The European Court of Justice's Ruling in The Kahveci Case Lights the Way for Other Turkish National Sportsmen in the European Union*

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I. INTRODUCTION

Nowadays, the European Court of Justice (ECJ)'s judgement in the Nihat Kahveci case[1] has had broad repercussions in the press. *Ntvmsnbc* published the news as "Nihat, marked a new period in Spain."[2] *Sabah* reported it as "Nihat Kahveci entered into the European Union."[3] *Nethaber* announced the ruling with the heading "Nihat will not be treated as a foreigner anymore."[4] Indeed because it was an expected decision of the European Court, a ruling to the contrary would be surprising, because Nihat shared the same fate as Slovakian goalkeeper Marcus Kolpak on the German handball team and Russian professional football player Igor Simutenkov while playing with the Spanish football club Deportivo Tenerife. Their common interest was the limited number of players allowed from countries that are not parties to the Agreement on the European Economic Area. According to *Yenişafak's* comment on 3 August 2008, Nihat paved the way for other

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1 Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci v Consejo Superior Deportes and Real Federación Española de Fútbol, E.C.R.* 2008, page 00000.

2 http://www.ntvmsnbc.com/news/253923.asp#BODY.

3 http://arsiv.sabah.com.tr/2004/01/22/spo112.html.

4 http://www.nethaber.com/Spor/70662/NIHAT-ARTIK-YABANCI-SAYILMAYACAK-Nihatin-AB-statusu.

Turkish national football players, for instance Mehmet Aurelio who is playing for Real Betis, İbrahim Kaş who is playing in Getafe and Ersen Martin from Recreativo.[5] The ECJ's judgement in the Kahveci case is encouraging for professional sportsmen who still do not hold a professional player's license identical to the license held by Community players. The ECJ's jurisdiction in these three cases leads to the conclusion that there is settled case law of the European Court in this subject and is worthy of consideration.

II. THE KOLPAK CASE

The ECJ's ruling in the Kolpak case[6] on 8 May 2003 is a reference for a preliminary ruling concerning the interpretation of Article 38(1) of the Association Agreement between the Communities and Slovakia.

The questions were raised in a dispute between the German Handball Federation (the DHB) and Marcos Kolpak, a Slovak national living in Germany with a valid residence permit. He entered into a fixed-term employment contract for the post of goalkeeper on a German handball team, a club which plays in the German Second Division.

The situation which gave rise to the dispute between parties was the rejection of Kolpak's request for a professional player's license which did not feature the specific reference to nationals of non-member countries.

According to SpO (Federal Regulations Governing Competitive Games) Rule 15:

(1) The letter A is to be inserted after the license number of the licenses of players

(a) who do not possess the nationality of a State of the European Union (EU State), and

(b) who do not possess the nationality of a non-member country associated with the EU whose nationals have equal rights regarding freedom of movement under Article 48(1) of the EC Treaty (after amendment Article 39 EC),

(2) For teams in the federal and regional leagues, no more than two players whose licenses are marked with the letter A may play in a league or cup match.

Kolpak defended his claim on the basis of Article 38(1) of the Association Agreement with Slovakia.

Article 38(1) of the Association Agreement with Slovakia states:

"Subject to conditions and modalities applicable in each Member

5 Case C-438/00, *Deutscher Handballbund eV v Marcos Kolpak, E.C.R.* 2003, page I-04135.
6 Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol, E.C.R.* 2005, p. I-02579.

State: treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."

The ECJ first examined whether Article 38(1) of the Association Agreement with Slovakia is directly applicable. After evaluating all the circumstances, the European Court affirmed the relevant article as being directly applicable. It prohibits discrimination on the basis of nationality in clear, precise and unconditional terms.

The European Court of Justice stated in its decision that Kolpak was not seeking access to the German labour market because he was already lawfully employed in Germany. He had a residence permit and a monthly salary which are evidence of his lawful access to the German labor market and workers once lawfully employed within the territory of a Member State have a right to equal treatment regarding the conditions of employment.

To sum up, the ECJ commented that Article 38(1) of the Association Agreement with Slovakia was to be construed as precluding the application to a professional sportsman of Slovak nationality who was lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorized to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the EEA Agreement.

