Opinion of Advocate General Poiares Maduro delivered on 21 October 2004

Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg

Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria

Free movement of persons - Public policy - Directive 64/221/EEC - Articles 8 and 9 - Refusal of residence permit and deportation order on criminal grounds - Appeal only on the legality of the measure ending the right of residence of the claimant - Appeal having no suspensory effect - Right of the claimant to submit observations on appropriateness before a body liable to give an opinion - EEC-Turkey Association Agreement - Free movement of workers - Articles 6(1) and 14(1) of Decision No 1/80 of the Association Council

Case C-136/03

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1. The present case concerns two questions referred for a preliminary ruling by the Verwaltungsgerichtshof (Higher Administrative Court), Austria. By the first, the national court wishes to know whether Articles 8 and 9 of Directive 64/221/EEC (2) preclude a system under which there is a right of appeal only in respect of legal validity and without suspensory effect against decisions ordering the expulsion of Community nationals, where there is no competent authority within the meaning of Article 9(1) of the Directive. By the second question it asks whether the guarantees of judicial protection provided by the Directive may be applied to Turkish nationals under Decision No 1/80 of 19 September 1980 on the development of the Association, (3) adopted by the Association Council created by the Agreement establishing an Association between the European Economic Community and Turkey. (4)

I – Legal background

A – Community law

1. Directive 64/221

2. Article 1 provides that Directive 64/221 is to apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services. Article 2 states that the Directive relates to all measures concerning the issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.

3. Under Article 8, '[t]he person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration'.

4. Article 9 provides:

'1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.'

2. The EEC-Turkey Association

5. The aim of the Association, as stated in Article 2(1), is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, including in the area of employment, inter alia by progressively securing freedom of movement for workers (Article 12), in order to improve the standard of living of the Turkish people and to facilitate the accession of the Republic of Turkey to the Community at a later date (the fourth recital in the preamble and Article 28).

6. Articles 6, 7 and 14 of Decision No 1/80 are included in Section 1 ('Questions relating to employment and the free movement of workers') of Chapter II ('Social provisions') of that decision.

7. Article 6(1) 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.'

8. Article 7 of Decision No 1/80 concerns free access to employment for members of the family of a Turkish worker.

9. Article 14(1) of the Decision states: '[t]he provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health'.

B – National law

10. Paragraph 10(2)(3) of the Fremdengesetz (Federal Law on the entry, residence and establishment of aliens), in the version in force at the time of the facts in the main proceedings, provides that an alien may be refused a residence permit inter alia if his residence poses a threat to public peace, order or security.

11. Under Paragraph 34(1)(2) of the Fremdengesetz, aliens residing in federal territory pursuant to a residence permit or during the procedure for the issue of a new residence permit may be expelled where a ground for refusal precludes the issue of a further residence permit.

12. Paragraph 36(1)(1) and (2) of the Fremdengesetz provides that a ban on residence may be issued against an alien where, on the basis of specific facts, there are sound reasons for assuming that his residence threatens public security and order or is contrary to other public interests referred to in Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under Paragraph 36(2)(1), the final sentencing of an alien by a national court to a non-suspended term of imprisonment of over three months, a partially suspended term of imprisonment, a suspended term of imprisonment of over six months, or the conviction of that person on more than one occasion for criminal acts on the basis of the same criminal conduct are, in particular, to be regarded as a specific fact within the meaning of Paragraph 36(1).

13. Paragraph 48(1) of the Fremdengesetz provides that a ban on residence may be issued against nationals of the European Economic Area or beneficiary nationals of a non-member country only where public order or security is threatened as a result of their conduct. Paragraph 48(3) provides that, where such a person is subject to an expulsion order or a ban on residence, he must automatically be granted a one-month suspension of operation of the decision, unless considerations of public policy or national security require the immediate removal of the person concerned.

14. Under Paragraph 88(1) of the Fremdengesetz, it is the district administrative authority (Bezirksverwaltungsbehörde) that is to take a decision concerning bans on residence, unless stipulated otherwise.

15. Those decisions may be subject to appeal. The Austrian appeals system is organised in the following way. The appeal is first brought before the Sicherheitsdirektionen (Security Authorities). Under Articles 78a and 78b of the Bundesverfassungsgesetz (the Federal Constitutional Law; 'the B-VG'), the Sicherheitsdirektionen are administrative authorities bound by the instructions of the Minister for Internal Affairs. They are headed by the Sicherheitsdirektor, who is appointed by the Minister for Internal Affairs in consultation with the Landeshauptmann (head of the Government of the federal State).

