Common Market Law Review **54**: 263–280, 2017.

Family reunification under the standstill clauses of EU-Turkey Association law: *Genc*

Case C-561/14, *Caner Genc* v. *Integrationsministeriet*, Judgment of the Court of Justice (Grand Chamber) of 12 April 2016, EU:C:2016:247

1. Introduction

The Association with Turkey entered its final stage with the establishment of the Customs Union regarding free movement of goods;[1] the instruments of the transitional stage, however, are the ones that govern the free movement of workers, services and establishment, namely the two Association Council Decisions adopted in 1980 and the Additional Protocol (AP) to the Association Agreement.[2] There have been developments facilitating free movement in these latter areas for the last 15 years.[3] However, these developments were not triggered by the adoption of new Association Council Decisions or Protocols, but merely by the removal of obstacles that had been introduced contrary to the standstill obligation in these areas.[4] *Genc* is also such a case. It concerns a Danish Law introduced in 2004 that makes family reunification more difficult for children whose parents do not apply for reunification within the two-year period following the date on which they obtain permanent residence in Denmark.

The ECJ delivered a judgment on another family reunification case two years ago. *Dogan* concerned a family reunification measure introduced by Germany (the requirement to pass a German language test in the country of

1. Decision 1/95 of the EC-Turkey Association Council of 22 Dec. 1995 on implementing the final phase of the Customs Union, O.J. 1996, L 35/1.

2. Decision 1/80 of the Association Council of 19 Sept. 1980 on the development of the Association, not published in the Official Journal; Decision 3/80 of the Association Council of 19 Sept. 1980 on the application of the social security schemes of the Member States of the EC to Turkish workers and members of their families, O.J. 1983, C 110/60; Agreement establishing an Association between the EEC and Turkey, signed at Ankara, 12 Sept. 1963, O.J. 1973, C 113/2; Additional Protocol (AP) annexed to the Agreement establishing the Association between the EEC and Turkey and on measures to be taken for their entry into force, signed at Brussels, 23 Nov. 1970, O.J. 1972, L 293/4.

3. The starting point was the Court's ruling in Case C-37/98, *Savas*, EU:C:2000:224.

4. For an example, see the changes triggered in the visa policies of Member States by Case C-228/06, *Soysal*, EU:C:2009:101; see further Groenendijk and Guild, *Visa Policy of Member States and the EU towards Turkish Nationals after* Soysal, Economic Development Foundation Publications No. 232 (2010).

origin) in contravention to the standstill clause on freedom of establishment (Art. 41(1) AP).[5] The Court ruled that such a measure constituted a "new restriction" under the standstill clause and that Germany was not able to justify it, because it was disproportionate and went beyond what was necessary to achieve the aim of "preventing forced marriages and the promotion of integration".[6] *Dogan* was the first case in which the Court established that family reunification fell within the scope of a standstill clause, and the Danish court and government sought to challenge that finding so as to prevent it from becoming established case law. They asked the ECJ to reconsider its judgment in light of its recent case law (in particular *Ziebell* and *Demirkan*),[7] in which it adopted a more restrictive approach to interpreting provisions of Association Law, after discarding the previously acknowledged objective of accession and replacing it with an "exclusively economic" one. At the request of the Danish Government, the Court delivered the judgment in a Grand Chamber. It in fact confirmed not only that family reunification fell within the scope of the standstill clauses, but also the changing nature or softening of those clauses. While these clauses were initially interpreted as clauses containing an absolute prohibition on "new restrictions", under the new line of case law, they are much softer, allowing for derogations and justifications replicating those under the EU free movement rules.

2. Factual and legal background

The dispute that led to the current case arose between Mr Genc, who applied for a residence permit to join his father in Denmark in January 2005, and the Danish Ministry of Integration, which refused his application. The applicant, Mr Genc, is a Turkish national born in 1991. He was 14 years old at the time of his application. His father, also a Turkish national, has been living in Denmark since 1997, the year of his divorce. Mr Genc and his two older brothers lived with their grandparents in Turkey despite the fact that it was their father who obtained their custody during the divorce. The father obtained a permanent residence in Denmark in 2001, following which Mr Genc's brothers joined him there two years later. The father was legally employed in Denmark at the time of the events giving rise to the current case.

5. Case C-138/13, *Dogan*, EU:C:2014:2066. The standstill clause contained in Art. 41(1) AP reads as follows: "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services."

6. Ibid., para 38.

7. Case C-371/08, *Ziebell*, EU:C:2011:809; Case C-221/11, *Demirkan*, EU:C:2013:583.

After the Danish Immigration Service refused Mr Genc's application in 2006, he lodged an appeal with the Ministry of Integration, which upheld the refusal. Both institutions evaluated the application on the basis of Paragraph 9(13) of the Law on Aliens (UL), introduced by Law No. 427 of 9 June 2004. It provided as follows:

> "In cases where the applicant and one of the applicant's parents are resident in their country of origin or another country, a residence permit under [Paragraph 9(1)(ii) of the UL] can be issued *only if the applicant has, or has the possibility of establishing, such ties with Denmark that there is a basis for successful integration in Denmark*. However, this shall not apply if the application is submitted no later than two years after the person residing in Denmark satisfies the conditions laid down in [Paragraph 9(1)(ii) of the UL] or if there are particularly compelling reasons which weigh against it, including regard for family unity."[8]

In order to determine whether the applicant had, or had the possibility of establishing, sufficient ties with Denmark, both institutions took account of certain factors, such as the place of birth and residence of the applicant, the language he speaks, ties with Denmark and the level of assimilation of Danish values and standards. Mr Genc, who was born and raised in Turkey, failed on all counts.