III. THE SIMUTENKOV CASE

The Simutenkov judgement[7] of the European Court of Justice, on 12 April 2005, is a reference for a preliminary ruling concerning the interpretation of Article 23(1) of the Community-Russia Partnership Agreement.

Questions had been raised in proceedings between Igor Simutenkov, the Ministry of Education and Culture, and the Royal Spanish Football Federation (the RFEF), concerning sporting rules which limit the number of players from non-member countries who maybe fielded in national competitions.

Igor Simutenkov was originally a Russian national, living in Spain and employed as a professional football player under an employment contract entered into with club Deportivo Tenerife and holding a federation license as a non-Community player. He also had both a residence and a work permit.

The trigger for all of these consequences was Simutenkov's application to the RFEF for replacement of the federation license which

7 *EEC-Turkey Association Agreement 1963*, O.J. 1964, L. 217.

he held, with a license the same as that held by Community players, and the RFEF's rejection of that application on the basis of its General Regulations and the agreement of 28 May 1999 which limited the number of players, not having the nationality of a Member State who were allowed to participate at any time in the Spanish First Division, to three for the 2000/-2001 to 2004/2005 seasons and, in the case of the Second Division, to three for the 2000/2001 and 2001/2002 seasons and to two for the following three seasons.

Pursuant to Article 173 of the General Regulations:

"Without prejudice to the exceptions laid down herein, in order to register as a professional and obtain a professional licence, a footballer must meet the general requirement of holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area."

Simutenkov contended that those rules discriminated between EU nationals or EEA nationals and nationals of non-member countries. In support of his claim, Simutenkov, so far as Russian players are concerned, relied on the Communities-Russia Partnership Agreement.

Article 23(1) of the Communities-Russia Partnership Agreement provides:

"Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."

The ECJ, in its jurisdiction, gave an answer to the national court's question whether Article 23(1) of the Community-Russia Partnership Agreement was to be construed as to preclude its application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, because clubs may field in competitions at the national level only a limited number of players from countries which are not parties to the EEA Agreement.

The ECJ, similar to its jurisdiction in the Kolpak case, first examined the direct effect of Article 23(1) of the Community-Russia Partnership Agreement, namely whether an individual before the courts of a Member State can rely on this provision. It is indicated in the judgement that according to the ECJ's well-established case law, a provision in an agreement concluded by the Communities with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which

is not subject, in its implementation or effects, to the adoption of any subsequent measure. Consequently Article 23(1) of the Communities-Russia Partnership Agreement lays down, in clear, precise, and unconditional terms, a prohibition precluding any Member State from discriminating, on the grounds of nationality, against Russian workers in comparison to their own nationals regarding working conditions, remuneration or dismissal and certainly individuals to whom that provision applies, namely Russian national workers who are lawfully employed in the territory of a Member State, are entitled to rely on it before a national court.

Finally, the ECJ ruled that Article 23(1) of the Community-Russia Partnership Agreement did not preclude its application to and protection of a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provides that clubs may field in competitions organized at the national level only a limited number of players from countries which are not parties to the EEA Agreement.

IV. THE SIMILARITIES OF THE KOLPAK AND SIMUTENKOV CASES

First, both the Kolpak case and the Simutenkov case are about third-country-national professional sportsmen (Slovakian and Russian respectively), employed in one of the Member States of the European Union (Germany and Spain respectively). Moreover, they were in conflict with rules drawn up by a sports federation of the Member State in question concerning the limit on the number of players who could be from countries which are not parties to the Agreement on the European Economic Area.

The European Union has agreements with both of these countries in question – the Association Agreement between the Communities and Slovakia and the Communities-Russia Partnership Agreement.

The ECJ, in the judgement in Simutenkov, addressed Article 23(1) of the Communities-Russia Partnership Agreement and found its wording very similar to Article 38(1) of the Communities-Slovakia Association Agreement. According to the ECJ, the difference between the wordings "the Community and its Member States shall ensure that the treatment accorded to Russian nationals … shall be free from any discrimination based on nationality" and "treatment accorded to workers of Slovak Republic nationality … shall be free from any discrimination based on nationality" is not a bar to the transposition of the interpretation upheld in Kolpak case; therefore, both provisions lay down, in clear, precise and unconditional terms, a prohibition of discrimination on the grounds of nationality.

