



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

3 October 2019\*

(Reference for a preliminary ruling — EEC-Turkey Association Agreement — Decision No 2/76 — Article 7 — Decision No 1/80 — Article 13 — ‘Standstill’ clauses — New restriction — Collection, registration and retention of biometric data of Turkish nationals in a central filing system — Overriding reasons of public interest — Objective of preventing and combating identity and document fraud — Articles 7 and 8 of the Charter of Fundamental Rights of the European Union — Right to respect for private life — Right to the protection of personal data — Proportionality)

In Case C-70/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 31 January 2018, received at the Court on 2 February 2018, in the proceedings

**Staatssecretaris van Justitie en Veiligheid**

v

**A,**

**B,**

**P,**

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, C. Toader, A. Rosas and M. Safjan, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 January 2019,

after considering the observations submitted on behalf of:

- A, B and P, by D. Schaap, advocaat,
- the Netherlands Government, by M.K. Bulterman and M.A.M. de Ree, acting as Agents,
- the Danish Government, by J. Nymann-Lindgren, M. Wolff and P. Ngo, acting as Agents,

\* Language of the case: Dutch.

- Ireland, by A. Joyce, acting as Agent, and by D. Fennelly, Barrister,
  - the United Kingdom Government, initially by R. Fadoju, and subsequently by S. Brandon, acting as Agents, and by D. Blundell, Barrister,
  - the European Commission, by G. Wils, D. Martin and H. Kranenborg, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 2 May 2019,
- gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 7 of Decision No 2/76 of 20 December 1976 adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the European Economic Community (EEC) and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1; ‘the Association Agreement’), and of Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association.
- 2 This request has been made in the context of two disputes between, first, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; ‘the Staatssecretaris’) and A, and, second, the Staatssecretaris and B and P, concerning the obligation to cooperate with the collection of biometric data from A and B for the purpose of obtaining a temporary residence permit in the Netherlands.

### **Legal context**

#### ***European Union law***

##### *Association Agreement*

- 3 Article 12 of the Association Agreement, which appears in Chapter 3, headed ‘Other economic provisions’, of Title II of that agreement, provides:

‘The Contracting Parties agree to be guided by Articles [39, 40 and 41 of the EC Treaty] for the purpose of progressively securing freedom of movement for workers between them.’

##### *Decision No 2/76*

- 4 Article 1 of Decision No 2/76, on the implementation of Article 12 of the Association Agreement, provides:

‘1. This Decision establishes for a first stage the detailed rules for the implementation of Article 36 of the [Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60)].

2. This first stage shall last four years, as from 1 December 1976.’

5 Article 7 of that decision provides:

‘The Member States of the Community and [the Republic of Turkey] may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their territory.’

6 Article 11 of that decision is worded as follows:

‘One year before the end of the first stage and in the light of the results achieved during it, the Association Council shall commence discussions to determine the content of the subsequent stage and to ensure that the Decision on that stage is enforced as from the date of expiry of the first stage. The provisions of this Decision shall continue to apply until the beginning of the subsequent phase.’

7 Pursuant to Article 13 of Decision No 2/76, that decision entered into force on 20 December 1976.

#### *Decision No 1/80*

8 Section 1, headed ‘Questions relating to employment and the free movement of workers’, of Chapter II, headed ‘Social Provisions’, of Decision No 1/80 contains Article 13, which provides:

‘The Member States of the Community and [the Republic of 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.’

9 Article 14(1) of that decision, which is also part of Section 1, states:

‘The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.’

10 In accordance with Article 16(1) of Decision No 1/80, the provisions of Section 1 of Chapter II thereof are applicable from 1 December 1980.

#### *Directive 95/46/EC*

11 Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) provides:

‘For the purpose of this Directive:

- (a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
- (b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

- (c) “personal data filing system” (“filing system”) shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

...’