16. In that regard, Paragraph 66 of the Allgemeine Verwaltungsverfahrensgesetz (Code of Administrative Procedure) provides:

'(1) The appeal authority shall instruct a lower authority to make necessary additions to the examination procedure or shall itself do so.

(2) Where the facts before the appeal authority are so inadequate that the conduct or repeat of oral proceedings appear to be unavoidable, the appeal authority may rectify the contested decision and remit the case to a lower authority for reconsideration and the issue of a fresh decision.

(3) However, the appeal authority may also itself conduct oral proceedings and hear evidence directly where time and costs are thereby saved.

(4) Other than in the case referred to in subparagraph (2), the appeal authority may, in so far as the appeal does not have to be dismissed as being inadmissible or out of time, always rule itself on the case. It is entitled to substitute the view of any lower authority with that of its own, both in the judgment and as regards the grounds and, accordingly, to amend the contested decision in any way.'

17. Subsequently, an appeal may be brought before the next two courts, the Verwaltungsgerichtshof (Higher Administrative Court) and the Verfassungsgerichtshof (Constitutional Court).

18. Article 130(1) of the B-VG provides that the Verwaltungsgerichtshof is to rule on appeals claiming that decisions of the administrative authorities, including the independent administrative chambers, are unlawful. Under Article 130(2), decisions are not unlawful where the law lays down no binding rules on the conduct of the administrative authorities and leaves the determination of such conduct to the authorities themselves and the authorities have exercised that discretion.

19. In that regard, Paragraph 30 of the Verwaltungsgerichtshofgesetz (Law on the Verwaltungsgerichtshof) provides:

'(1) Appeals shall not have suspensory effect by law ....

(2) The Verwaltungsgerichtshof shall, however, at the request of the appellant, grant suspensory effect by order in so far as this is not precluded by overriding public interests and, following consideration of all affected interests, the enforcement or exercise by a third party of the right granted by the decision would involve disproportionate detriment to the appellant. ...

(3) Decisions taken pursuant to subparagraph 2 shall be notified to all parties. Where suspensory effect is recognised, the authority shall suspend enforcement of the contested administrative act and make the orders

necessary in that regard. The party placed at an advantage by the contested decision may not exercise his entitlement.'

20. Paragraph 41(1) of the Verwaltungsgerichtshofgesetz provides that the Verwaltungsgerichtshof must review the contested decision on the basis of the facts of the case accepted by the defendant authority.

21. Paragraph 42(1) of the Verwaltungsgerichtshofgesetz provides that the Verwaltungsgerichtshof must give a ruling in each case. That ruling must, in principle, either dismiss the appeal as unfounded or annul the contested decision.

22. In the case of the Verfassungsgerichtshof, Article 144 of the B-VG states that that court is to rule only on the lawfulness of decisions in relation to a right guaranteed by the Constitution.

23. Under Paragraph 87(1) of the Verfassungsgerichtshofgesetz (Law on the Verfassungsgerichtshof), the Verfassungsgerichtshof is required to rule whether there has been an infringement of rights guaranteed by the Constitution or whether an appellant's rights have been infringed as a result of the application of an illegal regulation, an unconstitutional law or an unlawful treaty, and, where applicable, annul the contested administrative act.

24. In that regard, Paragraph 85 of the Verfassungsgerichtshofgesetz provides:

'(1) An appeal shall not have suspensory effect.

(2) However, the Verfassungsgerichtshof shall, at the request of the appellant, grant suspensory effect by order in so far as this is not precluded by overriding public interests and, following consideration of all the affected interests, the enforcement or exercise by a third party of the right granted by the decision would involve disproportionate detriment to the appellant. Where the requirements which were decisive in respect of the decision on the suspensory effect of the appeal have changed considerably, a fresh decision shall be taken at the request of the appellant, the authority (Paragraph 83(1)) or any other party concerned.

(3) Decisions taken pursuant to subparagraph 2 shall be notified to the appellant, the authority (Paragraph 83(1)) and any other party concerned. Where suspensory effect is recognised, the authority shall suspend enforcement of the contested administrative act and make the arrangements necessary in that regard. The party placed at an advantage by the contested decision may not exercise his entitlement.