According to Article 1 of the Communities-Russia Partnership Agreement, the purpose of the Agreement was to establish a partnership between the parties while Article 1(2) of the Communities-Slovakia Association Agreement states its purpose to be the establishment of an association with a view to gradual integration of Slovakia into the European Communities. The ECJ indicated that although the Communities-Russia Partnership Agreement was not intended to establish an association with a view to gradual integration of Russia into the European Communities, it does not mean the prohibition of discrimination in that agreement has a different meaning than the discrimination clause in the Communities-Slovakia Association Agreement. Also, the Simutenkov judgement indicated that although the Agreement is thus limited to establishing a partnership between the parties, without providing for an association or future accession of the Russian Federation to the Communities, this did not prevent its provisions from being directly effective.

V. TURKEY'S POSITION

As is known, the six founding countries – Belgium, France, Italy, Luxembourg, the Netherlands and Germany – signed on 25 March 1957 the Treaty of Rome which founded the European Economic Community. Right after the European Economic Community was established in 1959, Turkey requested to participate in the Community. Turkey's challenging journey on the way of accession into the European Union was triggered by the conclusion of the Agreement Establishing an Association between the European Economic Community and Turkey,[8] which was signed on 12 September 1963 in Ankara, and thus also became known as the Ankara Agreement. This agreement was the first concrete step towards Turkey-EU relations.

The key actor in the European Union's external relations and the basis for the Ankara Agreement is Article 310 of the Treaty Establishing the European Community. According to this Article, the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations.

A. Legal Basis

The aim of the Ankara Agreement as stated in Article 2 is to promote the continuous and balanced strengthening of trade and economic relations between the European Economic Community and Turkey, while taking into account the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people.

8 *Additional Protocol 1970*, O.J. 1972, L 293.

As stated in Article 1 of the Ankara Agreement, an association is established between the European Economic Community and Turkey by the Agreement. Besides, Article 28 addresses Turkey's potential accession to the Union with the condition of fulfillment of the obligations arising from the Treaty Establishing the European Community.

Article 9 of the Ankara Agreement provides:

"The Contracting Parties recognize that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community."

Article 12 of the Ankara Agreement reads:

"The Contracting Parties agree to be guided by Articles 48, 49 and 50 the Treaty Establishing the Community for the purpose of progressively securing freedom of movement for workers between them."

The wording of this article is very significant because the phrase "to be guided by" opens the door for the European Court of Justice to interpret the vague terms in the Agreement parallel to the Treaty Establishing the Community.

An Association Council was introduced, on the basis of Article 6 of the Ankara Agreement, which had the duty to ensure the implementation and progressive development of the Association within the powers conferred upon it by the Agreement. Subsequent to the entry into force of the Association Agreement in 1964, the Additional Protocol to the Association Agreement, concluded between the EEC and Turkey, was signed on 23 November 1970 which facilitates the application of Ankara Agreement.

To facilitate the application and clarification of the Ankara Agreement, Article 36 of the Additional Protocol states:

"Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement. The Council of Association shall decide on the rules necessary to that end."

The period specified in the Article expired on 1 December 198 but currently the Union does not recognize the free movement of Turkish workers within its Member States.

Article 37 of the Additional Protocol to the Ankara Agreement states:

"As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community."

Another very significant document relating to Turkey-EU relations is the Association Council's Decision 1/80.[9] This decision is of vital importance to situation of Turkish migrant workers working in the Community's territories.

Article 10(1) of the Decision No 1/80 of the Association Council 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."

B. Developments regarding the position of Turkish migrant workers in the European territories

The European Court of Justice's ruling in the Demirel case[10] constitutes a cornerstone regarding the position of Turkish migrant workers in the European territories. Mrs. Demirel, who was the wife of a Turkish worker working in Germany, filed a legal action on the basis of Article 36 of the Additional Protocol, claiming that the period specified in the relevant article has expired on 1 December 1986 and consequently Turkish workers had acquired the right to move freely between the Member States of the Community. The ECJ decided that Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol were not directly applicable in the internal legal order of the Member States because of its programmatic nature. In the case, it was emphasized that these provisions are not sufficiently precise and unconditional to be capable of directly governing the movement of workers.[11] Unfortunately Mrs. Demirel could not get an affirmative response to her claim. However, from another perspective, the ECJ in the Demirel case affirmed that the Ankara Agreement and its complementaries form an integral part of the community legal system so that the ECJ is competent to hear cases regarding the application and clarification of the Ankara Agreement and its complementaries.