*Regulation (EC) No 767/2008*

- 12 Article 2 of Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60) provides:

‘The VIS shall have the purpose of improving the implementation of the common visa policy, consular cooperation and consultation between central visa authorities by facilitating the exchange of data between Member States on applications and on the decisions relating thereto, in order:

...

- (c) to facilitate the fight against fraud;

...’

*Regulation (EU) 2019/817*

- 13 Article 2 of Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA (OJ 2019 L 135, p. 27) states:

‘1. By ensuring interoperability, this Regulation has the following objectives:

- (a) to improve the effectiveness and efficiency of border checks at external borders;  
(b) to contribute to the prevention and the combating of illegal immigration;

...

2. The objectives referred to in paragraph 1 shall be achieved by:

- (a) ensuring the correct identification of persons;  
(b) contributing to combating identity fraud;

...’

*Netherlands law*

- 14 Under Article 106a(1) of the Vreemdelingswet 2000 (2000 Law on Foreign Nationals) of 23 November 2000 (Stb. 2000, No 495), as amended by the Wet tot wijziging van de Vreemdelingenwet 2000 in verband met de uitbreiding van het gebruik van biometrische kenmerken in de vreemdelingenketen in verband met het verbeteren van de identiteitsvaststelling van de vreemdeling (Law amending the 2000

Law on Foreign Nationals in the context of expanding the use of biometric identifiers in the immigration process with a view to improving the identification of foreign nationals) of 11 December 2013 (Stb. 2014 No 2; ‘the Law on foreign nationals’):

‘Where the EU regulations on biometric data referred to in Article 1 do not provide for such a possibility, a facial image and an image of the 10 fingerprints of a foreign national may be taken and processed to establish the identity of the foreign national for the purpose of implementing this Law. The facial image and the image of the 10 fingerprints shall be compared with those in the filing system for foreign nationals.’

15 Article 107 of the Law on foreign nationals states:

‘1. A filing system for foreign nationals shall be established and administered by our Minister. The filing system for foreign nationals shall contain:

(a) the facial images and the images of fingerprints referred to in Article 106a(1);

...

2. The purpose of the filing system for foreign nationals is to allow the processing of:

(a) the data referred to in paragraph 1(a) for the purpose of the implementation of this Law, of the Law of the Kingdom [of the Netherlands] on Netherlands nationality and of the measures adopted pursuant thereto;

...

5. Without prejudice to the objective referred to in paragraph 2(a), ... the data referred to in paragraph 1(a) may be made available only for the following purposes:

...

(c) the detection and prosecution of criminal offences;

...

6. The data in the filing system for foreign nationals relating to the fingerprints of a foreign national may, in the cases referred to in paragraph 5(c), be provided for the purpose of detection and prosecution only in cases of criminal offences for which pre-trial detention may be imposed pursuant to written authorisation by the investigating judge given at the request of the public prosecutor and:

(a) where there is a reasonable suspicion that the suspect is a foreign person, or

(b) in the interest of an investigation when the preliminary investigation is not progressing or when rapid results are needed to clarify the offence.

...’

16 Article 8.34 of the Vreemdelingenbesluit 2000 (2000 Order on foreign nationals) of 23 November 2000 (Stb. 2000, No 497) provides:

‘1. The officials responsible for maintaining the filing system for foreign nationals shall have direct access to the facial images and images of fingerprints contained in the filing system to the extent that access is necessary for them properly to carry out their mission and when our Minister has granted them such access.

...’

17 Article 8.35 of the 2000 Order on foreign nationals states:

‘The retention period for facial images and images of fingerprints contained in the filing system for foreign nationals shall not exceed:

- (a) five years after the rejection of an application for the grant of a temporary residence permit;
- (b) in the case of legal residence, five years after the date on which it can be demonstrated that the foreign national whose legal residence has ended has left the territory of the Netherlands, or
- (c) if the foreign national has been prohibited from entering or declared undesirable, five years from the expiry of the period of validity of the entry ban or declaration of undesirability.’

18 The referring court explains that third-country nationals who wish to stay in the Netherlands for longer than 90 days on an ordinary stay must, in principle, hold a temporary residence permit at the time of entering the territory.

19 In addition, that court specifies that, in accordance with Article 54(1)(c) of the Law on foreign nationals, in conjunction with Article 1.31 of the 2000 Order on foreign nationals, a third-country national who applies for a temporary residence permit is required, at the time of his application, to cooperate with the taking and processing of his biometric data.

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

20 On 15 November 2013, a company incorporated under Netherlands law submitted an application on behalf of A, a Turkish national, for a temporary residence permit so that the latter could take up employment in the Netherlands.

21 By decision of 28 March 2014, the Staatssecretaris granted that application. However, that decision made the grant of the temporary residence permit conditional upon A providing certain biometric data, namely his facial image and 10 fingerprints. A cooperated with the collection of his biometric data and obtained a temporary residence permit in the Netherlands.

22 B is a Turkish national whose spouse, P, is resident in the Netherlands and has dual Turkish and Netherlands nationality. On 17 February 2014, P submitted an application for a temporary residence permit for B for the purpose of family reunification.

23 The Staatssecretaris initially refused that application. B and P brought an administrative appeal against that refusal. By decision of 4 April 2014, the Staatssecretaris declared the appeal well founded and granted the application for a temporary residence permit, but made the grant of that permit subject to the condition that B provide certain biometric data, namely a facial image and 10 fingerprints. B cooperated with the collection of his biometric data and obtained a temporary residence permit in the Netherlands.



- 24 A, on the one hand, and B and P, on the other, brought an administrative appeal before the Staatssecretaris against his decisions of 28 March and 4 April 2014 to the extent that they required A and B, respectively, to cooperate with the collection of their biometric data in order to obtain a temporary residence permit in the Netherlands.
- 25 By decisions of 23 December 2014 and 6 January 2015, respectively, the Staatssecretaris dismissed the appeals brought by B and P, on the one hand, and by A, on the other.
- 26 A, on the one hand, and B and P, on the other, brought an action before the rechtbank Den Haag, zittingsplaats Rotterdam (District Court, The Hague, sitting in Rotterdam, Netherlands) against the latter decisions.
- 27 By judgments of 3 February 2016, the rechtbank Den Haag, zittingsplaats Rotterdam (District Court, The Hague, sitting in Rotterdam) declared those actions well founded. That court found that the national rule requiring the collection, recording and retention of the biometric data of Turkish nationals in a central filing system was a ‘new restriction’ within the meaning of Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80. In addition, the rechtbank Den Haag, zittingsplaats Rotterdam (District Court, The Hague, sitting in Rotterdam) found, in essence, that the measure at issue was not proportionate in view of the legitimate objective pursued, namely preventing and combating identity and document fraud. Consequently, that court, first, annulled the decisions of the Staatssecretaris of 28 March and 4 April 2014 to the extent that they required A and B to cooperate with the collection of their biometric data and, second, ordered the Staatssecretaris to remove their biometric data from the central filing system within six weeks of notification of those judgments.
- 28 The Staatssecretaris brought an appeal against those judgments of 3 February 2016 before the Raad van State (Council of State, Netherlands).
- 29 The referring court states that the national rule requiring the collection, recording and retention of the biometric data of third-country nationals in a central filing system constitutes a ‘new restriction’ within the meaning of Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80. It notes that, in accordance with the Court’s case-law, such a restriction is prohibited unless it is justified by an overriding reason in the public interest, is appropriate for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to attain it. In that context, departing from the assumption that that rule pursues a legitimate objective and is suitable for achieving it, the referring court questions whether the collection, recording and retention of the biometric data of third-country nationals in a central filing system, as provided for by that rule, do not go beyond what is necessary to achieve the objective of preventing and combating identity and document fraud. According to the referring court, in so far as the taking and processing of biometric data constitute processing of personal data within the meaning of Article 2(b) of Directive 95/46 and in so far as such data fall within a special category of data within the meaning of Article 8(1) of that directive, derogations from and limitations on the protection of such data must apply only in so far as is strictly necessary, in accordance with the case-law of the Court following the judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970, paragraph 96).
- 30 Moreover, in so far as the national rule at issue in the main proceedings allows, under certain conditions, the provision of the biometric data of Turkish nationals to third parties for the purpose of the detection and prosecution of criminal offences, the referring court seeks to ascertain, in essence, whether such a rule constitutes a ‘new restriction’ within the meaning of Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80 and, if so, whether such a restriction is proportional to the objective pursued. In that regard, the referring court questions, in particular, whether the effect produced by that rule on access to employment in the Netherlands for Turkish nationals can be considered too uncertain and too indirect to conclude that there is a ‘new restriction’ within the meaning of those provisions.

- 31 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) (a) Must Article 7 of [Decision No 2/76] and Article 13 of [Decision No 1/80] be interpreted as not precluding a national rule providing for the general processing and [retention] of the biometric data of third-country nationals, including Turkish nationals, in a filing system within the meaning of [Article 2(c)] of [Directive 95/46] on the ground that that national rule does not go further than is necessary to achieve the legitimate objective [pursued], [namely] preventing and combating identity fraud and document fraud?
- (b) Is it significant in this regard that the duration of the [retention] of the biometric data is linked to the duration of the lawful and/or illegal stay of third-country nationals, including Turkish nationals?
- (2) Must Article 7 of [Decision No 2/76] and Article 13 of [Decision No 1/80] be interpreted as meaning that a national rule does not constitute a restriction, within the meaning of those provisions, if the effect of that national rule on access to employment, as referred to in those provisions, is too uncertain and too indirect to be regarded as constituting an obstacle to such access?
- (3) (a) If the answer to [the second question] is that a national rule which makes it possible to make available to third parties the biometric data of third-country nationals, including Turkish nationals, contained in a filing system, with a view to the prevention, detection and investigation of offences — whether or not of a terrorist nature — constitutes a new restriction, must Article 52(1), read in conjunction with Articles 7 and 8, of the Charter of Fundamental Rights of the European Union then be interpreted as precluding such a national rule?
- (b) Is it significant in this regard that that third-country national, at the time when he is detained on suspicion of having committed an offence, has in his possession the residence document on which his biometric data are stored?’

## **Consideration of the questions referred**

### ***The first question***

- 32 By its first question, the referring court asks, in essence, whether Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which makes the issuance of a temporary residence permit to third-country nationals, including Turkish nationals, conditional upon the collection, recording and retention of their biometric data in a central filing system constitutes a ‘new restriction’ within the meaning of those provisions and, if so, whether such a rule can be justified by the objective of preventing and combating identity fraud and document fraud.
- 33 In that regard, it should be noted, at the outset, that both Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80 constitute standstill clauses which generally prohibit the introduction of any new national measure having the object or effect of making the exercise by a Turkish national of the freedom of movement for workers on national territory subject to conditions more restrictive than those which applied at the time when those decisions entered into force with regard to the Member State concerned (judgment of 7 August 2018, *Yön*, C-123/17, EU:C:2018:632, paragraph 39).



