Opinion of Advocate General Mischo delivered on 8 July 1999

Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg

Reference for a preliminary ruling: Verwaltungsgericht Ansbach – Germany

EEC-Turkey Association Agreement - Freedom of movement for workers - Articles 6(1) and 14(1) of Decision No 1/80 of the Association Council - Registration as duly belonging to the labour force of a Member State - Turkish worker detained pending trial and subsequently sentenced to a suspended term of imprisonment - Expulsion on general preventive grounds

Case C-340/97

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Opinion of the Advocate-General

1. The Bayerisches Verwaltungsgericht Ansbach (Bavarian Administrative Court, Ansbach) (Germany) has pending before it an appeal brought by a Turkish national, Mr Nazli, and his minor children against a decision taken by the competent administrative authorities ordering his expulsion from Germany.

2. The national court has found no grounds, either in German law or in the European Convention on Establishment, to justify setting aside that decision, but is uncertain as to whether the appeal may be well-founded under Community law, and in particular under Decision No 1/80 of the Association Council (set up by the Association Agreement between the European Economic Community and Turkey) of 19 September 1980 on the development of the Association (hereinafter Decision No 1/80).

3. Mr Nazli has lived in Germany since 1978, and from 1979 to 1989 was in continuous paid employment, with appropriate work and residence permits, for the same employer. He was therefore entitled to rely on Article 6 of Decision No 1/80, which provides, in the third indent of paragraph 1, that a Turkish worker duly registered as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment. Moreover, in 1989 he obtained a work permit of unlimited duration.

4. In 1992 he was implicated in a case of drug trafficking, for which he was detained pending trial from 11 December 1992 to 21 January 1994 and then sentenced, by a judgment of the Landesgericht Hamburg of 20 April 1994 against which he did not appeal, to a suspended term of imprisonment of 21 months.

5. Since 2 January 1995 he has been in permanent paid employment again. In the meantime, however, his residence permit expired on 31 December 1994 and, despite an administrative appeal, he was unable, because of his criminal record, to obtain an extension of that permit since the administrative authorities took the view that grounds of public policy, for which Decision No 1/80 expressly provides in Article 14(1), precluded his residence in Germany.

6. The national court's uncertainties stem from two findings. Firstly, at the time of his detention pending trial Mr Nazli held an unlimited work permit and after his release it was possible for him, by virtue of the fact that the sentence imposed was suspended, to take up paid employment again.

7. Secondly, the criminal court set out fully, in the grounds of its judgment, the reasons which led it to impose on Mr Nazli a sentence which appeared light in view of the seriousness of the offence in which he had been implicated, a transaction involving 1 500 grams of heroin.

8. In particular, the court took into account, in fixing the length of the sentence and suspending it, the fact that Mr Nazli had shown sincere remorse and was dismayed by what he had done and its consequences, that the role which he had played in the commission of the offence had been minor, that he had learnt all the necessary lessons and was unlikely to re-offend and, finally, that he was socially well integrated.

9. According to the court making the reference, it is clear from those findings made by the criminal court that the decision ordering expulsion, of which Mr Nazli is the subject, cannot be justified on special preventive grounds, which means that it can be justified only on general preventive grounds. However, the permissibility of such grounds presupposes, in the case of a Turkish worker deriving rights from Article 6 of Decision No 1/80, that they do not conflict with Article 14 of that decision.

10. On account of those uncertainties, the national court has submitted the following two questions:

1. Does a Turkish worker, who has achieved the legal status conferred by the third indent of Article 6(1) of Decision No 1/80 of the Association Council (set up by the Association Agreement between the European Economic Community and Turkey) of 19 September 1980 on the development of the Association, forfeit that status subsequently if he is detained on strong suspicion of having committed a crime for which he is ultimately convicted and given a suspended prison sentence?

2. If not:

Is the expulsion of a Turkish worker in such circumstances solely on general preventive grounds, that is to say as a deterrent to other aliens, compatible with Article 14(1) of Decision No 1/80?

The consequences of detention pending trial and of a suspended prison sentence for the status of a Turkish worker

11. The first question raised by the national court must, it seems to me, be subdivided into two separate questions, one concerning the effects of the detention pending trial of a Turkish worker and the other concerning the consequences for him of a suspended prison sentence.