(4) When the Verfassungsgerichtshof is not sitting, decisions pursuant to subparagraph 2 shall be adopted at the request of the senior administrator in the Chambers of the President of the Verfassungsgerichtshof.'

II – The dispute in the main proceedings and the questions referred for preliminary ruling

25. Mr Georg Dörr is a German national. He is married, has lived in Austria since 1992, together with his family since 1995, and pursues a professional activity there. He was sentenced to a term of imprisonment of 18 months, 12 of which were suspended, for, inter alia, serious fraud.

26. By decision of the Bezirkshauptmannschaft Klagenfurt (first-instance administrative authority of Klagenfurt) of 1 October 1998, a 10-year ban on residence was issued against Mr Dörr pursuant to Paragraph 48(1) and (3) and Paragraph 36(1)(1) of the Fremdengesetz.

27. After his appeal to the Sicherheitsdirektion for the Federal State of Carinthia had been dismissed by decision of 4 December 1998, pursuant to Paragraph 66(4) of the Allgemeine Verwaltungsverfahrensgesetz, Mr Dörr brought the matter before the Verwaltungsgerichtshof.

28. Mr Ibrahim Ünal is a Turkish national. He has been legally resident in Austria for several years and is employed there. The documents before the Court show that he has received two convictions for affray and one for contravention of the Führerscheingesetz (Driving Licence Law) resulting in fines.

29. By decision of 23 March 2001, the Bezirkshauptmannschaft Dornbirn (first-instance administrative authority of Dornbirn) ordered the expulsion of Mr Ünal, pursuant to Paragraph 34(1)(2) and Paragraph 10(2)(3) of the Fremdengesetz.

30. After his appeal to the Sicherheitsdirektion for the Federal State of Vorarlberg had been dismissed by decision of 3 October 2001, pursuant to Paragraph 66(4) of the Allgemeine Verwaltungsverfahrensgesetz, Mr Ünal brought the matter before the Verwaltungsgerichtshof.

31. TheVerwaltungsgerichtshof joined the two sets of proceedings for the purpose of joint deliberation and resolution. As it was unsure whether the judicial review provided for by the Austrian legal system was compatible with the requirements laid down by Directive 64/221, and whether those requirements were applicable to Turkish workers, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public-health ("the Directive") to be interpreted as meaning that the administrative authorities may not – notwithstanding the existence of an internal appeal facility – take a decision ordering expulsion from the territory without obtaining an opinion from a competent authority within the meaning of Article 9(1) of the Directive (for which no provision is made in the Austrian legal system) – save in cases of urgency – where appeals against their decisions may be lodged with the courts of public law only subject to the following limitations: such appeals have no suspensory effect and the courts are barred from taking a decision on the appropriateness of the measures adopted and are able merely to annul the contested decision? Moreover, is one court (the Verwaltungsgerichtshof) limited, as regards the findings of the facts, to an examination of whether the conclusions based on the facts are warranted (Schlüssigkeitsprüfung), and the other (the Verfassungsgerichtshof) also limited to an examination of the infringement of rights guaranteed by the constitution?

2. Are the guarantees of judicial protection provided by Articles 8 and 9 of the Directive referred to in paragraph 1 to be applied to Turkish nationals whose legal status is defined by Article 6 or Article 7 of Decision No 1/80'?

32. Written observations have been submitted by Mr Dörr, Mr Ünal, the Austrian and German Governments and the Commission. All of the parties, with the exception of the German Government, were represented at the hearing held on 8 September 2004.

III – Observations submitted to the Court

33. As regards the first question, the appellants in the main proceedings maintain that Directive 64/221 precludes the Austrian system. Measures imposing a ban on residence cannot be enforced until an opinion has been obtained from an authority that is independent of the authority responsible for controlling aliens. That authority must be expressly designated by law and each person concerned must be guaranteed the right to refer his case to it.

34. The Commission shares that view. Appeals brought against decisions imposing a ban on residence relate only to the legal validity of the decisions and do not have automatic suspensory effect. In those circumstances, the fact that the Austrian system does not have a competent authority within the meaning of Article 9 of Directive 64/221 renders it incompatible with the Directive.

