

Anonymised version

TRANSLATION

C-194/20 — 1

Case C-194/20

Request for a preliminary ruling

Date lodged:

8 May 2020

Referring court:

Verwaltungsgericht Düsseldorf (Germany)

Date of the decision to refer:

7 May 2020

Applicants:

BY

CX

DW

EV

FU

Defendant:

City of Duisburg

ORDER

In the administrative court proceedings

1. BY,
2. CX,
3. DW,

EN

4. EV,

5. FU,

the third and fourth applicants being represented by their parents, the first and second applicants, all residing in: [...] Duisburg,

applicants,

[...]:

versus

the

City of Duisburg [...],

defendant,

concerning the German law relating to foreign nationals (residence permit pursuant to Paragraph 4(5) of the Aufenthaltsgesetz (Law on residence, ‘AufenthG’); here: order to stay proceedings and for reference)

the 7th Chamber of the Verwaltungsgericht Düsseldorf (Administrative Court of Düsseldorf) made, on 7 May 2020, the following

[...]

order:

The proceedings are stayed.

[Or. 2]

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

- 1. Does the entitlement of Turkish children under the first sentence of Article 9 of Decision No 1/80 of the EEC-Turkey Association Council (‘Decision No 1/80’) also include a right of residence in the host Member State without the need to fulfil further conditions?**
- 2. If Question 1 is answered in the affirmative:**
 - (a) Does an entitlement to residence under the first sentence of Article 9 of Decision No 1/80 require that the parents of the**

Turkish children benefiting from that provision have already acquired rights under Article 6(1) or Article 7 of Decision No 1/80?

(b) If Question 2(a) is answered in the negative: Is legal employment within the meaning of the first sentence of Article 9 of Decision No 1/80 to be interpreted in the same way as in Article 6(1) of Decision No 1/80?

(c) If Question 2(a) is answered in the negative: Can an entitlement to residence in respect of Turkish children under the first sentence of Article 9 of Decision No 1/80 already arise after one of the parents has been in legal employment in the host Member State for a period of (only) three months?

(d) If Question 2(a) is answered in the negative: Does the right of residence of Turkish children also entail, without the need to fulfil further conditions, a right of residence for one or both parents with custody?

I.

The applicants are Turkish nationals. The first and second applicants

the Chamber bases this numerical designation not on the numbering chosen by the applicants in the application initiating proceedings, but on the precedence given to the parents over the other applicants by the court administration,

are the parents of the third, fourth and fifth applicants, the latter having already reached the age of majority.

The first applicant entered Germany with a visa on 5 September 2015 and received via the defendant a residence permit for exercising self-employed activities (as a truck driver) from the defendant on 4 November 2015, which was valid until 27 March 2017.

The second, third, fourth and fifth applicants then entered Federal territory together on 19 February 2016 with a family reunification visa valid until 16 May 2016 and received residence permits in accordance with Paragraphs 30 and 32 of the Law on residence on 20 April 2016, which were also valid until 27 March 2017.

The second applicant worked as a warehouse assistant at MKS Kurierservice Metin Sariözüm in Duisburg, which registered, with the Deutsche Rentenversicherung (German pension insurance scheme), a period of employment commencing on 1 February 2016 [Or. 3] and ending on 30 April 2016 (three months). Further periods of employment are registered for the periods from

15 November to 31 December 2017, 1 January to 15 January 2018 and 1 August to 31 December 2018.

The third, fourth and fifth applicants attend state schools in Duisburg and, according to the records, have done so since 21 June 2016.

After the period of validity of the residence permits issued had expired, the defendant provisionally extended the applicants' permits by issuing provisional residence documents ('Fiktionsbescheinigung').

On 1 December 2017, the first applicant de-registered his business after receiving a penalty order for careless driving without a driving licence. On 1 February 2018, he registered another business (vans up to 3.5 tonnes).

