

**CASE C-371/08, NURAL ZIEBELL v. LAND BADEN-  
WÜRTTEMBERG**  
(Judgment of the Court of 8 December 2011, not yet reported)

**Nanette NEUWAHL\***

**Abstract**

*This case is about the scope of certain provisions of EU law: is the so-called 'citizens' directive' (replacing the EU worker's directive) applicable by analogy to a Turkish worker resident in Germany if the long-term resident directive is not applied? In reply, the Court acts as a doctor who cuts out a sore without spending much time on explaining the diagnosis. Its answer comes down to saying that for Turkish workers the citizens' directive does not entail any rights that extend beyond those already applicable under the EU-Turkey Association Council Decisions and associated case law. As a result, in the case at hand, the EU restriction of the reasons for the expulsion of foreign nationals to public security did not apply as a matter of EU law to Turkish workers. No analogy was drawn to the situation of workers of the European Economic Area in this case.*

**NURAL ZIEBELL v. LAND BADEN-WÜRTTEMBERG  
DAVA İNCELEMESİ**

**Özet**

*Bu karar AB Hukuku'nun bazı hükümlerinin kapsamıyla ilgilidir: Sözde "yurttaş direktifi" (AB işçi direktifinin yerini alan direktif), uzun süreli ikamete ilişkin direktifin uygulanmadığı Almanya'da mukim bir Türk işçisine örneksene yoluyla uygulanabilir mi? Buna karşılık, Mahkeme teşhisini açıklamak için vakit ayırmadan yaraya cerrahi müdahalede bulunan bir doktor gibi hareket ediyor. Mahkemenin yorumu, Türk işçiler açısından, yurttaş direktifinin kapsamının zaten yürürlükte olan AB-Türkiye Ortaklık Konseyi Kararları ve ilgili içtihadından doğan hakları da kapsayacak şekilde genişletilemeyeceği yönünde. Sonuç olarak elimizdeki karar, AB'nin kamu güvenliği gerekçesiyle yabancıların sınır dışı edilmesine ilişkin getirdiği kısıtlamaların, AB hukukunun bir gereği olarak Türk işçilere uygulanamayacağı yönünde. Kararda Avrupa Ekonomik Bölgesi'ndeki işçilerin durumlarına ilişkin hiçbir örneksene bulunmuyor.*

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## Introduction

This case the court tackles the question as to the assimilation of Turkish workers to EU citizens under Directive 2004/38, a question that had been posed before but which the Court was able to sidestep on the facts in Case C-349/06, *Polat*.<sup>1</sup>

### 1. Factual background

On 6 march 2007 Mr Ziebell, a 34 year-old of Turkish nationality born as the son of a Turkish immigrant worker in Germany and living in that country since his birth was issued with an expulsion order, essentially because he had committed several crimes since his early adulthood, to such an extent that his conduct was considered a ‘serious disturbance of the social order’.

Mr Ziebell objected to the decision ordering the expulsion on the grounds, in particular, that according to EU law a European Union citizen residing in Germany could not have been expelled in the same circumstances, and that according to the EU-Turkey Association Agreement<sup>2</sup> as implemented by Decision 1/80 of the Association Council,<sup>3</sup> he would be entitled to equal treatment with respect to EU citizens working in a Member State other than their own.<sup>4</sup> According to Directive 2004/38,<sup>5</sup> EU citizens who have lived 10 years in a Member State other than their own receive special protection against expulsion, which would be possible only in case of ‘imperative grounds of public security’, meaning that they constitute a ‘real and actual threat against one of the fundamental interests of society’. His objection was dismissed by the *Verwaltungsgericht* Stuttgart. The Land Baden-Württemberg argued that Decision 1/80 of the Association Council decision allows expulsion for reasons, not only of public security, but also of public order and public health.

In appeal, the *Verwaltungsgerichtshof* Baden- Württemberg dealing with the matter referred the following question to the Court of Justice of the European

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<sup>1</sup> [2007] ECR I-8167.

