

EYÜP

JUDGMENT OF THE COURT (Sixth Chamber)

22 June 2000 \*

In Case C-65/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Safet Eyüp

and

Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg

on the interpretation of the first paragraph of Article 7 of Decision No 1/80, of 19 September 1980, on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey,

\* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn, G. Hirsch, H. Ragnemalm and V. Skouris, Judges,

Advocate General: A. La Pergola,  
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mrs Eyüp, by W.L. Weh, of the Bregenz Bar,
  
- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,
  
- the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,
  
- the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Anderson, Barrister,
  
- the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, and B. Brandtner, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Eyüp, represented by W.L. Weh, of the Austrian Government, represented by G. Hesse, of the Federal Chancellor's Office, and I. Nowotny, Ministerialrätin in the same Office, acting as Agents, of the United Kingdom Government, represented by R.V. Magrill, of the Treasury Solicitor's Department, acting as Agent, and D. Anderson, and of the Commission, represented by P.J. Kuijper and B. Brandtner, at the hearing on 9 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1999,

gives the following

### Judgment

- 1 By order of 18 December 1997, received at the Court on 5 March 1998, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation of the first paragraph of Article 7 of Decision No 1/80 of the Association Council, of 19 September 1980, on the development of the Association (hereinafter 'Decision No 1/80'). The Association Council was established by the Agreement creating an Association between the European Economic Community and Turkey, signed on 12 September 1963 in Ankara by the Republic of Turkey and 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, p. 1).

- 2 Those questions were raised in proceedings between Safet Eyüp, a Turkish national, and the Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg (Regional Office of the Vorarlberg Employment Service) concerning a decision rejecting her application for a declaration that she fulfilled the conditions laid down in the first paragraph of Article 7 of Decision No 1/80 for working as an employed person in Austria.

#### Decision No 1/80

- 3 Articles 6 and 7 of Decision No 1/80 are contained in Chapter II of the latter, headed 'Social provisions', Section 1, concerning 'Questions relating to employment and the free movement of workers'.

- 4 Article 6(1) of Decision No 1/80 provides as follows:

'1. 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 The first paragraph of Article 7 of Decision No 1/80 provides:

'The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:

- shall be entitled — subject to the priority to be given to workers of Member States of the Community — to respond to any offer of employment after they have been legally resident for at least three years in that Member State;
  
- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.'

### The case at issue in the main proceedings

- 6 The documents in the main proceedings show that on 23 September 1983, Mrs Eyüp, who was born in 1963, married at Lauterach (Austria) a Turkish worker who had been duly registered as belonging to the Austrian labour force since 1975.
  
- 7 Following that marriage, the Austrian authorities issued Mrs Eyüp with a residence permit as a family member.
  
- 8 On 13 November 1985, the District Court of Trabzon (Turkey) pronounced the divorce of the couple.
  
- 9 Nevertheless, it is common ground that Mr and Mrs Eyüp continued to cohabit, with the result that their life together in Austria has endured since the date of their marriage. Four of the seven children of the couple were born during the period when they were cohabiting without being married.
  
- 10 On 7 May 1993, Mrs Eyüp married her ex-husband for the second time in Egg (Austria). Mr Eyüp then acknowledged the four children of the couple born outside marriage.
  
- 11 Mr Eyüp has a 'Befreiungsschein' in Austria, which is a document issued by the administration authorising him to be employed anywhere in the territory of that Member State, without a work permit, in accordance with the same rules as applicable to nationals.

