

JUDGMENT OF THE COURT (Second Chamber)

19 July 2012 (*)

(EEC-Turkey Association Agreement – Association Council Decision No 1/80 – Article 7, first paragraph –
Right of residence of members of the family of a Turkish worker duly registered as belonging to the
labour force of a Member State – Thai national who was married to a Turkish worker and lived with him
for more than three years)

In Case **C-451/11**,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Giessen
(Germany), made by decision of 11 August 2011, received at the Court on 1 September 2011, in the
proceedings

Natthaya Dülger

v

Wetteraukreis,

THE COURT (Second Chamber),

composed of J. N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Löhmus, A. Rosas, A. Ó
Caoimh and C. G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2012,

after considering the observations submitted on behalf of:

- Mrs Dülger, by C. Momberger, Rechtsanwalt,
- the Wetteraukreis, by D. Mayer, acting as Agent,
- the German Government, by A. Wiedmann, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Palatiello, avvocato dello Stato,
- the Austrian Government, by F. Koppensteiner, acting as Agent,
- the European Commission, by V. Kreuzsitz and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2012

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first indent of the first paragraph of Article 7 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 was made in the course of proceedings between Mrs Dülger, a Thai national, and the Wetteraukreis (Wetterau district), relating to a decision of the latter to refuse to issue her with a residence permit.

Legal context

European Union law

The EEC-Turkey Association

– The Association Agreement

3 According to Article 2(1), the aim of the Association Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, including in the labour sector, by progressively securing freedom of movement for workers and by abolishing restrictions on freedom of establishment and on freedom to provide services in order to improve the standard of living of the Turkish people and facilitate the accession of the Republic of Turkey to the Community at a later date

– The Additional Protocol

4 Article 1 of the Additional Protocol, which was signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 17; 'the Additional Protocol'), lays down the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of the Association Agreement. Under Article 62 thereof, the Additional Protocol is to form an integral part of that agreement.

5 Article 59 of that Protocol provides:

'In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community.'

– Decision No 1/80

6 Decision No 1/80 is intended, according to the third recital of its preamble, to improve, in the social field, the treatment accorded workers and members of their families in relation to the arrangements laid down by Decision No 2/76 which had been adopted by the Association Council on 20 December 1976.

7 Article 7 of Decision No 1/80 provides:

'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:

- shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State;
- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.'

Other provisions of European Union law

8 Article 10(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68'), was worded as follows:

'The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

- (a) his spouse and their descendants who are under the age of 21 years or are dependants;
- (b) dependent relatives in the ascending line of the worker and his spouse.'

9 Article 10 of Regulation No 1612/68 was repealed by Article 38(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28).

10 Article 5(2) of Directive 2004/38 provides as follows:

'Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.'

11 Article 6 of that directive, entitled 'Right of residence for up to three months', provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

12 Under Article 7(2) of that directive, the right of residence for more than three months extends to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State.

13 Article 38(3) of that directive is worded as follows:

'References made to the repealed provisions and Directives shall be construed as being made to this Directive.'

German law

14 Paragraph 4(5) of the Law on the Residence, Employment and Integration of Foreign Nationals in Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet) of 30 July 2004 (BGBl. 2004 I, p. 1950), in the version applicable to the facts in the main proceedings (BGB1. 2008 I, p. 162) ('the Aufenthaltsgesetz') provides:

'a foreign national who possesses a right of residence in accordance with [the Association Agreement] is required to prove the existence of that right through the possession of a residence permit, if he does not possess a settlement permit or a an EC long-term residence permit. The residence permit shall be issued on application.'

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

15 The claimant in the main proceedings entered the Federal Republic of Germany on 30 June 2002 on a tourist visa. On 12 September 2002, she married, in Denmark, Mr Dülger, a Turkish national.

