

OPINION OF ADVOCATE GENERAL
MISCHO

delivered on 3 June 1999 *

1. The Bundesverwaltungsgericht (Federal Administrative Court), Germany, has submitted to the Court for a preliminary ruling the question whether a Turkish national who has applied for extension of his residence permit 26 days after its expiry still satisfies the conditions in the first paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 (not published, hereinafter 'Decision No 1/80') if the national authorities have refused to extend the permit in question.

2. That provision is worded as follows:

'[T]he 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 background to the main proceedings

3. In October 1975 Mr Ergat, a Turkish national born in 1967, joined his parents in Germany where they were both in employment. His mother is still in employment there, whereas his father has been unemployed since 1994.

4. In 1986 Mr Ergat married in Turkey a Turkish national who lives in that country with the child born of that marriage.

5. From 1983 onwards the plaintiff held fixed-term work permits and was employed, with interruptions, by various employers. On 19 December 1989 he obtained a work permit with no time-limit.

* Original language: French.

6. When he entered German territory Mr Ergat was not required, under the legislation applicable at the time, to have a residence permit. Following an application of 29 April 1983, he was issued a residence permit expiring on 1 April 1984. That permit was extended, first, until 1 April 1985 and then, on the basis of an application dated 9 April 1985, until 1 April 1987. Following a further application by Mr Ergat, dated 15 April 1987, his residence permit was extended until 1 April 1989, then, following an application of 20 April 1989, until 28 June 1991.

7. By a form signed on 10 June 1991, but lodged with the appropriate authority dealing with foreigners only on 24 July 1991, Mr Ergat applied for a further extension of his residence permit.

8. On 22 January 1992 that authority rejected Mr Ergat's application on the ground that it had been lodged 26 days after the expiry of his last residence permit. In addition, it required Mr Ergat to leave the country and threatened to deport him since the German law on foreigners precluded extension of his residence permit.

9. On 17 March 1992 Mr Ergat lodged an administrative appeal against that decision, which was dismissed by the Tübingen district administration on 4 May 1992.

10. Mr Ergat went back to Turkey in August 1992, returning to Germany only in autumn 1993. He states that since June 1994 he has again been in employment there.

11. The plaintiff brought proceedings before the courts against the decisions of 22 January and 4 May 1992. By judgment of 11 April 1994, the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen) set those decisions aside and ordered the Stadt Ulm to extend Mr Ergat's residence permit indefinitely. On appeal by the Stadt Ulm, that judgment was overturned by the Verwaltungsgerichtshof Baden-Württemberg (Baden-Württemberg Higher Administrative Court) by judgment of 7 December 1995.

12. Mr Ergat subsequently lodged an appeal on a point of law before the Bundesverwaltungsgericht, claiming that he was entitled to have his residence permit extended on the basis, in particular, of the first paragraph of Article 7 of Decision No 1/80. The fact that, because he had not always submitted his applications for renewal in due time, he had not been legally resident on a continuous basis in Germany was, he argued, immaterial because he had been granted the extensions applied for. He had maintained his residence in Germany and had remained there lawfully.

13. According to the Bundesverwaltungsgericht, no provision of German law allows the extension of Mr Ergat's residence

permit. However, that court is uncertain whether he could derive a right of residence from Decision No 1/80.

Turkish worker duly registered as belonging to the labour force of a Member State:

14. In this context, the Bundesverwaltungsgericht considers that refusal to extend Mr Ergat's residence permit cannot, despite six criminal offences committed by him, be justified under Article 14(1) of Decision No 1/80, which provides that the provisions of the section on questions relating to employment and the free movement of workers 'shall be applied subject to limitations justified on grounds of public policy, public security or public health'. As in the case of nationals of Member States, public policy may be invoked only in the event of an actual and sufficiently serious danger affecting a fundamental interest of society. However, in the present case, the offences committed by Mr Ergat were not particularly serious and were all punished by fines which, moreover, in the overwhelming majority of cases, were of small amounts.

- 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.'