<sup>2</sup> Agreement establishing an Association between the European Economic Community and Turkey (‘Ankara Agreement’), signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963. *OJ* 217, 29.12.1964, p. 3685–3697.

<sup>3</sup> Decision No 1/80 of 19 September 1980 of the Association Council on the Development of the Association between the European Economic Community and Turkey.

<sup>4</sup> Case C-303/08, *Bozkurt*, paragraphs 57 to 60.

<sup>5</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), *OJ* L 158, 30.4.2004, p. 77–123.

Union: ‘ Is the protection against expulsion provided in Article 14 (1) of Decision 1/80 [of the Association Council] [...] and enjoyed by a Turkish national, whose legal status derives from the second indent of the first paragraph of Article 7 of [that decision] and who has resided for the previous 10 years in the Member State in respect of which this legal status applies, to be determined in accordance with Article 28(3)(a) of Directive 2004/38, as implemented by the relevant Member State, with the result that expulsion is permitted only on imperative grounds of public security, as defined by Member States?’

The German Law on the residence, employment and integration of foreign nationals in the Federal territory<sup>6</sup> in the version applicable at the time of the facts in the main proceedings, contains the following provisions:

‘Paragraph 53 – Mandatory expulsion

A foreign national shall be expelled:

1. where, after being convicted of one or more intentional offences, he has been definitively sentenced to at least three years’ imprisonment or youth custody or where, after being convicted of a number of intentional offences within a period of five years, he has been definitively sentenced to a number of terms of imprisonment or youth custody amounting to at least three years or where, on the occasion of the most recent definitive conviction, a term of preventive detention was ordered. ...

Paragraph 55 – Discretionary expulsion

1. A foreign national may be expelled where his presence endangers public security, public order or other important interests of the Federal Republic of Germany....

Paragraph 56 – Special protection against expulsion

(1) A foreign national who

1. Holds a permanent residence permit and has been lawfully resident in the Federal territory for at least five years .....

shall enjoy special protection against expulsion. He may be expelled only on serious grounds of public security or public policy. Serious grounds of public security or public policy generally exist in the cases covered by Paragraphs 53 and 54(5), (5a) and (7). Where the conditions laid down in Paragraph 53 are satisfied, the foreign national shall, as a rule, be expelled. Where the conditions laid down in

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<sup>6</sup> *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet – Aufenthaltsgesetz* of 30 July 2004, BGBl. 2004 I, p. 1950.

Paragraph 54 are satisfied, the decision as to his expulsion shall be a discretionary matter.’

Article 7(1) of Association Council Decision 1/80 provides a right of family members of a Turkish worker to engage in gainful employment, subject, according to Article 14(1), to ‘limitations justified on ground of public policy, public security and public health’.

There is no explicit reference to equal treatment with EU citizens, except in Chapter II: Social Provisions, Section 1: Questions relating to employment and the free movement of workers, as regards working conditions. Here, Article 10 paragraph 1 provides :

‘ The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers.’

In one interpretation, the free movement in a Member State and the right of residence of the worker and his family (even after the retirement or death of the main right holder) are a corollary of the right to work. However that may be, Article 14(1) of Association Council Decision 1/80 provides that Section 1 applies ‘subject to limitations justified on ground of public policy, public security and public health’. Section 2 adds that the provisions of section 2 ‘shall not prejudice rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States... where such legislation or agreements provide for more favourable treatment for their nationals.’

Under Directive 2003/109,<sup>7</sup> Member States are to grant long-term residents to third country nationals who have resided legally and continuously within their territory for 5 years. Article 12 of that directive, entitled ‘Protection against expulsion’, provides:

‘1. Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.

2. The decision referred to in paragraph 1 shall not be founded on economic considerations.

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<sup>7</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.

3. Before taking a decision to expel a long-term resident, Member States shall have regard to the following factors:

- (a) the duration of residence in their territory;
- (b) the age of the person concerned;
- (c) the consequences for the person concerned and family members;
- (d) links with the country of residence or the absence of links with the country of origin....'

Recitals 8 and 16 in the preamble to that directive state:

'(8) ..., third-country nationals who wish to acquire and maintain long-term resident status should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime.

