Gülbahce's residence permits should not have been extended

15 — Ibid., paragraph 65.

16 — Ibid., paragraph 66.

17 — See paragraphs 29 to 40 of the judgment.

because, according to his wife's statements, the matrimonial cohabitation had not existed for two years. The Freie und Hansestadt Hamburg also considered that Mr Gülbahce was not entitled to have them extended under Article 6 of Decision No 1/80, since he had not been employed with the same employer for at least a year at the time when each of the permits was extended. Moreover, Mr Gülbahce had obtained the residence permits fraudulently, as the matrimonial cohabitation between him and his wife had ceased.

38. By judgment of 3 July 2007, the Verwaltungsgericht (Administrative Court) (Germany) dismissed Mr Gülbahce's appeal against the decision of the Freie und Hansestadt Hamburg on the ground that it rightly withdrew the residence permits because matrimonial cohabitation between the spouses had not existed for two years. Moreover, Article 10(1) of Decision No 1/80, on which Mr Gülbahce relied for his work permit of unlimited duration, did not have the effect of requiring the Freie und Hansestadt Hamburg to allow him to continue the gainful employment that he was engaged in at the time by extending his residence permit.

39. By judgment of 29 May 2008, the Oberverwaltungsgericht Hamburg, the appeal court, amended the judgment delivered by the Verwaltungsgericht and ordered the Freie und Hansestadt Hamburg to issue Mr Gülbahce with a residence permit on the ground that the work permit of unlimited duration, in conjunction with Article 10(1) of Decision No 1/80, created a right of residence independent of his marriage. In fact, a Turkish worker duly registered as belonging to the labour force of a Member State who was in possession of a legal work permit for an unlimited period was entitled to rely on that provision even if he could not rely on the rights established by Article 6 of that decision. The appeal court considers that the case-law of the Court of Justice concerning the prohibitions of discrimination laid down in the EEC-Morocco Agreement and the Euro-Mediterranean Agreement should be applied by analogy. The right actually to engage in employment could therefore be denied to him only on grounds of the protection of a legitimate national interest, such as grounds of public policy, public security or public health. However, such grounds did not exist and, in particular, Mr Gülbahce had not entered into a marriage of convenience.

40. On appeal on a point of law, the Bundesverwaltungsgericht (Federal Administrative Court) (Germany) set aside, by judgment of 8 December 2009, the judgment of 29 May 2008 and referred the case back to the lower court for a new hearing and decision on the ground that the appeal court wrongly proceeded from the principle that Mr Gülbahce was entitled to an extension or to the grant of a residence permit under Article 10(1) of Decision No 1/80 and because he had been granted a work permit for an unlimited period.

41. The referring court states that the new hearings held when the case was referred back and the evidence furnished by the parties show that Mr Gülbahce was employed from October 2006 from time to time and then continuously from 2 November 2009 by the Hamburg firm Consultin Bau GmbH.

III – Questions referred for a preliminary ruling

42. The Hamburgisches Oberverwaltungsgericht, being in doubt as to the correct interpretation of the provisions of Decision No 1/80, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 10(1) of Decision No 1/80 to be interpreted as meaning:

(a) that a Turkish worker who has been duly granted a permit to take up employment in the territory of a Member State for a particular period (which may be unlimited) that extends beyond the duration of his residence permit ("overrunning work permit") may exercise his

rights under that permit for the whole of that period provided that this is not precluded on grounds relating to the protection of a legitimate national interest such as public policy, public security or public health;

(b) and that a Member State is prohibited from refusing a priori to recognise that permit as having any effect on his residence status on the basis of national provisions in force at the time when the permit was granted which make the work permit dependent on the residence permit (in accordance with the judgments in [*Eddline*] *El-Yassini*, paragraph 3 of the summary of the judgment, paragraphs 62 to 69 of the grounds, concerning the scope of Article 40(1) of the EEC-Morocco Agreement, and *Gattoussi*, paragraph 2 of the summary of the judgment, paragraphs 36 to 43 of the grounds, concerning the scope of Article 64(1) of the EC-Tunisia Euro-Mediterranean Agreement)?

If that question is answered in the affirmative:

2. Is Article 13 of Decision No 1/80 to be interpreted as meaning that the standstill clause also prohibits a Member State, by means of a legislative provision (in this case, [the Aufenthaltsgesetz]), from depriving a Turkish worker duly registered as belonging to its labour force of the possibility of relying on a breach of the principle of non-discrimination contained in Article 10(1) of Decision No 1/80 by reason of a work permit previously granted to him for a period extending beyond the duration of the residence permit?