15. In the opinion of the Bundesverwaltungsgericht, Mr Ergat cannot derive any rights from Article 6(1) of Decision No 1/80, which provides:

'[S]ubject to Article 7 on free access to employment for members of his family, a

16. According to the national court, Mr Ergat does not satisfy the conditions laid down in that provision. Thus, on the date of the application at issue, Mr Ergat had not been in legal employment with the same employer for at least a year and, with regard to the employment after the expiry of his last residence permit, he was not in a stable and secure situation as a member of

the labour force since that employment was not covered by a valid residence permit.

Ergat expired on 28 June 1991 and was not further renewed.

17. The Bundesverwaltungsgericht is uncertain, however, whether Mr Ergat is entitled, in the circumstances of this case, to rely on the first paragraph of Article 7 of Decision No 1/80 in order to obtain extension of his residence permit in Germany.

21. It is true that the abovementioned judgment concludes that the rights conferred by the first paragraph of Article 7 are granted to the persons concerned regardless of the issue by the authorities of the host Member State of a specific administrative document, such as a residence permit.

18. The fact that the Mr Ergat was of full age at the time of expiry of the last residence permit does not preclude the application of the first paragraph of Article 7 of Decision No 1/80, since that decision contains no age-limit for possession of the status of member of the family of a Turkish worker.

22. The national court is of the opinion that that conclusion means that, if a residence permit is required under national law, the first paragraph of Article 7 of Decision No 1/80 can be a material legal basis therefor. It does not mean, on the other hand, that the person concerned does not need a residence permit or that such a permit should be merely declaratory. If, as in this case, legal residence is the condition for a right derived from the first paragraph of Article 7 of Decision No 1/80 to arise, it cannot be founded on a legal position which merely follows from the existence of that right.

19. Moreover, it is apparent from the judgment in the *Kadiman* case¹ that that provision has direct effect.

20. In the present case, the issue is whether Mr Ergat satisfies the condition of legal residence in the host Member State, which is laid down in the first paragraph of Article 7. Fulfilment of that condition is assessed according to national law which, in Germany, requires a residence permit. However, the residence permit issued to Mr

23. It is clearly upon that consideration, according to the national court, that the Court of Justice of the European Communities bases its reasoning. It has held² that, for the purposes of the first paragraph of Article 7, account must be taken of the period during which the person concerned was not in possession of a valid residence permit, where the competent authorities of

1 — Case C-351/95 [1997] ECR I-2133.

2 — Judgment in *Kadiman*, at paragraph 54.

the host Member State did not claim on that ground that the person concerned was not legally resident within national territory, but on the contrary issued a new residence permit to him. However, in the opinion of the Bundesverwaltungsgericht, that does not call into question the requirement in principle of a residence permit. Moreover, the renewal without retroactive effect of a permit which had already expired when the application for extension was made does not, according to the national court, affect the absence of legality of the previous period of residence not covered by a permit. Finally, contrary to the practice followed in the *Kadiman* case, the competent authorities in this case refused to grant Mr Ergat a further extension of his residence permit.

24. In those circumstances, it is not clear according to the Bundesverwaltungsgericht, whether the first paragraph of Article 7 of Decision No 1/80 presupposes that the family member of a Turkish worker must still be legally resident in the host Member State at the material time for deciding on the application for extension of the expired residence permit, or whether that provision allows no importance to be attached to the legality of residence on the basis of a residence permit if the person concerned was still in possession of a valid residence permit a few weeks previously.

25. Consequently, the Bundesverwaltungsgericht has decided to refer to the Court,

under Article 234 (formerly Article 177) of the EC Treaty, the following question:

‘Does a Turkish national who has entered the country as a member of the family of a Turkish worker duly registered as belonging to the labour force, without requiring a residence permit in accordance with the national law on foreigners in force at the date of entry, and has subsequently been in possession of residence permits with interruptions, but who has applied for extension of his last residence permit 26 days after its expiry, satisfy the conditions in the first paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council that he has been “legally resident” there “for at least three years” (first indent) or “for at least five years” (second indent), if the national authorities have refused to extend the residence permit?’

The observations submitted to the Court

26. The German Government, taking the view that the conditions for the application of the first paragraph of Article 7 of Decision No 1/80 are not satisfied in this case, proposes that the question raised by the national court should be answered in the negative.