The Ministry of Integration refused to review its refusal decision in 2007, following which Mr Genc brought proceedings before a court of first instance which upheld the decision of the Ministry in December 2011. The applicant appealed against that judgment to the Eastern Regional Court (Østre Landsret), which referred four questions for preliminary ruling in December 2014. In essence, these questions inquire whether Paragraph 9(13) UL constitutes a "new restriction" within the meaning of Article 13 of Association Council Decision 1/80, and if so, whether such a restriction may be justified. It is worth noting that the internal procedures leading to the preliminary reference took almost 10 years. By the time the ECJ delivered its judgment, the Genc family had been pursuing their legal battle to reunite for longer than 11 years.

3. The Advocate General's Opinion

Advocate General Mengozzi was also the Advocate General in *Dogan*,[9] the case in which the Court established that the language proficiency requirement

8. Judgment, para 10. Emphasis added.
9. Opinion of A.G. Mengozzi in Case C-138/13, *Dogan*, EU:C:2014:287.

introduced by German law, fell within the scope of the standstill clause on freedom of establishment (Art. 41(1) AP). In *Genc*, the Danish Government calls the Court to overturn its judgment in *Dogan*, hence the call for a Grand Chamber ruling. The Advocate General's Opinion deals with the questions referred in a more systematic and detailed way. However, the Opinion will not be summarized here, since the Court follows the Advocate General on all points in its ruling. The Court makes many references to the Opinion, some of which will be mentioned below as raised in the judgment of the Court.

4. The judgment

The Court considered it appropriate to examine the referred questions together. These ask in essence whether the requirement introduced by Paragraph 9(13) of Law No. 427 cited above constitutes a "new restriction" within the meaning of Article 13 of Decision 1/80 and,[10] if so, whether it can be justified.

The Court began its analysis by repeating the purpose of the standstill clauses which contain a general prohibition regarding the introduction of new measures which "are intended to or have the effect of making the exercise of an economic freedom subject … to conditions more stringent than those which were applicable at the date of entry into force of [Decision 1/80] or [the AP] as regards that Member State".[11] According to the Court, it is clear that the contested law makes family reunification of minor children of third country nationals (TCNs) more difficult by making the conditions of admission more stringent.[12] However, it emphasized, just as the Advocate General did,[13] that in this case, it is the father of the applicant who exercised an economic freedom, and that as a worker integrated into the labour force of the host Member State, he is covered by Article 13 of Decision 1/80. Accordingly, the Court proceeded to examine whether the introduction of new rules was "likely to affect his freedom to carry out paid employment in that Member State".[14] On this point, the Court referred to *Dogan* in which it already

10. Art. 13 of Decision 1/80 provides as follows: "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."

11. Judgment, para 33, with reference to Case C-37/98, *Savas*, and Case C-242/06, *Sahin*, EU:C:2009:554.

12. Ibid., para 34.

13. Opinion of A.G. Mengozzi, EU:C:2016:28, para 25.

14. Judgment, para 37.

established that this was the case, as these rules might negatively affect the person concerned by pushing him to make a choice between his family life in Turkey and exercising freedom of establishment in the host Member State.[15] Since the standstill clauses in Article 13 of Decision 1/80 (on free movement of workers) and Article 41(1) AP (on freedom of establishment and freedom to provide services) were previously found to be of the same kind and to pursue the same objective, the Court ruled that its finding in *Dogan* regarding Article 41(1) AP can be transposed to this case concerning Article 13.[16]

As to the doubts of the Danish Government and the referring court regarding the compatibility of the Court's interpretation in *Dogan* with the "exclusively economic objective" of the Ankara Agreement, the Court pointed to the link between the exercise of an economic freedom and family reunification. It explained that family reunification came within the scope of the standstill clause because of its likely effect on the exercise of an economic freedom. According to the Court, this does not mean the recognition of a right to family reunification for family members of a Turkish worker. It explained that it merely means the preclusion of new rules that make family reunification more difficult and thereby affect the Turkish national exercising an economic activity.[17] The Court pointed out that the interpretation in *Dogan* is also in line with its interpretation concerning Article 7 of Decision 1/80, the objective of which is to "create conditions conducive to family unity in the host Member State by facilitating the employment and residence of Turkish workers".[18]

In short, the Danish law, which made the admission of minors subject to new and stricter conditions, and which is likely to affect the exercise of an economic activity by the father of Mr Genc who is a Turkish worker, constitutes a "new restriction" within the meaning of Article 13 of Decision 1/80. However, the Court added immediately that such a law is prohibited, unless it is justified by one of the grounds listed in Article 14 of that Decision (public policy, public security and public health) or by an "overriding reason in the public interest" which is necessary and suitable to achieve the legitimate aim it pursues.[19]

Before proceeding to examine the existence of a justification ground, the Court recalled that under Article 12 of the Association Agreement, in accordance with its "exclusively economic aim",[20] the parties have agreed to