(16) Long-term residents should enjoy reinforced protection against expulsion. This protection is based on the criteria determined by the decisions of the European Court of Human Rights.'

Article 28(3)(a) of Directive 2004/38 („Citizens’ directive’)<sup>8</sup> provides: ‘An expulsion decision may not be taken against European Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: have resided in the host member states for the previous 10 years [...]’.

## 2. The Advocate General’s opinion

Advocate General Bot<sup>9</sup> advised the Court to take the following approach (which was essentially followed, though in a different wording, by the Court): ‘Article 14(1) of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, 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 it does not preclude a Member State from taking an expulsion measure against a Turkish national whose legal status derives from the second indent of the first paragraph of Article 7 of Decision No 1/80, where he has resided

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<sup>8</sup> *Supra*, note 5.

<sup>9</sup> Opinion of the Advocate General at the sitting on 14 April 2011, not yet reported.

on the territory of that State for the 10 previous years, in so far as his personal conduct constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of society, which it will be for the national court to assess.’

This comes down to saying that because the citizens’ directive is not applicable by analogy to Turkish workers, the grounds for expulsion are not limited by EU law to public security.

### **3. Judgment of the Court**

The Court rules as follows on the interpretation of Article 14 of the Association Council decision:

1. ‘[since] protection against expulsion conferred by that provision on Turkish nationals does not have the same scope as that conferred on citizens of the Union under Article 28(3)(a) of directive 2004/38 [...] the scheme of protection against expulsion enjoyed by the latter cannot be applied *mutatis mutandis* to Turkish nationals [...]

2. [it] does not preclude an expulsion measure based on grounds of public policy to be taken [...] in so far as the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of the society of the host Member State and that measure is indispensable in order to safeguard that interest. It is for the national court to determine [...] whether such a measure is lawfully justified.’

### **4. Comment**

This case concerns the relationship between national legislation concerning the immigration and expulsion of third country nationals on the one hand and requirements of European Union law on the other. Mr Ziebell wants to argue before the German court that the decision ordering the expulsion could not have been taken: The provisions of the German legislation regarding restrictions to the right of residence of foreigners should be interpreted conform Association Council Decision 1/80 as interpreted by the European Court of Justice.<sup>10</sup> Because on the basis of the Court’s caselaw the situation of Turkish workers needs to be assimilated to workers who are EU citizens, he wants to invoke directly applicable provisions of Directive 2004/38, in particular, a reinforced protection against expulsion.

That argument is an attractive one, also because, in the past, the rights of Turkish workers under EU-Turkey Association Council decisions have frequently

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<sup>10</sup> Cf. Case C-484/93, *Pehlivan*, judgment of 16 June 2011, *not yet reported*.

been interpreted in light of Directive 64/221,<sup>11</sup> the directive that was abrogated by Directive 2004/38.

As from the expiry of the deadline for implementation of Directive 2003/109, Turkish nationals could also benefit from a reinforced protection laid down in that directive, that is, if they had applied for the status the directive entitled them to.<sup>12</sup> In order to invoke that directive as against the Member State in which one resided, one had to have been legally resident in that State for a period of at least five years and obtained the status of third country national 'long term resident'. If Mr Ziebell had not invoked the 'third country directive' before the German court, one can only speculate as to why not. Two reasons are among the most plausible ones: 1. first of all, it is logical for a third country national to invoke national law first before looking at EU law, and if the directive was properly implemented this should normally suffice; 2. in as far as the acquisition of the status is indeed constitutive of the rights under EU law and not merely declaratory, he had perhaps not asked for the status, exactly because he considered that for EU workers, to which he was to be assimilated, the right of residence was a corollary of the right to work that needed no formal proof. Also, as we shall see, the directive is not quite as protective against expulsion as Directive 2004/38.

This brings us back to the question of the applicability, in analogy, of the relevant provisions of Directive 2004/38.