35. The German and Austrian Governments take the view, on the contrary, that the Austrian system is compatible with Directive 64/221. The Austrian Government submits that the judicial review provided for is not restricted to the legal validity of a decision ordering expulsion but includes an examination of the errors of assessment marring a decision. To that extent, it is similar to the system accepted by the Community case-law, which is sometimes limited to a review of manifest errors of assessment or misuse of powers. (5) Furthermore, it should be remembered that suspensory effect may be granted. The German Government also emphasises the fact that the Verwaltungsgerichtshof also reviews the evaluation of the evidence on which the decision ordering expulsion is based. This constitutes, to a certain extent, a review of the facts.

36. So far as concerns the second question, Mr Ünal cites the case-law according to which it is necessary to extend, so far as possible, the principles enshrined in Article 39 EC (6) to Turkish workers accorded rights under Decision No 1/80. The minimum legal protection afforded by the procedural guarantees provided by Directive 64/221 must be capable of being applied within the context of Decision No 1/80.

37. The Commission maintains that nothing prevents the line of argument developed by the Court of Justice, in paragraphs 56 to 64 of the judgment in *Nazli*, (7) concerning the need to harmonise the legal status of Turkish nationals legally resident in a Member State with that of the nationals of the Member States of the Community, from being extended to cover the procedural safeguards provided by Directive 64/221. If the procedural safeguards mentioned in Articles 8 and 9 of Directive 64/221 were not applicable to Turkish workers, the Member States would have full discretion to make it impossible for them to exercise their rights under Decision No 1/80.

38. The Austrian Government takes the view that the relevant provisions of Directive 64/221 clarify Article 39 EC, but that that they cannot be directly inferred from that article. In order to be applicable to Turkish workers, those provisions would require an additional legal measure which has not been adopted by the Association Council.

39. The German Government submits that secondary Community legislation cannot be applied to Turkish workers in the absence of express provisions. Given that the provisions of Articles 8 and 9 of Directive 64/221 must not be regarded as specific to the free movement of workers, it is by no means established that they must be applied by analogy to Turkish workers. The German Government acknowledges that judicial protection against administrative decisions is a general principle of Community law. However, the safeguards provided for in Articles 8 and 9 of Directive 64/221 do not have the same scope as the principle of judicial protection enshrined in primary law.

40. Those two governments maintain that the arguments outlined by the Court in *Nazli* do not conflict with their interpretation, because that judgment concerns, in essence, the interpretation of the concept of public policy established in Article 14(1) of Decision No 1/80, not the procedural aspects contained in Directive 64/221.

IV – Assessment

A – The first question

41. It seems to me that the reply to this question may easily be inferred from the case-law. In paragraph 6 of the operative part of the judgment of 29 April 2004 in *Orfanopoulos and Oliveri*, (8) which was delivered after the reference in the present case was made, the Court held that 'Article 9(1) of Directive 64/221 precludes a provision of a Member State which provides neither a complaints procedure nor an appeal, comprising also an examination of expediency, against a decision to expel a national of another Member State taken by an administrative authority, where no authority independent of that administration has been put in place'.

42. Support for this interpretation is found in the following passages: '[t]he object of Article 9(1) of Directive 64/221 is to ensure a minimum procedural safeguard for persons affected by a decision ordering their expulsion from the territory. That article, which applies in three cases, namely where there is no right of appeal to a court of law, where such an appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, provides for the intervention of a competent authority other than that empowered to take the decision. Save in cases of urgency, the administrative authority may not take its decision until an opinion has been obtained from the other competent authority. The person concerned must enjoy such rights of defence before the latter authority and of assistance or representation as the domestic law of that country provides for' (paragraph 105). (9) It is also clear from the Court's case-law that the intervention on the part of the competent authority 'must make it possible for an exhaustive examination to be made of all the facts and circumstances, including the expediency of the measure in question, before the decision is definitively adopted ... . The Court has also stated that, save in urgent cases, the administrative authority may not take its decision until an opinion has been obtained from the competent authority' (paragraph 106). (10)

43. This procedural safeguard is provided by the Court in order to 'permit persons affected by decisions ordering their expulsion the safeguard of an exhaustive examination of the expediency of the measure in question' and to 'meet the requirements of sufficiently effective protection' (paragraph 110). (11) In so far as it appears that the actions brought to challenge a decision of expulsion relate only to its legal validity, the Court points out that it is necessary 'to establish whether the requirement is met for the intervention of a competent authority other than that empowered to take the decision and, as the case may be, whether such intervention satisfies the conditions set out in paragraph 106 of this judgment', cited above (paragraph 113). The Court also points out that Directive 64/221 'leaves a discretion to the Member States as regards the designation of the authority. Any public authority independent of the administrative authority called on to adopt any of the measures provided for by that directive may be regarded as such an authority; it must be organised in such a way that the person concerned has the right to be represented and to defend himself before it' (paragraph 114). (12)