15. Ibid., paras. 39–40.
16. Ibid., paras. 41–42. For the precise wording of both clauses see *supra* notes 5 and 10.
17. Ibid., paras. 43–46.
18. Ibid., para 49.
19. Ibid., para 51.
20. The "solely economic" objective of the Agreement was introduced by Case C-371/08, *Ziebell* in 2011 and has been repeated in various forms ever since.

be guided by corresponding EU primary law on free movement of workers, which means that principles developed in this context "must be extended, so far as possible, to Turkish nationals who enjoy rights under that Association Agreement".[21] The Court established that the condition contained in Paragraph 9(13) UL is not covered by one of the exhaustive grounds of justification listed in Article 14.[22] The Danish Government argued that it was justified by an overriding reason in the public interest, which was to ensure successful integration. By reference to primary and secondary EU Law,[23] which emphasize the importance of the promotion of the integration of TCNs into the host Member States, the Court concluded, as suggested by the Advocate General, that successful integration may be considered an overriding reason in the public interest.[24]

As in *Dogan*, the deciding factor in the current case was whether the contested law respected the principle of proportionality. The Court noted that the condition to prove sufficient ties to Denmark in cases of family reunification where the child and one of his parents still live in the State of origin or in a third State applies only when the reunification application is made more than two years after the parent living in Denmark obtains a permanent residence permit.[25] The Danish Government said that the aim of this law is to discourage parents from leaving their children in their country of origin, to ensure that they can be educated in line with Danish values and culture from as early on as possible.[26] According to the Court, the contested law is based on the presumption that children whose parents have not applied for family reunification within the two-year period after obtaining their permanent residence permits will be able to integrate successfully only if they are able to prove sufficient ties to Denmark, that is if they pass the discretionary assessment carried out by Danish authorities. As mentioned above, that assessment takes into account factors such as nature and duration of previous residence in (or visits to) Denmark, whether the child speaks Danish and whether he or she has assimilated Danish values and standards. According to the Advocate General, the Danish law is based on an

21. Judgment, para 52.

22. Art. 14(1) of Decision 1/80 provides as follows: "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health."

23. The Court refers to Art. 79(4) TFEU, Council Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification, O.J. 2003, L 251/12, and Council Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2004, L 16/44.

24. Judgment, paras. 55–56. See also para 35 of the Opinion.

25. Judgment., paras. 58–59.

26. Opinion, para 41.

"assumption of incompatibility of cultures",[27] i.e. it assumes that a child who was born and raised abroad is bound to fail to integrate into Danish society.

The Court noted that the requirement to prove sufficient ties to Denmark becomes applicable not because of personal factors that can affect or hinder children's integration such as their age or their ties to that country, but based on a factor that does not seem to be directly relevant for children's successful integration: the length of the period within which a parent obtains a permanent residence permit and applies for family unification. Both the Court and the Advocate General questioned the logic of the contested rule. According to the Advocate General, there is an inconsistency between the contested rule and the objective it pursues which could be better achieved by, for instance, setting an age limit to prevent late reunifications.[28] The Court also agreed that a rule based on the date on which an application for family reunification was made, without taking into account factors such as the personal situation of the child, might lead to discrimination between children in identical situations (regarding their age and ties to Denmark).[29] For instance, a child who is 10 years old and has never been to Denmark, but whose parent has applied for family reunification within the two year period, will not have to go through the assessment procedure, while a child in the same circumstances, whose parent has made the application after the expiry of that two-year period, will have to demonstrate sufficient ties to Denmark. Advocate General Mengozzi further pointed out that the absence of frequent visits to Europe or the choice of residence for the children of these migrant families is determined mainly by their economic situation rather than any cultural preference.[30]

Lastly, with reference to the Advocate General's criticism concerning the imprecision and criteria used by Danish authorities in their assessment and the vague nature of "Danish standards and values" that need to be assimilated by the child,[31] the Court provided that the assessment concerned must be made "on the basis of sufficiently precise, objective and non-discriminatory criteria which must be examined on a case-by-case basis, giving rise to a reasoned opinion which may be subject to an effective appeal in order to prevent a systematic administrative practice of refusal".[32]

Based on all the considerations mentioned above, the Court ruled that the Danish law constitutes a "new restriction" under Article 13 of Decision 1/80, which is not justified.

27. Ibid., para 48.
28. Ibid., para 52.
29. Judgment, para 65.
30. Opinion, para 49.
31. Ibid., para 54.
32. Judgment, para 66.

5. Analysis

5.1. *Nature of the standstill clause contained in Article 13 of Decision 1/80*

Both standstill clauses have direct effect,[33] however, it should be emphasized that they do not themselves confer substantive rights on individuals. They simply act as quasi-procedural rules which determine, *ratione temporis*, the laws of a Member State that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise one of the freedoms.[34] Put differently, the standstill clauses freeze the existing rules and the legal framework relating to the exercise of the economic freedoms at the time of their entry into force. For the old Member States, that is the time when the instruments containing those clauses entered into force: 1 December 1980 for Decision 1/80 (on workers and their family members) and 1 January 1973 for the Additional Protocol (on free movement of services and establishment).[35] For those Member States that acceded to the Union after 1 December 1980, the reference point is the date of their accession to the Union. Standstill clauses allow Member States to keep existing obstacles in place[36] or to take steps to lift them; however, they do not allow their reintroduction: once an obstacle is lifted, it may not be put back in place later.[37]

The Court broadened the interpretation of Article 13 of Decision 1/80 over the years.[38] While a strict interpretation would mean that it applies only *vis-à-vis* new restrictions on the conditions of "access to employment", as the wording of the Article suggests,[39] the Court's case law has by now established that it "prohibits generally the introduction of any new measure having *the object or effect of making the exercise* by a Turkish national in its territory *of the freedom of movement for workers subject to more restrictive conditions*

33. Case C-192/89, *Sevince*, EU:C:1990:322, paras. 18 and 26; Case C-37/98, *Savas*, para 49; Case C-317/01, *Abatay and Others*, EU:C:2003:572, paras. 58–59; Case C-228/06, *Soysal*, para 45.