27. According to the German Government, that provision governs access to the labour force for the family members of a Turkish worker, to whom, in accordance with national law, a residence permit has been granted for the purpose of establishing and preserving the community of family life with that Turkish worker. Moreover, legal residence within the territory of the host State constitutes a prior condition for the application of that provision and it is the provisions of national law which determine when residence is legal. However, in the present case, Mr Ergat was no longer legally resident in Germany, since his residence permit had been out of date for 26 days.

28. Furthermore, according to the German Government, it is clear, by contrary inference, from paragraph 54 of the *Kadiman* judgment, to which the Bundesverwaltungsgericht also refers, that the Court takes the view that the condition of legality of residence is not satisfied if, as in this case, the competent authorities have refused to extend the residence permit of the person concerned and, in any event, that case-law could only have the consequence of regularising the previous gaps in Mr Ergat's legal residence.

29. Regardless of whether such retroactive effect is lawful, it is not, according to the German Government, sufficient for the person concerned to have resided legally in the host Member State at a certain time in the past, but, conversely, it is decisive that, at the date of making the application, the Turkish national still has a residence permit and is, therefore, legally resident in the host Member State.

30. In the German Government's opinion, any other interpretation would mean that, once three or five years had elapsed, the first paragraph of Article 7 would grant to the members of a Turkish worker's family a right of residence regardless of the national requirements concerning residence permits.

31. However, such a consequence, it maintains, would be contrary to the terms of the provision in question, which prescribes legal residence for a period of 'at least' three years or five years, and to its objective which, in order to promote the integration of the members of a Turkish worker's family into the host Member State by creating conditions conducive to family reunification, makes the rights conferred on those persons conditional upon the situation of the Turkish worker himself; on the other hand, a Turkish national cannot enjoy independent rights unless he satisfies the conditions in Article 6 of Decision No 1/80, which also presupposes that the requirements of national law concerning residence and work permits have been complied with.

32. In the Commission's opinion, the question submitted for a preliminary ruling raises two separate legal issues.

33. Firstly, according to the Commission, it is necessary to decide whether the first paragraph of Article 7 of Decision No 1/80 is to be taken to mean that, at the time when the member of a Turkish worker's family relies on that provision in order to

claim the rights which it confers on him, legal residence must still exist and it is not sufficient for such residence to have existed previously for three years or five years. The Commission takes the view that the question thus raised should be answered in the affirmative, having regard not only to the wording of the provision in question, which implies the present tense ('have been ... resident'), but also to its spirit and purpose.

34. Although it is true, according to the Commission, that, where a residence permit is applied for in due time and in a lawful manner and all the conditions in the first paragraph of Article 7 are satisfied, that provision confers entitlement to the issue of a residence permit, which the host Member State may not refuse the Turkish national, that State could, on the other hand, legitimately require a member of a Turkish worker's family to register in the lawful manner with the competent national authorities, declaring a fixed place of residence, and to maintain legal residence throughout his stay within the territory of the State concerned. On that basis, the State concerned would be entitled to require the obtaining of a residence permit in the forms and according to the rules laid down by its legislation. Even if that permit has only declaratory status, the person concerned would have to prove legal residence and maintain it, otherwise he would no longer satisfy the conditions in the first paragraph of Article 7. That strict interpretation of the provision in question is justified by the legitimate interest of Member States in ensuring that foreigners present within their territory comply with the relevant national legislation and, in particular, continue to reside there legally.

35. However, in the circumstances in point the main proceedings, Mr Ergat himself, the Commission states, broke the chain of rights conferred by the first paragraph of Article 7 by failing to apply in due time, without a valid excuse, for extension of his permit to reside in Germany, with the result that, through his negligent conduct, he forfeited, in principle, the right of residence which he held in Germany until 28 June 1991.

36. Secondly, however, according to the Commission, it is important to determine whether, in view of the minimal length of time of less than a month by which Mr Ergat exceeded the period of residence authorised until a further permit had to be applied for and taking into account the fact that Mr Ergat could have had a claim to extension of his residence permit if he had submitted his application in due time, the refusal given in this instance by the German authorities is in accordance with the principle of proportionality. The failure of the plaintiff in the main proceedings to act seems minor, whereas its legal consequence, namely deportation from the host Member State, is considerable.

37. According to the Commission, application of the principle of proportionality presupposes that all the relevant circumstances of the case are appropriately taken into account.

38. It concludes that, in view of the minimal nature of the delay at issue in this case and having regard to the fact that other late applications by Mr Ergat have not led the competent authorities to refuse extensions

of his residence permit, the gap in legal residence, within the meaning of the first paragraph of Article 7, which is now alleged by those same authorities, is not a sufficient ground for refusing to grant a new residence permit. In a case of this nature, the requirements of public policy do not override the interests of the Turkish national concerned, in so far as he was not duly warned in the past of the possible consequences of late submission of applications to renew his residence permit.

39. According to the French Government, the effect of the *Kadiman* judgment is that Member States have retained the power to determine the conditions under which Turkish nationals may enter their territory, reside and have access to the labour market there, subject to observance of the spirit and purpose of Decision No 1/80.

40. However, as regards the limitation of the period of validity of the residence permit held by the Turkish worker's family member in the host Member State, the French Government states that the Court also held in that judgment that the rights conferred by the first paragraph of Article 7 on family members of a Turkish worker are granted by that provision to the persons concerned regardless of the issue by the authorities of the host Member State of a specific administrative document, such as a residence permit.

41. The French Government takes the view that the interpretation of this last point is decisive for the outcome of this case, in which the issue is whether the circumstance that Mr Ergat's residence permit had expired when he lodged an application for its extension causes him to forfeit the rights conferred by the first paragraph of Article 7 of Decision No 1/80.

42. It observes that in the present case the German authorities have interpreted the conditions governing residence in Germany restrictively and taken the view that the expiry of Mr Ergat's residence permit renders his position illegal under the national legislation applicable to foreigners, with the result that he is no longer able to rely on the first paragraph of Article 7 of Decision No 1/80.

43. However, in the French Government's opinion, the discretion enjoyed by Member States in this regard cannot undermine the effectiveness of Decision No 1/80 and account should be taken of Mr Ergat's situation, namely, that he was authorised to enter Germany for the purpose of family reunification, resided there legally for 16 years and, since 1989, has had a work permit with no time-limit. In those circumstances, the restrictive interpretation adopted by the German authorities would appear to go beyond the objective pursued by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963.

44. It is therefore a matter for the national court to determine whether the German authorities have, in this case, exercised their powers with regard to the entry and residence of Turkish nationals without impairing the effectiveness of Decision No 1/80.

Assessment

45. The Bundesverwaltungsgericht is essentially seeking to ascertain whether the child of a Turkish migrant worker forfeits the rights which he may have acquired under the first paragraph of Article 7 of Decision No 1/80 if he has ceased, for some time, to be in possession of a valid residence permit.

46. The national court takes the view that the *Kadiman* judgment 'does not decide whether the said provision presupposes that the member of the family must still be legally resident at the material time for deciding on the application for extension of the expired residence permit, or whether the law of the Association disregards whether the residence was legal on the basis of a residence permit at the material time if the foreigner was still in possession of a residence permit a few weeks previously'.

47. I shall first attempt to deal with the question raised in the general context of the

rights of a Turkish migrant worker and his family. In its judgment in *Sevince*³ the Court stated that the provisions of the third indent of Article 6(1) of Decision No 1/80 'merely govern the circumstances of the Turkish worker as regards employment, and make no reference to his circumstances concerning the right of residence'.

48. In the same judgment, the Court referred to the 'standstill' clause contained in Article 13 of Decision No 1/80, under which 'the Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally *resident* and *employed* in their respective territories'.⁴

49. Legality of residence and legality of employment must therefore not be confused.

50. Article 7, on the other hand, governs the situation of family members as regards employment, but establishes an explicit link between the right to employment and the legality of residence. It grants to those family members of workers who '*have been legally resident ... for*⁵ at least five years' in the host Member State 'free access to any paid employment of their choice'.

3 — Case C-192/89 [1990] ECR I-3461.

4 — Emphasis added.

5 — Emphasis added.

51. The Bundesverwaltungsgericht takes the view that it can be inferred from the use of wording implying the present tense in that provision, as well as from the word 'for', that the family member's residence must continue to be legal, even at the end of the five-year period.

52. That interpretation is confirmed by the recent *Akman* judgment⁶ which, at paragraph 50, contains the following passage:

'Article 7 ... provides for a right of free access to employment for Turkish nationals *legally resident in the host Member State*: either for family members in general *after a specified period of legal residence*⁷ on the basis of family unification with a Turkish worker (first paragraph); or for the children of such a worker irrespective of the length of time they have been resident but following completion of training in the State in which one of the parents has been employed for a certain period (second paragraph).'

53. One is therefore entitled to consider that the family member's residence must continue to be 'legal' beyond the five-year reference period.

54. It would, moreover, be incomprehensible if a worker's child who has been 'legally' resident in the host Member State for at least five years could then reside there 'illegally' for the simple reason that he had in the meantime acquired the right of free access to any paid employment of his choice.

55. It is true that, in the *Bozkurt* judgment,⁸ the Court held that the provisions of Article 6(1) of Decision No 1/80, 'which grants Turkish workers the right, after specified periods of legal employment ... to enjoy free access to any paid employment of [their] choice, necessarily implies the existence of a right of residence for the person concerned, since otherwise the right of access to the labour force and the right to work as an employed person would be deprived of all effect'.

56. By isolating that phrase from its context, one might be tempted to argue that the fact of having acquired, at a certain point in time, the right of free access to any paid employment automatically implies a right of unlimited residence.

6 — Case C-210/97 [1998] ECR I-7519.

7 — Emphasis added.

8 — Case C-434/93 [1995] ECR I-1475.

57. But that is not at all the effect of the rest of that judgment, where the following is stated:

'Article 6 of Decision No 1/80 covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State because he has, *for example*, reached *retirement age* or, as in the present case, become *totally and permanently incapacitated for work*.⁹

Consequently, in the absence of any specific provision conferring on Turkish workers a right to remain in the territory of a Member State after working there, a Turkish national's right of residence, as implicitly but necessarily guaranteed by Article 6 of Decision No 1/80 as a corollary of legal employment, ceases to exist if the person concerned becomes totally and permanently incapacitated for work.

Furthermore, as far as Community workers are concerned, the conditions under which such a right to remain may be exercised

were, under Article 48 (which has become, after amendment, Article 39(3)(d) of the Treaty, made subject to regulations to be drawn up by the Commission, with the result that the rules applicable under Article 48 (which has become, after amendment, Article 39) cannot simply be transposed to Turkish workers.'¹⁰

58. It is therefore clear that the right of residence enjoyed by the person concerned is neither unconditional nor unlimited in time.

59. Admittedly, the *Bozkurt* judgment concerns Article 6, whereas the present case concerns Article 7. However, since both those provisions have the same objective, namely to regulate the conditions under which a Turkish national can claim a right to work in the host Member State, it seems to me that what applies to Article 6 also applies, *mutatis mutandis*, to Article 7.

60. In my opinion, the *Kadiman* judgment did not call into question the conclusions concerning the right of residence reached by the Court in its case-law on Article 6,

9 — Emphasis added.

10 — See paragraphs 39 to 41 of the judgment.

even though it contains wording which may seem to indicate the contrary.

there might have been any uncertainty, it would in any event have been cleared up by the *Akman* judgment.

61. Paragraph 51 of that judgment states:

‘[As] regards the limitation of the period of validity of the residence permit held by the Turkish worker’s family member in the host Member State, it must be observed that, whilst the Member States retain the power to lay down the conditions under which that family member may enter their territory and reside there *until he or she becomes entitled to respond to any offer of employment*¹¹ ... the fact nevertheless remains that the rights conferred by the first paragraph of Article 7 on family members of a Turkish worker are granted by that provision to the persons concerned regardless of the issue by the authorities of the host Member State of a specific administrative document, such as a residence permit’.

62. In the abovementioned passage, the Court certainly did not mean that a Member State’s legislation on the residence of foreigners ceases to apply to family members of a Turkish worker once they have obtained the right of access to the paid employment of their choice. In so far as

63. Of course, a Member State’s legislation must be consistent with Community law, and in particular with Decision No 1/80, that is to say, it must not withdraw from family members rights which they derive directly from Community law.

64. However, that legislation may, without being in conflict with Decision No 1/80, provide that, in certain circumstances, the child of a Turkish worker can no longer remain in the host Member State.

65. Such may be the case, in particular, where:

— the child is voluntarily unemployed for an extended period;¹²

— the child had returned to his country of origin for a long period;¹³

¹¹ — Emphasis added.

¹² — Conclusion drawn, by contrary inference, from the judgment in Case C-171/95 *Tetik* [1997] ECR I-329.

¹³ — Observation made by the Commission at the hearing and which seems to me to be relevant. It should be pointed out that, in the case of Community nationals, it is only interruptions of residence not exceeding six consecutive months which do not affect the validity of their residence permit.

— the child has been the subject of a deportation order for committing offences against public policy, public security or public health, pursuant to Article 14 of Decision No 1/80.

66. Indeed, if the logic of Decision No 1/80 is not to be turned completely on its head, it must be considered that, once the child of full age has reached the stage where it is entitled to free access to any paid employment, it is subject to the same rules as a Turkish worker who has come to reside in a Member State as an adult.

67. It may be noted in passing that Article 12 of Decision No 1/80 gives a Member State the right to refrain from automatically applying the provisions of Articles 6 and 7 where it experiences or is threatened with serious disturbances on its employment market which might seriously jeopardise the standard of living or level of employment in a particular region, branch of activity or occupation. The State concerned is to inform the Association Council of any such temporary restriction. However, that provision has not yet been invoked.

68. Nevertheless, the Member State must have the right to check periodically whether any of the circumstances referred to above applies to a Turkish worker or members of his family.

69. Such a check can be carried out when the residence permit expires since, unlike the 'residence permits' issued to Community nationals,¹⁴ Community law does not require the permits issued to Turkish workers and members of their families to be renewed automatically after five years.

70. Moreover, it cannot be disputed that responsibility for taking the initiative in applying for extension of the residence permit rests with the Turkish worker or his family member.

71. It remains to be ascertained what inferences can be drawn from the fact that a Turkish worker has ceased to be in possession of such a residence permit through failing to apply in time for its renewal and whether, in that case, the national authorities are entitled to deprive him of the rights acquired pursuant to the first paragraph of Article 7 by refusing to extend his residence permit.

72. The German Government and the Commission propose a particularly rigorous answer to that question. They take the

¹⁴ — See Article 6 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).

view that, in such a situation, the national authorities are under no obligation whatsoever to grant the extension applied for. For my part, after careful consideration, I take the view that that conclusion is too radical. I am of the opinion that the failure to be in possession of a residence permit, where it results from a delay in the submission of the application for renewal and where the residence permit should have been granted if it had been applied for in time, cannot justify the deportation of the worker.

73. Strictly speaking, of course, the worker is no longer 'legally resident'. But is it therefore reasonable to treat him like a illegal immigrant? Should not account be taken of differing degrees of illegality in a situation?

74. Thus, for example, when carrying out a check, the police may find that a driver is not in possession of a driving licence. Such a driver certainly deserves to be penalised, but the penalty may differ depending on whether, on the one hand, he has never had a driving licence or has been disqualified from driving by a judicial decision or whether, on the other hand, he is no longer in possession of a valid driving licence because he has failed to undergo the medical examination required of him by the regulations on account of his age.

75. It seems to me that the Court was referring to a distinction of that kind when

it stated, in the *Kadiman* judgment, that the rights of family members of a Turkish worker 'are granted ... to the persons concerned regardless of the issue by the authorities of the host Member State of a specific administrative document, such as a residence permit'.

76. To my mind, that statement means that the Member State must make the deportation of a Turkish national dependent, not on whether he does or does not possess a current valid residence permit, but on the existence of any of the circumstances listed above, which nullify the very basis of the right of residence.

