



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 15 December 2016¹

Case C-652/15

Furkan Tekdemir
v
Kreis Bergstraße

(Request for a preliminary ruling from the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany))

(Reference for a preliminary ruling — Association Agreement between the European Union and Turkey — Right of residence of members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State — Standstill clause — Article 13 of Decision No 1/80 — New restriction — Requirement for minors under the age of 16 to hold a residence permit — Child born in Germany of a parent who is a Turkish worker — Requirement to go to Turkey to make the application for a residence permit — Possible existence of an overriding reason in the public interest justifying new restrictions — Efficient management of migration flows — Proportionality)

I – Introduction

1. Mr Nedim Tekdemir, the father of the applicant in the main proceedings, Furkan Tekdemir, is a Turkish national. He entered Germany in 2005. He has been in paid employment there at least since 2009. At first he obtained a temporary residence permit on humanitarian grounds which was renewed until 2013, before being issued a residence permit which was valid until 6 October 2016. That residence permit was granted on account of the existence of a right of residence in Germany under the Agreement establishing an Association between the European Economic Community and Turkey, which was signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and the Member States of the EEC and the Community, on the other, and which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963² ('the EEC-Turkey Association Agreement'), and under Decision No 1/80 of 19 September 1980 on the development of the Association ('Decision No 1/80'), adopted by the Association Council established by that agreement. It seems to be common ground that the father has the means to ensure the livelihood of his family in Germany.

¹ — Original language: French.

² — OJ 1973 C 113, p. 1.

2. Mrs Derya Tekdemir, the mother of the applicant in the main proceedings, who is also a Turkish national, entered Germany in November 2013 on a Schengen tourist visa. In that same month she lodged an application for asylum with the German authorities. She is in possession of a residence permit for asylum seekers. The procedure in connection with that application was still pending when the referring court, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany), made the present reference for a preliminary ruling to the Court.

3. The parents of the applicant in the main proceedings were married in September 2015.

4. Furkan Tekdemir, the applicant in the main proceedings, was born in Germany on 16 June 2014. He is a Turkish national and holds a Turkish passport. On 10 July 2014, he applied to the Kreis Bergstraße (Foreign Nationals Office, District of Bergstraße, Germany) for the issue of a residence permit pursuant to Paragraph 33 of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz) (Law on residence, employment and integration of foreign nationals in federal territory) of 30 July 2004,³ in its version published on 25 February 2008⁴ ('the AufenthG'), as last amended by Paragraph 3 of the Asylverfahrensbeschleunigungsgesetz (Law relating to the acceleration of asylum procedures) of 23 October 2015.⁵ and of Article 13⁶ of Decision No 1/80, he should be granted a right to family reunification. Under the national legislation applicable in 1980, foreign nationals under the age of 16 were exempt from the requirement to hold a residence permit. The law as it previously stood was therefore more favourable to the applicant in the main proceedings than Paragraph 33 of the AufenthG, which is thus contrary to the standstill clause contained in Article 13 of Decision No 1/80. The Foreign Nationals Office maintains that it is not unreasonable to expect the father of the applicant in the main proceedings to continue to live as a family with his son and his wife in Turkey given that he has not been recognised as an applicant for asylum or a refugee and that he is of Turkish nationality.

7. The referring court recalls the Court's case-law regarding the standstill clause and, in particular, the fact that the standstill clause is also applicable to legislation which concerns the rights of family members of Turkish workers in the area of family reunification in so far as legislation which makes family reunification difficult or impossible may negatively affect the decision of a Turkish national to exercise a stable economic activity in a Member State of the European Union.⁷ The referring court further states that the applicant in the main proceedings is considered to be legally in German territory and that his father, who is also legally there, is duly registered as belonging to the labour

3 — Adopted as Paragraph 1 of the Zuwanderungsgesetz (Law on immigration), BGBl. I, p. 1950.

4 — BGBl. 2008 I, p. 162.