16 Since 1998 Mr Dülger has held a residence permit for Germany of unlimited duration. During the time that the Dülgers lived together, Mr Dülger was employed by various employers in that Member State, from 1 October 2002 to 30 June 2004, from 1 August 2004 to 8 June 2005, from 1 March 2006 to 15 March 2008, and from 1 June 2008 to 31 December 2009.

17 On 18 September 2002, Mrs Dülger applied for a residence permit. She stated that she was married and had two children born in Thailand in 1996 and 1998. In order that she and her husband could live together as a married couple, Mrs Dülger was granted a residence permit of limited duration which has been extended on several occasions and, most recently, from 10 September 2008 to 26 June 2011. Since 21 June 2011, Mrs Dülger has been in possession of a 'Fiktionsbescheinigung' (a provisional residence document).

18 Mrs Dülger's daughters entered the Federal Republic of Germany on 1 July 2006.

19 Mrs Dülger separated from her spouse on 3 June 2009 and moved into a women's hostel in Friedberg (Germany) with her two daughters. Since then, she has been in receipt of benefits under Book II of the Social Security Code – benefits in favour of job-seekers (Zweites Buch Sozialgesetzbuch – Grundsicherung für Arbeitsuchende) ('the SGB II').

20 Her divorce from Mr Dülger was granted on 3 February 2011.

21 By letter of 9 September 2009, the immigration authority for the district of Wetterau ('the immigration authority') drew the attention of Mrs Dülger to the fact that she had acquired an independent right of residence after her separation, valid for one year, after which that right would be subject to the obligation incumbent upon her to prove that she is able to support herself and her children. She was informed that if she were to continue to be reliant on social security after 4 June 2010, the conditions of validity of her right of residence, and that of her children, would no longer be met and she would have to

leave German territory. Only if she were able to support herself and her children by that date would she continue to qualify for a right of residence.

22 On 18 September 2009, Mrs Dülger applied for a residence permit on the basis of Paragraph 4(5) of the Aufenthaltsgesetz on the ground that, as a member of the family of a Turkish worker duly registered as belonging to the labour force of a Member State with whom she had been legally resident for at least three years, she had acquired rights under Article 7 of Decision No 1/80.

23 By decision of 15 March 2010, the immigration authority refused Mrs Dülger's application since she had not acquired any rights under Article 7 of Decision No 1/80; in its view, only the Turkish members of a Turkish worker's family are able to rely on that provision.

24 Mrs Dülger brought an appeal against that decision, arguing that Article 7 of Decision No 1/80 contains no particular conditions with regard to the nationality of the family members. She asked the referring court to set aside the decision of the immigration authority and to direct it to issue her with a residence permit pursuant to Paragraph 4(5) of the Aufenthaltsgesetz.

25 The referring court notes that the residence permit can be issued to Mrs Dülger under Paragraph 4(5) only if she is authorised to reside on German territory pursuant to Article 7 of Decision No 1/80. According to that court, in view of the conditions mentioned in that provision, the only question that arises in the present case is whether Mrs Dülger, as a Thai national, can be regarded as a member of the family of a Turkish worker duly registered as belonging to the labour force of a Member State.

26 In those circumstances, the Verwaltungsgericht Giessen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'May a Thai national, who was married to a Turkish worker duly registered as belonging to the labour force of a Member State and who, after receiving authorisation to join him, lived with him without interruption for more than three years, rely on the rights arising from the first indent of the first paragraph of Article 7 of Decision No 1/80 ... with the consequence that she has a right of residence because of the direct effect of that provision?'

The question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether the first paragraph of Article 7 of Decision No 1/80 must be interpreted as meaning that a member of the family of a Turkish worker, who is a national of a third country other than Turkey, may invoke, in the host Member State, the rights resulting from that provision, where all the other conditions laid down by the latter have been fulfilled.