- 34 The Court has previously held, first, that Article 7 of Decision No 2/76 applies *ratione temporis* to national measures introduced during the period between 20 December 1976 and 30 November 1980 and, second, that Article 13 of Decision No 1/80 applies *ratione temporis* to national measures introduced after 1 December 1980, which is the date marking the entry into force of that decision (judgment of 7 August 2018, *Yön*, C-123/17, EU:C:2018:632, paragraph 48).
- 35 In the present case, it is apparent from the order for reference that the national rule at issue in the main proceedings was introduced subsequent to the date on which Decision No 1/80 entered into force in the Netherlands.
- 36 It follows that that rule falls within the scope *ratione temporis* of Article 13 of Decision No 1/80, which means that only the latter provision must be interpreted in the context of the answer to be given to the first question.
- 37 As has been pointed out in paragraph 33 above, the standstill clause set out in Article 13 of Decision No 1/80 prohibits generally the introduction of any new national measure having the object or effect of making the exercise by a Turkish national of the freedom of movement for workers on national territory subject to conditions more restrictive than those which applied at the time when Decision No 1/80 entered into force with regard to the Member State concerned (judgment of 29 March 2017, *Tekdemir*, C-652/15, EU:C:2017:239, paragraph 25).
- 38 The Court has also recognised that that provision precludes the introduction into Member States' legislation, as from the date of entry into force in the Member State concerned of Decision No 1/80, of any new restrictions on the exercise of the free movement of workers, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that Member State of Turkish nationals intending to exercise that freedom (judgment of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, paragraph 34 and the case-law cited).
- 39 Furthermore, as is apparent from the case-law of the Court, national legislation tightening the conditions for the family reunification of Turkish workers lawfully residing in the Member State in question, in relation to the conditions applicable at the time of the entry into force in that Member State of Decision No 1/80, constitutes a 'new restriction', within the meaning of Article 13 of that decision, on the exercise by such Turkish workers of the freedom of movement for workers in that Member State (judgment of 29 March 2017, *Tekdemir*, C-652/15, EU:C:2017:239, paragraph 31).
- 40 In the present case, the national rule at issue in the main proceedings, which, as has been stated in paragraph 35 above, was introduced in the Netherlands subsequent to the date on which Decision 1/80 came into force in that Member State, provides that third-country nationals, including Turkish nationals, who wish to stay in the Netherlands for longer than 90 days must first obtain a temporary residence permit. It is clear from the order for reference, however, that the issuance of such a permit is subject to the condition that such nationals cooperate with the collection of their biometric data, namely 10 fingerprints and a facial image. Those data are then recorded and retained in a central filing system for the purpose of preventing and combating identity and document fraud.
- 41 Thus, that rule makes the conditions for first entry into Netherlands territory that apply to Turkish nationals more restrictive than those which applied to them at the time when Decision No 1/80 entered into force in the Netherlands.
- 42 In the cases in the main proceedings, it is apparent from the order for reference that the issuance of temporary residence permits to A and B with a view to their respective taking up employment in the Netherlands and exercising the right to family reunification with P in that Member State was made subject to the condition that A and B provide their biometric data.

- 43 In those circumstances, the national rule at issue in the main proceedings constitutes a ‘new restriction’ within the meaning of Article 13 of Decision No 1/80.
- 44 According to settled case-law, such a restriction is prohibited, unless it falls within the restrictions referred to in Article 14 of that decision or it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it (judgment of 7 August 2018, *Yön*, C-123/17, EU:C:2018:632, paragraph 72 and the case-law cited).
- 45 It is therefore necessary to examine whether the national rule at issue in the main proceedings satisfies those conditions.
- 46 With regard, first, to the question of whether the objective pursued by the national rule at issue in the main proceedings, namely the objective of preventing and combating identity and document fraud, may constitute an overriding reason in the public interest capable of justifying a ‘new restriction’ within the meaning of Article 13 of Decision No 1/80, it should be noted, in the first place, that the Court has previously held that the objective of preventing unlawful entry and residence constitutes such an overriding reason (judgment of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, paragraph 41).
- 47 In the second place, the Court has also found that the collection and retention of fingerprints when issuing passports in order to prevent the falsification of passports and the fraudulent use of passports pursues an objective of public interest recognised by the European Union, namely prevention of illegal entry into its territory (see, to that effect, judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraphs 36 to 38).
- 48 In the third and final place, it is important to highlight the importance accorded by the EU legislature to the fight against identity fraud, as is apparent, inter alia, from Article 2(c) of Regulation No 767/2008 and Article 2(2)(b) of Regulation 2019/817.
- 49 In those conditions, the objective of preventing and combating identity and document fraud may constitute an overriding reason in the public interest capable of justifying a ‘new restriction’ within the meaning of Article 13 of Decision No 1/80.
- 50 Second, as regards the appropriateness of the national rule at issue in the main proceedings for the purpose of ensuring that such an objective is achieved, it should be noted that the taking, recording and retention of 10 fingerprints and a facial image of third-country nationals in a central filing system make it possible to identify precisely the person concerned and to detect identity and document fraud by comparing the biometric data of the applicant for a temporary residence permit with those contained in that filing system.
- 51 It follows that the national rule at issue in the main proceedings is appropriate to guarantee the objective pursued.
- 52 Third, as regards whether the national rule at issue in the main proceedings does not go beyond what is necessary to achieve the objective pursued, it must be ensured that it does not, in the name of the objective of preventing and combating identity and document fraud, disproportionately undermine the right to privacy in the processing of personal data.
- 53 In that respect, it should be recalled that Article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’) provides, inter alia, that everyone has the right to respect for his or her private life. Under Article 8(1) thereof, everyone has the right to the protection of personal data concerning him or her.

