OPINION OF ADVOCATE GENERAL ELMER
delivered on 29 April 1997 *

Introduction

1. In the present case the Verwaltungsgericht (Administrative Court) Darmstadt has referred to the Court a number of questions on the interpretation of Article 6(1) and (3) of Decision No 1/80 of the Association Council created by the Association Agreement between the European Economic Community and Turkey. [1]

Applicable Community legislation

2. The Association Agreement is intended, in the words of Article 2(1), 'to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'.

Under Article 12 of the Agreement, 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'.

3. Pursuant to Article 36 of an additional protocol to the Association Agreement, dated 23 November 1970, [2] the Association Council is to determine the detailed rules necessary for the progressive achievement of freedom of movement for workers between Member States of the Community and Turkey, in accordance with the principles set out in Article 12 of the Association Agreement.

4. Pursuant to that article, the Association Council adopted Decision No 1/80, which entered into force on 1 July 1980 (hereinafter

* Original language: Danish.

1 — Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 and concluded on behalf of the Community by Decision 64/732/EEC of the Council of 23 December 1963 (*Collection of the Agreements concluded by the European Communities*, Vol. 3, p. 541).

2 — OJ 1973 C 113 of 24 December 1973.

'Decision No 1/80'). [3] Article 6(1) and (3) of the Decision is worded as follows:

'1. ... 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.

2. ...

3. The procedures for applying [paragraph] 1 ... shall be those established under national rules.'

Facts of the case

5. In 1991 Kasim Ertanir, a Turkish national then residing in the Federal Republic of Germany, was informed by the German authorities responsible for foreigners that his residence permit could not be further extended; at the same time, however, those authorities told him that they were prepared to grant him advance consent enabling him to obtain from the German Embassy in Ankara an entry visa in order to obtain a residence and work permit to work as a specialist chef. In a letter of 17 December 1991, the authorities responsible for foreigners informed Mr Ertanir's lawyer that 'the period of residence as a Turkish specialist chef in the Federal Republic of Germany may not exceed three years'.

6. Mr Ertanir then returned to Turkey. On 14 April 1992 the German Embassy in Ankara issued the abovementioned visa to him and he returned to Germany the same day. The visa, which was valid for three months, stated *inter alia* that it was '... Valid only for work as a specialist chef in the Ratskeller Restaurant in Weinheim'.

3 — The Decision has not been published.

7. Upon application dated 30 June 1992, Mr Ertanir received on 14 August 1992 a residence permit valid until 13 April 1993. A further application for extension dated 8 April 1993 was granted on that date, with effect until 13 April 1994. In each case the residence permit stated: 'The residence permit expires on termination of work as a chef in the Ratskeller Restaurant in Weinheim. The residence permit does not replace the work permit.'

8. By letter of 9 August 1993 the competent authorities drew Mr Ertanir's attention to the fact that a residence permit for the purpose of work as a specialist chef could be granted or renewed only for a total of three years.

9. On 19 April 1994 Mr Ertanir applied for a further extension of his residence permit. By letter of 20 April 1994 the competent authorities extended his residence permit to 14 April 1995, again pointing out that a residence permit as a specialist chef could only be extended for a maximum period of three years. The residence permit bore the same statement as that issued on 14 August 1992.

10. During his stay in Germany Mr Ertanir obtained work permits from the Arbeitsamt (Labour Office) Mannheim for the activity which he was authorized to exercise under the terms of the residence permits. Thus on 24 April 1991 he received a work permit valid until 23 April 1992 authorizing him to work as a specialist chef in the Ratskeller Restaurant in Weinheim. On 27 March 1992 that work permit was extended until 23 April 1993. On 13 May 1993 it was extended, with effect from 24 April 1993, until 23 April 1994. On 6 May 1994 the work permit was again extended, with effect from 24 April 1994, until 23 April 1996.

11. On 13 April 1995 Mr Ertanir applied for extension of his residence permit for a further two years. The competent authorities of the State of Hessen rejected his application by decision of 17 July 1995, referring, in particular, to the decree of 3 February 1995 issued by the Ministry of the Interior for Hessen, which provided that specialist chefs were excluded from the benefits of Decision No 1/80.

12. By letter of 8 August 1995 Mr Ertanir lodged an administrative complaint against that decision.

Main proceedings and questions referred to the Court

13. On 24 October 1995 Mr Ertanir also applied to the Verwaltungsgericht Darmstadt

for a declaration that his complaint should have suspensory effect. By order of 29 February 1996 the Verwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. What are the consequences, for the maintenance of work and residence permits, of interruptions in lawful residence or periods of work without a work permit with regard to rights that have already arisen under Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council on the development of the Association in so far as such periods are not treated as periods of legal employment under Article 6(2) of Decision No 1/80?

