

**Case C-402/21****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 June 2021

**Referring court:**

Raad van State (Netherlands)

**Date of the decision to refer:**

23 June 2021

**Appellants:**

Case 1: Staatssecretaris van Justitie en Veiligheid

Case 2: E

Case 3: C

**Respondents:**

Case 1: S

Case 2: Staatssecretaris van Justitie en Veiligheid

Case 3: Staatssecretaris van Justitie en Veiligheid

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**Subject matter of the main proceedings**

This reference for a preliminary ruling concerns three separate cases in which the Staatssecretaris (State Secretary) has withdrawn the residence permits of Turkish nationals who have been lawfully resident in the Netherlands for more than 30 years, because they pose a threat to public policy. A new regulation of 2012 makes this possible, but the question is whether this regulation is consistent with Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the EEC-Turkey Association.

## **Subject matter and legal basis of the request**

In this request for a preliminary ruling under Article 267 TFEU, the referring court asks the Court of Justice of the European Union ('the Court of Justice'), in essence, whether Article 13 of Decision No 1/80 is applicable if a foreign national already derives rights from Article 6 or Article 7 of Decision No 1/80 and, if so, how Article 13 of Decision No 1/80 relates to Article 14 of Decision No 1/80.

## **Questions referred for a preliminary ruling**

1. Can Turkish nationals who have the rights referred to in Article 6 or Article 7 of Decision No 1/80 still rely on Article 13 of Decision No 1/80?
2. Does it follow from Article 14 of Decision No 1/80 that Turkish nationals can no longer rely on Article 13 of Decision No 1/80 if, due to their personal conduct, they represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?
3. Can the new restriction whereby the right of residence of Turkish nationals may be terminated even after 20 years on grounds of public policy be justified by reference to the changed social perceptions which gave rise to that new restriction? Is it sufficient that the new restriction serves the public policy objective, or is it also required that the restriction be suitable for achieving that objective and not go beyond what is necessary to attain it?

## **Provisions of European Union law relied on**

Additional Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the EEC and Turkey (OJ 1973 C 113, p. 17), Article 59.

Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, Articles 6, 7, 13 and 14.

Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77), Article 28.

## **Provisions of national law relied on**

Vreemdelingenwet 2000 (Law on foreign nationals of 2000)

Vreemdelingenbesluit 2000 (Decree on foreign nationals of 2000), as amended by Article I of the Besluit van 26 maart 2012, houdende wijziging van het Vreemdelingenbesluit 2000 in verband met aanscherping van de glijdende schaal

(Decree of 26 March 2012 amending the Decree on Foreign Nationals of 2000 as regards the tightening of the sliding scale).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Before 2012, it was no longer possible in the Netherlands to terminate the right of residence of foreign nationals after a period of lawful residence of more than twenty years. In that year, an amendment to the Decree on foreign nationals came into force by which the so-called sliding scale was adjusted. That term refers to a regulation by which an increasingly strict standard applies to the termination of a residence permit on grounds of public policy. The longer a foreign national has been in the Netherlands, the more serious must be the crimes of which he or she has been convicted in order for his or her residence permit to be withdrawn. Since 2012, it has been possible to withdraw a residence permit even after twenty years for various serious crimes punishable by a custodial sentence of more than three years.
- 2 However, it is questionable whether the new tighter sliding scale can be applied to Turkish nationals, as this adjustment constitutes a new restriction as referred to in Article 13 of Decision No 1/80. That article prohibits the introduction of new provisions that make Turkish nationals' access to employment in the EU more difficult. In the case of foreign national S, who was convicted of 39 counts of robbery and trafficking in hard drugs, the Rechtbank (District Court) held that the new sliding scale could not be applied. The State Secretary has lodged an appeal with the referring court.
- 3 However, in the comparable cases of foreign nationals E and C, the court of first instance ruled that, pursuant to Article 14 of Decision No 1/80, the application of Article 13 is excluded in the case of restrictions on the grounds of public policy, public security and public health, and that the new sliding scale therefore does apply. In those cases, foreign nationals E and C have lodged appeals.