If that question is answered in the affirmative:

3. Is Article 10(1) of Decision No 1/80 to be interpreted as meaning that the principle of non-discrimination there laid down does not in any event prohibit the national authorities, in accordance with national provisions, from withdrawing, after their period of validity has expired, residence permits of limited duration wrongfully granted to a Turkish worker under national law for such periods of time during which the Turkish worker actually made use of a work permit of unlimited duration which had previously been duly granted to him and was in employment?

4. Is Article 10(1) of Decision No 1/80 further to be interpreted as meaning that that provision covers only employment in which a Turkish worker who is in possession of a work permit which has been duly granted to him by the national authorities for an unlimited period and without restrictions *ratione materiae* is engaged at the time when his residence permit, which has been granted for a limited period for a different purpose, expires, and that a Turkish worker in that situation cannot therefore ask the national authorities, even after having permanently left that employment, to grant him further right of residence for the purposes of new employment – which may be taken up after an interval of time needed to look for another job?

5. Is Article 10(1) of Decision No 1/80 further to be interpreted as meaning that the principle of non-discrimination (only) bars the national authorities of the host Member State from taking measures, after the last-issued residence permit has expired, to repatriate a Turkish national duly registered as belonging to its labour force to whom it originally granted specific rights in relation to employment which were more extensive than his rights of residence, in so far as such measures do not serve to protect a legitimate national interest, but does not require them to issue a residence permit?'

IV – Analysis

43. Mr Gülbahce considers that the extension of his residence permits in August 2001 and January 2004 was not contrary to the law and that he was justified in claiming that extension in order to exercise his right to work based on the work permit of unlimited duration which had been issued to him in September 1998.

44. The order for reference shows that the Hamburgisches Oberverwaltungsgericht starts from the premiss that Mr Gülbahce could not rely on the rights provided for in Article 6(1) of Decision No 1/80 in order to contest the withdrawal of his residence permits.

45. However, I note that, in the order for reference, it states that, in December 2005, Mr Gülbahce requested the extension of his residence permit in respect of employment that he had commenced in November 2004 with Atla GmbH in Hamburg. Similarly, it states that Mr Gülbahce engaged in gainful employment of longer duration only in November 2004, which he pursued until June 2006. [18] Moreover, the referring court explains that, at the time when the residence permits of August 2001 and January 2004 were withdrawn and the extension of his residence permit was refused, that is to say, in February 2006, Mr Gülbahce had been employed with the same employer for more than a year. [19]

46. It is not, therefore, apparent that Mr Gülbahce in any way fulfilled the conditions of Article 6(1) of Decision No 1/80.

47. Consequently, for the purposes of providing the referring court with a useful reply, I shall examine the questions raised by that court, firstly, by assuming that Mr Gülbahce could base his right to extension of his residence permit on Article 6(1) of Decision No 1/80 then by proceeding from the premiss taken as a basis by the referring court, namely that Mr Gülbahce does not fulfil the conditions of that provision.

A – *Mr Gülbahce can rely on the right which derives from Article 6(1) of Decision No 1/80*

48. The referring court explains that, under the national provisions, Mr Gülbahce's national residence permit was retroactively rescinded from 3 July 2001 by the withdrawal in February 2006 of the residence permits issued in August 2001 and January 2004 and he could not, therefore, rely on Article 6(1) of Decision No 1/80. [20]

49. In my view, this finding directly contradicts the case-law established by the Court of Justice in the *Unal* judgment. [21]

50. In fact, in that judgment, the Court ruled 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).

18 — Point 23 of the order for reference.
19 — Point 24 of the order for reference.
20 — Point 23 of the order for reference.
21 — Case C-187/10 [2011] ECR I-9045.

51. The Court held, in particular, that, according to the general principle of respect for acquired rights, 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. [22]

52. In order to determine whether Mr Unal had acquired such rights, the Court took as the relevant date the date on which the national authorities of the host Member State adopted the decision to withdraw the residence permit of the Turkish worker. [23]

53. In the main proceedings, Mr Gülbahce's residence permits of 16 August 2001 and 20 January 2004 were withdrawn from him by decision of 6 February 2006. However, as has been stated in point 45 of this Opinion, on that date Mr Gülbahce had probably been employed with the same employer for more than a year.