5 — Under that provision, 'a child who is born in federal territory may be granted a residence permit ex officio if one of the parents is in possession of a residence permit, a settlement permit or an EU long-term residence permit. If, at the time of the birth, both parents or the parent having sole parental responsibility are in possession of a residence permit, a settlement permit or an EU long-term residence permit, a child born in federal territory shall be granted a residence permit ex officio. A child born in federal territory whose father or mother is in possession of a visa or is permitted to stay in federal territory without a visa at the time of the birth shall be permitted to stay in federal territory until such time as the visa or the lawful period of stay without a visa expires'.⁵ On 27 July 2015, the Foreign Nationals Office refused that application, arguing that, in a situation where only one of the two parents holds a residence permit, Paragraph 33 of the AufenthG confers on the competent authority unlimited discretion to grant or refuse a residence permit. Within the scope of the discretion accorded to the authority, account should also be taken of the parent-child relationship, without, however, this necessarily resulting in a decision in the applicant's favour. Rather, the Foreign Nationals Office took the view that it would be reasonable to require the applicant in the main proceedings to initiate a visa application procedure even if this inevitably leads to the applicant and his mother being separated, at least temporarily, from the father.⁶ On 17 August 2015, the applicant in the main proceedings brought an action against that decision refusing his application before the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt), in which he argues that, on account of his father's specific legal status, in particular in the light of Article 6(1) TPE DENOTENONPREVUThe first and second indents of Article 6(1) are worded as follows: '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'.

6 — 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'.

7 — The referring court invokes the judgments of 11 May 2000, *Savas* (C-37/98, EU:C:2000:224); of 21 October 2003, *Abatay and Others* (C-317/01 and C-369/01, EU:C:2003:572); and of 17 September 2009, *Sahin* (C-242/06, EU:C:2009:554).

force in Germany. Furthermore, German law confers special protection in principle on the family unit and on the parent/child relationship. However, the requirement for foreign nationals under the age of 16 to hold a residence permit constitutes a new restriction, within the meaning of Article 13 of Decision No 1/80. Such a restriction cannot constitute an infringement of that article provided that it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.

8. In those circumstances, the referring court is uncertain, first, whether there is an overriding reason in the public interest in the present case where, according to the national authorities, the requirement for foreign nationals under the age of 16 to hold a residence permit was introduced with the aim of achieving efficient management of migration flows. Second, the referring court is uncertain about the ‘qualitative requirements’ which must be satisfied by such an overriding reason and points out in particular in this regard that the applicant in the main proceedings was born in Germany and continues to live there legally with his parents, one of whom is a Turkish worker holding rights recognised under the EEC-Turkey Association Agreement and Decision No 1/80.

9. Thus faced with a difficulty relating to the interpretation of EU law, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt) decided to stay the proceedings and, by order for reference received at the Court Registry on 7 December 2015, to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does the aim of efficient management of migration flows constitute an overriding reason in the public interest capable of denying exemption for a Turkish national born in federal territory from the requirement for a residence permit which he could claim by virtue of the standstill clause of Article 13 of [Decision No 1/80]?’
- (2) If the [Court] answers the above question in the affirmative[,] what are the qualitative requirements for the existence of an “overriding reason in the public interest” in relation to the aim of efficient management of migration flows?’

10. In the present case written observations were submitted by the applicant in the main proceedings, the Austrian and German Governments and the European Commission.

11. At the hearing, which was held before the Court on 13 October 2016, the applicant in the main proceedings, the German Government and the Commission presented oral argument.

II – Legal analysis

12. It should be borne in mind that the Court has ruled that a new restriction ‘is prohibited, unless it falls within the restrictions referred to in Article 14 of [Decision No 1/80] or in so far as it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary’.⁸ The analysis below will therefore consist in a preliminary examination of the existence of such an overriding reason followed by a review of the proportionality of the legislation at issue in the main proceedings.

⁸ — Judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 51 and the case-law cited).

A – The existence of an overriding reason in the public interest

13. It is settled case-law that the standstill clause set out in Article 13 of Decision No 1/80 prohibits ‘generally the introduction of new internal measures which are intended to or have the effect of making the exercise by a Turkish citizen of an economic freedom subject, on the territory of the Member State concerned, to conditions more stringent than those which were applicable at the date of entry into force of that decision ... as regards that Member State’.⁹ It is common ground between the parties that Paragraph 33 of the *AufenthG* constitutes a new restriction within the meaning of Article 13 of Decision No 1/80, in so far as it tightens the conditions for residence of minor children born in Germany of parents who are third-country nationals.

14. It is also common ground that the father of the applicant in the main proceedings is a worker duly registered as belonging to the labour force because he carries out paid employment in Germany. It is only the situation of the Turkish worker residing in the Member State concerned to which it is appropriate to refer in order to determine whether a national measure such as Paragraph 33 of the *AufenthG* must be disapplied, if it proves to be the case that it is likely to affect his freedom to carry out paid employment in that Member State.¹⁰ The situation of the father of the applicant in the main proceedings is undeniably affected, as Paragraph 33 of the *AufenthG* makes the legal residence of his child, who was born in Germany, more difficult to obtain and therefore continued family reunification more uncertain. Consequently, Paragraph 33 of the *AufenthG*, which tightens the conditions for residence in German territory of minor children, who were born in Germany and are resident there, of Turkish nationals residing in that Member State as workers, compared with those which were applicable at the date of entry into force of Decision No 1/80, is likely to affect the exercise of the economic freedoms of those workers in Germany¹¹ and is therefore covered by Article 13 of Decision No 1/80.

15. As I stated at the beginning of my analysis, a new restriction within the meaning of Article 13 of Decision No 1/80 may be justified either on the grounds set out in Article 14 of that decision¹² or by an overriding reason in the public interest. This is now well established case-law.¹³ If Paragraph 33 of the *AufenthG* cannot be covered by Article 14, the German Government asserts that — as is clear, moreover, from the wording of the first question referred to the Court — the new requirement for minor children born in German territory of parents who are Turkish workers settled in Germany to hold a residence permit is justified by an overriding reason in the public interest, namely efficient management of migration flows.

16. Thus far, in interpreting the standstill clause contained in Decision No 1/80, the Court has explicitly affirmed two overriding reasons in the public interest, namely the objective of preventing unlawful entry and residence¹⁴ and the objective of ensuring the successful integration of third-country nationals in the Member State concerned.¹⁵ It has allowed some doubt to remain about two other potential justifications in relation to the prevention of forced marriages and the promotion of integration.¹⁶ I have already had occasion to observe that the Court is not particularly demanding in the matter of recognising the existence of an overriding reason in the public interest, thus allowing the Member States some discretion.¹⁷

9 — Judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 33 and the case-law cited).

10 — Judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 37).

11 — By analogy, see judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 50).

12 — It should be noted that the grounds mentioned in that article are public policy, public security and public health.

13 — See judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 51).

14 — Judgment of 7 November 2013, *Demir* (C-225/12, EU:C:2013:725, paragraph 41).

15 — Judgment of 12 April 2016, *Genc* (C-561/14, EU:C:2016:247, paragraph 56).

16 — Judgment of 10 July 2014 *Dogan* (C-138/13, EU:C:2014:2066, paragraph 38).

17 — See my Opinion in *Genc*, C-561/14 (EU:C:2016:28, points 33 and 34).

17. I still tend to the view that, at this stage of the argument and at this point in the test for the possible justification of a new restriction within the meaning of Article 13 of Decision No 1/80, the Court should confine itself to an analysis in abstracto of the overriding reason invoked by the German Government. Seeking efficient management of migration flows is one of the objectives of the common immigration policy referred to in Article 79(1) TFEU and it is not, as such, contrary to the objective of the EEC-Turkey Association Agreement. The overriding reason in the public interest invoked by the German Government seems to me to be all the more valid since, as everyone knows, the European Union has, for some years, been faced with an unprecedented migration crisis and it would be ill-advised, in my view, for the Court to deny a Member State the possibility of invoking — without it being, in any event, sufficient to justify the legislation at issue in the main proceedings — the pursuit of an objective which the European Union itself is desperately trying to achieve. If the Court were to adopt a more tangible approach, the question could, however, be asked whether the right of residence in Germany of a child born in German territory and having always resided there — and thus, strictly speaking, having never actually migrated — really relates to the management of migration flows.

18. Nevertheless, if the Court were to recognise the efficient management of migration flows as an overriding reason in the public interest, it must nevertheless still be examined whether Paragraph 33 of the AufenthG is actually suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it, as I consider this to be the meaning of the second question referred for a preliminary ruling.

B – The proportionality of the requirement for children under the age of 16 born in Germany to hold a residence permit

1. Preliminary remark

19. Before beginning the analysis, I would like to make a preliminary remark to clarify the purport of the second question referred to the Court.

20. I take the view that the somewhat enigmatic wording of that question can be easily addressed by interpreting it to the effect that the referring court is asking the Court about the third phase of the test which it has set out — and confirmed — where there are new restrictions in order to determine whether they can be justified. In order to provide a useful answer to the referring court, I therefore propose that the Court now concentrate on the proportionality of the new restriction under examination.

2. Analysis

21. Even though German law makes minors under the age of 16 subject to a general requirement to hold a residence permit, the situation before the Court in this reference for a preliminary ruling is the specific case, governed in part by Paragraph 33 of the AufenthG, of children born in German territory of parents who are third-country nationals, at least one of whom is legally resident and employed.

22. The referring court interprets that provision as meaning that the residence of a child born in Germany of parents who are third-country nationals is considered to be legal for six months. After the end of that period, that residence must be regarded as legal until the exhaustion of the right of residence of the parent who is legally resident and employed. The German Government, on the other hand, puts forward a different position. In order to determine whether a minor child should be granted a residence permit *ex officio* on the basis of Paragraph 33 of the AufenthG when that child is actually in Germany, where he was recently born, the German authorities may require the child to initiate the

procedures necessary to apply for a visa from the country of which he is a national.¹⁸ The effect of any right to family reunification enjoyed by the parent residing in Germany on the applicant's own right of residence will be assessed as part of the processing of that application. The German Government stated that it had little doubt *prima facie* about the favourable decision which the authorities ought to take on the application to be made, from Turkey, by the applicant in the main proceedings, since, because of his father's legal situation under the EEC-Turkey Association Agreement and Decision No 1/80, he ought to be granted a right of residence.

23. On the wording of Paragraph 33 of the AufenthG, the German authorities may grant a residence permit *ex officio* to a child born in Germany if one of his parents who is a third-country national is in possession of a residence permit. It is undeniable that that provision allows the German authorities considerable latitude in deciding whether or not to exercise their power to grant a residence permit *ex officio*. The lack of precision in the conditions under which those authorities deal with a case of their own motion is problematic. The same holds for the fact that the grant of a residence permit to a child born in Germany of a parent legally resident in that State is merely a possibility. Thus, the authorities may grant a residence permit to a child who satisfies the abovementioned conditions — place of birth, legal residence of the parent — just as they may refuse to grant it to him, without any criteria being made explicit.

24. It is true that, as the Foreign Nationals Office stated in the decision at issue in the main proceedings, Paragraph 33 of the AufenthG confers unlimited discretion, on the one hand, to review the situation of a child falling within its scope and, on the other, to decide on his right to reside in Germany when he is still present in German territory. Such unlimited discretion may be a good thing, in theory, if it means that the authorities are able to take into consideration a multitude of features of the individual case at issue. After all, the Court does require an assessment on a case-by-case basis.¹⁹ However, it gives greater cause for concern where, as in the case before the Court, no information is really available regarding the conditions under which that discretion is exercised. When asked about this point at the hearing before the Court, the German Government was unable to offer clarification on the principles which must nevertheless guide the assessment by the authorities in order to assure the Court that its discretionary power is not, in practice, turned into an arbitrary power. The overall impression which emerges from all the above considerations is ultimately of a very broad discretionary power. However, such a power is preventing the rights of Turkish workers being taken into account and respected at the most opportune moment.

25. In addition, I have serious difficulties in seeing the relationship between the aim of efficient management of migration flows and the consequences arising from the application of Paragraph 33 of the AufenthG. The consequence of the refusal to grant a residence permit '*ex officio*' pursuant to Paragraph 33 of the AufenthG is that a child who was born in Germany and has resided legally there until that point with at least one of his two parents, who is also legally resident, is forced to leave Germany and his family to travel to a third country of which he is a national but in which he may well have never lived, and to make an application for a visa from that third country. I cannot understand the reasons why it is necessary for such travel since, as is clearly illustrated by the case of the applicant in the main proceedings, all the necessary information for the authorities to take a decision on his situation is already available to them.

18 — Given the life course of the applicant in the main proceedings, it would be wrong to refer to Turkey as his country of origin since he was born in Germany and he has resided there continuously since his birth.

19 — See judgment of 10 July 2014, *Dogan* (C-138/13, EU:C:2014:2066, paragraph 38).

26. Thus, because the German authorities did not wish — for reasons which are still unclear to me — to grant a residence permit *‘ex officio’* to the applicant in the main proceedings, they are requiring him to travel to Turkey when he was born and has always resided in Germany. In view of his very young age, it is not possible for him to travel alone.²⁰ As his mother is seeking asylum in Germany, there is a strong likelihood — if only to preserve the chances of her application being successful — that she would be unable to accompany him. Even if she were to accompany him, her husband, who has Turkish worker status, would in any event be deprived of the presence of his wife and his son. There is still the possibility that the applicant in the main proceedings could be accompanied to Turkey by his father. The Foreign Nationals Office stated in the decision at issue in the main proceedings that it was not ‘unreasonable’ to envisage this and to expect the child’s father ‘to continue to live as a family with his son in Turkey’. However, requiring the child to leave the country, aside from its obvious consequences for family life, could also be interpreted as an attempt to dissuade all his family members, including one who has Turkish worker status, to settle and to continue residing in Germany.

27. Is it possible to disregard to a greater extent the rights which Turkish workers derive from the EEC-Turkey Association Agreement? The description of the consequences of the application of the new restriction for the family of the applicant in the main proceedings is sufficient to demonstrate that it is wholly disproportionate. The major disadvantages caused for the Turkish worker, who must choose between continuing his paid employment and seeing his family life profoundly disrupted or giving up that employment without any guarantee of professional reintegration on his (possible) return, cannot in any circumstances be justified by the legitimate objective of managing migration flows more efficiently. The question can rightfully be asked how the requirement for children born in Germany of parents who are legally resident third-country nationals to leave Germany to make an application for a residence permit would prove to be more efficient in terms of management of these flows. I cannot explain it. Worse still, I wonder if such management does not require precisely the opposite, that is, not creating artificially and unnecessarily the conditions under which children — I must reiterate — who were born in Germany and have resided there legally up to that point with their family must travel to a third country. This latter aspect thus tends to highlight a lack of coherence in the legislation at issue in the main proceedings.

28. For these reasons, I take the view that legislation of a Member State introduced after the entry into force of Decision No 1/80, the application of which results in a child born in the territory of that Member State of a parent having Turkish worker status being required to travel to the third country of which he is a national to make an application for a residence permit from that third country, with the consequence that the worker will have to choose between remaining in Germany and continuing his economic activity while being separated from the child or accompanying his child and giving up that activity indefinitely, constitutes a new restriction prohibited by Article 13 of Decision No 1/80.

III – Conclusion

29. In the light of all the above considerations, I suggest that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) as follows:

The aim of efficient management of migration flows constitutes an overriding reason in the public interest which may be invoked by a Member State to justify a new restriction within the meaning of Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the Agreement establishing an Association between the European Economic Community and Turkey, which was signed at Ankara on 12 September 1963 by

20 — The legislation at issue in the main proceedings applies to all minors under the age of 16, of whom a large majority are not able to travel alone, *a fortiori* to initiate administrative procedures.

the Republic of Turkey, on the one hand, and the Member States of the EEC and the Community, on the other, and which was concluded, approved and confirmed on behalf of the Community by Decision 64/732/EEC of 23 December 1963.

Legislation of a Member State introduced after the entry into force of Decision No 1/80, the application of which results in a child born in the territory of that Member State of a parent having Turkish worker status being required to travel to the third country of which he is a national to make an application for a residence permit from that third country, with the consequence that the worker will have to choose between remaining in Germany and continuing his economic activity while being separated from the child or accompanying his child and giving up that activity indefinitely, constitutes a new restriction prohibited by Article 13 of Decision No 1/80.