44. The application of those criteria to the present case is a matter for the national court alone. However, it is for the Court of Justice to provide any ruling on Community law which, according in particular to the order for reference, that court may need in order to enable it to apply them. In the present case, it is clear from the order for reference that, in the Austrian legal system, legal actions to challenge a decision of expulsion suffer from two major limitations. Appeals brought before the Verwaltungsgerichtshof and the Verfassungsgerichtshof do not automatically have suspensory effect. Furthermore, those courts are precluded from examining the expediency of the measures in question.

45. There can be no doubt that such limitations on judicial protection are contrary to Community law, unless they are offset by the prior intervention of an independent authority having the characteristics described in the case-law cited in paragraph 43 above. Even if it were established that suspension of the decision of expulsion may in fact be obtained as a matter of course from the Austrian courts, as the Austrian Government claims, the lack of a provision dealing with automatic suspension in the applicable legislation seems to me to be contrary to the requirements of the Directive, for obvious reasons of legal certainty. In any event, the mere fact that the appeals in question do not allow a court to review the expediency of the measures is enough to confer a right to the minimum procedural safeguard provided for in Article 9 of Directive 64/221.

46. I understand a review of expediency to mean an in-depth examination of the situation of the person concerned and the opportunity to decide the best possible solution in the light of the circumstances of the case. This definition renders completely ineffective the argument that the Austrian courts are able to review abuses of powers and errors of assessment. That possibility falls short of the requirements laid down by Directive 64/221 as interpreted by the Court, according to which it must be possible, in judicial proceedings, to obtain an exhaustive examination of the facts and of the expediency of the measure in question. (13)

47. I also take the view that the case-law relating to the existence in Community law of a limited judicial review, cited by the Austrian Government, (14) is irrelevant to the present case. That case-law has been developed in the specific context of the spheres of Community law involving complex economic or technical assessments. (15) It cannot be transposed outside the spheres within which it was developed.

48. In that regard, the Austrian Government bases its arguments inter alia on the judgment in Case C-120/97 *Upjohn* [1999] ECR I-223. In that judgment, the Court acknowledged that, 'where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion' (paragraph 34). In those circumstances, the Court declared, in paragraph 35 of the judgment, that 'Community law does not require the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations, taken pursuant to Directive 65/65 and in the exercise of complex assessments, which involves a more extensive review than that carried out by the Court in similar cases'.

49. It is therefore clear that that limited judicial review is justified by reasons of a practical nature relating to the economic or technical complexity of the assessments made in specific matters. Such a review can be applied only to national situations similar to those governed by those spheres of Community law. The present case, however, concerns measures of law and order which have a direct and significant impact on personal freedom. No reason of a practical nature can justify a limited review of such decisions; on the contrary, it seems especially necessary, in that sphere, to carry out an in-depth judicial review.

50. The question may be raised at this stage as to whether the minimum protection provided for by the Directive is compatible with the fundamental right to effective judicial protection. It seems to me that the mere existence of an independent authority with the power to give a prior opinion on a decision to expel cannot replace or compensate for the lack of full and thorough judicial review which ought, in any event, to be guaranteed. Let us remember that, in his Opinion in *Shingara and Radiom*, (16) Advocate General Ruiz-Jarabo Colomer concluded that the minimum safeguard provided by the Directive is not in conformity with the right of citizens to judicial protection, a right upheld by the Court as a general principle of Community law. Although the Court has not yet had the opportunity to give a ruling on this point, I consider that the line of argument pursued in that Opinion should be followed.

51. However, in the present case there is no need to consider that matter. It need only be stated that the national law currently in force does not meet the requirements laid down by Directive 64/221. I accordingly take the view that Articles 8 and 9 of Directive 64/221 preclude the administrative authorities, under a judicial appeals system such as that described in the order for reference, from taking a decision ordering expulsion from the territory without first obtaining an opinion from a competent authority in accordance with Article 9(1) of the Directive.