2. Is a Turkish employee who holds work and residence permits entitling him to work as a specialist chef duly registered as belonging to the labour force of a Member State within the meaning of Article 6(1) of Decision No 1/80 even if he was aware from the beginning of his residence in that Member State that he would be granted a residence permit only for a total period of three years and only to do specific work for a named employer?

3. If the Court of Justice should take the view that a person as described in Question 2 is duly registered as belonging to the labour force of a Member State, does the power conferred by Article 6(3) of Decision No 1/80 entitle Member States to create rights of residence that do not from the outset confer the benefit of Article 6(1) of Decision No 1/80?'

The first question

14. It appears from the documents before the Court that, throughout his stay in Germany, Mr Ertanir's work was authorized under the rules governing employment. It was, however, the subject of retroactive regularization on two occasions. As regards his residence permit, it appears that in April 1994 Mr Ertanir failed to apply in good time for the extension of that permit, with the consequence that he did not have a valid residence permit between 14 April 1994 and 20 April 1994.

Therefore the first question actually asks whether short interruptions in the lawful residence and employment of a Turkish worker have consequences for his rights under Article 6(1) of Decision No 1/80 where the Member State in question has subsequently regularized his residence during those periods.

15. The German Government considers that in the light of its reply to the second and third questions there is no need to answer the first question.

16. The Commission claims that such very short interruptions in the lawful activity and residence of a Turkish worker have no consequences for the rights which he derives from Article 6(1) of Decision No 1/80, provided that the Member State in question does not complain of those interruptions in subsequent decisions.

17. One of the conditions of being able to base a right on Article 6(1) of Decision No 1/80 is that the Turkish worker concerned has been in legal employment during the periods referred to therein. Since Article 6(1) does not lay down any separate conditions as to when employment is 'legal', the issue must be resolved on the basis of Member States' rules setting out the conditions under which Turkish nationals may enter and reside in their territory and pursue an activity there. Consequently, it is the legislation of the individual Member States which determines the conditions under which residence in their national territory is lawful.

18. It is quite common for the authorities of a Member State responsible for foreigners not to extend residence and work permits until after they have expired, for example because of the large number of applications, in such a way that the new permits take effect as though they had been issued at the proper time and the period not covered by a residence or work permit is subsequently regularized. It is also quite common for those authorities in a Member State to turn a blind eye where the time-limits for applying for extensions of residence and work permits are exceeded, even though under the applicable rules a foreigner is personally responsible for ensuring that his employment and residence are lawful and thus for ensuring that the relevant permits are extended in good time, with the result that the permits are extended as though application had been made in good time.

19. In *Kadiman* [4] the Court, after observing that, for the purpose of calculating the three-year period of legal residence required by the first indent of the first paragraph of Article 7 of Decision No 1/80, account must be taken of certain categories of residence abroad, accordingly held that:

'The same applies to the period during which the person concerned was not in possession of a valid residence permit, where the competent authorities of the host Member State did not claim on that ground that the person concerned was not legally resident within national territory, but on the contrary issued a new residence permit to him.'

4 — Case C-351/95 *Kadiman* v *State of Bavaria* [1997] ECR I-2133.

20. It appears from the documents before the Court that the German authorities responsible for foreigners considered that during the short periods between the expiry of the previous residence permit and the issue of a new permit Mr Ertanir's residence in Germany was lawful, since his residence during those periods was subsequently regularized as though the relevant applications had been made in good time.

21. The answer to this question must therefore be that Article 6(1) of Decision No 1/80 is to be interpreted as meaning that, for the purpose of calculating the period of legal employment within the meaning of that provision, account must be taken of a period during which the worker in question did not have a valid residence or work permit, where the competent authorities of the host Member State did not challenge on that ground the lawfulness of that person's residence in the territory of the State but, on the contrary, subsequently regularized his residence by issuing a new residence or work permit.

The second question

22. By its second question, the national court is asking whether a Turkish worker employed as a specialist chef is in legal employment and duly registered as belonging to the labour force of a Member State in the sense in which those expressions are used in Article 6(1) of Decision No 1/80 in the case where it was stated when the residence and work permits were issued that they could only be issued for three years at the most and solely for the purpose of carrying out a specific activity with a specific employer.

23. The German Government claims that a Turkish worker who had obtained temporary residence and work permits in order to work as a specialist chef cannot be regarded as duly registered as belonging to the labour market of a Member State in the sense in which that expression is used in Article 6(1) of Decision No 1/80.

24. The Commission and Mr Ertanir, on the other hand, consider that specialist chefs do not carry on an occupation distinct from other occupations in such a way that a Turkish worker employed as a specialist chef in a Member State is not duly registered as belonging to the labour market. That is so even where the worker in question was aware from the beginning of his residence in the Member State that the residence and work permits which he would receive would be subject to certain restrictions.

