JUDGMENT OF THE COURT (Second Chamber)

9 December 2010 *

In Joined Cases C-300/09 and C-301/09,

REFERENCES for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decisions of 24 July 2009, received at the Court on 30 July 2009, in the proceedings

Staatssecretaris van Justitie

v

F. Toprak (C-300/09),

I. Oguz (C-301/09),

* Language of the cases: Dutch.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Rosas, U. Lõhmus, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Netherlands Government, by C.M. Wissels and B. Koopman, acting as Agents,

— the Danish Government, by V. Pasternak Jørgensen and R. Holdgaard, acting as Agents,

— the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

— the European Commission, by G. Rozet and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present references for a preliminary ruling concern the interpretation of Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80'). The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113; the 'Association Agreement').

2 The references have been made in the course of proceedings between, on the one hand, Mr Toprak (Case C-300/09) and Mr Oguz (Case C-301/09) and, on the other, the Staatssecretaris van Justitie (State Secretary for Justice) concerning the latter's refusal to vary their temporary residence permits.

Legal context

European Union legislation

The Association Agreement

3 According to Article 2(1) of the Association Agreement, the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, which includes, in relation to the workforce, the progressive securing of freedom of movement for workers and the abolition of restrictions on freedom of establishment and on freedom to provide services, with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date.

Decision No 1/80

4 Article 6(1) of Decision No 1/80 is drafted 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.'

5 Article 13 of Decision No 1/80 provides:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

The Additional Protocol

6 As is clear from Article 62 thereof, the Additional Protocol, signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (JO 1972 L 293, p. 1) ('the Additional Protocol'), forms an integral part of the Association Agreement.

7 Article 41(1) of the Additional Protocol states:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

National legislation

8 On 1 December 1980, the admission and residence of foreign nationals in the Netherlands were regulated by the Law on Foreign Nationals (Vreemdelingenwet) (*Staatsblad* 1965, No 40), which entered into force on 1 January 1967, and the Foreign Nationals Decree (Vreemdelingenbesluit) and the Foreign Nationals Circular (Vreemdelingencirculaire) 1966.

9 It is apparent from the orders for reference that the regime applicable on 1 December 1980 was the following.

10 A foreign national whose marriage to a person with a right of permanent residence has lasted at least three years and who has also resided in the Netherlands for a three-year period, holding a residence permit with the condition attached that that permit is for purposes of 'residing with spouse', could, in principle, despite the breakdown of the marriage, apply for an independent residence permit. However, the grant of such a permit could be refused if the foreign national did not have sufficient means of subsistence. Furthermore, such a permit could exceptionally be granted on compelling humanitarian grounds or where the work undertaken by the foreign national served an essential interest of the Kingdom of the Netherlands.

11 This regime was revised with effect from 1 February 1983 in two respects by the Foreign Nationals Circular adopted in 1982 ('the 1982 circular'). First, the period of residence in the Netherlands prior to the breakdown or dissolution of the marriage, which had been three years, was reduced to one year. Second, the lack of means of subsistence could be relied on against a foreign national only if the competent authorities could require him to make himself available for work.

12 On 1 April 2001, the Law of 23 November 2000 revising in its entirety the Law on Foreign Nationals (Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet) (*Staatsblad* 2000, No 495) entered into force. That law was accompanied by a decree on foreign nationals adopted in 2000 (Vreemdelingenbesluit 2000) (*Staatsblad* 2000, No 497) ('the Vb 2000'), and a circular on foreign nationals also adopted in 2000 (Vreemdelingencirculaire 2000) ('the 2000 circular').

13 The entry into force of the Vb 2000 and the 2000 circular on 1 April 2001 had the effect of rendering the amendments introduced in 1982 null and void and of reintroducing the conditions for obtaining an independent residence permit which had been in force on 1 December 1980.

14 However, transitional rules, based on Article 9.6 of the Vb 2000, were laid down for foreign nationals who were entitled, prior to 11 December 2000, to a residence permit by reason of their marriage. Under those rules, where a foreign national has held, for at least one year, a residence permit based on a marriage which lasted three years before it broke down or was dissolved, a residence permit for the purposes of 'seeking and undertaking paid or unpaid employment' may be issued to that foreign national.