- 12 Mrs Eyüp, who has devoted herself essentially to household tasks, has had in the host Member State only a few short-term jobs lasting a total of 877 days and does not fulfil the conditions regarding legal employment in Article 6(1) of Decision No 1/80.
- 13 On 23 April 1997, after an employer for whom Mrs Eyüp had already worked required, before employing her again, that she produce the required work permit so as not to expose him to criminal proceedings for illegally employing a foreigner, Mrs Eyüp applied to the Arbeitsmarktservice Bregenz (Bregenz Employment Service) for a certificate that she met the conditions laid down in the second indent of the first paragraph of Article 7 of Decision No 1/80.
- 14 That application was rejected on 7 July 1997, whereupon Mrs Eyüp appealed to the Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg.
- 15 On 24 September 1997, the latter nevertheless confirmed the contested decision.
- 16 The Austrian authorities took the view that, first, only the spouse — and not the cohabitee — of a Turkish worker should be regarded as a member of the latter's family within the meaning of the first paragraph of Article 7 of Decision No 1/80, and that the cohabitation of Mr and Mrs Eyüp had caused the latter to lose the benefit of the period between 23 September 1983 and 13 November 1985 in which they were married. Secondly, if one were to take the date of her second marriage as the starting-point, Mrs Eyüp did not fulfil the time

requirement in the second indent of that provision, as she had not lived in Austria for at least five years as a member of the family of a Turkish worker.

- 17 Mrs Eyüp then brought an action before the Verwaltungsgerichtshof in which she accused the competent authorities, *inter alia*, of failing to acknowledge that, at the very least, she fulfilled the conditions set out in the first indent of the first paragraph of Article 7 of Decision No 1/80.
- 18 In parallel with that action, Mrs Eyüp applied to the Verwaltungsgerichtshof for interim measures preserving her right to work in an employed capacity until the final determination of her right of access to the Austrian labour market. In that respect, Mrs Eyüp maintains that preventing her from engaging in paid employment endangers not only her own existence but also that of her family, and causes her irreparable damage. Without authorisation, the employer would risk criminal prosecution, leaving her with no chance of being employed.
- 19 The national court notes that, in its case-law, the Court of Justice has not yet defined the circle of persons who are to be regarded as members of a Turkish worker's family. If a cohabitee does not count as a family member under the first paragraph of Article 7 of Decision No 1/80, the further question arises whether the periods of marriage, interrupted by periods of cohabitation, should be aggregated, or the period of eligibility prior to the second marriage lost.
- 20 Mrs Eyüp's action also raises problems in relation to the application for interim measures, which the national court states may be based only on Community law. Under national law, such a claim would have to be dismissed, since the Verwaltungsgerichtshof, as a court with review powers on points of law, does not have the power to grant individuals provisional legal protection so as to preserve their rights against measures taken by the administration.

## The questions referred for a preliminary ruling

21 Taking the view that, in those circumstances, an interpretation of Community law was necessary in order to resolve the dispute, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Is the concept of members of the family in the first sentence of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey to be interpreted as meaning that the partner (in a relationship resembling marriage with no formal matrimonial bond) of a Turkish worker also meets the relevant objective requirements?
  
2. If a partner is not to be regarded as a member of the family:

Is the second indent of the first sentence of Article 7 of Decision No 1/80 to be interpreted as meaning that, to meet the objective requirements, the formal matrimonial bond between the Turkish worker and the family member must have lasted for five years without interruption, or is it permissible for periods during which there is a formal matrimonial bond with a partner to be interrupted by many years of cohabitation with the same partner?

3. Is the second indent of the first sentence of Article 7 of Decision No 1/80 to be interpreted as meaning that the formal dissolution of the matrimonial bond (for instance by divorce) with the Turkish worker extinguishes all previous periods of compliance, as a member of the family, with the conditions as to time?
  
4. Does Community law require that the (directly effective) rights deriving from Articles 6 and 7 of Decision No 1/80 in a Member State for the group of people designated therein be safeguarded by providing provisional legal

protection in certain cases in the form of positive (prescriptive) interim measures?

5. If Question 4 is answered in the affirmative: Is there a need for positive (prescriptive) interim measures on the basis of Community law to the effect that in certain cases (where an applicant invokes rights under Articles 6 and 7 of Decision No 1/80) the freedom of movement sought on the basis of the association agreement is provisionally granted for the duration of the proceedings before the competent administrative authority, before the court reviewing the decision of that authority or before the Court of Justice of the European Communities when a question is referred for a preliminary ruling, until legal protection is finally granted, to prevent serious and irreparable damage, and does the fact that a binding decision as to whether the objective requirements are met for freedom of movement under the association agreement is not taken immediately, but at a later date in certain cases, constitute such damage?’