B – The second question

52. The national court inquires whether the minimum procedural safeguards laid down by Directive 64/221 may and should be transposed to Decision No 1/80.

53. It ought to be pointed out that, under Article 12 of the Association Agreement, '[t]he Contracting Parties agree to be guided by Articles 48, 49 and 50 [now, after amendment, Articles 39 EC, 40 EC and 41 EC] of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them'. 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, (17) lays down the timetable for the progressive attainment of freedom of movement for workers between the Member States of the Community and Turkey and states that 'the Council of Association shall decide on the rules necessary to that end'.

54. On the basis of those provisions the Association Council, which was established by the Association Agreement in order to ensure the implementation and progressive development of the Association, adopted Decision No 1/80, which, according to the third recital in its preamble, is intended to improve, in the social field, the treatment accorded to workers and members of their families. The provisions of Section 1 of Chapter II of Decision No 1/80 thus constitute a further stage in securing freedom of movement for workers on the basis of Articles 39 EC, 40 EC and 41 EC. (18)

55. In that respect, the Court has consistently concluded from the wording of Article 12 of the Association Agreement and Article 36 of the Additional Protocol, as well as from the objective of Decision No 1/80, that the principles enshrined in Articles 39 EC, 40 EC and 41 EC must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by Decision No 1/80. (19) In its judgment in *Nazli*, the Court inferred therefrom that 'when determining the scope of the public policy exception provided for by Article 14(1) of Decision No 1/80, reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a Member State of the Community. Such an approach is all the more justified because Article 14(1) is formulated in almost identical terms to Article 48(3) of the Treaty.' (20)

56. The intervening governments put forward two objections to the extension of that case-law to the provisions of Directive 64/221.

57. By the first, they suggest that that case-law concerns only primary law. It is not applicable to secondary legislation relating to the free movement of workers. Consequently, the application of those specific provisions of Directive 64/221 ought to be refused. That objection is unfounded. It must be pointed out, first, that the Association Agreement does not mention only Article 39 EC. In Article 12, it also mentions Article 40 EC, which constitutes the legal basis for the adoption of 'the measures required to bring about freedom of movement for workers, as defined in Article 39'. Directive 64/221 is based not only on Article 56(2) of the EC Treaty (now, after amendment, Article 46(2) EC) but also on Regulation No 15 on initial measures to bring about free movement of workers within the Community, (21) which was adopted on the basis of Articles 48 and 49 of the EC Treaty. There is therefore a clear link between the regulatory framework of the Association and the Community measures adopted in respect of the free movement of workers.

58. Furthermore, the Court has already had the opportunity to transpose measures of secondary legislation to Turkish workers in connection with the application of Decision No 1/80. Thus, in its judgment in*Wählergruppe Gemeinsam*, (22) the Court looked to the provisions of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (23) in order to interpret Decision No 1/80, since '[t]he aim of Regulation No 1612/68 is ... solely to clarify the requirements of Article 48'. (24) Similarly, in *Cetinkaya*, Advocate General Léger suggested that the Court transpose the interpretation of Article 3 of Directive 64/221 to the context of Article 14 of Decision No 1/80. (25) The purpose of the provisions of Directive 64/221 is inter alia to specify the detailed rules for the application of the public policy exception referred to in Article 39(3) EC and, in similar terms, in Article 14 of Decision No 1/80. It follows that, in the interpretation of Decision No 1/80, recourse should also be had to the provisions of secondary legislation which specify or clarify the rules of the Treaty relating to workers, particularly the provisions of Directive 64/221.

59. The other objection is derived from the fact that the provisions in question in this case are of a procedural nature. Such provisions do not form part of the rules concerning freedom of movement which may be extended to Turkish workers enjoying rights conferred by Decision No 1/80. In my view, this objection is equally unfounded. Let us remember that Article 6 of Decision No 1/80, which has been acknowledged to have direct effect, creates an individual right of access to the employment market and a correlative right of residence. (26) It must be possible, if that individual right is to be effective, to invoke it before a competent authority which will protect it. The procedural safeguards laid down in Article 9 of Directive 64/221 must not be regarded merely as technical rules unconnected with the substantial rights conferred on individuals. On the contrary, they safeguard and protect those rights. They are therefore fundamental guarantees required to ensure the effectiveness of those rights and of the principle of the free movement of workers. In that sense, they are inseparable from that principle and those rights. To the extent to which the substantive rights conferred on nationals of the Member States have been extended to Turkish nationals under Decision No 1/80, the procedural protection granted by Community law for the assertion of those rights must also be afforded to such nationals. There is no justification for establishing a separate, lower level of protection for the rights conferred by Decision No 1/80.