28 According to the first paragraph of Article 7 of Decision No 1/80, the family members of a Turkish worker have, subject to compliance with the conditions set out therein, a right of their own of access to the labour force in the host Member State. In that regard, the Court has repeatedly held that the rights granted by the first paragraph of Article 7 to the family members of a Turkish worker with regard to employment in the Member State concerned necessarily imply the existence of a concomitant right of residence for the person concerned, without which the right of access to the labour force and actually to take up paid employment would be rendered totally ineffective (see, *inter alia*, Case C-325/05 *Derin* [2007] ECR I-6495, paragraph 47, and Case C-303/08 *Bozkurt* [2010] ECR I-0000, paragraph 36).

29 According to the first paragraph of Article 7 of Decision No 1/80, the acquisition of the rights set out in that provision is subject to three cumulative conditions:

- the person concerned must be a member of the family of a Turkish worker who is already duly registered as belonging to the labour force of the host Member State;
- that person has been authorised by the competent authorities of that State to join that worker there, and
- he has been legally resident for a certain period in the territory of the host Member State.

30 In the main proceedings, as is clear from the order for reference and, more specifically, from the wording of the question referred, Mrs Dülger was married to a Turkish worker duly registered as belonging to the labour force of Germany and she lived with that worker, without interruption, from her marriage in September 2002 to her separation in June 2009 after receiving authorisation to join him in that Member State. The conditions indicated in the previous paragraph were, *prima facie*, fulfilled.

31 The German, Italian and Austrian governments argue, however, that the concept of ‘members of the family’, for the purposes of the first paragraph of Article 7 of Decision No 1/80, includes only members of the family of a Turkish worker who also have Turkish nationality. Mrs Dülger’s Thai nationality would thus prevent her from invoking the rights laid down in that provision.

32 This argument cannot be accepted.

33 According to settled case-law, Article 7 of Decision No 1/80 forms an integral part of European Union law (Case C-192/89 *Sevinçe* [1990] ECR I-3461, paragraphs 8 and 9, and Joined Cases C-7/10 and C-9/10 *Kahveci* [2012] ECR I-0000, paragraph 23).

34 The first paragraph of Article 7 does not include either a definition of the concept of ‘members of the family’ of the worker or express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept. Furthermore, no condition concerning the nationality of members of the family is contained in it.

35 It is also clear from the Court’s case-law that the concept of ‘members of the family’ is not limited to the worker’s blood relations (Case C-275/02 *Ayaz* [2004] ECR I-8765, paragraph 46).

36 In those circumstances, and in order to ensure consistent application in the Member States of the concept of ‘members of the family’ for the purposes of the first paragraph of Article 7 of Decision No 1/80, this must be construed in an independent and uniform manner at the level of European Union law (see, to that effect, *Ayaz*, paragraph 39).

37 As has been held by the Court, the concept of ‘members of the family’ of the worker must be interpreted in terms of the objective it pursues and in the context in which it is placed (*Ayaz*, paragraph 40).

38 In that regard, it should be noted that the scheme of gradual acquisition of rights which is provided for in the first paragraph of Article 7 of Decision No 1/80 pursues a dual objective.

39 First, before the initial period of three years expires, that provision seeks to enable family members to be with a migrant worker, with a view to thus furthering, by means of family reunification, the employment and residence of the Turkish worker who is already legally integrated in the host Member State (see, *inter alia*, *Kahveci*, paragraph 32 and the case-law cited).

40 Secondly, that provision seeks to deepen the lasting integration of the Turkish migrant worker’s family in the host Member State by granting to the family member concerned, after three years of legal residence, the possibility of himself gaining access to the labour force. The fundamental objective thus pursued is that of consolidating the position of that family member, who is, at that stage, already legally

integrated in the host Member State, by giving him the means to support himself in that State and therefore to establish a position which is independent of that of the migrant worker (see, inter alia, Case C-467/02 *Cetinkaya* [2004] ECR I-10895, paragraph 25, and *Kahveci*, paragraph 33).

41 It follows that family reunification plays a central role in the scheme introduced by the first paragraph of Article 7 of Decision No 1/80.