### The first, second and third questions

- 22 It should be noted at the outset that, according to the order for reference, on 13 November 1985, the date on which the divorce between Mr and Mrs Eyüp was pronounced, Mrs Eyüp had not yet satisfied the condition of at least three years’ legal residence in the host Member State laid down in the first indent of the first paragraph of Article 7 of Decision No 1/80. She was authorised to enter Austria on the ground of preserving the family unit only after her marriage to Mr Eyüp, which took place on 23 September 1983.

- 23 Therefore, Mrs Eyüp may rely on rights conferred upon her by the first or second indent of the first paragraph of Article 7 of Decision No 1/80 only in so far as periods of residence in Austria after 13 November 1985 may be regarded as legal within the meaning of that provision.
- 24 In those circumstances, the first three questions should be read as asking essentially whether the first paragraph of Article 7 of Decision No 1/80 must be interpreted as covering the situation of a Turkish national who, like Mrs Eyüp, was authorised in her capacity as the spouse of a Turkish worker duly registered as belonging to the labour force of the host Member State to join that worker there, in circumstances where that spouse, having divorced before the expiry of the three-year qualification period laid down in the first indent of that provision, has nevertheless continued in fact to live uninterruptedly with her former spouse until the date on which the two former spouses remarried. If that interpretation cannot be accepted, the further question arises whether, leaving aside the period in which the persons concerned cohabited outside marriage, the periods of marriage preceding and following the cohabitation may be aggregated for the purposes of calculating periods of lawful residence within the meaning of the first paragraph of Article 7 of Decision No 1/80.
- 25 In that respect, the Court has consistently held that the first paragraph of Article 7 of Decision No 1/80 has direct effect in the Member States, so that Turkish nationals fulfilling the conditions which it lays down may directly rely on the rights conferred on them by that provision. In particular, they are entitled under the first indent of that provision, subject to priority being granted to workers of the Member States, to respond to any offer of employment after being legally resident in the host Member State for at least three years, and, in accordance with the second indent, are to enjoy free access to any paid employment of their choice after they have been legally resident there for at least five years (Case C-351/95 *Kadiman v Freistaat Bayern* [1997] ECR I-2133, paragraphs 27 and 28; Case C-329/97 *Ergat v Stadt Ulm* [2000] ECR I-1487, paragraph 34).

- 26 The Court has also held that that first paragraph of Article 7 of Decision No 1/80 is designed to promote family unity in the host Member State, in order to facilitate the employment and residence of Turkish workers duly registered as belonging to the labour force of the Member State concerned, by first allowing family members who have been authorised to join the migrant worker to be present with him and by then consolidating their position with the right to work as employed persons in that State (*Kadiman*, paragraphs 34, 35 and 36).
- 27 Thus, whilst that provision lays down the right for members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State to work there as employed persons after being lawfully resident there for a certain time, it does not thereby affect the power of the Member State in question to authorise the persons concerned to join the Turkish worker legally employed there and to regulate their stay until they become entitled to respond to any offer of employment (*Kadiman*, paragraphs 32 and 51; *Ergat*, paragraph 35).
- 28 The Court has concluded from this that the first paragraph of Article 7 of Decision No 1/80 requires that the unity of the family, in pursuit of which the person concerned entered the territory of the host Member State, should be evidenced for a certain period by actual cohabitation in a household with the worker and that this must be so until he or she becomes entitled to enter the labour market in that State (*Kadiman*, paragraphs 33, 37 and 40; *Ergat*, paragraph 36).
- 29 Consequently, the Court has construed Decision No 1/80 as not in principle preventing the authorities of a Member State from making the benefit of the right of access to paid employment and the corresponding right of residence which it confers on members of a Turkish worker's family subject to the condition that the person concerned actually lives with that worker for the period of three years prescribed by the first indent of the first paragraph of Article 7 of that decision (*Kadiman*, paragraphs 41 and 44; *Ergat*, paragraph 37).