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

Case C-300/09 Toprak

15 Mr Toprak, a Turkish national, married a Netherlands national on 14 June 2001. On 21 May 2002 he entered the Netherlands with a provisional residence permit, which was replaced by a temporary residence permit bearing the words 'for purposes of residing with spouse', the period of validity of which was extended to 24 September 2006.

16 The marriage between Mr Toprak and his spouse effectively broke down on 12 April 2004, that is to say, less than three years after it had taken place, and their divorce was pronounced on 30 December 2004, more than three years after the marriage. It follows that, between the date of his entry into the Netherlands and the date on which his marriage effectively broke down, Mr Toprak had resided with his spouse in the Netherlands for less than three years.

17 Following his divorce, Mr Toprak made a number of applications to have the words 'for purposes of residing with spouse' substituted by 'for purposes of engaging in paid employment' and for an extension of the temporary residence permit.

18 Mr Toprak's applications were rejected by the Minister responsible on the ground that, as from the date of the effective breakdown of his marriage, he no longer satisfied the condition of residence with his spouse. Furthermore, although he had worked in the Netherlands, Mr Toprak had also not sufficiently demonstrated that, at that date, he satisfied the conditions for obtaining a residence permit in order to engage

in paid employment on the basis of Article 6(1) of Decision No 1/80. In particular, he had not shown that he had worked for one year with the same employer or that the latter was prepared to continue to offer him work. Nor did his paid employment serve any essential interest of the Kingdom of the Netherlands.

19 Mr Toprak lodged an appeal with the Staatssecretaris van Justitie. However, that appeal was dismissed as unfounded.

20 Mr Toprak thereupon brought an action before the Rechtbank 's-Gravenhage (District Court, The Hague). That court took the view that the tightening of the policy pursued with respect to persons such as Mr Toprak, which followed an earlier relaxation of that policy, amounted to a 'new restriction' within the meaning of Article 13 of Decision No 1/80. Accordingly, it upheld the action, annulled the Staatssecretaris van Justitie's rejection decision and ordered the latter to take a new decision. The Staatssecretaris van Justitie appealed against that ruling to the Raad van State (Council of State).

Case C-301/09 Oguz

21 Mr Oguz is a Turkish national who was married to a Turkish national with a permanent right of residence in the Netherlands. Their marriage was celebrated on 12 August 2002. Mr Oguz entered the Netherlands one year later and obtained a temporary residence permit subject to a condition of 'residence with spouse', the period of validity of which was extended up to August 2009.

22 The marriage between Mr Oguz and his spouse effectively broke down on 16 October 2005 and their divorce was pronounced on 21 July 2006, each of those events occurring more than three years after their marriage. However, between the date of his entry into the Netherlands in 2003 and the date on which his marriage effectively broke down, Mr Oguz had resided with his spouse in the Netherlands for less than three years.

23 On 12 April 2006, Mr Oguz requested that the condition of issue of his residence permit, which bore the words 'for purposes of residing with spouse', be changed to 'for purposes of engaging in paid employment'. It is apparent from the order for reference that Mr Oguz concluded an employment contract with an employer from 1 April to 1 October 2004, that he had worked for another employer from 16 October 2005 and that he was hired by a third employer with effect from 1 February 2006.

24 The application for variation of the temporary residence permit was rejected by a number of decisions of the Minister responsible on the ground that, from the breakdown of his marriage, MrOguz no longer fulfilled the condition of 'residence with spouse' to which the grant of his residence permit had been made subject. Furthermore, Mr Oguz had failed sufficiently to demonstrate that he was entitled to a residence permit for the purposes of engaging in paid employment on the basis of Article 6(1) of Decision No 1/80. In particular, he had not shown that he had worked for one year with the same employer or that the latter was prepared to continue the employment relationship. Nor did his paid employment serve any essential interest of the Kingdom of the Netherlands.

25 Mr Oguz lodged an appeal with the Staatssecretaris van Justitie, who held his appeal to be unfounded.

26 The Staatssecretaris van Justitie stated, in particular, that Mr Oguz was not entitled to a residence permit under the transitional provisions based on Article 9.6 of the Vb 2000 because his residence permit had not been issued to him prior to 11 December 2000.