42 As it is an essential way of making family life possible, the family reunification enjoyed by Turkish workers who belong to the labour force of the Member States contributes both to improving the quality of their stay and to their integration in those Member States and, therefore, promotes social cohesion in the society concerned.

43 The German government claims, however, that both the meaning and objective of the Association Agreement and of Decision No 1/80 militate against the idea that the first paragraph of Article 7 of that decision would also apply to non-Turkish nationals. That agreement pursues primarily economic objectives. The regulation of the right of residence of the spouse of a Turkish worker from a third country is not, therefore, an ongoing issue for an association based on such objectives.

44 That argument cannot be accepted.

45 Although it is true that, under Article 2(1) of the Association Agreement, that agreement has the purpose of promoting the continuous and balanced strengthening of trade and economic relations between the European Economic Community and Turkey, the fact remains that, by providing in the first paragraph of Article 7 of Decision No 1/80 for the possibility for the family members of a Turkish worker to join him in the Member State where he works, the Contracting Parties took as their basis grounds that go well beyond considerations of a purely economic nature.

46 Article 7 of Decision No 1/80 is included in Section 1 of Chapter II of that decision, entitled 'Social Provisions'. That section concerns questions relating to employment and the free movement of workers.

47 The advantages that family reunification bring to family life, to the quality of the stay and to the integration of the Turkish worker in the Member State where he works and resides are clearly independent of the nationality of the members of his family who are authorised to join him in that State.

48 Furthermore, the Court has already held that the social provisions of Decision No 1/80, of which the first paragraph of Article 7 forms part, constitute a further stage in securing freedom of movement for workers on the basis of Articles 45, 46 and 47 TFEU and that, therefore, the principles enshrined in those Treaty articles must be transposed, so far as possible, to Turkish nationals who enjoy the rights conferred by that Decision (see, to that effect, Case C-171/95 *Tetik* [1997] ECR I-329, paragraph 20, and Case C-351/95 *Kadiman* [1997] ECR I-2133, paragraph 30).

49 It is also clear from the Court's case-law that, in the determination of the scope of 'member of the family' for the purposes of the first paragraph of Article 7 of Decision No 1/80, reference should be made to the interpretation given to that concept in the field of freedom of movement for workers who are nationals of the Member States of the European Union and, more specifically, to the scope given to Article 10(1) of Regulation No 1612/68 (*Ayaz*, paragraph 45).

50 Article 10(1) of that regulation provided that the members of the family of a worker who is a national of one Member State had the right to install themselves with him in the Member State where he was employed, irrespective of their nationality.

51 That provision was repealed but Article 6(2) and Article 7(2) of Directive 2004/38 also establish the principle that members of the family of a citizen of the European Union who are not nationals of a Member State have the right to accompany or join him in the host Member State.

52 Any limitation on the right to family reunification, which would necessarily result if the rights conferred under the first paragraph of Article 7 of Decision No 1/80 were applied only to members of the family who have Turkish nationality, would undermine the objective of that provision.

53 Such a limitation would also be contrary to the right to respect for private and family life, as enshrined in Article 7 of the Charter of Fundamental Rights of the European Union. As Article 7 of Decision No 1/80 forms an integral part of the law of the European Union, the Member States are bound to observe the obligations resulting from Article 7 of that Charter which, under 6(1) TEU, has the same legal value as the Treaties.

54 As the Advocate General has observed in points 50 to 53 of his Opinion, that interpretation of the concept of 'members of the family', for the purposes of the first paragraph of Article 7 of Decision No 1/80, is particularly appropriate given that it is also the solution required in relation to Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983, C 110, p. 60).