### **The essential arguments of the parties in the main proceedings**

- 4 The State Secretary is primarily of the view that foreign nationals S, E and C cannot rely on Article 13 of Decision No 1/80 because they already derive rights from Article 6 or Article 7 of that decision. The latter provisions protect the rights of Turkish nationals who take up employment in the EU. Those rights are progressively extended in proportion to the duration of their employment in a Member State. Since those two provisions already fully protect the rights of Turkish nationals in the field of employment, Article 13 of Decision No 1/80 cannot have as its purpose the protection of such rights. The latter article is intended only to protect Turkish nationals who wish to acquire the rights provided for in Articles 6 and 7. Article 13 thus protects them against the tightening of national law which makes access to employment more difficult. According to the

State Secretary, this follows from the judgment of 21 October 2003, *Abatay*, C-317/01 and C-369/01, EU:C:2003:572, paragraphs 78 and 79.

- 5 If, in principle, Article 13 of Decision No 1/80 does apply to the cases in the main proceedings, the State Secretary argues that, having regard to Article 14 of that decision, foreign nationals S, E and C can nevertheless not rely on it in the present cases because they pose a threat to public policy. According to the State Secretary, this can be inferred from the judgments of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, 12 April 2016, *Genc*, C-561/14, EU:C:2016:247, and 29 March 2017, *Tekdemir*, C-652/15, EU:C:2017:239. Thus, pursuant to Article 14 of Decision No 1/80, the new sliding scale may be applied to foreign nationals S, E and C.
- 6 According to these foreign nationals, the State Secretary has misinterpreted the *Abatay* judgment. After all, it would be strange if a Turkish national who satisfied all the requirements for a right of residence under Article 6 or Article 7 of Decision No 1/80 was less well protected against a restriction of that right of residence than a Turkish national who did not yet satisfy all the requirements.
- 7 Moreover, Article 14 of Decision No 1/80 is not intended to have the effect of somehow preventing the application of Article 13 on grounds of public policy. A new restriction is only justified on grounds of public policy if it is suitable for safeguarding public policy and does not go beyond what is necessary for that purpose. The foreign nationals must represent a present, genuine and sufficiently serious threat affecting one of the fundamental interests of society, and the principle of proportionality must not preclude withdrawal [of a residence permit]. According to the foreign nationals, that is evident from the aforementioned *Demir* judgment and the judgment of 8 December 2011, *Ziebell*, C-371/08, EU:C:2011:809.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

#### *Question 1*

- 8 The referring court doubts whether the State Secretary may interpret the *Abatay* judgment as meaning that Turkish nationals who already derive rights from Article 6 or Article 7 of Decision No 1/80 can no longer rely on Article 13. Indeed, it follows from the judgment of 17 September 2009, *Sahin*, C-242/06, EU:C:2009:554, paragraph 51, that ‘Article 6 governs the conditions in which actual employment permits the gradual integration of the person concerned in the host Member State, while Article 13 concerns the national measures relating to access to employment’. However, this does not necessarily mean that Article 13 is not applicable if a foreign national derives rights from Article 6 or Article 7. In the *Abatay* judgment, the Court of Justice may have intended only to reject the German Government’s contrary view that Article 13 applies only if Article 6 also

applies. That is presumably why it held that Article 13 applies if Article 6 does not apply.

- 9 The objective of Decision No 1/80 to allow the free movement of Turkish workers and their gradual integration into the host Member State appears to be at odds with the view that a Turkish national loses the protection of Article 13 of Decision No 1/80 on becoming progressively more integrated in the host Member State. Moreover, it would also follow from the aforementioned *Genc* and *Tekdemir* judgments and from the judgments of 10 July 2019, A, C-89/18, EU:C:2019:580, and of 29 April 2010, *Commission v Netherlands*, C-92/07, EU:C:2010:228, that Article 13 of Decision No 1/80 applies to all national measures which may adversely affect the pursuit of an economic activity within Union territory, and not only to restrictions relating to the first admission to the territory of the Member State.
- 10 Since it is not clear from the abovementioned case-law of the Court of Justice whether a foreign national who derives rights from Article 6 or Article 7 of Decision No 1/80 may still rely on Article 13 of Decision No 1/80, the referring court is of the view that it is necessary to refer the first question to the Court of Justice for a preliminary ruling.