27 Mr Oguz brought an action before the Rechtbank 's-Gravenhage. That court took the view that the Staatssecretaris van Justitie had been wrong to base his decision on Article 9.6 of the Vb 2000, and should instead have applied the policy followed from 1983. The Rechtbank upheld Mr Oguz's action, taking the view that the stricter regime applied to him by the Staatssecretaris van Justitie, which followed an earlier less restrictive regime for Turkish nationals, constituted a 'new restriction' contrary to Article 13 of Decision No 1/80. Consequently, it annulled the decisions of the Staatssecretaris van Justitie and ordered the latter to take a new decision. The Staatssecretaris has appealed against that ruling to the Raad van State.

The question referred for a preliminary ruling

28 It was in those circumstances that the Raad van State decided to stay the respective proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 13 of Decision No 1/80 be interpreted as meaning that a new restriction, within the terms of that provision, includes a tightening in respect of a provision which entered into force after 1 December 1980, and which constituted a relaxation of the provision which had been in force on 1 December 1980, if that tightening does not amount to a deterioration vis-à-vis the provision which was in force on 1 December 1980?'

29 By order of the President of the Court of Justice of 2 October 2009, Cases C-300/09 and C-301/09 were joined for the purposes of the written and oral procedure and also of the judgment.

The question referred for a preliminary ruling

Preliminary observation

30 It should be noted, as a preliminary point, that Article 13 of Decision No 1/80 may apply to provisions which appear not only in laws or regulations but also in a circular which specifies the manner in which the government concerned intends to apply the law.

31 Article 13 applies to restrictions introduced by the Member States, without specifying the nature of the act introducing such restrictions.

32 In its judgment of 10 April 2008 in Case C-398/06 *Commission* v *Netherlands*, the Court examined the lawfulness of a circular on foreign nationals, similar to those at issue in the main proceedings in the present cases, in the light of European Union secondary legislation on the freedom of movement of persons. It held that the circular was contrary to that law.

33 It is common ground that the 1982 and 2000 circulars, like the circular at issue in the case which gave rise to the judgment in Case C-398/06 *Commission* v *Netherlands*, produce effects with respect to the foreign nationals concerned, including Turkish nationals.

34 It follows that Article 13 of Decision No 1/80 is capable of applying to the provisions of such circulars.

The Court's reply

35 By its question, the national court asks essentially, with regard to a national provision relating to the acquisition of a residence permit by Turkish workers such as Mr Toprak and Mr Oguz, whether Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision introduced after 1 December 1980, which provided for a relaxation of the provision applicable on 1 December 1980, constitutes a 'new restriction' within the meaning of that article, even where that tightening does not make the conditions for acquiring that permit more stringent than those resulting from the provision which was in force on 1 December 1980.

36 The question referred by the Raad van State thus essentially relates to the determination of the relevant date for the purposes of examining whether there is a new restriction within the meaning of Article 13 of Decision No 1/80.

37 Although the Netherlands Government does not deny that Mr Toprak and Mr Oguz have worked in the Netherlands, it none the less submits that there is no need to answer that question, as Article 13 of Decision No 1/80 is not applicable in the present cases on the ground that the regime at issue in the main proceedings relates, not to the conditions of access to employment for Turkish workers covered by that article, but to the right of foreign spouses in respect of family reunification.

38 It is necessary to examine that objection before, if necessary, answering the question referred by the national court.

39 The Netherlands Government states that, after three years of marriage and residence of the same period in the Netherlands granted on account of that marriage, a foreign national is entitled, in principle, to a right to an independent residence permit without any condition that he is to reside with his spouse. However, where the need for family reunification disappears before the expiry of those three years because the marriage has broken down, that fact, in principle, puts an end to any right of residence. That regime does not concern workers and Article 13 of Decision No 1/80 is therefore not applicable. As regards foreigners with Turkish nationality, since the marriage broke down within that three-year period, they are not entitled to any right of residence under the regime at issue and may derive such a right from Article 6 of Decision No 1/80 only if they satisfy the condition of legal employment with the same employer laid down in that article.

40 In that connection, it is true that that regime does not directly refer to foreign workers but concerns foreign nationals married to persons entitled to a right of permanent residence in the Netherlands.