25. It should be pointed out that the Court has consistently held that Article 6(1) of Decision No 1/80 has direct effect. [5]

5 — See Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* [1990] ECR I-3461.

According to its wording, that provision concerns only the right to work, but the Court has consistently held that the right to work entails a right of residence. [6]

On the other hand, that provision does not govern the question of the right to work and reside in Member States of Turkish workers who fail to meet the temporal conditions laid down therein. Other than in the cases referred to in Decision No 1/80, it is thus the laws of the Member States which determine whether, and if so under what conditions, Turkish nationals may enter and reside in the territory of those States in order to carry out an activity there.

26. Furthermore, the Court held in *Kus* [7] that:

'... according to its wording, Article 6(1) [of Decision No 1/80] applies to Turkish workers duly registered as belonging to the labour force of a Member State and ..., under the first indent, a Turkish worker needs only to have been in legal employment for more than one year in order to be entitled to the renewal of his permit to work for the same employer ...'.

In order to be able to base a right on Article 6(1) of Decision No 1/80, therefore, the Turkish worker concerned must be duly registered as belonging to the labour force of a Member State and have been in legal employment during the periods referred to in that provision.

27. As to when a Turkish worker may be regarded as carrying out an activity as a duly registered member of the labour force, I am bound to state here and now that it must be clear, in my view, that a post as a specialist chef is not distinguishable from other forms of paid activity. The person concerned works in return for payment of normal contractual pay. What is so special about this type of chef compared with other chefs? It is irrelevant whether a chef prepares French, Italian, Turkish, Lebanese or Chinese cuisine. In principle, those types of cuisine may also be prepared by Turkish or Swedish chefs — just as Turkish chefs may also prepare French, Italian or German cuisine.

28. To my mind, it is on the basis of a completely objective evaluation of the nature

6 — See footnote 4.

7 — Case C-237/91 *Kus* v *Landeshauptstadt Wiesbaden* [1992] ECR I-6781.

of the activity that it must be determined whether, in connection with the activity here being engaged in, the person concerned is duly registered as belonging to the labour force in Germany. Therefore, in my view, no significance should be attached to the statements provided by the authorities of the Member States responsible for foreigners when issuing residence and work permits to the Turkish worker in question, since that would mean that the Member States would thereby be able to render Article 6(1) of Decision No 1/80 illusory.

29. In my Opinion in *Bozkurt* [8] I stated that:

'Article 6(1) of Decision No 1/80 lays down no independent conditions for the employment to be "legal".

...

By the expression "legal" employment, Article 6(1) of Decision No 1/80 of the Association Council must therefore be assumed to refer to the rules of the Member States as to the conditions under which Turkish nationals have a right of entry and of residence in their territory and of pursuing employment there. As the provision does not make the legality of the employment conditional upon the existence of a formal residence permit or the like, the most obvious interpretation is that employment is "legal" within the meaning of that provision if it is not illegal under the legislation of the Member State in question for a Turkish national to pursue it.'

30. In *Sevince* v *Staatssecretaris van Justitie* [9] (hereinafter '*Sevince*') the Court provided a number of guidelines on what the laws of the Member States may include within the concept of 'legal employment' in Article 6(1) of Decision No 1/80:

'The legality of the employment within the meaning of those provisions, even assuming that it is not necessarily conditional upon possession of a properly issued residence permit, nevertheless presupposes a stable and secure situation as a member of the labour force. [10]

...

8 — Case C-434/93 *Bozkurt* v *Staatssecretaris van Justitie* [1995] ECR I-1475 at p. 1486 et seq.

9 — See footnote 5.

10 — Paragraph 30.

Consequently, the expression "legal employment" contained in ... the third indent of Article 6(1) of Decision No 1/80 cannot cover the situation of a Turkish worker who has been legally able to continue in employment only by reason of the suspensory effect deriving from his appeal pending a final decision by the national court thereon, provided always, however, that the court dismisses his appeal.' [11]

31. It could be argued that as long as a Turkish worker has a temporary work permit his situation as a member of the labour force of the Member State must automatically be regarded as temporary, so that he cannot be in legal employment.

32. It follows from *Sevince*, however, that for the purpose of determining whether a Turkish worker may be regarded as legally employed in a Member State it is not decisive that he has been formally given a residence permit. On the other hand, it is decisive that, according to the national legislation of the Member State concerned, he was in fact entitled to work and reside in the Member State in question during the relevant period.

33. Just as it is irrelevant whether the right of residence derives from a formal work and residence permit, I consider it equally irrelevant that the validity of a residence or work permit issued was restricted in time. If the temporal validity of a residence permit were to be considered relevant, Member States would need only to issue residence permits valid for limited periods to be able to avoid completely the application of Article 6(1) of Decision No 1/80, so that Turkish nationals would not in fact benefit from the rights which that provision confers on them. In that regard, it should not be forgotten that it is apparently a widespread practice in Member States for nationals of non-member countries to receive only a limited residence permit during the first years in which they are entitled to work and reside in a Member State.