12. I shall begin by considering the first subquestion, making it clear that I am merely putting myself in the position of the court making the reference, which is required to rule on Mr Nazli's appeal, that is to say the situation in which a Turkish worker, at the time of his arrest, is entitled to rely on the third indent of 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 enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

13. During the oral procedure, the plaintiff in the main proceedings, referring to the position adopted by the French Government and the Commission in their written observations, maintained that a worker who has acquired the right in question may not be deprived of it on any ground other than prejudice to the requirements of public policy.

14. I do not believe that to be the case. As I have argued in detail in my Opinion of 3 June 1999 in the Ergat case (C-329/97), which is currently pending before the Court, I take the view that, even after four years of legal employment in the host Member State, a Turkish worker does not thereby acquire a right of residence which is unconditional and of unlimited duration.

15. That conclusion is drawn, firstly, from the Bozkurt judgment, in which the Court stated that:

Article 6 of Decision No 1/80 covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State because he has, for example, reached retirement age or, as in the present case, become totally and permanently incapacitated for work.

Consequently, in the absence of any specific provision conferring on Turkish workers a right to remain in the territory of a Member State after working there, a Turkish national's right of residence, as implicitly but necessarily guaranteed by Article 6 of Decision No 1/80 as a corollary of legal employment, ceases to exist if the person concerned becomes totally and permanently incapacitated for work.

Furthermore, as far as Community workers are concerned, the conditions under which such a right to remain may be exercised were, under Article 48(3)(d) of the Treaty, made subject to regulations to be drawn up by the Commission, with the result that the rules applicable under Article 48 cannot simply be transposed to Turkish workers.

16. Moreover, the operative part of the Tetik judgment states

that a Turkish worker who has been legally employed for more than four years in a Member State, who decides voluntarily to leave his employment in order to seek new work in the same Member State and is unable immediately to enter into a new employment relationship, enjoys in that State, for a reasonable period, a right of residence for the purpose of seeking new paid employment there, provided that he continues to be duly registered as belonging to the labour force of the Member State concerned, complying where appropriate with the requirements of the legislation in force in that State, for instance by registering as a person seeking employment and making himself available to the employment authorities.

17. It follows, by contrary inference from that judgment, that a worker who remains, beyond a reasonable period, in a situation of voluntary unemployment forfeits his right of residence.

18. The right of free access to any paid employment, and the right of residence which is its corollary, may therefore be forfeited even in situations where no prejudice to the requirements of public policy can be shown to have been caused by the Turkish worker.

19. Article 6(2) of Decision No 1/80 lists various specific situations in which acquired rights are not forfeited. That provision is worded as follows:

Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.

20. In the Bozkurt judgment, at paragraph 38, the Court made it clear that the paragraph in question applies particularly in calculating the length of the period of legal employment required in order to acquire the right of free access to any paid employment. It does not, therefore, apply only to that calculation, but also when it is a question of preserving that right once it has been acquired.

21. Article 6(2) of Decision No 1/80 distinguishes two categories of interruption of employment, to which it attributes different consequences. In one category, comprising situations in which the employee retains his position within the undertaking, such interruptions are treated as periods of legal employment, and it is difficult to see how it could be otherwise. It would not occur to anyone to claim that an employee whose employer has authorised him to take his annual holiday has left the labour force, since any paid employment involves alternating periods of work and rest.

22. The other category comprises situations in which the worker is no longer employed and cannot be held responsible for that inactivity, but it is also not known when he will work again. Such interruptions of employment are not treated as periods of legal employment, but nevertheless do not lead to the worker being excluded from the lawful labour force, as he would be if, for example, he became totally and permanently incapacitated for work or returned to Turkey for a long period.

23. The worker is no longer in paid employment, but he retains the right of access to employment which he had acquired by virtue of his employment prior to the event which, against his will, excluded him from the labour force.

24. It has manifestly been sought to minimise the consequences for a Turkish worker of events regarded as hazards of life by not allowing forfeiture of the right to work to complicate still further the situation, by definition difficult, of a person who loses his job or who falls ill without any prospect of a speedy recovery.

25. Clearly, a Turkish worker who, like Mr Nazli, is detained pending trial is not in any of the situations provided for by Article 6(2) of Decision No 1/80.

26. Is that to say, as was held to be the case by the German administrative authorities, that he no is longer duly registered as belonging to the labour force and has forfeited the rights which he had acquired under the third indent of Article 6(1) of Decision No 1/80?

27. That would certainly be the case if Article 6(2) had to be interpreted as listing exhaustively all the situations in which the lack of actual paid employment does not have such a consequence for a Turkish worker.