41 However, such a regime may affect foreign workers, in particular Turkish workers, by setting the conditions for the grant of independent residence permits, not connected to residence with a spouse.

42 It is apparent from the files that the situation of Turkish workers married to persons who have a right of permanent residence in the Netherlands, in particular Netherlands nationals, changed with effect from 1 April 2001 as regards the grant of such a permit. Since that date, and in contrast to the situation existing from 1 February 1983,

those workers have once again been subject to the condition of residence with their spouse in that Member State for a period of three years.

43 The Court has already ruled on changes to the conditions for the grant of a residence permit to Turkish nationals in the light of the standstill rules in Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80. It has held that the introduction of an obligation which did not exist when the Additional Protocol entered into force, namely the obligation to be in possession of a visa in order to provide certain services in Germany, constitutes a 'new restriction' within the meaning of Article 41(1) of the Additional Protocol (Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 57). The Court has also held that the introduction of administrative charges, for the grant of a residence permit, in an amount which is disproportionate in comparison with those applied to nationals of the Member States constitutes a restriction prohibited by Article 13 of 1/80 (Case Decision No C-242/06 *Sahin* [2009] ECR I-8465, paragraph 74).

44 In the present cases, the Netherlands regime at issue in the main proceedings also involves changes in the conditions governing the granting of certain residence permits. In so far as those changes affect the situation of Turkish workers, such as Mr Toprak and Mr Oguz, the view must be taken that such a regime comes within the scope of Article 13 of Decision No 1/80.

45 The fact that the workers concerned are not already integrated into the labour force of the Netherlands, in the sense that they do not meet the conditions laid down in Article 6(1) of Decision No 1/80, does not in any way constitute an obstacle to the application of Article 13 thereof. The Court has previously held that the standstill rule in Article 13 of Decision No 1/80 is not intended to protect Turkish nationals who are already integrated into a Member State's labour force, but is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employ-

ment and, accordingly, residence under Article 6(1) of that decision (see Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 83, and Case C-92/07 *Commission* v *Netherlands* [2010] ECR I-3683, paragraph 45).

46 The Netherlands Government's argument that Article 13 of Decision No 1/80 is not applicable to the regime at issue in the main proceedings must therefore be rejected, as that article does not deal with the conditions of access to employment for the Turkish workers covered by that article, but with the right of foreign spouses in respect of family reunification.

47 It is thus appropriate to examine the date to be taken into account for the purpose of examining whether there is a 'new restriction' within the meaning of Article 13 of Decision No 1/80.

48 The Netherlands, Danish and German Governments take the view that 1 December 1980 is the only date which is relevant for ascertaining whether a particular law or policy worsens the situation of Turkish workers. Any subsequent amendment which is more favourable to those workers should not, they argue, be taken into account.

49 It should be observed that, since the wording of Article 13 of Decision No 1/80 does not stipulate any particular date from which the standstill rule is to apply, the existence of 'new restrictions', within the meaning of that article, may be assessed in relation to the date of entry into force of the text in which it appears, this being, in the present cases, the date on which Decision No 1/80 entered into force. Furthermore, the Court has referred to that starting point on several occasions. Thus, in paragraph 49 of the judgment in Case C-92/07 *Commission* v *Netherlands*, the Court held that Article 13 of Decision No 1/80 precludes the introduction into Netherlands law, as from the date on which that decision entered into force in the Netherlands, of any

new restrictions on the exercise of the free movement of workers (see also, inter alia, *Abatay and Others*, paragraph 74, and *Sahin*, paragraph 63; see, by way of analogy, as regards the standstill rule laid down in Article 41(1) of the Additional Protocol, *Abatay and Others*, paragraph 66, and *Soysal and Savatli*, paragraph 47).

50 It does not follow, however, that that is the only relevant date.

51 In order to determine the scope of the term 'new restrictions', it is necessary to refer to the objective pursued by Article 13 of Decision No 1/80.

52 In paragraph 72 of its judgment in *Abatay and Others*, the Court held that the standstill rules in Article 13 of Decision No 1/80 and in Article 41(1) of the Additional Protocol pursue the same objective, which is to create conditions conducive to the gradual establishment of freedom of movement for workers, of the right of establishment and of freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms so as not to make the gradual achievement of those freedoms more difficult between the Member States and the Republic of Turkey.