EU law does not normally apply to third country nationals who live in a Member State and who do not move within the EU-, although there are agreements such as the European Economic Area agreement, the agreement with Switzerland, Morocco, Turkey etc. that cover that matter for the nationalities concerned, and although there exists a directive on family reunification<sup>13</sup> that applies to people with a work contract of at least a year. That directive creates a right to residence of family members of a third country national working in a Member State, subject to provisions dealing with public security, public policy and public health.<sup>14</sup>

The assimilation to EU nationals is of interest to persons like Mr. Ziebell for several reasons: apart from the reasons already mentioned above, Directive 2004/38

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<sup>11</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56, 4.4.1964, p. 850–857.

<sup>12</sup> Article 7 of Directive 2003/109.

<sup>13</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.

<sup>14</sup> None of these instruments provide for a special protection against expulsion as a matter of EU law, although this arguably has to be granted in certain cases as a matter of human rights. Directive 2003/109 is an exception that applies only in well-defined circumstances.

provides in Article 28 (3) (a) that after 10 years of residence, EU citizens who live in a Member State other than their own and who have the right of permanent residence there can be expelled only on imperative grounds of public *security*. That limitation to cases of public security has most clearly the effect of excluding reasoning related to public health: In European Union law the ground of public *policy* (including perhaps drugs policy and the fight against terrorism alongside considerations of public morality and public order) is little defined, probably because it is the Member States who determine it in the first place.<sup>15</sup> In the preamble of Directive 2003/109, it is stated that public policy can mean the commission of a serious crime. For citizens of the European Union, under the citizens' directive it is not possible to expulse a permanent resident merely for having committed a serious crime if this is not also affecting national security in a serious way.

Furthermore, it is generally accepted that under EU law limitations of the right of residence cannot be justified on account of economic reasons. It shall be clear that Article 28 (3) (a) of Directive 2004/38 is an important limitation which, if applied *mutatis mutandis* to enlighten the meaning of Decision 1/80, can change the situation of all Turkish workers who have lived 10 years or more in the European Union, even if they would benefit from the protection of Directive 2003/109, because that directive is not nearly as restrictive.

It is, however, not easy to make the case of the assimilation of Turkish workers to EU citizens. In my mind, there is a fundamental difference, in European Union law, between European Union citizens (and their dependants) on the one hand and third country nationals on the other hand. The difference is that for the former, a fundamental principle of free movement is laid down in primary Union law. Third country nationals, by comparison, do not have a fundamental treaty right (unless they are dependants of EU citizens migrating in the EU). They can however be granted the right to migrate to and to remain on EU territory by explicit permission, for instance in a national law, an international agreement (such as the EU/Turkey Association Agreement) or its implementing decisions, or (given the fact that immigration is a shared competence)<sup>16</sup> by secondary EU law.

Because for citizens of the EU, free movement is an inalienable right laid down in primary EU law, directly enforceable in law, whereas for third country nationals it is, in essence, a privilege to be explicitly granted, the role and significance of

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<sup>15</sup> Case 41/74, *Van Duyn*, [1974] ECR, p. 1337, Case C-30/77, *Bouchereau*, [1997] ECR, Case C-100/01, *Olazabal* [2002] ECR p. I-10981, Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, [2004] ECR p. I-5257, Case C-441/02, *Commission v. Germany*, [2006] ECR I-3449, Case C-145/09, *Tsakouridis*, judgment of 23 November 2010, *not yet reported*.

<sup>16</sup> Article 4(2)(j) TFEU.

legislation regarding EU nationals and their family is different from that concerning third State nationals: whereas legislation concerning free movement of EU nationals (and their families) serves ‘merely’ to clarify and facilitate the exercise of the right, legislation concerning free movement of third country nationals serves to create those rights. The rights are not given by courts but by the legislator, who can also restrict, or even withdraw them. In case of third country nationals, action by the political institutions is *constitutive*, that is, it is a prerequisite for the existence of those rights.