- 30 In paragraphs 47 to 50 and 54 of *Kadiman*, the Court also held that, although the spirit and purpose of the first indent of the first paragraph of Article 7 of Decision No 1/80 imply that the family member is in principle required to reside uninterruptedly with the Turkish migrant worker during the initial three-year period, account must nevertheless be taken, for the purpose of calculating the three-year period of legal residence within the meaning of that provision, of short interruptions in their living together which are not intended to call into question their joint home in the host Member State, such as an absence from the joint home for a reasonable time and legitimate reasons, or an involuntary stay of less than six months by the person concerned in his country of origin.
- 31 In this case, the national court's file shows that Mrs Eyüp was authorised to join Mr Eyüp for the purposes of family unity in Austria, the Member State in which Mr Eyüp was lawfully employed.
- 32 Notwithstanding the decree of divorce between the spouses, Mr and Mrs Eyüp did not at any time interrupt their living together, since they never ceased to reside together under the same roof. Four children were born during the extra-marital cohabitation period. Mr Eyüp always maintained his family, Mrs Eyüp devoting herself essentially to household tasks and having only occasionally taken certain short-term jobs.
- 33 Mr and Mrs Eyüp subsequently remarried and continued to cohabit, Mr Eyüp having legitimated the children of the couple born outside marriage.
- 34 It follows from the above that Mr and Mrs Eyüp did not at any time reside separately or cease to live together in Austria, so that they constantly maintained a common legal residence within the meaning of the first paragraph of Article 7 of Decision No 1/80. Their conduct was thus permanently in accordance with the

objective underlying that provision, namely *de facto* family unity in the host Member State.

35 Moreover, it is undisputed that, during the period of cohabitation by the former spouses, the competent national authorities did not challenge Mrs Eyüp's right of residence in the host Member State.

36 In those circumstances, having regard to the particular facts of the case before the national court, and in particular the fact that the Eyüps' period of extra-marital cohabitation took place between their two marriages, that period cannot be regarded as an interruption of their joint family life in Austria, so that it must be taken into account in its entirety for the purposes of calculating periods of legal residence within the meaning of the first paragraph of Article 7 of Decision No 1/80.

37 Since, as has been noted in paragraph 30 of this judgment, the Court held in paragraphs 48 to 50 and 54 of *Kadiman* that the competent national authorities must take account of certain interruptions in the living together of the persons concerned in order to calculate the periods of lawful residence within the meaning of the first paragraph of Article 7 of Decision No 1/80, the interpretation of that provision given in the paragraph above applies even more in a case such as that at issue in the main proceedings, in which the cohabitation of the Turkish migrant worker with a person seeking the benefit of that provision has not been interrupted at all.

38 In the situation arising in the main proceedings, the information provided by the national court shows that in April 1997, when she applied for a certificate that she was entitled under the first paragraph of Article 7 of Decision No 1/80 to work in Austria as an employed person, Mrs Eyüp had for a period of more than 13 years never ceased to cohabit with Mr Eyüp in the host Member State — both during the periods in which they were married and during the years in which they

lived as cohabitantes — so that, at the date of that application, she was entitled to free access to any paid employment of her choice, in accordance with the second indent of that provision.

- 39 In the light of the foregoing interpretation, it is no longer necessary to rule on the subsidiary question concerning the possibility of aggregating periods of marriage where they are interrupted by a period of cohabitation of several years.
- 40 In view of the arguments raised by the parties in the main proceedings, it is important to add that as a result of the direct effect to be accorded to the first paragraph of Article 7 of Decision No 1/80 a Turkish national who, like Mrs Eyüp, fulfils the conditions laid down by that provision may directly rely on the individual rights which it confers in the matter of employment and, correspondingly, residence.
- 41 In that respect, it is settled case-law that a Member State cannot unilaterally modify the scope of the system of gradually integrating Turkish workers into the host Member State's labour force, so that that State no longer has the power to adopt measures such as to impede the exercise of the rights expressly granted by Decision No 1/80 (see, most recently, Case C-340/97 *Nazli v Stadt Nürnberg* [2000] ECR I-957, paragraph 30).
- 42 It is also settled case-law that every court of a Member State must apply Community law in its entirety and protect the rights which Community law confers on individuals, setting aside any provision of national law which may conflict with it (see, by analogy, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 21).