54. Therefore, on the date when the residence permits at issue were withdrawn, Mr Gülbahce might have acquired rights under Article 6(1) of Decision No 1/80, which would necessarily imply that he had a concomitant right of residence. [24] It is for the referring court to determine, for this purpose, whether the period of work completed by Mr Gülbahce between November 2004 and June 2006 fulfils the condition of one year's legal employment within the meaning of that provision, since 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. [25] In this regard, legal employment presupposes a stable and secure situation as a member of the labour force of the host Member State and, from this viewpoint, implies an undisputed right of residence. [26]

55. In particular, 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. [27]

56. It would seem, in this case, that Mr Gülbahce has not been guilty of any fraudulent conduct and that, moreover, he had a residence permit and a work permit of unlimited duration which enabled him to freely engage in paid employment in German territory. In any event, it is for the referring court to verify whether Mr Gülbahce fulfilled the conditions laid down by Article 6(1) of Decision No 1/80.

57. Consequently, I consider that, if the referring court established that Mr Gülbahce fulfilled the condition of one year's legal employment as a member of the German labour force on the date when the residence permits of August 2001 and January 2004 were withdrawn, he might be able to rely on the rights conferred on him by that provision in order to extend his residence permit, and the competent national authorities would not therefore be justified in withdrawing his residence permits from him 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.

58. If, on the other hand, the referring court were to find that Mr Gülbahce did not fulfil such a condition, it would be right in dismissing the possibility of Mr Gülbahce obtaining an extension of his residence permit on the basis of Article 6(1) of Decision No 1/80.

22 — *Unal*, paragraph 50.

23 — Ibid., paragraphs 51 and 52.

24 — Ibid., paragraphs 29 and 30.

25 — Ibid., paragraph 38.

26 — Ibid., paragraph 31.

27 — Ibid., paragraph 47.

59. In the latter case, the question arises whether Mr Gülbahce can rely on Article 10(1) of that decision in order to extend his residence permit.

B – *Mr Gülbahce cannot rely on the right which derives from Article 6(1) of Decision No 1/80*

60. By its first question, the referring court seeks to ascertain, in essence, what the scope of Article 10(1) of Decision No 1/80 is. Does that provision allow a Turkish national who is in possession of a work permit of unlimited duration to obtain an extension of his residence permit when the letter of Article 6(1) of that decision, the conditions of which he does not fulfil, appears to preclude it?

61. In fact, the referring court seems to consider that Mr Gülbahce cannot be regarded as being covered by one of the situations provided for in Article 6(1) of that decision because, at the time when the residence permit was withdrawn, he had not been in continuous employment with the same employer for a period of at least one year.

62. Since the matter at issue is, firstly, the possible application by analogy of the rules laid down by the EEC-Morocco Agreement or the Euro-Mediterranean Agreement, an explanation needs to be given of the difference between those agreements and the association agreement.

63. The Court itself explained the difference in paragraph 61 of the *Eddline El-Yassini* judgment, when it stated that there are substantial differences between the EEC-Morocco Agreement and the association agreement not only in their wording but also in their subject-matter and purpose, such that the Court's case-law on the association agreement cannot be transposed by analogy to the EEC-Morocco Agreement.

64. Thus, in that judgment, the Court pointed out that the object of the association agreement was to progressively integrate Turkish workers in anticipation of the accession of the Republic of Turkey to the European Union, whereas the aim of the EEC-Morocco Agreement was overall economic cooperation. [28]

65. After recalling the wording of Article 6(1) of Decision No 1/80, the Court stated that, given that framework, the Court had consistently held that a Turkish worker who fulfils the criteria laid down in that provision may claim an extension of his residence permit in the host Member State in order to remain in lawful gainful employment in that State. [29]

66. Finding that the provisions of that decision reflect its specific scheme, the Court logically concluded that the EEC-Morocco Agreement could not be interpreted by analogy with those provisions.

67. For the same reasons, the converse of the Court's statement must also apply.

68. In fact, the Court demonstrated in paragraph 53 of the *Eddline El-Yassini* judgment, that extension of the Turkish worker's residence permit so that he can remain in lawful gainful employment depends on fulfilment of the conditions laid down in Article 6(1) of Decision No 1/80. However, it must be noted that there is no equivalent of that provision in the EEC-Morocco Agreement. That aspect alone would support rejection of interpretation by analogy as proposed by Mr Gülbahce. This follows not least because that provision forms an integral part of a system which is specific to the association agreement by reason of its subject-matter and purpose.

28 — See paragraphs 54 and 58 of the judgment.

29 — *Eddline El-Yassini*, paragraph 53 and the case-law cited.

69. Therefore, in my view, the interpretation set out in that judgment cannot be transposed to the case under consideration.