34. The same considerations apply where Member States limit residence and work permits other than by a temporal restriction, for example by stating that the permit entitles the holder to work only for a specific employer or to do work of a specifically defined nature. If Member States were able, simply by imposing restrictions of one form or other on residence and work permits, to limit the rights conferred on Turkish workers by Community law, they would be

11 — Paragraph 32.

perfectly free to render illusory the rights of Turkish nationals under Decision No 1/80, which forms an integral part of Community law.

35. That does not mean that such restrictions, whether as to duration or of any other kind, are irrelevant, since they produce the effects attributed to them by the national legal order in question in so far as nationals of non-member countries have not acquired rights under Community law. Thus, if a Turkish national's work permit is limited to a certain type of employment with a specific employer, and that employment is terminated before the end of the first year, it follows from an *a contrario* reading of the first indent of Article 6(1) of Decision No 1/80 that the Turkish national has not acquired a right under Community law to continued employment and that the question whether he may remain and work in the territory of the Member State concerned is therefore a matter for the domestic legislation of that Member State alone.

36. As to whether a Turkish worker can be regarded as being in legal employment in a Member State, the determining factor to my mind therefore lies solely in whether the person concerned was actually entitled to reside and work in the Member State during the period in issue, within the meaning of that Member State's laws on aliens. It is therefore irrelevant that the worker concerned had valid residence and work permits during those periods and that those permits were subject to a temporal or other restriction.

37. The answer to the second question should therefore be that Article 6(1) of Decision No 1/80 must be interpreted as meaning that a Turkish worker engaged in paid employment as a specialist chef in a Member State must be considered to be duly registered as belonging to the labour force and that Member States cannot prevent the worker in question from acquiring rights under that provision by imposing temporal or other restrictions on his residence or work permits.

The third question

38. The third question submitted asks whether, where a category of persons must, by its objective characteristics, be regarded as being in legal employment and forming part of the labour force of a Member State, Article 6(3) of Decision No 1/80 empowers a Member State to issue residence permits

which provide in advance that the holders are to be excluded from the advantages deriving from Article 6(1).

39. The German Government takes the view that Article 6(3) of Decision No 1/80 confers on Member States the power to issue Turkish nationals with residence permits which preclude in advance the application of Article 6(1).

40. The Commission contends that Article 6(3) of Decision No 1/80 does not allow Member States to introduce residence and work permits which exclude Turkish nationals in advance from the benefit of Article 6(1), which would be contrary to the purpose thereof.

41. In *Sevince*, the Court held that:

'The conclusion that the articles of ... [Decision No] 1/80 ... can have direct effect cannot be affected by the fact that ... Article 6(3) of Decision No 1/80 [provides] that the procedures for applying the rights conferred on Turkish workers are to be established under national rules. [That provision] merely [clarifies] the obligation of the Member States to take such administrative measures as may be necessary for the implementation of those provisions, without empowering the Member States to make conditional or restrict the application of the precise and unconditional right which the decisions of the Council of Association grant to Turkish workers.' [12]

42. It follows that Article 6(3) refers only to the adoption of national implementing provisions, and to nothing else. Accordingly, it does not empower Member States to implement national provisions excluding certain categories of Turkish nationals who objectively meet the conditions for entitlement to request an extension of their residence and work permits under Article 6(1) of Decision No 1/80 from the rights based on that provision.

43. The answer to this question should therefore be that Article 6(3) of Decision No 1/80, which provides that the procedures for applying Article 6(1) are to be established under national rules, must be interpreted as not empowering Member States to derogate from Article 6(1).

12 — Paragraph 22.

Conclusion

44. I accordingly propose that the Court should answer the questions referred to it as follows:

(1) Article 6(1) of Decision No 1/80 of 19 September 1980 of the Association Council established by the Association Agreement between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 and concluded on behalf of the Community by Decision 64/732/EEC of the Council of 23 December 1963, is to be interpreted as meaning that, for the purpose of calculating the period of legal employment within the meaning of that provision, account must be taken of a period during which the worker in question did not have a valid residence or work permit, where the competent authorities of the host Member State did not challenge on that basis the lawfulness of that person's residence in the territory of the State but, on the contrary, subsequently regularized his residence by issuing a new residence or work permit.

(2) That provision must also be interpreted as meaning that a Turkish worker engaged in paid employment as a specialist chef in a Member State must be considered to be duly registered as belonging to the labour force and that Member States cannot prevent the worker in question from acquiring rights under that provision by imposing temporal or other restrictions on his residence or work permits.

(3) Article 6(3) of Decision No 1/80, which provides that the procedures for applying Article 6(1) are to be established by national rules, must be interpreted as not empowering Member States to derogate from Article 6(1).