28. That, however, is not the interpretation adopted by the Court. It has held that a Turkish worker who is unemployed cannot lose rights which he has acquired as regards employment and, as the corollary of that, residence, unless it is established that he has definitively left the labour force of the host Member State.

29. That leaving must be objectively assessed, with the result that both a worker who has voluntarily given up his job in order to return to live in Turkey and one who, in the language of the Bozkurt judgment, has reached retirement age or been the victim of an accident at work which has caused him to become totally and permanently incapacitated for work must be considered to have left that labour force.

30. On the other hand, it is clear from the Tetik judgment that a Turkish worker who is not employed at a particular time must not automatically be regarded as having left the labour force because he does not fit into any of the categories provided for by Article 6(2) of Decision No 1/80.

31. While it is thus established that a period of unemployment not covered by any of the situations expressly provided for by Article 6(2) of Decision No 1/80 does not always lead to forfeiture of the rights acquired as the result of preceding periods of employment, it remains to be ascertained whether the prevailing interpretation in the case-law of that provision as protecting the rights of a Turkish worker can be applied to the advantage of a Turkish worker whose unemployment is somewhat unusual in that it is attributable to detention pending trial ordered by a court.

32. In order to answer this question, it is necessary to take into account the very nature of detention pending trial and to refer to fundamental principles of criminal law and criminal procedure.

33. By definition, detention pending trial is temporary in character since it automatically ends once the court having jurisdiction has decided whether the accused is guilty and has either ordered his release, having found him not guilty, or imposed a non-custodial sentence on him, or ordered his imprisonment so that he can serve a prison sentence which it has imposed on him.

34. In this latter case, an accused who has been detained prior to judgment will continue to be detained thereafter but no longer on the same basis, which is of crucial importance in legal terms, even though the distinction may not be very noticeable to the person concerned.

35. It could be objected to the emphasis on that distinction that, in the case of a prison sentence, the period of detention pending trial can be counted towards the term of imprisonment imposed by the court (which was not the case in the main proceedings, however, since the whole of the sentence imposed on Mr Nazli was suspended).

36. Although that is true, it does not alter the fact that, depending on the requirements of the investigation, the person concerned could, at any time during his imprisonment by way of detention pending trial, have been released and thus been able to take up his employment again.

37. The counting of detention pending trial towards the sentence is an act of clemency aimed at limiting the deprivation of liberty strictly to the period of imprisonment deemed necessary by the court in order to penalise the offence. There can be no question of deriving adverse consequences from it for the worker, who was imprisoned, not because he had been convicted, but because the operation of the judicial system required it.

38. I thus come to a second characteristic of detention pending trial: its nature as a measure which, for the purpose of the proper working of the criminal justice system, imposes on an individual a particular burden, namely, the loss of his freedom to come and go as he chooses.

39. In a society which proclaims its commitment to human rights and fundamental freedoms, such loss of liberty must be limited to a strict minimum. Moreover, that is certainly how detention pending trial is envisaged by the legislatures of the various Member States. It is not possible here to undertake a comparative examination of that system in the fifteen Member States, but it should be borne in mind that, as a general rule, the existence of serious evidence against an accused person is not, in itself, sufficient ground for detaining a suspect pending trial. Imprisonment must be genuinely necessary for the purposes of the investigation, in order, for example, to prevent pressure on witnesses or contact between co-accused persons, or where there are serious risks to the requirements of public policy, such as that posed by the reappearance of the presumed kidnapper in a neighbourhood where a child has been abducted.

40. The present legislative trend is, moreover, very noticeably towards ever stricter control over the use and duration of detention pending trial, including the fixing of a maximum period which may be exceeded only in exceptional and clearly-defined circumstances.

41. In the light of that trend it would, to say the least, be somewhat inconsistent to declare that a Turkish worker detained pending trial in order to enable justice to be dispensed under optimal conditions has culpably excluded himself from the lawful labour force.

42. Those considerations seem to me sufficient in themselves to show that detention pending trial cannot mean expulsion from the labour force. However, there is another reason which absolutely precludes such an interpretation, namely, the presumption of innocence, which is enshrined in Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

43. That presumption implies that, until the day when the court having jurisdiction, by a decision constituting res judicata, determines whether he is guilty, an accused person is presumed innocent and, accordingly, may not be punished for offences which he is suspected of committing.

44. The presumption of innocence must be construed in a particularly strict manner, so that any form of punishment, including deprivation of the right of access to employment, must be regarded as prohibited as long as the accused, not having been tried, is entitled to invoke that presumption.