77. To deport a worker because of a delay in the submission of his application would also amount to placing such a delay on the same level as an offence against public policy or public security.

78. Finally, the criterion proposed above can also be supported by an argument from analogy, based on the directives adopted by the Council with regard to certain categories of Community nationals.

79. I refer here to Council Directive 90/364/EEC of 28 June 1990 on the right

of residence,¹⁵ which concerns nationals of Member States who do not enjoy that right under other provisions, to Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity,¹⁶ and to Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.¹⁷

80. All those directives contain a provision stipulating that '[t]he right of residence shall remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1'. Article 1 provides, in each case, that nationals of Member States must have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, and be covered by sickness insurance in respect of all risks in the host Member State.

81. All those directives also provide that exercise of the right of residence is to be evidenced by the issue of a document known as a 'Residence Permit for a National of a Member State of the EEC', the validity of which may be limited to five years on a renewable basis.

82. However, contrary to what is the case for Community workers who are actually in employment, those directives do not provide that such residence permits must be automatically renewable.

83. That can certainly be explained by the fact that persons coming within those categories do not have the same 'right of residence' as active workers, who derive that right directly from Article 48 of the EC Treaty (which has become, after amendment, Article 39), but an exceptional right to which stricter conditions are attached.

84. Similarly, Turkish nationals do not have exactly the same rights as active workers from another Member State. They do not, as individuals, have the right to come and work in the Community. It follows from Articles 6 and 7 of Decision No 1/80 that their entry into the Community is subject to express individual authorisation. Moreover, their right of residence is dependent, according to the *Bozkurt* judgment, on their being 'in legal employment', of which it is the corollary. It is therefore logical to treat them in the same way as the categories of persons covered by the three abovementioned directives. This means that it is possible to deny them extension of their residence permit only if they no

15 — OJ 1990 L 180, p. 26.

16 — OJ 1990 L 180, p. 28.

17 — OJ 1993 L 317, p. 59.

longer satisfy the substantive conditions on which their right of residence is based.

on such persons penalties with a greater deterrent effect than that of mere fines.

85. It remains to be ascertained how the competent authorities are to treat a Turkish worker who, while in legal employment, neglects for months to apply for the renewal of his permit or who, on each occasion when it expires, submits his application several weeks late.

88. In the judgment in *Pieck*,¹⁸ the Court held that the failure on the part of a Community national to obtain the special residence document prescribed in Article 4 of Directive 68/360 may not be punished by imprisonment.

89. However, the Court gave as the reason for that finding the fact that that special residence document cannot be assimilated to a residence permit, in connection with the issue of which the national authorities have a discretion.¹⁹

86. The Commission has argued in this connection that 'the possibility of imposing administrative penalties or fines on a Turkish worker's family member often does not constitute a sufficient sanction since, in the case of persons on low incomes, such penalties are difficult to enforce and even represent a significant administrative expense'.

90. However, the entry of a Turkish worker into Community territory presupposes a genuine residence permit which, moreover, must not have been obtained fraudulently.²⁰

87. In order to take account of that consideration, the validity of which is beyond question, it may be inquired whether it would be compatible with the law of the Association for national courts to impose

91. It does not seem to me, therefore, to be out of the question, where there is prolonged or repeated failure to comply with the formalities governing residence, for a sentence of imprisonment to be imposed on a Turkish worker, even though it may be suspended on the first occasion.

18 — Case 157/79 [1980] ECR 2171.

19 — See paragraph 13.

20 — See judgment in Case C-285/95 *Kol* [1997] ECR I-3069.

Conclusion

92. In the light of the foregoing, I propose that the Court answer the question submitted by the Bundesverwaltungsgericht as follows:

A Turkish national who, as a member of the family of a Turkish worker duly registered as belonging to the labour force, has acquired the rights conferred by the first paragraph of Article 7 of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 and who has applied for extension of his last residence permit after its expiry does not forfeit those rights on account of that expiry and of the refusal to renew his permit, provided that he still satisfies the substantive conditions governing his right of residence.