- 54 Respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual (judgment of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 52).
- 55 Thus, first, fingerprints and the facial image of a natural person constitute personal data, as they objectively contain unique information about individuals which allows those individuals to be identified with precision (judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 27). Second, the activities comprising the collection, recording and retention of fingerprints and the facial image of third-country nationals in a filing system constitute the processing of personal data within the meaning of Article 8 of the Charter (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, point 123 and the case-law cited).
- 56 According to settled case-law, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, point 140 and the case-law cited).
- 57 In that respect, it should be noted, in the first place, that, in order to prevent and combat identity and document fraud, Member States must verify the declared identity of the applicant for a temporary residence permit. As the Advocate General pointed out, in essence, in point 27 of his Opinion, that objective calls for checks to ensure, inter alia, that an applicant has not already submitted another application before that application under a different identity by comparing his fingerprints with those already in the central filing system.
- 58 In the second place, the data referred to in the national rule at issue in the main proceedings are limited to 10 fingerprints and a facial image. The collection of those data, besides providing a reliable way of identifying the person concerned, is not of an intimate nature and does not cause any particular physical or mental discomfort for the person concerned (see, to that effect, judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 48).
- 59 Moreover, the EU legislature itself laid down, inter alia in the context of Regulation No 767/2008, the obligation on applicants for visas to provide their fingerprints and their facial image.
- 60 In the third place, as regards the scope of the national rule at issue in the main proceedings, it is clear from the order for reference that it applies, in essence, to all third-country nationals who wish to reside in the Netherlands for a period of more than 90 days or who reside illegally in that Member State.
- 61 In this respect, it should be noted that the objective pursued by that rule, namely the prevention and combating of identity and document fraud by third-country nationals, cannot be achieved by limiting the application of the rule to a specific category of third-country nationals. Consequently, the scope of the national rule at issue in the main proceedings appears to ensure the effective achievement of the objective pursued.
- 62 In the fourth place, it is apparent from the file submitted to the Court that access to and use of the biometric data contained in the central filing system is limited to officials of the national authorities responsible for the implementation of national legislation on foreign nationals, such as staff of consular and diplomatic posts, duly authorised to that end by the competent minister, for the purpose of establishing or verifying the identity of third-country nationals to the extent necessary for the performance of their tasks.