34. Case C-16/05, *Tum and Dari*, EU:C:2007:530, para 55.

35. As far as the standstill obligation for free movement of workers is concerned, it can be taken back to 20 Dec. 1976, the date when Decision 2/76 of the Association Council on the implementation of Art. 12 of the Ankara Agreement entered into force in line with its Art. 13. It was replaced by Decision 1/80.

36. Case C-77/82 *Peskeloglou*, EU:C:1983:92, para 13; Case C-317/01, *Abatay and Others*, para 81; Case C-16/05, *Tum and Dari*, para 61.

37. Joined Cases C-300 & C-301/09, *Toprak and Oguz*, EU:C:2010:756.

38. In its early case law, the Court interpreted the provision literally to cover new restrictions on access to employment: See Case C-192/89, *Sevince*, para 18.

39. For the wording of Art. 13 of Decision 1/80 see *supra* note 10.

than those which applied at the time Decision 1/80 entered into force with regard to that Member State concerned".[40]

While the wide material scope of Article 13 has been confirmed, the personal scope of the provision remains contentious. Its wording suggests that it is limited to "workers and their families legally resident and employed in their respective territories", whereas case law points in different directions. In *Abatay and Others*, the Court explained clearly that the standstill clause "is not intended to protect Turkish nationals already integrated into a Member State's labour force".[41] In *Sahin*, it stated that the clause "is intended to apply *precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and, accordingly, residence under Article 6(1) of Decision 1/80*".[42] Yet, in the recent *Demir* ruling the Court seems to overturn its reasoning in *Abatay and Others*, and to limit the personal scope of the provision to individuals whose residence rights are "undisputed".[43]

Following the Court's interpretation in *Demir*, as well as the logic in its free movement case law,[44] it is perhaps to be expected that it is economically active persons who are able to rely on the standstill clauses, particularly when family reunification is concerned: that is, the father of Mr Genc, who is a worker, in the present case; and the husband of Mrs Dogan, who was self-employed. They are also the ones already legally present on Member State territory. However, this does not mean that family members who are legally resident but not economically active are outside the scope of the standstill clause, as they are not obliged, and more importantly, not even allowed to work during their first three years of residence in a host Member State.[45] One could question the

40. Case C-242/06, *Sahin*, para 63, emphasis added.

41. Case C-317/01*, Abatay and Others*, paras. 83–84.

42. Case C-242/06, *Sahin*, para 51, emphasis added. Also repeated in Case C-92/07, *Commission* v. *Netherlands*, EU:C:2010:228, para 45.

43. Case C-225/12, *Demir*, EU:C:2013:725, para 48. The *Demir* ruling is very confusing as the Court's answers to the questions referred are inconsistent. For a discussion of *Demir*, see Tezcan, "The puzzle posed by *Demir* for the free movement of Turkish workers: A step forward, a step back, or standstill?" in Thym and Zoeteweij-Turhan (Eds.), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff, 2015), pp. 223–247.

44. Similar logic concerning the residence rights of family members of economically active Member State nationals can be seen in some EU free movement cases which concern individuals who try to obtain residence rights for their family members on the territory of their own Member State. See Case C-370/90, *Singh*, EU:C:1992:296, paras. 19–20, Case C-60/00, *Carpenter*, EU:C:2002:434, and Case C-457/12, *S and G*, EU:C:2014:136, paras. 41–42. For a more detailed analysis, see Spaventa, "Family rights for circular migrants and frontier workers: *O and B* and *S and G*", 52 CML Rev. (2015), 753–777.

45. See Decision 1/80, Art. 7(1).

added value of adding "family members" to the standstill clause in Decision 1/80, if they were to remain outside its scope. Article 7 of Decision 2/76 already provided a prohibition on new restrictions regarding workers themselves.[46]

As pointed out elsewhere,[47] the confusion is caused by the inclusion of "and their family members" in the existing standstill clause on workers, without taking into account the fact that family members have different rights and obligations than the workers themselves. In short, the confusion is caused by bad drafting. As far as family members are concerned, it follows from the system of rights created under Decision 1/80 that they fall within the personal scope of the standstill clause once they are "legally resident" on the territory of a host Member State.[48] This means that Mrs Dogan and Mr Genc will be able to rely on the standstill clause independently once they are allowed to join their families and become legally resident in Germany and Denmark respectively. Until that point in time, the standstill clauses apply to Mr Dogan and the father of Mr Genc, both of whom perform an economic activity on the territory of a host Member State.

5.2. *Novel elements in recent case law and their implications*

The main issue raised in *Genc* is not entirely new; however, due to its "highly sensitive" nature[49] – because it interferes with immigration laws of Member States[50] – it needed a Grand Chamber ruling to be confirmed. The Court had already established in *Dogan* that rules on family reunification fell within the scope of the standstill clause laid down in Article 41(1) AP. It was not difficult for the Court to extend its finding to Article 13 of Decision 1/80 in *Genc*. However, back in 1987, in *Demirel*, the Court's first case concerning the Association Agreement, the Court was of the opinion that family

46. Cited *supra* note 35.

47. Tezcan, op. cit. *supra* note 43, p. 231.

48. That is also implied in Case C-317/01*, Abatay and Others*, para 84.

49. The effect of free movement rules and the rights of TCNs on the immigration laws of Member States has remained for decades a "highly sensitive issue" and "one of extreme political and legal complexity". See Hoogenboom, "Free movement and integration of non-EC nationals and the logic of the internal market" in Schermers et al. (Eds.), *Free Movement of Persons in Europe: Legal Problems and Experiences* (Martinus Nijhoff Publishers, 1993), p. 497.

50. For an article discussing precisely this point see Peers, "EU migration law and the EU/Turkey Association Agreement" in Thym and Zoeteweij-Turhan (Eds.), op. cit. *supra* note 43, pp. 202–222; and Hailbronner, "The stand still clauses in the EU-Turkey Association Agreement and their impact upon immigration law in the EU Member States" in Thym and Zoeteweij-Turhan (Eds.), op. cit. *supra* note 43, pp. 186–201.

reunification required the promulgation of a specific Association Council Decision to that effect.[51] That should not come as a surprise, as the applicant in that case, Mrs Demirel, did not even invoke the standstill clause at that time. She was hoping to be able to remain with her husband relying on other provisions of the Association Agreement, which the Court found to be of too broad and programmatic nature to have direct effect.[52]

The second important issue, which was confirmed after its first appearance in *Demir* and its repetition in *Dogan*,[53] was the Court's providing the possibility to derogate from the standstill clause on the grounds of Article 14 (public policy, public security or public health) or on the ground of an overriding reason in the public interest. For years, the Court had interpreted the standstill clauses in Association Law in line with its interpretation of those clauses under EU law:[54] they were qualified as clear, precise, unconditional and "unequivocal" standstill clauses,[55] prohibiting the introduction of new restrictions. The only exception explicitly mentioned in the ECJ's case law was Article 59 AP, which provides that Turkish nationals shall not be treated more favourably than EU nationals.[56] The Court also added to that exception those who have not complied "with the rules of the host Member State as to entry, residence and, where appropriate, employment".[57] However, as mentioned above, the Court's case law on that point has not been consistent, as it also provided that legal residence was "irrelevant for the purposes of

51. Case C-12/86, *Demirel*, EU:C:1987:400, para 22. Mrs. Demirel was the spouse of a Turkish worker. She was not able to join Mr Demirel because he did not fulfil the 8-year legal residence requirement for family reunification under the new rules which were made more difficult in 1982 and 1984. He fulfilled the previous residence requirement, which was only 3 years. For a fierce critique of the judgment, see Weiler, "Thou shall not oppress a stranger: On the judicial protection of non-EC nationals – A critique", 3 EJIL (1992), 65–91.

52. The applicant relied on Art. 12 of the Ankara Agreement and Art. 36 AP in conjunction with Art. 7 of the Ankara Agreement. See Case C-12/86, *Demirel*, paras. 19–25. Even if Mrs Demirel had relied on the standstill clause, she might still not have been successful, as the Court interpreted the clause much more narrowly than today. See ibid., para 22, and Case C-192/89, *Sevince*, para 18.

53. In Case C-138/13, *Dogan*, the Court only talks of derogation on the ground of an overriding reason in the public interest since the AP does not contain a provision corresponding to Art. 14 of Decision 1/80. See para 37.

54. Case C-26/62, *Van Gend en Loos*, EU:C:1963:1. See also the Court's reference in Joined Cases C-300 & C-301/09, *Toprak and Oguz*, paras. 58 and 59 to cases concerning standstill clauses in the area of value added tax: Case C-40/00, *Commission* v. *France*, EU:C:2001:338, paras. 17–19 and Case C-101/05, *A*, EU:C:2007:804, paras. 48–49.

55. See Case C-192/89, *Sevince*, para 18, Case C-37/98, *Savas*, para 46 and Case C-317/01, *Abatay and Others*, para 58.

56. The Court referred to Art. 59 AP in Case C-228/06, *Soysal*, para 61, Case C-242/06, *Sahin*, paras. 67 and 71 and Case C-92/07, *Commission* v. *Netherlands*, paras. 55 and 62.

57. Case C-317/01, *Abatay and Others*, para 84.

applying the standstill clause".[58] Moreover, even though not usually mentioned, both Decision 1/80 and the AP also contain safeguard clauses allowing the introduction of temporary restrictive measures in case one of the parties experiences a disturbance in its employment market (affecting a particular region, branch of activity or profession),[59] or a sector of its economy.[60] Parties need merely inform the Association Council of such temporary measures. Curiously, Member States seem to have never resorted to this tool,[61] which is another trademark of transitional regimes.