53 In its judgment in Case C-16/05 *Tum and Dari* [2007] ECR I-7415, at paragraph 61, the Court added, with respect to Article 41(1) of the Additional Protocol, that that provision is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time.

54 Having regard to the convergence in the interpretation of both Article 41 of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of free movement by workers which makes more stringent the conditions which exist at a given time.

55 It is thus necessary to ensure that the Member States do not depart from the objective pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory.

56 It follows that, in cases such as those in the main proceedings, the relevant date from which it is appropriate to assess whether the introduction of the new rules gives rise to 'new restrictions' is the date on which those provisions were adopted.

57 This interpretation follows the direction taken by the Court in its interpretation of standstill rules in other areas of European Union law, including that of the right to deduct value added tax as laid down in Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), and that of the free movement of capital.

58 With regard to value added tax, the Court has held that national rules infringe the standstill rule in Article 17(6) of the Sixth Directive if their effect is to increase, after the entry into force of that directive, the extent of existing exclusions, thus diverging from the objective of that directive. The Court stated that the same is true of any amendment subsequent to the entry into force of that directive which increases the

extent of exclusions applicable immediately prior to that amendment. It is of little importance, in this regard, that the amendment does not extend the scope of the exclusions which applied when the directive came into force (see Case C-40/00 *Commission* v *France* [2001] ECR I-4539, paragraphs 17 to 19).

59 The Court has ruled along the same lines with regard to the exception laid down in Article 57(1) EC concerning free movement of capital, which allows measures on the movement of capital to or from non-member countries which existed in national law on 31 December 1993 to be maintained in force. It held that the notion of a restriction existing on the date indicated in that article, namely 31 December 1993, presupposed that the legal provision relating to the restriction in question formed part of the legal order of the Member State concerned continuously since that date. It added that, if that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-member countries which existed as part of the national legal order on 31 December 1993 but had not been maintained. The Court accordingly concluded that the exception did not cover a provision which reintroduced an obstacle which, following the repeal of earlier legislation, no longer existed (Case C-101/05 *A* [2007] ECR I-11531, paragraphs 48 and 49).

60 Therefore, it must be held that, by adopting provisions which make the conditions applicable to Turkish workers for the acquisition of a residence permit more stringent than the conditions which were previously applicable to them, under provisions adopted since the entry into force of Decision No 1/80 within the territory concerned, a Member State introduces 'new restrictions' within the meaning of Article 13 of that decision.

61 In situations such as those of the cases in the main proceedings, it is for the national court to determine whether, in the light of the 1982 circular, the 2000 circular makes

it more difficult for Turkish workers to obtain an independent residence permit and whether Mr Toprak and Mr Oguz met the conditions laid down in the 1982 circular. If such a permit is more difficult to acquire pursuant to the 2000 circular, the latter will constitute a 'new restriction', within the meaning of Article 13 of Decision No 1/80, even if that circular did no more than reintroduce provisions which existed in Netherlands law on 1 December 1980.

62 In the light of the foregoing considerations, the answer to the question referred is that, in circumstances such as those of the cases in the main proceedings, concerning a national provision on the acquisition of a residence permit by Turkish workers, Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision introduced after 1 December 1980, which provided for a relaxation of the provision applicable on 1 December 1980, constitutes a 'new restriction' within the meaning of that article, even where that tightening does not make the conditions governing the acquisition of that permit more stringent than those which resulted from the provision in force on 1 December 1980, this being a matter for the national court to determine.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

In circumstances such as those of the cases in the main proceedings, concerning a national provision on the acquisition of a residence permit by Turkish workers, Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the Agreement establishing an Association between the European Economic Community and Turkey, must be interpreted as meaning that a tightening of a provision introduced after 1 December 1980, which provided for a relaxation of the provision applicable on 1 December 1980, constitutes a 'new restriction' within the meaning of that article, even where that tightening does not make the conditions governing the acquisition of that permit more stringent than those which resulted from the provision in force on 1 December 1980, this being a matter for the national court to determine.

[Signatures]