70. In so far as Mr Gülbahce does not fulfil the conditions laid down in Article 6(1) of Decision No 1/80, he cannot rely on any right to renewal or extension of his residence permit based on that decision.

71. In fact, it follows from *Unal*, that, where the rights pursuant to Article 6(1) of Decision No 1/80 can be relied on as acquired rights, the fact that the initial circumstances which enabled the worker to acquire them no longer exist is of no significance.[30] However, unless the condition of a minimum period of employment laid down in the first indent of Article 6(1) of that decision has been fulfilled, the rights pursuant to that provision cannot have been acquired.

72. Accordingly, the scope of Article 10(1) of that decision can now be defined.

73. That provision itself forms part of the specific scheme of the association agreement and of Decision No 1/80. It therefore supplements Article 6(1) of that decision rather than precluding it, contrary to the interpretation advocated by Mr Gülbahce. In fact, as that provision provides for a system of progressive integration, the process that it establishes begins with a regime which restricts the rights of the Turkish worker duly registered as belonging to the labour force.

74. The progressive regime for acquiring the right to engage in gainful employment includes, in its initial stages, restrictions amounting to discrimination on grounds of nationality, as is indicated by the second indent of Article 6(1) of the decision, which provides for priority to be given to the workers of Member States. Those restrictions are justified by the overall philosophy of the association agreement and concern the acquisition of the right to seek employment.

75. On the other hand, once that right and that employment have been acquired, no discrimination whatsoever can be tolerated in respect of the conditions on which that right is exercised. This is what is indicated, in my view, by Article 10(1) of the decision.

76. I therefore consider that the conditions of access to employment of Turkish workers are governed only by Article 6(1) of Decision No 1/80 and that Article 10(1) of that decision cannot also be intended to regulate those conditions of access and thereby to enable the person concerned to base his application for an extension of his residence permit on the latter provision.

77. I would point out, in this regard, that, as EU law stands at present, the provisions concerning the association agreement do not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment, but merely regulate the situation of Turkish workers who are already lawfully integrated into the host Member State as a result of lawful employment over a certain period, in accordance with the conditions laid down in Article 6 of Decision No 1/80.[31] Accordingly, a Turkish national's first admission to the territory of a Member State is, in principle, governed exclusively by that State's own domestic law, and the person concerned may claim certain rights under EU law in relation to holding paid employment or exercising self-employed activity, and, correlatively, in relation to residence, only in so far as his position in the Member State concerned is already regular.[32]

78. The association agreement does not therefore confer any right of residence on Turkish workers.

30 — See paragraph 50 of that judgment.

31 — Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 63 and the case-law cited. See also *Unal*, paragraph 41.

32 — *Abatay and Others*, paragraph 65 and the case-law cited.

79. Consequently, if it were to be accepted that a Turkish worker who does not fulfil the conditions laid down in Article 6(1) of Decision No 1/80 can rely on Article 10(1) of that decision, this would have the effect of obliging Member States to extend that worker's residence permit notwithstanding a situation that would be deemed to be irregular by the competent national authorities in the territory of the host Member State.

80. Such an interpretation would have the effect of creating a right of residence in favour of the Turkish worker where he is possession of a work permit of unlimited duration. Not only is such a right not provided for by the association agreement; it also encroaches upon the competence of the Member States to regulate the entry into their territories of Turkish nationals until they have acquired the rights provided for in Article 6(1) of Decision No 1/80.

81. That interpretation might undermine the system established by Decision No 1/80.

82. For all these reasons, I consider that Article 10(1) of Decision No 1/80 must be interpreted as meaning that a Turkish worker who has been issued with a work permit of unlimited duration and who does not fulfil the conditions laid down in Article 6(1) of that decision cannot rely on the former provision in order to obtain an extension of his residence permit in the territory of the host Member State.

V – Conclusion

83. In the light of all the foregoing, I propose that the Court answer the questions referred by the Hamburgisches Oberverwaltungsgericht as follows:

(1) Article 6(1) 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 on 12 September 1963 in Ankara by the Republic of Turkey, of the one part, and the EEC Member States and the Community, of the other part, must be interpreted as meaning that a Member State cannot withdraw 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 that provision.

(2) Article 10(1) of Decision No 1/80 must be interpreted as meaning that a Turkish worker who has been issued with a work permit of unlimited duration and who does not fulfil the conditions laid down in Article 6(1) of that decision cannot rely on the former provision in order to obtain an extension of his residence permit in the territory of the host Member State.