#### *Question 2*

- 11 If Turkish nationals who derive rights from Article 6 or Article 7 of Decision No 1/80 are still able to rely on Article 13 of Decision No 1/80, the question arises whether they can also do so if, due to their personal conduct, they constitute a threat to public policy. Article 13 of Decision No 1/80 is addressed to the Member States and prohibits them from introducing new measures which have the object or effect of making Turkish nationals subject to more restrictive conditions in the field of freedom of movement (see *Demir* judgment, paragraph 33). A Turkish national can request a court or tribunal to declare inapplicable new rules of national law that conflict with that article (see *Sahin* judgment, paragraph 62). If a foreign national poses a threat to public policy due to his or her personal conduct and therefore satisfies Article 14 of Decision No 1/80, it is not obvious that the prohibition laid down in Article 13 automatically ceases to apply. After all, that prohibition is addressed to the Member States and has no connection whatsoever with the personal conduct and personal circumstances of Turkish nationals.
- 12 However, the Court of Justice has also ruled in the aforementioned *Ziebell* judgment, paragraph 82, that a Member State can restrict the rights ensuing from Articles 6 and 7 of Decision No 1/80 if the personal conduct of a Turkish national constitutes a present, genuine and sufficiently serious threat to a fundamental interest of society, and the restriction of those rights is proportionate. At the same time, the fundamental rights of the foreign national, in particular, the right to privacy and family life, must be respected.

- 13 The referring court therefore raises the question whether it is not rather the case that the importance of not being confronted with new restrictions as referred to in Article 13 of Decision No 1/80 must be taken into account when assessing the personal conduct of the foreign national and compliance with the principle of proportionality. On the basis of that assessment, the rights derived from Article 6 or Article 7 of Decision No 1/80 could possibly be terminated in any case. In that event, reliance on Article 13 would no longer be relevant. According to the referring court, it is therefore not clear from the abovementioned case-law of the Court of Justice whether a Turkish national who constitutes a threat to public policy can still rely on the fact that a new measure which is contrary to Article 13 of Decision No 1/80 must be disapplied, and it therefore refers the second question for a preliminary ruling.

### *Question 3*

- 14 In the cases in the main proceedings, the tightening of the sliding scale was prompted by changed social perceptions on the protection of public policy. In the Explanatory Memorandum to the decree that made it possible to withdraw residence permits after more than 20 years of lawful residence, it is stated that the previous regulation at times did not take adequate account of people's sense of justice. Sometimes, despite a long period of residence, it was considered necessary to be able to terminate the right of residence. The question is whether those changed social perceptions justify the tightening of the sliding scale.
- 15 According to the referring court, it is not clear from the case-law of the Court of Justice when a new legislative measure which is contrary to Article 13 of Decision No 1/80 is nevertheless justified in the interests of public policy. It does not follow clearly from paragraph 40 of the previously mentioned *Demir* judgment whether a new restriction is only required to be in the interests of public policy or whether such a new restriction must also be suitable for achieving the legitimate objective pursued and not go beyond what is necessary for that purpose. The latter requirement provides less scope for Member States to introduce new restrictions within the meaning of Article 13 of Decision No 1/80 and seems to be supported by the judgments of 22 December 2010, *Bozkurt*, C-303/08, EU:C:2010:800, paragraph 56, and of 22 May 2012, *I.*, C-348/09, EU:C:2012:300, paragraph 23. However, in the latter judgment, the Court of Justice also held that Member States retain the freedom 'to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another'. It follows from the judgment of 4 December 1974, *Van Duyn*, 41/74, EU:C:1974:133, paragraph 18, that the national authorities have a certain margin of discretion in that respect. It is obvious that this also applies to the tightening of legal measures in the interests of public policy.
- 16 The referring court raises the question whether the tightening of the sliding scale due to changes in social perceptions takes sufficient account of the restrictive interpretation that must be given to the concept of public policy and whether it

still falls within a Member State's margin of discretion. For that reason, the third question is referred for a preliminary ruling.

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