- 43 At the hearing, the Austrian Government stated in that context that, on 5 November 1998, the competent national authorities granted Mrs Eyüp a work permit on the ground that, taking the date of her second marriage to Mr Eyüp as the starting-point, she satisfied the conditions under the second indent of the first paragraph of Article 7 on the date on which that permit was granted; since that time, she has therefore been allowed access to any paid employment in the host Member State.
- 44 In that regard, it must be pointed out, however, that, under paragraphs 36 to 38 of this judgment, uninterrupted periods of cohabitation by Turkish nationals such as Mr and Mrs Eyüp must be fully taken into account for the purposes of determining the period of lawful residence required by the first paragraph of Article 7 of Decision No 1/80, so that, on the expiry of a three-year period as from her admission to Austrian territory, Mrs Eyüp already enjoyed the right set out in the first indent of the first paragraph of Article 7, and, two years later, she enjoyed the right set out in the second indent of that provision.
- 45 In any event, it is settled case-law that the issue of a work or residence permit does not constitute the basis of a Turkish national's right to work or reside, such rights being conferred directly by Decision No 1/80, irrespective of whether the authorities of the host Member State have issued those particular documents, which are merely of declaratory and probative value, providing evidence of the existence of those rights (*Ergat*, paragraphs 61 and 62).
- 46 It follows that Mrs Eyüp's argument that she had no chance of being employed on account of the fact that the potential employer had to fear criminal prosecution for employing a foreigner without the authorisations required by the relevant national legislation, and maintaining that interim measures are essential to preserve her right to work as an employed person pending the outcome of the dispute, is irrelevant.

- 47 Since Mrs Eyüp fulfilled the conditions for relying directly on the rights conferred upon her by the first or second indent of the first paragraph of Article 7 of Decision No 1/80, the latter are, first, independent of the possession of any permit, and, secondly, all national authorities are required to recognise and apply those rights granted directly by Community legislation.
- 48 In view of all the considerations set out above, the answer to the first three questions must be that the first paragraph of Article 7 of Decision No 1/80 must be interpreted as covering the situation of a Turkish national who, like Mrs Eyüp, was authorised in her capacity as the spouse of a Turkish worker duly registered as belonging to the labour force of the host Member State to join that worker there, in circumstances where that spouse, having divorced before the expiry of the three-year qualification period laid down in the first indent of that provision, still continued in fact to live uninterruptedly with her former spouse until the date on which the two former spouses remarried. Such a Turkish national must therefore be regarded as legally resident in that Member State within the meaning of that provision, so that she may rely directly on her right, after three years, to respond to any offer of employment, and, after five years, to enjoy free access to any paid employment of her choice.

#### The fourth and fifth questions

- 49 Having regard to the answer given to the first three questions, there is no longer any need to reply to the other questions, which essentially concern the point whether, if national law does not allow provisional legal protection to be granted, the courts of a Member State are required under Community law to order provisional measures capable of preserving the right of access to employment of Turkish nationals in the host Member State for as long as no final ruling has been given on the legality of the refusal by the competent national authorities to authorise such access.

## Costs

50 The costs incurred by the Austrian, German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 18 December 1997, hereby rules:

The first paragraph of Article 7 of Decision No 1/80, of 19 September 1980, on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey must be interpreted as covering the situation of a Turkish

national who, like the applicant in the main proceedings, was authorised in her capacity as the spouse of a Turkish worker duly registered as belonging to the labour force of the host Member State to join that worker there, in circumstances where that spouse, having divorced before the expiry of the three-year qualification period laid down in the first indent of that provision, still continued in fact to live uninterruptedly with her former spouse until the date on which the two former spouses remarried. Such a Turkish national must therefore be regarded as legally resident in that Member State within the meaning of that provision, so that she may rely directly on her right, after three years, to respond to any offer of employment, and, after five years, to enjoy free access to any paid employment of her choice.

Schintgen

Kapteyn

Hirsch

Ragnemalm

Skouris

Delivered in open court in Luxembourg on 22 June 2000.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber