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Provisional text

JUDGMENT OF THE COURT (First Chamber)

29 March 2017 (*)

(Reference for a preliminary ruling — Association Agreement between the European Union and Turkey — Decision No 1/80 — Article 13 — ‘Standstill’ clause — Right of residence of members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State — Existence of an overriding reason in the public interest justifying new restrictions — Efficient management of migration flows — Requirement for nationals of third countries under 16 years old to hold a residence permit — Proportionality)

In Case C-652/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany), made by decision of 1 December 2015, received at the Court on 7 December 2015, in the proceedings

Furkan Tekdemir, legally represented by Derya Tekdemir and Nedim Tekdemir,

v

Kreis Bergstraße,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.-C. Bonichot, A. Arabadjiev, C.G. Fernlund and S. Rodin, Judges,

Advocate General: P. Mengozzi,

Registrar: M Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2016,

after considering the observations submitted on behalf of:

- Furkan Tekdemir, legally represented by Derya Tekdemir and Nedim Tekdemir, by R. Gutmann, Rechtsanwalt,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the Austrian Government, by G. Hesse, acting as Agent,
- the European Commission, by D. Martin and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, 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) ('the Association Agreement').
- 2 The request has been made in proceedings between Furkan Tekdemir, a child legally represented by his parents, Mrs Derya Tekdemir and Mr Nedim Tekdemir, and Kreis Bergstraße (District of Bergstraße, Germany) concerning the latter's rejection of his application for a residence permit in Germany.

Legal context

EU law

The Association Agreement

3 It is apparent from Article 2(1) of the Association Agreement that that agreement is intended to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people.

4 According to Article 12 of the Association Agreement, ‘the Contracting Parties agree to be guided by Articles [45, 46 and 47] TFEU for the purpose of progressively securing freedom of movement for workers between them’.

Decision No 1/80

5 Article 13 of Decision No 1/80 states:

‘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.’

6 According to Article 14 of Decision No 1/80:

‘1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.

2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment of their nationals.’

German law

7 Paragraph 4 of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in federal territory) of 30 July 2004 (BGBl. 2004 I, p. 1950), in the version in force at the time of the facts in the main proceedings (‘the Law on residence’), entitled ‘Residence permit requirement’, provides:

‘(1) A foreign national must hold a residence authorisation in order to enter and reside in federal territory, unless otherwise provided by EU law or regulation or unless he has a right of residence under [the Association Agreement]. Residence authorisations are issued in the form of:

1. a visa pursuant to Paragraph 6(1)(1) and (3),

2. a temporary residence permit (Paragraph 7),

2a. an EU Blue Card (Paragraph 19a),

3. a permanent settlement permit (Paragraph 9) or
4. an EU permanent residence permit (Paragraph 9a).

...

(5) A foreign national who has a right of residence under [the Association Agreement] shall be required to prove the existence of that right through the possession of a temporary residence permit, if he does not hold a permanent settlement permit or an EU permanent residence permit. The temporary residence permit shall be issued on request.'

- 8 Paragraph 33 of the Law on residence, entitled 'Birth of a child in federal territory', provides:

'In derogation from Paragraphs 5 and 29(1)(2), a temporary residence permit may be issued ex officio to a child who is born in federal territory if one parent holds a temporary residence permit, a permanent settlement permit or an EU permanent residence permit. If, at the time of birth, both parents or the parent with sole custody hold a temporary residence permit, a permanent settlement permit or an EU permanent residence permit, a temporary residence permit shall be issued ex officio to a child born in federal territory. A child born in federal territory whose mother or father possesses a visa or is permitted to reside in federal territory without a visa at the time of birth shall be deemed authorised to reside in federal territory until such time as the visa or the lawful period of residence without a visa expires.'

- 9 Paragraph 81 of the Law on residence, entitled 'Application for a residence authorisation', states:

'(1) Unless otherwise specified, a residence authorisation shall be issued to a foreign national only at the foreign national's request.

(2) A residence authorisation which may be obtained after entering federal territory ... must be applied for immediately after entry or within the period stipulated by regulation. An application relating to a child born in federal territory whose residence authorisation has not been issued ex officio shall be filed within six months of the birth.

...'

- 10 Paragraph 2 of the Ausländergesetz (Law on foreign nationals) of 28 April 1965 (BGBl. 1965 I, p. 353), as applicable on the date of the entry into force in Germany of Decision No 1/80, provided:

'(1) Foreign nationals who enter territory to which this law applies and wish to reside there must hold a residence authorisation. A residence authorisation can be

issued provided that the presence of the foreign national does not prejudice the interests of the Federal Republic of Germany.

(2) A residence authorisation is not required to be held by foreign nationals:

1. are under the age of 16 years old,

...

3. are exempted therefrom under international agreements,

(3) The Federal Minister for the Interior may, by regulation, exempt other foreign nationals from the requirement of a residence permit in order to facilitate their residence.

(4) The Federal Minister for the Interior may, by regulation, require foreign nationals exempted from the requirement for a residence permit to declare their residence.'

11 Lastly, according to the order for reference, under Paragraph 7(4) and (5) of that law, an administrative authority could, at its discretion, put a time limit on a residence permit issued to a foreigner under the age of 16 years old who is exempted from the requirement of a residence permit due to his age.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Furkan Tekdemir, born in Germany on 16 June 2014, is a Turkish national.

13 On 1 November 2013, Furkan Tekdemir's mother, also a Turkish national, entered Germany under the cover of a Schengen visa for tourists. On 12 November 2013, she lodged an application for asylum with the Gießen branch of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) (Germany). The procedure was still ongoing at the time the order for reference was made. Furkan Tekdemir's mother does not hold a residence authorisation but, as an asylum seeker, she does have authorisation to stay.

14 Furkan Tekdemir's father, also a Turkish national, entered Germany on 13 November 2005. Since 1 February 2009, he was employed in various jobs. He has been in full-time employment since 1 March 2014.

15 On 21 April 2008, Furkan Tekdemir's father initially obtained an authorisation to stay on humanitarian grounds, which was renewed without interruption until 30 October 2013. Since 31 October 2013, he has held a residence permit, valid until 6 October 2016 and issued pursuant to Paragraph 4(5) of the Law on residence.

- 16 Furkan Tekdemir's parents married on 23 September 2015. Previously, they exercised joint custody over the applicant in the main proceedings.
- 17 On 10 July 2014, Furkan Tekdemir, whose residence in Germany during the six months following his birth was found to be lawful by the referring court, applied for a residence permit to be issued pursuant to Paragraph 33 of the Law on residence.
- 18 By decision of 27 July 2015, the District of Bergstraße rejected that application. As grounds for rejecting the application, the District of Bergstraße stated, inter alia, that the competent authority enjoys a degree of discretion as to whether a residence authorisation must be issued and, in the present case, it decided not to exercise its discretion in Furkan Tekdemir's favour. The District of Bergstraße took the view that it was not intolerable to require Furkan Tekdemir to pursue the procedure for a visa *ex post facto*, even if that would inevitably mean that he and his mother would, at least temporarily, be separated from their father and wife, respectively. In addition, it decided that it was not unreasonable to expect Furkan Tekdemir's father to continue the family community and matrimonial life with his son and wife in Turkey since he was not recognised as an asylum seeker or refugee and has Turkish nationality, as do his son and wife. Lastly, the District of Bergstraße drew attention to the fact that Furkan Tekdemir's stay in Germany was tolerated for the duration of the asylum proceedings initiated by his mother.
- 19 Furkan Tekdemir, represented by his parents, brought an action against that decision before the referring court.
- 20 The referring court considers that the requirement for nationals of third countries under the age of 16 years old to hold a residence permit constitutes a new restriction within the meaning of Article 13 of Decision No 1/80.
- 21 However, given that such a requirement pursues the objective of efficient management of migration flows, the referring court asks whether that objective constitutes an overriding reason in the public interest capable of justifying such a restriction and, if so, asks what the qualitative requirements are for the existence of an overriding reason in the public interest in relation to that objective.
- 22 In those circumstances, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice 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?’

Consideration of the questions referred

- 23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 13 of Decision No 1/80 must be interpreted as meaning that the objective of efficient management of migration flows constitutes an overriding reason in the public interest capable of justifying a national measure, introduced after the entry into force of that decision in the Member State in question, requiring nationals of third countries under the age of 16 years old to hold a residence permit in order to enter and reside in that Member State and, if so, whether such a measure is proportionate to the objective pursued.
- 24 In order to answer the questions referred by the referring court, it must, in the first place, be determined whether the national measure at issue in the main proceedings constitutes a new restriction within the meaning of Article 13 of Decision No 1/80, which the referring court considers to be the case.
- 25 In that regard, it should be noted that it is settled case-law of the Court that the ‘standstill’ clause contained in Article 13 of Decision No 1/80 prohibits generally the introduction of any new national measure having the object or effect of making the exercise by a Turkish national of the freedom of movement for workers on national territory subject to conditions more restrictive than those which applied at the time when Decision No 1/80 entered into force with regard to the Member State concerned (judgment of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, paragraph 33 and the case-law cited).
- 26 According to the order for reference, under the national legislation applicable to the facts in the main proceedings, nationals of third countries, including those under the age of 16 years old, are required to hold a residence permit in order to enter and reside in Germany. However, as regards child nationals of a third country born in that Member State and one of whose parents holds a residence permit in Germany, such as Furkan Tekdemir, the competent authority may issue them with a residence permit *ex officio*.
- 27 It is also stated in the order for reference that, under the national legislation applicable at the time Decision No 1/80 entered into force in Germany, nationals of third countries under the age of 16 years old were exempted from the requirement to hold a residence permit in order to enter and reside in that Member State. On the basis of that exemption, those minors benefited from a right of residence and were thus classed as nationals of third countries holding a residence permit. The right of residence thereby granted to those minors could nevertheless be limited in time by the administrative authority *ex post facto* at its discretion.

- 28 After comparing the national legislation in force at the time Decision No 1/80 entered into force and the national legislation at issue in the main proceedings, the referring court found, without that finding being disputed by the German Government, that the conditions for nationals of third countries under the age of 16 years old to enter and reside in Germany laid down by the latter legislation are more stringent than those laid down by the former.
- 29 Furthermore, the referring court states that, even if the national legislation does not specifically govern family reunification, it may, however, affect the family reunification of a Turkish worker, such as Furkan Tekdemir's father, where, as in the present case, the application of that legislation makes such reunification more difficult. Nor is that finding disputed by the German Government.
- 30 The Court must therefore proceed on the basis that the national legislation at issue in the main proceedings has tightened the conditions for the family reunification of Turkish workers, such as Furkan Tekdemir's father, compared with those in force when Decision No 1/80 entered into force in Germany.
- 31 In that context, the Court points out that, as is apparent from its case-law, national legislation tightening the conditions for family reunification of Turkish workers lawfully residing in the Member State in question, in relation to the conditions applicable at the time of the entry into force in that Member State of Decision No 1/80, constitutes a new restriction, within the meaning of Article 13 of that decision, on the exercise by such Turkish workers of the freedom of movement for workers in that Member State (see, to that effect, judgment of 12 April 2016, *Genc*, C-561/14, EU:C:2016:247, paragraph 50).
- 32 The national legislation at issue in the main proceedings therefore constitutes a new restriction within the meaning of Article 13 of Decision No 1/80.
- 33 In that regard, the Court has already held that a restriction whose the object or effect is to make the exercise by a Turkish national of the freedom of movement of workers in national territory subject to conditions more stringent than those applicable on the date of entry into force of Decision No 1/80 is prohibited, unless it falls within the restrictions referred to in Article 14 of that decision or 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 (judgment of 12 April 2016, *Genc*, C-561/14, EU:C:2016:247, paragraph 51 and the case-law cited).
- 34 In the present case, the Court notes that the national legislation at issue in the main proceedings does not fall within the restrictions referred to in Article 14 of Decision No 1/80 in so far as, as is clear from the order for reference and the observations of the German Government, that legislation pursues the objective of efficient management of migration flows.

- 35 It must therefore be determined, in the second place, whether the efficient management of migration flows constitutes an overriding reason in the public interest capable of justifying a new restriction within the meaning of Article 13 of Decision No 1/80, as the German Government maintains.
- 36 In that regard, the Court notes the importance that EU law attaches to the objective of efficient management of migration flows, as appears from Article 79(1) TFEU, which explicitly refers to that objective amongst those pursued by the common immigration policy of the European Union.
- 37 Furthermore, it must be found that that objective is not contrary either to the objectives set out in Article 2(1) of the Association Agreement or to those expressed in the recitals of Decision No 1/80.
- 38 In addition, the Court has held that the objective of preventing unlawful entry and residence constitutes an overriding reason in the public interest for the purposes of Article 13 of Decision No 1/80 (see, to that effect, judgment of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, paragraph 41).
- 39 In those circumstances, as the Advocate General stated in paragraph 17 of his Opinion, the objective of efficient management of migration flows may constitute an overriding reason in the public interest capable of justifying a new restriction within the meaning of Article 13 of Decision No 1/80.
- 40 In the third place, it must be ascertained whether the national measure at issue in the main proceedings is suitable to achieve the objective pursued and does not go beyond what is necessary in order to attain it.
- 41 As regards the suitability of the measure for the purposes of the objective pursued, the requirement for nationals of third countries under the age of 16 years old to hold a residence permit in order to enter and reside in the Member State in question does indeed enable the legality of the residence of those nationals to be examined. Thus, in so far as the efficient management of migration flows requires those flows to be monitored, such a measure is suitable to achieve that objective. It is therefore, in principle, capable of justifying a further restriction notwithstanding the ‘standstill’ clause.
- 42 As to whether the national measure at issue in the main proceedings goes beyond that which is necessary in order to attain the objective pursued, it must be observed that, in principle, the requirement for nationals of third countries, including those under the age of 16 years old, hold a residence permit in order to enter and reside in Germany cannot in itself be regarded as disproportionate in relation to the objective pursued.