In Articles 12, 13 and 14 of the Ankara Agreement, the wording "to be guided by" has significant importance. Martin Hedemann-Robinson, in his article, commented on this wording as follows: "This guid-

9 Decision No 1/80 of the Association Council of 19 September 1980 on the Development of the Association.
10 Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd, E.C.R.* 1987, page 03719
11 *Id*., Para 23.

ance has had a significant influence on the ECJ's approach to interpreting the scope of the association accords and instruments, notably where the arrangements are silent on definitions and explanations of various key phrases in the texts."[12]

Article 6 of Decision No 1/80 dealt with Turkish migrant workers' access to the labor markets of the Member States. In the Günaydın case, the ECJ states that Article 6 only regulates the situation of Turkish workers already integrated into the labor force of the host Member State and does not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment. [13] In conclusion, the first access to the labour market of the host Member State by an individual worker remains a sovereign power of the host Member State.

However, Turkish nationals who are integrated into the labor market of the host Member State hold the right to equal treatment on the basis of nationality regarding remuneration and other conditions of work if they are duly registered as belonging to the labor markets of the Member States, as provided for in Article 10(1) of Decision No 1/80.

The meaning given to the phrase "duly registered" is important. The ECJ, in the Kol case, defined legal employment to be a stable and secure situation as a member of the labor force in the host Member State and the existence of an undisputed right of residence.[14] Kol obtained his residence permit by means of fraudulent conduct and consequently his situation was not stable and secure acording to the ECJ. Also the ECJ requires a close link with the territory of the host Member State and, according the Bozkurt case,[15] when determining this, takes into account the place of hire, the territory where the paid employment is based, the applicable national legislation in the field of employment and the social security law. Another criterion, as stressed in the Günaydin case, is to determine whether the Turkish migrant worker is duly registered as belonging to the labor markets of the Member States is.[16] Pursuant to this paragraph, the worker should be bound by an employment relationship covering a genuine and effective economic activity, pursued for the benefit and under the direction of another person for remuneration.

12 *Martin Hedemann-Robinson*, Common Market Law Review 38, 2001, Kluwer Law International, An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident within the European Union, with Particular Reference to the Case Law of the European Court of Justice, p. 542.

13 Case C-36/96, *Faik Günaydın, Hatice Günaydın, Güneş Günaydın and Seda Günaydın v Freistaat Bayern, E.C.R.* 1997, page I-05143, Para. 23.

14 Case C-285/95, *Suat Kol v Land Berlin, E.C.R.* 1997, page I-03069, Para 21.

15 Case C-434/93, *Ahmet Bozkurt v Staatssecretaris van Justitie, E.C.R.* 1995, I-01475.

16 Case C-36/96, *Faik Günaydın, Hatice Günaydın, Güneş Günaydın and Seda Günaydın v Freistaat Bayern, E.C.R.* 1997, page I-05143, Para. 34.

C. Comparative Facts of the Kahveci Case

The European Court of Justice's judgement in the Kahveci case[17] concerned the interpretation of Article 37 of the Additional Protocol. Just like the related articles in the Kolpak and Simutenkov cases, this article prevents discrimination, on the basis of nationality, between Turkish migrant workers and workers who are nationals of the Member States of the Community. This reference was made in proceedings regarding a dispute between Real Sociedad de Fútbol SAD and Nihat Kahveci on the one hand and the Royal Spanish Football Association (the RFEF), on the other, concerning sporting rules which limit the number of players from non-member States who may be fielded in national competitions the same concern as in the aforementioned cases of Kolpak and Simutenkov.

Nihat Kahveci was a Turkish national residing in Spain. He had a residence and a work permit. He was employed as a professional football player under a contract of employment and had a federation license as a non-Community player. When the ECJ's case law is evaluated regarding Kahveci's duly registration in the labor market of the host Member State, it is crystal clear that he had a stable and secure situation and an undisputed right of residence, holding a close link with the host Member State Spain and pursuing a genuine and effective economic activity for the benefit and under the direction of another person for remuneration.