55 Article 1(a) of Decision No 3/80 provides, *inter alia*, that, for the purposes of that decision, the expression 'member of the family' has the meaning assigned to it in Article 1 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

56 The Court, called upon to interpret the personal scope of Regulation No 1408/71, has repeatedly held that Article 2(1) of that regulation refers to two clearly distinct categories of persons: workers, on the one hand, and members of their families and their survivors, on the other. In order to fall within the scope of the regulation, the former must be nationals of a Member State, or stateless persons or refugees residing within the territory of a Member State. There is on the other hand no nationality requirement for application of the regulation to the family members or survivors of workers who are themselves nationals of the European Union (see, *inter alia*, Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, paragraph 21, and Case C-189/00 *Ruhr* [2001] ECR I-8225, paragraph 19).

57 Furthermore, the Court has also held that the definition of the persons to whom Decision No 3/80 applies contained in Article 2 thereof is inspired by the same definition set out in Article 2(1) of Regulation No 1408/71 (Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 84).

58 An interpretation of the first paragraph of Article 7 of Decision No 1/80 based on all of the above considerations cannot be called into question by the fact that, as the referring court has observed, the Court has made reference to the Turkish nationality of the members of the family of a worker in several of its judgments on the application of that provision (see Case C-329/97 *Ergat* [2000] ECR I-1487, paragraph 67; Case C-65/98 *Eyüp* [2000] ECR I-4747, paragraph 48; *Derin*, paragraph 48; and *Bozkurt*, paragraph 46).

59 In all of those judgments, the disputes in the main proceedings concerned the granting of benefits set out in Decision No 1/80 to the children or spouses of a Turkish worker who were themselves of Turkish nationality. That said, the reference made by the Court to the nationality of the members of the family was of no particular significance.

60 The German, Italian and Austrian governments argue, moreover, that a broad interpretation of the first paragraph of Article 7 of Decision No 1/80 would extend excessively the personal scope of Decision No 1/80, enabling third country nationals, in numbers that are difficult to determine, to invoke that provision.

61 In that connection, it is sufficient to note that the first paragraph of Article 7 of Decision No 1/80 expressly provides that the family member's right to join the migrant Turkish worker is subject to the authorisation to that effect granted in accordance with the conditions laid down by the legislation of the host Member State (*Ayaz*, paragraphs 34 and 35, and *Derin*, point 63).

62 That requirement, which is intended to exclude from the scope of the first paragraph of Article 7 members of a Turkish worker's family who have entered and reside in the host Member State in breach of that State's legislation (*Cetinkaya*, paragraph 23), is explained by the fact that, in the context of the EEC-Turkey Association, the members of the family of the migrant Turkish worker do not have a right to join him to live as a family; their ability to join him depends rather on a decision of the national authorities taken solely on the basis of the law of the Member State concerned, subject to the requirement of observance of fundamental rights (see, to that effect, *Derin*, paragraph 64).

63 For the same reason, it cannot be claimed that to include the members of the family of a Turkish worker who do not have Turkish nationality within the scope of the first paragraph of Article 7 of Decision No 1/80 would constitute more favourable treatment of them as compared with the members of the family of a citizen of the European Union, in breach of Article 59 of the Additional Protocol.

64 Contrary to the system applicable to the members of the family of a Turkish worker, the members of the family of a citizen of the European Union who are third-country nationals have a right, under Article 5(2) of Directive 2004/38, to enter the territory of Member States which is subject only to the condition that they hold an entry visa or valid residence card.

65 Consequently, the answer to the question referred is that the first paragraph of Article 7 of Decision No 1/80 must be interpreted as meaning that a member of the family of a Turkish worker, who is a national of a third country other than Turkey, may invoke, in the host Member State, the rights arising from that provision, where all the other conditions laid down by the provision have been fulfilled.

Costs

66 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 paragraph of Article 7 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, which was signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, must be interpreted as meaning that a member of the family of a Turkish worker, who is a national of a third country other than Turkey, may invoke, in the host Member State, the rights arising from that provision, where all the other conditions laid down by the provision have been fulfilled.

[Signatures]

* Language of the case: German.