By written submission from their lawyer of 2 October 2018, the applicants communicated that the first applicant intended to work as a dependent employee in the future and was applying for a residence permit pursuant to Paragraph 18 of the Law on residence or any other provision that could be of relevance. The second applicant would also return to work as from 1 August 2018, while the third, fourth and fifth applicants would continue to attend school. Rights of residence for the children arose from Article 9 of Decision No 1/80 and Article 3 of Decision No 2/76 of the EEC-Turkey Association Council ('Decision No 2/76').

After hearing the applicants, the defendant refused to renew or issue residence permits by administrative orders of 18 March 2019 and ordered the applicants to depart from the territory within 30 days of the notification of the order under threat of deportation to Turkey. As grounds, it stated that the first applicant was no longer self-employed. The income earned from the activity carried out as a salaried employee did not cover the subsistence costs of the 'community of need', as required by point 1 of Paragraph 5(1) of the Law on residence.

The applicants brought an action on 22 March 2019, by which they pursue their request to be issued a residence permit or have their residence permits extended.

In support of their action, they assert that the third, fourth and fifth applicants, as the Turkish children of the first and second applicants, lived with their parents in a lawful manner. The rights to participate in education arising from Article 9 of Decision No 1/80 and Article 3 of Decision No 2/76 entailed a right of residence, to which the parents with custody also had to be entitled.

Accordingly, the applicants request that

the administrative orders of 18 March 2019 be annulled and the defendant be obliged to issue a new decision on the applications for extension, having due regard for the court's legal appraisal.

The defendant requests that

the action be dismissed [Or. 4]

and, in support of its request, refers to the grounds set out in the contested administrative orders. In addition, it submits that the third, fourth and fifth applicants could not rely on rights under Article 9 of Decision No 1/80, since their parents had not acquired rights under Article 6 or 7 of Decision No 1/80.

In the preliminary hearing (in the main proceedings and the proceedings for interim measures) before the Judge-Rapporteur, the defendant suspended the execution of the contested administrative orders.

[...] [reference to the case files].

II.

The case must be stayed. Pursuant to Article 267 TFEU, a preliminary ruling of the Court of Justice of the European Union ('Court of Justice') must be obtained on the questions set out in the operative part of this order. These questions concern the interpretation of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association. Since the questions concern the interpretation of EU law, the Court of Justice has jurisdiction.

1. The legal assessment of the claim asserted by the applicants — that the defendant's rejection decision of 18 March 2019 should be annulled and it should be obliged to issue a new decision on their residence permit application, having due regard to the court's legal appraisal — is based on the current legal situation.

On that basis, the following provisions of national law form the relevant legal framework in the present case :

Paragraph 4 AufenthG

(...)

(5) A foreigner who possesses a right of residence in accordance with the EEC-Turkey Association Agreement shall be obliged to furnish evidence of the existence of said right through the possession of a temporary residence permit, unless he is in possession of a permanent settlement permit or an EU long-term residence permit. Said residence permit shall be issued on application.

Paragraph 50 AufenthG

(1) A foreigner shall be obliged to leave the federal territory if he does not possess or no longer possesses the necessary residence title a right of residence does not exist or no longer exists under the EEC-Turkey Association Agreement. **[Or. 5]**

(...)

2. The questions referred for a preliminary ruling are material to the decision to be given and require clarification by the Court of Justice of the European Union.

a) The effect of the school attendance — as from 21 June 2016, according to the records — of the third, fourth and fifth applicants, who live with their parents in a joint household, is of decisive significance for the legal assessment of the claim asserted by the applicants in which they seek an extension of the residence permits issued on the basis of national law.

Following the preliminary hearing conducted by the Judge-Rapporteur, it is common ground that the second applicant worked as a salaried employee in the Federal territory in the period from 1 February to 30 April 2016 (three months) and had an undisputed right of residence. During further periods of employment, she was only in possession of provisional residence documents, after which no residence permit was issued. It is common ground that the applicants have not acquired rights under Articles 6 and 7 of Decision No 1/80.

The applicants are not pursuing claims for residence permits based on national law — with the exception of the provision in Paragraph 4(5) of the AufenthaltG, a prerequisite of which is a right of residence on the basis of the Association Agreement.