Along the same line as Simutenkov, Kahveci applied through his club to the RFEF for the replacement of his license with a professional player's license identical to those held by Community players, on the basis of the Communities-Turkey Association Agreement and its integrated Additional Protocol. According to Juan de Dios Crespo, the lawyer in charge, Kahveci and his club together asked for the application of the Communities-Turkey Association Agreement because it is a labor matter from the perspective of Kahveci and a competition case from the perspective of his club. Unfortunately Kahveci's application was rejected in exactly the same way as Simutenkov's application, on the basis of Article 173 of the General Regulations which makes holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area a necessity in order to obtain a professional player's license.

It is more advantageous to obtain a Professional player's license identical to those held by Community players because, according to the agreement of 28 May 1999, the number of players who are not Member State nationals who may be fielded simultaneously in the first

17 Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci v Consejo Superior Deportes and Real Federación Española de Fútbol, E.C.R.* 2008, page 00000.

division is limited to three for the 2000/2001 to 2004/2005 seasons.

The national referring court sought an answer to the question whether a rule under which clubs may in national competitions use only a limited number of players from non-member States not belonging to the European Economic Area is contrary to Article 37 of the Additional Protocol to the Community-Turkey Association Agreement. The ECJ stressed in its judgement that this question is similar to that referred to the Court in the cases which give rise to the judgements in the Kolpak and Simutenkov cases. Provided in Article 104(3) of the Rules of Procedure, where the answer to a question referred for a preliminary ruling may be clearly deduced from existing case law, the ECJ may give its decision in which reference is made to its previous judgement. The ECJ did so and referred to its previous Kolpak and Simutenkov judgements in its decision.

The ECJ compared Article 38(1) of the Association Agreement with Slovakia and Article 23(1) of the Communities-Russia Partnership Agreement with Article 37 of the Additional Protocol to the Community-Turkey Association Agreement. The ECJ observed that all these provisons are directly effective so that they may be relied on by individuals before the national courts and these provisions prohibit Member States in clear, precise and unconditional terms from discriminating, on grounds of nationality, against workers from the non-member State concerned regarding their conditions of work, remuneration and dismissal.

After all, when the ECJ took all the things mentioned above into consideration, it concluded that Article 37 of the Additional Protocol and Article 10(1) of Decision 1/80 must be interpreted as to preclude the application to a professional sportsman of Turkish nationality legally employed by a club established in a Member State, of a rule laid down by a sports association in that State that clubs are authorized to field, in competitions organized at the national level, only a limited number of players from non-member States which are not parties to the Agreement on the European Economic Area.

One last remark about the Kahveci case can be that Juan de Dios Crespo, the lawyer in charge, informed us that he has been notified that the Spanish Court followed the ECJ's decision.

VI. CONCLUSION

With the 2004 enlargement of the European Union on 1 May 2004, the Union gained ten more Member States. Slovakia was one of these ten Member States, so as a corollary to this the treatment of Slovakia as a non-member State is history. The European Court of Justice's judgement in the Kolpak case, before Slovakia's accession into the European Union, lit the way for the Simutenkov case. Both these cas-

es encouraged and strengthened the hopes of third-country nationals who share a common fate with Marcos Kolpak and Igor Simutenkov. Today, Nihat Kahveci, who -unofficially- ranked as the top football player of the year 2004 in Spain,[18] is the pioneer for future Turkish national professional sportsmen. Essentially, the ECJ's ruling in the Kahveci case was an expected decision. The reason why this ruling had broad repercussions is in its being the very first and great white hope for other Turkish national sportsmen who do not hold a professional player's license identical to the license held by Community players. It is clear that the Communities-Turkey Association Agreement and its integrated Additional Protocol, together with Decision No 1/80 of the Association Council, precludes the application, to a professional sportsman of Turkish nationality legally employed by a club established in a Member State, of a rule drawn up by a sports federation of a European Member State under which clubs are authorized to field, in competitions at national level or during the league or club matches, only a limited number of players from non-member countries which are not parties to the EEA Agreement. Consequently, the European Court of Justice's ruling in the Kahveci case lights the way for other Turkish national sportsmen in the European Union who are being discriminated against on the basis of their nationality.

18 http://spor.ekolay.net/Haber.asp?PID=2923&HaberID=525044.