45. The presumption of innocence is not amenable to any restriction and is in no way called into question by detention pending trial, which, as I have pointed out above, has its justification and rationale in the requirements of the investigation, and certainly not in punishment.

46. I can therefore only conclude that the fact that Mr Nazli was detained pending trial for 13 months did not have the effect of causing him to forfeit the rights which he had previously acquired under the third indent of Article 6(1) of Decision No 1/80.

47. I thus come to the second issue raised by the national court's first question, namely, that of the possible consequences for those same rights of a suspended prison sentence.

48. This seems to me to necessitate only some very brief arguments. Suspension of the prison sentence allows the convicted person to remain free or, if he had been detained pending trial, to regain his freedom and therefore to engage in paid employment.

49. The very objective of suspension is to prevent the convicted person from becoming cut off from society by his imprisonment and to enable him to retain, or to resume, a completely normal lifestyle, which includes the pursuit of an occupation. It would go directly against that objective to combine the imposition on a Turkish worker of a suspended prison sentence with the loss of the right to engage in paid employment.

50. Moreover, to do so would be to couple the sentence passed, which the court, after full and objective consideration of all the material in the file, in particular the seriousness of the offence, the previous convictions of the person concerned and his prospects of reintegration, specifically wanted to mitigate, with a very severe penalty, since the person concerned, by losing the right to work, would also lose the right of residence.

51. To exclude a Turkish worker in that way would be in flagrant conflict with the possibility of reintegration, which the criminal court intended to leave open because it did not believe it to be unrealistic. It should also be noted that, in certain types of case, where suspension has attached to it conditions imposed on the convicted person in order to give the process of reintegration the maximum prospect of success, the requirement to engage in legal employment is invariably one of those conditions.

52. To deprive a Turkish worker of the possibility of satisfying that requirement would run directly counter to the treatment which the criminal court had deemed it appropriate to apply to the offender and would, moreover, in those circumstances, lead to the revocation of suspension, which is provided for in all cases where the convicted person fails to comply with the requirements imposed on him.

53. The unavoidable conclusion is therefore that, just as with detention pending trial, even though for different reasons, the imposition on a Turkish worker of a suspended prison sentence does not have the effect of depriving him of the rights which he may have acquired previously under the third indent of Article 6(1) of Decision No 1/80.

54. However, it is a different question, which is also raised by the national court, whether a Turkish worker in Mr Nazli's situation can be the subject of a measure ordering his expulsion on the ground of safeguarding public policy.

Whether a Turkish worker may be expelled on general preventive grounds

55. As noted above, the court making the reference takes the view that, in the light of the grounds of the judgment sentencing Mr Nazli to a suspended prison term of 21 months, it is impossible to find any special

preventive grounds on which to justify his expulsion, with the result that the expulsion must be regarded as having been decided on general preventive grounds.

56. The question before us is therefore whether Decision No 1/80 authorises expulsion based on such grounds. It is clear from Article 14(1) of the decision that the provisions of Section 1 of Chapter II, concerning questions relating to employment and the free movement of workers, shall be applied subject to limitations justified on grounds of public policy, public security or public health.

57. If we were dealing with an expulsion, based on those grounds, by a Member State of a worker of another Member State, there would be no doubt about the answer.

58. Article 3 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 provides, in paragraphs 1 and 2, that Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures. That article has been interpreted by the Court as [preventing] the deportation of a national of a Member State if such deportation is ordered for the purpose of deterring other aliens, that is, if it is based ... on reasons of a "general preventive nature".

59. In the case of Turkish workers, however, there is no similar clarification, by an implementing provision, of what is covered by limitations justified on grounds of public policy.

60. Hence the confrontation between two views: on the one hand, that taken by the city of Nuremberg and the German Government and, on the other hand, that taken by Mr Nazli, the French Government and the Commission.

61. According to the first view, the requirements of public policy, as recognised by Article 14 of Decision No 1/80, must be construed in the conventional manner, that is to say very broadly, and therefore include general prevention. The fact that Article 12 of the Association Agreement states that the Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them does not in any way preclude that interpretation.

62. Apart from the fact that that provision is programmatic in nature, the prohibition of recourse to expulsion on general preventive grounds cannot be derived from Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and was introduced, for Community nationals only, by Directive 64/221.