The applicants are now relying solely on the provision in Article 9 of Decision No 1/80, from which they derive not only a right for Turkish children to participate in school education and vocational training, but also rights of residence for the third, fourth and fifth applicants on the basis of their school attendance, which is not a point of contention between the parties. According to the applicants, the residence of the first and second applicants, which is required in order to give practical effect to the rights of the third, fourth and fifth applicants — in any event with regard to the third and fourth applicants, who have not yet reached the age of majority — is also granted by Article 9 of Decision No 1/80.

In so far as the applicants additionally, and also primarily, rely on the provisions of Article 3 of Decision No 2/76, the Chamber considers that that provision has been entirely replaced by Article 9 of Decision No 1/80, and the applicants can no longer derive any rights from it.

b) The national case-law on the question of whether Article 9 of Decision No 1/80 has the effect of conferring rights of residence is inconsistent.

According to the judgment of the Hessische Verwaltungsgerichtshof (Higher Administrative Court of Hesse) of 17 February 1997

[...]

Article 9 of Decision No 1/80 presupposes a right of residence for the children, but does not establish any entitlement to family reunification or other means of regularising irregular migrants.

See also, in this respect, judgment of the Higher Administrative Court of Hesse of 2 December 2002 [...], even if it casts even more doubt in the light of the Court of Justice's decision in the *Baumbast* case of 17 September 2002, C-413/99, concerning Article 12 of Regulation (EEC) No 1612/68.
[Or. 6]

According to a further view, the possibility of the provision having the effect of conferring a right of residence could be ruled out in any event if the Turkish child entered the country for the purpose of education and not in the context of family reunification. The reason for this was that — as made clear by the second sentence of Article 7 of Decision No 1/80 — children acquired an independent right of residence in connection with education only after having completed it.

Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia), order of 3 April 2001 [...].

Nor could an effect of conferring a right of residence be inferred from that provision if, at the time of the Turkish child's entry, the parents no longer had Turkish nationality, but that of the host Member State.

Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court of Rhineland-Palatinate), order of 29 June 2009 [...].

According to another view, Turkish children who fulfil the other requirements of the first sentence of Article 9 of Decision No 1/80 also have a right of residence protected under EU law during the education available to them under that provision.

Verwaltungsgericht Karlsruhe (Administrative Court of Karlsruhe), judgment of 2 July 2004 [...].

From the national case-law of other Member States, the referring court is aware of the decision of the Raad van State (Council of State) of 27 November 2008

[...]

which takes the view that Article 9 of Decision No 1/80 relates only to children of Turkish workers as described in Articles 6 and 7 of Decision No 1/80, in line with the objective of the Decision of the Association Council — the gradual integration of Turkish workers [...].

c) The Chamber is inclined to take the view that Article 9 of Decision No 1/80 cannot be said to have the effect of conferring a right of residence, at least in cases

where the parents have not acquired rights under Article 6(1) or (7) of Decision No 1/80 (see question 2(a)).

Question 1 seeks to ascertain whether the content of Article 9 of Decision No 1/80 gives rise to rights of residence, as claimed by the applicants.

At first glance, the provision is very similar, in terms of structure and conditions, to the provision in Article 10(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union,

or Article 12 of the predecessor, REGULATION (EEC) No 1612/68 OF THE COUNCIL of 15 October 1968 on freedom of movement for workers within the Community, [Or. 7]

and is therefore open to being interpreted as being relevant to rights of residence. This is because the Court of Justice has clarified, in settled case-law, that the provision in Article 12 of Regulation (EEC) No 1612/68 or Article 10(1) of Regulation (EU) No 492/2011 does have relevance to rights of residence, and has clarified the conditions under which that relevance arises and the scope of that relevance.