As for the derogation grounds introduced by the Court, as long as they are justified and proportionate, the measures introduced therewith do not have to be temporary. It is noteworthy that the Court introduced both derogation grounds (Art. 14 of Decision 1/80 and the overriding reason in the public interest) simultaneously. That could perhaps be explained partially by the absence of a provision equivalent to Article 14 in the AP, and partially by the Court's willingness to give more space to Member States to introduce policies which contravene the standstill clause but pursue a legitimate public interest, i.e. policies which are "reasonable".[62] According to Hailbronner, the introduction of the overriding reason in the public interest as a derogation ground is "the inevitable compensation for the Court's extensive concept of prohibition of restrictions".[63] He argues that an unconditional obligation to never change the legislative framework existing at the time of the entry of the standstill clauses "would be simply unacceptable and in practice impossible to maintain".[64]

Use of such clauses has not only been acceptable but also quite common in transitional periods: that of the EEC itself,[65] those following the accession of new Member States,[66] as well as those established in Association Agreements

58. Case C-186/10, *Oguz*, EU:C:2011:509, para 33. See also Case C-16/05, *Tum and Dari*, para 59. It should be noted that both of these cases concerned Art. 41(1) AP. For the precise wording of Art. 41(1) AP, see *supra* note 5.

59. See Decision 1/80, Art. 12 (previously Art. 6 of Decision 2/76).

60. AP, Art. 60.

61. See "Turkey-European Union Association Council Decision 1964–2000", Vol. 2, Publ. No. DPT:2596, <www.ab.gov.tr/files/_files/okk_eng.pdf>.

62. For the first indications providing the possibility to derogate from the free movement of goods under the so-called "rule of reason" doctrine, see Case C-8/74, *Dassonville*, EU:C:1974:82, para 6 and Case C-120/78, *Cassis de Dijon*, EU:C:1979:42, para 8.

63. Hailbronner, op. cit. *supra* note 50, p. 197.

64. Ibid., p. 198.

65. The most famous standstill clause was laid down in Art. 12 EEC which gave rise to the Court's seminal ruling in Case C-26/62, *Van Gend en Loos*.

66. For an example, see Art. 45(1) of the Greek Act of Accession which gave rise to Case C-77/82 *Peskeloglou*.

with third countries.[67] Arguably, it is the longevity of the transitional period in the case of Turkey combined with the receding prospect of accession that make the standstill difficult to maintain. The latter development finds a clear reflection in the ECJ's case law. While in earlier cases the Court defined the objective of the Agreement as accession,[68] starting with its *Ziebell* ruling in 2011, it re-defined it as "solely economic".[69] After a retreat in *Dülger*,[70] in *Demirkan* the Court confirmed the "purely economic" purpose of the Agreement,[71] which was mentioned again in *Genc*. Interestingly, while the Court used the economic nature of the Agreement in *Ziebell* and *Demirkan* to give a restrictive interpretation of the rights granted to Turkish nationals, in *Genc* it used it to justify its finding that family reunification is a right granted to the economically active to enable their proper functioning in the host Member State.[72]

As to the implications of the possibility to derogate from the standstill clauses, they no longer function as standstill clauses, i.e. they do not serve as the basis for a clear-cut and unconditional prohibition.[73] Once an issue falls within the scope of the standstill clauses, they function akin to the freedoms in the Treaties, which means that it is possible for Member States to derogate from those clauses when they pursue a legitimate aim that constitutes an overriding reason in the public interest and meet the proportionality test set by the Court. This becomes a totally different game, as cases under this test are often decided on the grounds of proportionality.[74] Previously, the establishment of the existence of new restrictions meant the end of the case. Now the Court needs to confirm that there is an overriding reason in the public interest to derogate from the standstill, which is not very difficult. As long as

67. For a recent example, see Association Agreement with Ukraine, O.J. 2014, L 161/11, Art. 18(1)(a).

68. Mostly, those references were part of the "legal context" under which the "EEC-Turkey Association" was described, and sometimes part of the reasoning of the relevant judgment. For a few examples, see Case C-262/96, *Sürül*, EU:C:1999:228, para 70; Case C-416/96, *El-Yassini,* EU:C:1999:107, para 49; Case C-37/98, *Savas*, paras. 3 and 52; Case C-317/01*, Abatay and Others*, para 3; Case C-16/05, *Tum and Dari*, para 3; Case C-228/06, *Soysal*, para 3; Case C-242/06, *Sahin*, para 3. Interestingly, those references which contradicted what the Court established further down in the judgments in *Ziebell* and *Demirkan* were also present in them. See Case C-371/08, *Ziebell*, para 3 and C-221/11, *Demirkan*, para 4.

69. Case C-371/08, *Ziebell*, para 64.

70. When interpreting Art. 7 of Decision 1/80, the Court clearly stated that "the Contracting Parties took as their basis grounds that go well beyond considerations of purely economic nature": Case C-451/11, *Dülger*, EU:C:2012:504, para 45.

71. C-221/11, *Demirkan*, para 51.

72. Judgment, paras. 43 and 52.

73. Hailbronner, op. cit. *supra* note 50, p. 200.

74. For examples, see Case C-384/93, *Alpine Investments*, EU:C:1995:126, paras. 45–55 and Case C-76/90, *Säger*, EU:C:1991:331, paras. 15–20.

there is a reasonable ground in *abstracto*, the Court will accept it.[75] Whether that ground is reasonable in relation to the facts of the particular case at hand is analysed under proportionality. In both *Dogan* and *Genc*, the contested national laws failed the proportionality test, as they were found to be unsuitable to achieve the aimed objectives and go beyond what was necessary.

Lastly, *Genc* established that "achieving successful integration"[76] constitutes an overriding reason in the public interest in addition to "prevent[ion] of unlawful entry and stay"[77] and "prevention of forced marriages and the promotion of integration".[78] Integration measures are allowed under the Family Reunification Directive (FRD) as well as the Long Term Residents Directive (LTRD).[79] In the past, under Ankara Association law, it was easy for national courts to qualify these integration measures as "new restrictions" as soon as it was established that they created obstacles and/or made free movement of workers, services and establishment more difficult for Turkish nationals.[80] Under the new test, as demonstrated by the existing three examples, establishing the existence of a new restriction is merely the first step. After acknowledging a derogation ground in the public interest, the battle determining the fate of the case is waged on the third and final step of proportionality.

Given the emphasis Member States place on the promotion of integration in their national laws,[81] as well as its place in secondary EU law, it is worth briefly examining this ever more frequently used ground of defence in recent cases.[82] It is also worth mentioning why *Genc* was decided on the basis of a standstill provision in Association Law rather than a provision of the FRD; we

75. E.g. the ground to prevent forced marriages in the case of Mrs Dogan – even though she already had four children with her husband.

76. Judgment, para 55.

77. Case C-225/12, *Demir*, para 41.

78. Case C-138/13, *Dogan*, para 38.

79. See Council Directive 2003/86/EC (Family Reunification Directive), Art. 7(2), and Council Directive 2003/109/EC (Long Term Residents Directive), Arts. 5(2) and 15(3).

80. For an example, Dutch courts found that compulsory language courses and tests which were part of a national strategy to integrate TCNs (known as *inburgering*) were in violation of the standstill clauses of Association Law. For a detailed analysis, see Tezcan/Idriz, "Dutch courts safeguarding rights under the EEC-Turkey Association Law. Case note on District Court Rotterdam judgments of 12 August 2010, and District Court Roermond judgment of 15 October 2010", 13 *European Journal of Migration and Law* (2001), 219–239.

81. Kostakopoulou, "The anatomy of civic integration", 73 MLR (2010), 933–958; Jesse, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom* (Brill Nijhoff, 2016).

82. In addition to Case C-138/13, *Dogan*, see also Case C-579/13, *P and S*, EU:C:2015:369 and Case C-153/14, *K and A*, EU:C:2015:453. For a case note on the latter two cases see Jesse, "Integration measures, integration exams and immigration control: *P and S* and *K and A*", 53 CML Rev. (2016), 1065–1088.

then discuss whether reliance on the latter would have produced a different outcome.

5.3. *Promoting integration and the Family Reunification Directive*

To ensure the proper integration of TCNs in their societies, many Member States have introduced civic integration programmes composed of mandatory courses and exams on language, history and local culture.[83] Initially, successful completion of these programmes was a precondition for naturalization, but today it can also be a precondition for obtaining a permanent residence permit and/or authorization for family reunification.[84] It is the latter use of integration measures that make them controversial, as family reunification and residence permits are often used not as a tool to promote and facilitate integration, but as a reward at the end of a successful integration process.[85] Similarly, pre-departure integration measures have been a source of particular concern,[86] since they are often used as instruments of "immigration-control policy regarding admission"[87] rather than as instruments promoting integration.[88] The case of Mr Genc demonstrates how these measures are employed to filter and block "undesirable" applicants: first, a long list of vague criteria on "Danish standards and values" is used, which both the Advocate General and the Court reprimanded;[89] and second, the process dragged on for almost ten years. If the purpose had indeed been the facilitation of Mr Genc's integration into Danish society at a younger age, the authorities should have undoubtedly acted more promptly so as to make that objective possible.

It should be noted that the FRD also applies to Turkish nationals, as they are TCNs. Denmark is not bound by the Directive due to its opt-out from it.[90] However, it is bound by the standstill clauses in Association Law, as they were

83. Kostakopoulou, op. cit. *supra* note 81.

84. Jesse, op. cit. *supra* note 82, 1075.

85. Jesse, "The value of 'integration' in European Law – The implications of the *Förster* case on legal assessment of integration conditions for third-country nationals", 17 ELJ (2011), 182; Ruffer, "Pushed beyond recognition? The liberality of family reunification policies in the EU", 37 *Journal of Ethnic and Migration Studies* (2011), 944.

86. These measures can be in the form of a language exam that needs to be successfully taken at the country of origin as in Case C-153/14, *K and A*, but they can also be more comprehensive, requiring knowledge of language and/or local values and culture, as in the case annotated here.

87. Ruffer, op. cit. *supra* note 85, 944.

88. Jesse, "The selection of migrants through law – A closer look at regulation governing family reunification in the EU" in Anthias and Pajnik (Eds.), *Contesting Integration, Engendering Migration: Theory and Practice* (Palgrave Macmillan, 2014), pp. 86–101.

89. See respectively Opinion, para 54, and judgment, para 65.

90. See Council Directive 2003/86/EC, Preamble, para 18.

in place prior to the negotiation of Denmark's general opt-out from the AFSJ.[91] If the Court had departed from its finding in *Dogan* on the scope of the standstill clauses, the only safety-net for Mr Genc in Denmark would have been that provided by Article 8 ECHR. That would not be much, as Article 8 ECHR does not grant a right to entry and residence for family reunification in a specific country.[92] However, that right is granted under the FRD once the conditions specified under the Directive are fulfilled.[93]

As to the hypothetical question whether a case with a factual background similar to *Genc* would have been decided differently if based on the FRD,[94] the recent *K and A* case is instructive and suggests that the result would not have been very different. In the latter case,[95] the Court checked the legality of Dutch pre-departure integration measures under Article 7(2) of the FRD which allows Member States to require TCNs to comply with integration measures specified in national law. The Court emphasized that authorization of family reunification is the general rule, which requires Article 7(2) to be interpreted strictly.[96] Thus, the national law introduced to transpose Article 7(2) has to comply with the general principle of proportionality. Measures introduced under that law can be deemed legitimate "only if they are capable of facilitating the integration of the sponsor's family members".[97] Integration requirements can be useful in establishing links with the host Member State; however, their conditions of application are not meant to undermine or exceed what is necessary to achieve the aims of the Directive. More concretely, according to the Court, integration measures "must be aimed *not* at filtering those persons who will be able to exercise their right to family reunification,

91. See Protocol No. 22 on the Position of Denmark, O.J. 2012, C 326/299, Arts. 1–2. The history of this opt-out goes back to the Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 Dec. 1992 concerning certain problems raised by Denmark on the Treaty on European Union.

92. ECtHR, *Rodrigues da Silva and Hoogkamer* v. *The Netherlands*, Appl. No. 50435/99, judgment of 31 Jan. 2006, para 39. See also Groenendijk, "Family reunification as a right under Community law", 8 *European Journal of Migration and Law* (2006), 218–219.

93. See Council Directive 2003/86/EC, Arts. 5–8. See also Groenendijk, op. cit. *supra* note 92, 218.

94. The Danish law violates the derogation laid down in the second indent of Art. 4(1) of Council Directive 2003/86/EC as it applies irrespective of age, while the derogation is limited to children who are aged over 12. However, beyond this specific point, for the purpose of our comparison, it is useful to see how the Court examines cases under the Directive.

95. As to the factual background of the case, both K and A wished to be reunited with their spouses who lived in the Netherlands. They provided Dutch authorities with medical certificates stating that due to physical and psychological problems, they would be unable to take the pre-departure civic integration exam. Both applications were rejected.

96. Case C-153/14, *K and A*, para 50.

97. Ibid, para. 52.

but at facilitating the integration of such persons *within* the Member States".[98] Moreover, in line with Article 17 of the FRD, which requires a case-by-case examination, national authorities have to take into account the specific circumstances of every individual in order to dispense their family members from the obligation to fulfil integration requirements.[99]

To sum up, the critical part of the cases on family reunification discussed in this case note (*Dogan*, *Genc*, *K and A*) was the final assessment based on the principle of proportionality. In all three cases the Court emphasized the importance of carrying out an individual assessment taking into account the particularities of each case which were ignored by national authorities.[100] In the case of *Genc*, Danish authorities do not seem to have taken into account the fact that the father of Mr Genc had the custody of his three sons and that he applied for reunification with his two older sons as soon as that was legally possible, i.e. after he obtained permanent residence in Denmark. It is not difficult to guess why Mr Genc was left behind in Turkey: accommodating all three sons at the same time would have been a logistical and financial challenge. It was only after a year and a half, once his older brothers were settled, that the request for family reunification with Mr Genc was lodged; however, that was considered too late for the 14-year-old Mr Genc to be able to integrate into Danish society. Instead, he will try to integrate now when he is 25. As the saying goes, "better late than never".

6. Conclusion

Given that Articles 12, 13 and 14 on free movement of workers, services and establishment in the Association Agreement lack direct effect, the standstill clauses emerged as the most effective tool of the transitional period. They aimed to prevent Member States from introducing new restrictions until the adoption of more specific measures implementing these provisions and/or their full materialization in the final stage of the Association. However, the fact that no further measures were adopted after 1980, when the last Association Council Decisions laying down the rights of Turkish workers were adopted, seems to have decreased the credibility and urgency of the standstill obligation and weakened its underlying rationale. The stalemate in EU-Turkey relations and the Court's recent redefinition of the objective of the Agreement as "purely economic" have not helped either.

98. Emphasis added. Ibid., para 57.
99. Ibid., paras. 58 and 60.
100. Case C-138/13, *Dogan*, para 38; Judgment, paras. 65–66; Case C-153/14, *K and A*, paras. 56–58.

The possibility to derogate from the standstill clauses will over time inevitably water down what was once seen as the "privileged" position of Turkish nationals in the host Member States of the EU[101] by bringing it closer to that of other TCNs. However, as demonstrated by *Genc*, there will also be instances in which they will make a difference, due to an opt-out or another exception. The Court widened the scope of the standstill clause on free movement of workers over the years despite its narrower formulation in comparison to the standstill clause on free movement of services and establishment. That widening, which also continued with the inclusion of family reunification into its scope in *Genc*, seems to have taken place at the expense of the effectiveness of the clause which can now be derogated from. The result is rather mixed: the Court gave with one hand, and took with the other.

Narin Tezcan/Idriz *

101. See Martin, "The privileged treatment of Turkish nationals" in Guild and Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (Brill, 2011), pp. 75–92, and Tezcan/Idriz, "Free movement of persons between Turkey and the EU: To move or not to move? The response of the judiciary", 46 CML Rev. (2009), 1622 and 1665.

* Assist. Prof. European Law, Utrecht University.