63. According to the second view, although the situation of a Turkish worker is not identical to that of a worker of a Member State, if only because the former has not been granted the right to freedom of movement enjoyed by the latter, it is nevertheless possible and, as the Court held in the Bozkurt judgment at paragraph 20, would even seem to be essential in the light of Article 12 of the Association Agreement, to apply, whenever possible, the principles enshrined in Article 48 of the Treaty to Turkish workers.

64. Although the prohibition of measures ordering expulsion on general preventive grounds is indeed laid down only by Article 3 of Directive 64/221, that prohibition can equally be inferred from a reasonable interpretation of Article 48 of the Treaty and can therefore be extended to Turkish workers, as a principle enshrined in Article 48, notwithstanding the absence in their case of any provision analogous to Article 3 of Directive 64/221.

65. In support of that view, reference is made by Mr Nazli to the Royer judgment, in which the Court held that the exception contained in Article 48(3) of the Treaty must be regarded as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty, and by the Commission to the Bouchereau judgment, in which the Court held that recourse by a national authority to the concept of public policy presupposes, in any event, in addition to the disturbance of the social order which any infringement of the law involves, the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society.

66. How are we to decide between those two diametrically opposed views?

67. First of all, it is perfectly clear that the status of a Turkish worker differs in a number of fundamental respects from that of a Community worker, and there can therefore be no question of asserting as a principle that the former must be treated in all respects like the latter.

68. It should be borne in mind in this connection that the right of a Turkish worker to enter the territory of a Member State can be made subject to a genuine residence authorisation, which, in order to give rise to employment rights, must not have been obtained on a provisional basis or by means of fraudulent conduct. Unlike a residence permit issued to nationals of a Member State, a residence permit granted to a Turkish worker does not have to be automatically renewed after five years. It does not confer entitlement to freedom of movement in the other Member States.

69. It can be inferred from all those considerations that, even when he has acquired the right of free access to any paid employment of his choice, a Turkish worker does not have a right of residence which is absolutely identical in content to that enjoyed by a Community worker.

70. However, that does not seem to me to be sufficient reason to conclude that a different concept of prejudice to the requirements of public policy from that applied to Community workers can be applied to Turkish workers.

71. Thus it would not be reasonable for a single act of selling narcotic drugs always to be regarded, in the case of a Turkish worker, as prejudicial to the requirements of public policy, whereas a Community worker could carry out several such acts before causing the same prejudice.

72. Since I can find no objective factors which would allow the requirements of public policy to be defined differently according to the precise status of the person concerned, I am of the opinion that the principle which should be applied is that of the same legal classification for the same offence.

73. Moreover, as the Commission has rightly pointed out, such protection against expulsion on grounds of public policy relating to general prevention does not presuppose that freedom of movement is fully secured.

74. In fact, when Directive 64/221 was adopted, that freedom was not yet secured with respect to Community workers. Furthermore, once a right of residence is granted, limits must of necessity be placed on the right of a Member State to adopt a measure ordering a worker's expulsion.

75. Allowing a Member State to have recourse to measures ordering the expulsion of Turkish workers solely on general preventive grounds would reduce such limits to very little and would in any case go against the intention, declared in the Association Agreement, to be guided, as far as possible, in defining the status of Turkish workers, by the status conferred on Community workers by Article 48 of the Treaty. Directive 64/221 clarifies the implications of that article rather than supplementing it.

76. Finally, to come back to the case of Mr Nazli, I must point out that the chances are that a Member State will only very exceptionally be faced with a situation in which one of its criminal courts, at the same time as convicting a Turkish national for his involvement in drug trafficking, finds that the convicted person is unlikely to re-offend and, in equally positive terms, gives a favourable prognosis for the reintegration of the person concerned, thereby precluding his expulsion on special preventive grounds, the permissibility or necessity of which in certain cases is beyond question.

77. For all those reasons I conclude that Article 14(1) of Decision No 1/80 does not authorise a Member State to order the expulsion of a Turkish worker solely on the basis of general preventive grounds.

Conclusions

78. Finally, I propose that the Court give the following answers to the questions referred to it by the national court:

(1) A Turkish worker who has achieved the legal status conferred by Article 6(1) of Decision No 1/80 of the Association Council (set up by the Association Agreement between the European Economic Community and Turkey) of 19 September 1980 on the development of the Association does not subsequently forfeit that status if he is detained on strong suspicion of having committed a crime for which he is ultimately convicted and given a suspended prison sentence.

(2) The expulsion of a Turkish worker in such circumstances solely on general preventive grounds, that is to say as a deterrent to other aliens, is not compatible with Article 14(1) of Decision No 1/80.