Decision 1/80 does not itself explicitly lay down a special protection against expulsion for Turkish workers. However, the Court could consider whether the legislator had meant to cover the issue. It takes its cue from the Ankara Agreement:<sup>17</sup> According to Article 12 of the Association Agreement, ‘[t]he Contracting Parties agree to be guided by Articles 45, 46 and 47 TFUE [ex-articles 39, 40 and 41 EC] for the purpose of progressively securing freedom of movement for workers between them’.

It is on this basis that the Court of justice has in the past assimilated the rights of Turkish workers to those of EU nationals working and residing in a Member State other than their own and extended the application of Directive 64/221.<sup>18</sup>

Importantly, Article 12 of the Ankara Agreement does not impose that the parties intended to be guided by any citizenship provision of the EU treaties which, at the time of the conclusion of the Association agreement, did not exist in any event.

It is important to note that Article 36 of the Additional Protocol to the Ankara Agreement lays down the schedule for gradual implementation of free movement for workers between the Member States and the Republic of Turkey and provides that ‘the Council of Association is to decide on the rules necessary to that end’. If that provision is to have any sense, then the Court of Justice cannot implement the Association Agreement independently of the existence of Association Council decisions, for instance by giving a teleological interpretation to the agreement. In other words, the scope of Decision 1/80 is to provide the answer in order for the Court to be able to decide positively.

The third recital in the preamble to Decision No 1/80 states that it is aimed at improving the social treatment accorded to Turkish workers and members of their

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<sup>17</sup> Its competence to interpret that agreement is both given and delimited by the fact that that agreement is a mixed agreement and the matter comes within the shared competence of the Union and its Member States

<sup>18</sup> E.g., Case C-340/97, *Nazli*, [2000] ECR p. I-957, Case C-136/03, *Doerr and Unal*, [2005] ECR p. I-4759.

families. It is within that context that the EU's treaty provisions on the free movement of workers are relevant, including the derogations relating to public policy, public security and public health.

In addition, the powers to regulate public policy and public security have not been transferred from the Member States to the European Union. The Member States are therefore free to legislate on these matters, except where this interferes unacceptably with powers of the EU already exercised. As far as immigration into EU territory is concerned, this is a matter of shared competence<sup>19</sup> governed today by the provisions of the area of liberty, security and justice- and the Court needs to respect the division of powers.

In the end, therefore, it is the division between the Court and the legislator that accounts for the outcome of the judgment. But what conclusions to draw from it?

The importance of the judgment is at least twofold: (1) The ECJ holds that the Citizens' directive does not apply, *mutatis mutandis*, to Turkish nationals. As a result, Turkish nationals are to be considered 'ordinary' third country nationals, except where their situation is covered by Association Council Decisions.<sup>20</sup> Under EU law, Turkish nationals can be expelled on grounds of public policy, public security or public health, be it that Member State power is circumscribed by principles of law developed in the context of the free movement of workers, services and establishment as formerly laid down in Directive 64/221 and in the case law of the Court of justice. (2) The grounds of expulsion of long-term residents from third countries are not restricted to public security as they are for EU citizens.

Furthermore, one can take from the judgment that human rights conformity is, in principle, equally a matter for the national courts to assess.<sup>21</sup> On this point, the judgment is again totally in line with its previous case law on mixed agreements, according to which the ECJ would be reluctant to interfere with the powers that have remained with the Member States. Already in *Demirel*<sup>22</sup> the Court has held that it would not control the conformity with human rights of Member State actions outside the scope of EU powers. In a similar vein, the ECJ would not assess questions of proportionality.

A question still outstanding is that concerning the position of third country national citizens of the European Economic Area under Directive 2004/38. Although that directive is, according to its title, 'of EEA relevance', the

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<sup>19</sup> Article 4(2)(j) TFEU.

<sup>20</sup> E.g., Case C-484/93, *Pehlivan*, judgment of 16 June 2011, *not yet reported*.

<sup>21</sup> It is to be noted that the latter may well be different under Directive 2003/109, but whether this is a blessing cannot be contemplated in the context of this annotation.

<sup>22</sup> Case 12/86, *Demirel*, [1987] ECR, p. 3719.

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applicability of Article 28 (3) (a) of that Directive to third country nationals is yet to be established.