- 43 However, the principle of proportionality also requires that the procedure for implementing such a requirement does not exceed what is necessary for achieving the objective pursued.
- 44 In that regard, the Court observes that Paragraph 33 of the Law on residence leaves the competent authority broad discretion to decide, in circumstances such as those in the case in the main proceedings, whether or not to issue a residence permit.
- 45 In the present case, according to the order for reference, the District of Bergstraße, in exercising its discretion, rejected Furkan Tekdemir's application for a residence permit, taking the view, first, that it was not intolerable to require him to pursue the procedure for a visa *ex post facto*, even if that would inevitably mean that he and his mother would, at least temporarily, be separated from their father and wife, respectively, and, second, that it was also not unreasonable to expect Furkan Tekdemir's father to continue his family community and matrimonial life with his son and wife in Turkey.
- 46 It is therefore common ground that the application of the national legislation at issue in the main proceedings to a Turkish worker, such as Furkan Tekdemir's father, has the effect of requiring that worker to choose between pursuing paid employment in Germany and having his family life profoundly disrupted or giving up that employment with no guarantee of finding new employment upon a return from Turkey.
- 47 The German Government explains that its national law does not exclude the possibility of family reunification as between Furkan Tekdemir and his father in providing that a procedure for a visa must be initiated *ex post facto*, in the course of which the conditions for such family reunification will be able to be examined. Accordingly, Furkan Tekdemir will have to initiate such a procedure from Turkey so as to obtain a residence permit in order to enter and reside in Germany on the ground of family reunification.
- 48 However, there is no element in the case file laid before the Court to support a finding that it is necessary – for the purposes of examining the lawfulness of the residence of nationals of third countries under the age of 16 years old in the Member State in question and, consequently, of attaining the objective of efficient management of migration flows – that child nationals of third countries born in that Member State and residing there since their birth must return to the third country of their nationality and initiate a procedure from that third country in the course of which such conditions will be examined.
- 49 In that regard, it has not been claimed, still less established, that only by Furkan Tekdemir leaving Germany and initiating a procedure for a visa *ex post facto* will the competent authority be in a position to assess the legality of his residence on the ground of family reunification.

- 50 On the contrary, there is no reason to consider that all of the information necessary for a decision on the right of residence in Germany of Furkan Tekdemir is not already available to the competent authority and that it cannot undertake that assessment, without the disruption referred to in paragraph 46 above, when deciding on whether to issue a residence permit on the basis of Paragraph 33 of the Law on residence.
- 51 Accordingly, in so far as, in circumstances such as those at issue in the main proceedings, the application of the national legislation leads to consequences such as those described in paragraph 46 above, the Court finds that its application is disproportionate to the objective pursued.
- 52 In those circumstances, the Court finds that, for the purposes of Article 13 of Decision No 1/80, the procedure for implementing the requirement that nationals of third countries under the age of 16 years old hold a residence permit in order to enter and reside in the Member State in question, as regards child nationals of third countries born in the Member State concerned and one of whose parents is a Turkish worker with a residence permit in that Member State, such as the applicant in the main proceedings, goes beyond what is necessary in order to attain the objective of efficient management of migration flows.
- 53 In the light of the foregoing considerations, the answer to the questions from the referring court is that Article 13 of Decision No 1/80 must be interpreted as meaning that the objective of efficient management of migration flows may constitute an overriding reason in the public interest capable of justifying a national measure, introduced after the entry into force of that decision in the Member State in question, requiring nationals of third countries under the age of 16 years old to hold a residence permit in order to enter and reside in that Member State. Such a measure is not, however, proportionate to the objective pursued where the procedure for its implementation as regards child nationals of third countries born in the Member State in question and one of whose parents is a Turkish worker lawfully residing in that Member State, such as the applicant in the main proceedings, goes beyond what is necessary for attaining that objective.

Costs

- 54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed

in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 must be interpreted as meaning that the objective of efficient management of migration flows may constitute an overriding reason in the public interest capable of justifying a national measure, introduced after the entry into force of that decision in the Member State in question, requiring nationals of third countries under the age of 16 years old to hold a residence permit in order to enter and reside in that Member State.

Such a measure is not, however, proportionate to the objective pursued where the procedure for its implementation as regards child nationals of third countries born in the Member State in question and one of whose parents is a Turkish worker lawfully residing in that Member State, such as the applicant in the main proceedings, goes beyond what is necessary for attaining that objective.

[Signatures]

* Language of the case: German.