60. In those circumstances, the reply to be given to the second question referred for a preliminary ruling is that the procedural guarantees provided by Articles 8 and 9 of Directive 64/221 apply to Turkish nationals whose legal status is defined by Article 6 or Article 7 of Decision No 1/80.

V – Conclusion

61. In the light of the foregoing, I propose that the Court reply as follows to the questions raised in this case:

(1) Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, must be interpreted as meaning that the administrative authorities of a Member State may not take a decision ordering expulsion from its territory without first obtaining an opinion from a competent authority within the meaning of Article 9(1) of the Directive where appeals against its decision may be lodged with the courts of public law only subject to the following limitations: such appeals do not have suspensory effect, and the courts are barred from taking a decision on the expediency of the measures adopted and are able merely to annul the contested decision.

(2) The procedural guarantees set out in Articles 8 and 9 of Directive 64/221 apply to Turkish nationals whose legal status is defined by Article 6 or Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association.

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1 – Original language: Portuguese.

2 – Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117).

3 – Decision No 1/80, which came into force on 1 July 1980, may be inspected in the *EEC-Turkey Association Agreement and other relevant documents*, Office for Official Publications of the European Communities, Brussels, 1992.

4 – Agreement signed on 12 September 1963 in Ankara between the Republic of Turkey and the Member States of the EEC and the Community, ratified and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (JO 1964 217, p. 3685, 'the Association Agreement').

5 – The Austrian Government refers to the judgments in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 24 and 25, Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 39, and Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 34.

6 – He refers inter alia to Case C-171/95 *Tetik* [1997] ECR I-329, paragraph 20.

7 – Case C-340/97 *Nazli* [2000] ECR I-957.

8 – Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-0000.

9 – The Court refers to the judgments in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 62, and Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraphs 29 to 31.

10 – The Court refers to the judgments in Case 98/79 *Pecastaing* [1980] ECR 691, paragraph 17; Case 131/79 *Santillo* [1980] ECR 1585, paragraph 12; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 15, and *Dzodzi*, cited above, paragraph 62.

11 – The Court refers to the judgments in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 17, and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15.

12 – As is clear from paragraph 19 of the judgment in *Santillo*, cited in footnote 10.

13 – *Orfanopoulos and Oliveri*, cited above in footnote 8, paragraphs 110 and 113.

14 – See the summary of its observations in point 35 of this Opinion.

15 – There are many such spheres. I would mention, among the spheres in which this case-law developed originally, the sphere of competition rules and that of the common agricultural policy. See, in general, Molinier, J., 'Le contrôle juridictionnel et ses limites: à propos du pouvoir discrétionnaire des institutions communautaires', in Rideau, J., (ed.), *De la Communauté de droit à l'Union de droit. Continuités et avatars européens*, LGDJ, Paris, 2000.

16 – Opinion delivered on 26 November 1996 in Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343.

17 – OJ, English Special Edition 1972 (I), p. 15.

18 – Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraphs 14 and 19, *Tetik*, cited in footnote 6, paragraph 20, and Case C-210/97 *Akman* [1998] ECR I-7519, paragraph 20.

19 – See, to that effect, *Bozkurt*, cited in footnote 18, paragraphs 14, 19 and 20; *Tetik*, cited in footnote 6, paragraphs 20 and 28; Case C-36/96 *Günaydin* [1997] ECR I-5143, paragraph 21; Case C-98/96 *Ertanir* [1997] ECR I-5179, paragraph 21; and Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 23.

20 – Judgment cited in footnote 7, paragraph 56.

21 – JO 1961 57, p. 1073.

22 – Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301.

23 – OJ, English Special Edition 1968 (II), p. 475.

24 – Paragraph 83 of the judgment.

25 – Point 63 of the Opinion delivered on 10 June 2004 in Case C-467/02 *Cetinkaya*, judgment of 11 November 2004, [2004] ECR I-0000.

26 – Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 29 and 31; Case C-237/91 *Kus* [1992] ECR I-6781, paragraph 33, and *Tetik*, cited in footnote 6, paragraphs 26, 30 and 31.