- 63 In the fifth and final place, as regards the duration of the retention of the personal data, the national rule in question must, *inter alia*, continue to satisfy objective criteria that establish a connection between the personal data to be retained and the objective pursued (Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, point 191).
- 64 In the present case, the national rule at issue in the main proceedings provides that biometric data are to be retained in the central filing system for a period of five years following the rejection of an application for a temporary residence permit, the departure of the person concerned at the end of a legal stay or the expiry of the period of validity of an entry ban or a declaration of undesirability. Biometric data are to be destroyed immediately if the third-country national is naturalised during his stay in the Netherlands.
- 65 In that context, it should be noted that the national rule at issue in the main proceedings establishes a connection between the period for which biometric data are retained and the objective of preventing and combating identity and document fraud.
- 66 The retention of the biometric data of third-country nationals during their stay in the Netherlands appears justified in the light of the need to verify, during that period, the identity of such nationals and the legality of their stay in that Member State, in accordance with the Law on foreign nationals, in particular when considering an extension of a residence permit. Moreover, as the Advocate General pointed out, in essence, in point 30 of his Opinion, such a retention period appears to be necessary in order to prevent applications for temporary residence permits from being made under the identity of third-country nationals lawfully resident in the Netherlands.
- 67 As regards the retention of the biometric data of third-country nationals for a period of five years following the rejection of their application for a temporary residence permit, their departure at the end of a legal stay or the expiry of the period of validity of an entry ban or a declaration of undesirability made against them, it should be noted that such a retention period prevents, in particular, third-country nationals who find themselves in those circumstances from making a new application under a different identity.
- 68 To that end, the five-year retention period does not appear excessive in the light of the objective pursued by the national rule at issue in the main proceedings.
- 69 In those circumstances, the national rule at issue in the main proceedings does not go beyond what is necessary to achieve the objective of preventing and combating identity and document fraud.
- 70 In the light of the findings above, the answer to the first question is that Article 13 of Decision No 1/80 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which makes the issuance of a temporary residence permit to third-country nationals, including Turkish nationals, conditional upon the collection, recording and retention of their biometric data in a central filing system constitutes a ‘new restriction’ within the meaning of that provision. Such a restriction is, however, justified by the objective of preventing and combating identity and document fraud.

### ***The second question***

- 71 By its second question, the referring court asks the Court whether Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80 must be interpreted as meaning that a national rule does not constitute a restriction within the meaning of those provisions if the effect of that national rule on access to employment is too uncertain and too indirect to be regarded as constituting an obstacle to such access.

- 72 In particular, it is apparent from the order for reference that, by its second question, that court seeks to ascertain, in essence, whether, in view of the fact that the national rule at issue in the main proceedings also allows the biometric data of third-country nationals, including Turkish nationals, to be provided to third parties for the purpose of the detection and prosecution of criminal offences, that legislation constitutes a ‘new restriction’ within the meaning of those provisions.
- 73 In that regard, according to settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 130 and the case-law cited).
- 74 In the present case, it is apparent from the order for reference that the national legislation at issue in the main proceedings provides, in essence, that the provision of biometric data of third-country nationals, including Turkish nationals, to third parties for the purpose of the detection and prosecution of criminal offences is permitted only in cases of criminal offences for which a measure of provisional detention may be imposed where, at the very least, there is a suspicion that a third-country national has committed an offence of this nature.
- 75 It does not appear from the order for reference, however, that A and B are suspected of having committed a criminal offence and that their biometric data have been provided to third parties pursuant to Article 107(5) and (6) of the Law on foreign nationals. Moreover, the Netherlands Government confirmed at the hearing before the Court that the biometric data of A and B have not been used in the context of criminal proceedings.
- 76 In those circumstances, the second question must be declared inadmissible.

### *The third question*

- 77 Since the second question has been declared inadmissible, there is no need to answer the third question.

### **Costs**

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

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

**Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the European Economic Community (EEC) and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which makes the issuance of a temporary residence permit to third-country nationals, including Turkish nationals, conditional upon the collection, recording and retention of their biometric data in a central filing system does constitute a ‘new restriction’ within the meaning of that provision. Such a restriction is, however, justified by the objective of preventing and combating identity and document fraud.**

[Signatures]