CJEU, judgment of 13 June 2013 — C-45/12 [ECLI:EU:C:2013:390], *Hadj Ahmed* — paragraph 46; CJEU, judgment of 23 February 2010 — C-310/08 [ECLI:EU:C:2010:80; CJEU], *Teixeira*, paragraph 61, judgment of 17 September 2002 — C-413/99 [ECLI:EU:C:2002:493], *Baumbast and R* — paragraph 73 et seq.; CJEU, judgment of 23 February 2010 — C-480/08 — paragraphs 86 and 87; CJEU, judgment of 27 September 1988 — C-263/86 [ECLI:EU:C:1988:451], *Humbel and Edel* — paragraphs 24 and 25; CJEU, judgments of 15 March 1989 — C-389/87 [ECLI:EU:C:1989:130], *Echternach and Moritz* — paragraphs 29 and 30, and of 23 February 2010 — C-310/08 — paragraph 19; CJEU, judgment of 17 September 2002 — C-413/99 — paragraph 54; CJEU, judgment of 8 May 2013 — C-529/11 [ECLI:EU:C:2013:290], *Alarape and Tijani* — paragraph 48.

However, there are also significant differences between the provision in Article 9 of Decision No 1/80 and the aforementioned provisions.

It is therefore clear that, based on its wording, the provision is intended to benefit only Turkish children, in contrast to Article 10(1) of Regulation (EU) No 492/2011 and Article 12 of Regulation (EEC) No 1612/68.

It cannot be inferred, even in the light of the provision in Article 7 of Decision No 1/80, that the nationality of the children of a Turkish worker — as required by Article 9 of Decision No 1/80 — is supposed to be of significance for integration in the host Member State. This is because it benefits family members of Turkish workers, irrespective of their nationality, in terms of access to the labour market

and therefore also with regard to their residence. Paragraph 2 makes the children's entitlement to benefit from the provision dependent — likewise irrespective of their nationality — on the completion of vocational training in the host Member State. Assuming that the two provisions are schematically connected in terms of rights of residence, it makes little sense to make access to (vocational) training dependent on the possession of Turkish nationality. In this respect, the meaning of the provision in Article 9 — aside from its undisputed content regarding anti-discrimination and participation (especially in the second sentence) — could be confined to a statement of principle.

Furthermore, integration under residence law via access to the labour market after having obtained an education in the host Member State is comprehensively, but not unconditionally, regulated in Article 7. In the light of these detailed provisions, deriving a right of residence solely from the (former) status as a worker of a Turkish parent with whom the child lives must be contradictory if those parents have not acquired rights of their own under Article 6 or 7 of Decision No 1/80.

(d) If the core question as to whether the content of Article 9 of Decision No 1/80 confers rights of residence (Question 1) is answered in the affirmative, the referring court raises Questions 2(a) to (d) regarding the conditions for a right of residence under Article 9 of Decision No 1/80 and the legal consequences. **[Or. 8]**

In this respect, Question 2(a) concerns the legal status of the parents, namely whether they must already have acquired rights under Article 6 of Decision No 1/80 (direct) or Article 7 of Decision No 1/80 (derived) in order to be able to confer rights on their own children (or also stepchildren, where applicable) pursuant to Article 9 of Decision No 1/80 — under the other conditions of the provision.

By Question 2(b), the referring court is introducing the Court of Justice's case-law on the criterion of 'legal employment'. If Question 2(a) is answered in the negative, must the legal employment of the parents then be subject to the same conditions to which it is subject in Article 6 of Decision No 1/80 and can the interpretation developed in relation to Article 6 of Decision No 1/80 be applied in relation to Article 9 of Decision No 1/80?

If Question 2(a) is answered in the negative, there is no time frame that can be imposed for engaging in legal employment. In this respect, can the entitlement of Turkish children under Article 9 of Decision No 1/80 arise if one of the parents has been in employment for a duration of (only) three months and is actual attendance at the educational establishment a condition for the acquisition and continued existence of the right of residence (Question 2(c))?

Finally, Question 2(d) concerns the exercise of the right by Turkish children for whom, in the case of being under the age of majority, that can be factually possible only if a parent who has custody of the children is present. Can parents

with custody derive from the right of residence of Turkish children a right of residence — which is possibly limited by the child's minority and actual attendance at the educational establishment?

[...]

WORKING DOCUMENT