

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 692  
**RECORD NO. 2020/333JR**

**BETWEEN**

**ELIF DOGAN**

**APPLICANT**

**-AND-**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Tara Burns delivered on 18 October 2021**

**General**

1. The Applicant is a Turkish national who first entered the State on 29 December 2013 on a student visa which was renewed on numerous occasions up to 6 November 2016.
2. The Applicant's student visa stipulated that the Applicant was:-

*"[P]ermitted to remain in Ireland to pursue a course of studies on condition that the holder does not engage in any business or profession. (Employment for up to 20 hours per week during school terms and up to 40 hours per week during school holidays permitted.) And does not remain later than 6/11/2016."*
3. The Applicant was lawfully employed by the same employer from October 2014 to the time of the expiry of her student visa in November 2016. After the expiry of the student visa, the Applicant remained resident in the State. Documentation from the Revenue Commissioners establishes that the Applicant continued to work for the same employer up until January 2018. Evidence has not been placed before the Court as to the Applicant's current employment status.
4. On 8 February 2019, an application was made, on the Applicant's behalf, for renewed permission to work, and a corollary right of residence, pursuant to Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association (hereinafter referred to as "Decision 1/80"). It was asserted that, having regard to the decision of the European Court of Justice (hereinafter referred to as "the ECJ") in *R(Payir) v. Secretary of State for the Home Department*, (C-294/06) [2008] 1 WLR 1910, the Applicant was entitled to be regarded as duly registered as belonging to the labour force, as she had lawfully entered the State as a student with employment permission and had met the conditions of the first indent of Article 6(1) of Decision 1/80, thereby entitling her to a work permit.
5. The Applicant lost her GNIB card for a two year period prior to the aforementioned application.
6. By letter dated 13 January 2020, the Respondent refused the Applicant's application on the basis that the Applicant was not currently registered in employment and did not have permission to remain in the State since November 2016. She therefore failed to fulfil a requirement to be considered for permission to remain to work in the State.

7. Leave to apply by way of Judicial Review seeking an order of *Certiorari* of the Respondent's decision, together with declaratory relief, was granted by the High Court on 8 July 2020, on the grounds that the Respondent erred in law in refusing the Applicant's application and that the Respondent failed to have proper regard to the Applicant's Article 8 private life rights pursuant to the European Convention of Human Rights.

**Decision 1/80**

8. Article 6 of Decision 1/80 provides:-

- "1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:
- shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
  - shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of the Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;
  - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.
2. The procedures for applying paragraph 1... shall be those established under national rules."

9. Article 13 provides:-

*"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."*

10. The ECJ held in *Sevince v. Staatssecretaris van Justitie* (C-192/89) [1992] 2 CMLR 57 that Article 6(1) and 13 of Decision 1/80 have vertical direct effect.

**Employment Permits Act 2003 - 2006**

11. The Employment Permits Act 2003 – 2006 (hereinafter referred to as "the Employment Permits Act") provides for the grant of employment permits in respect of non-nationals. Section 2 of the Act provides inter alia:-

- "(1) A foreign national shall not-
- (a) enter the service of an employer in the State, or
  - (b) be in employment in the State, except in accordance with an employment permit granted by the Minister [for Enterprise, Trade and Employment] under section 8 of the Employment Permits Act 2006 that is in force.

...

- (10) Without prejudice to the other provisions of this Act, this section does not apply to a foreign national – ...
- (c) who is entitled to enter the State and to be in employment in the State pursuant to the treaties governing the European Communities (within the meaning of the European Communities Acts 1972 to 2003), or
- (d) who is permitted to remain in the State by the Minister for [Justice] and who is in employment in the State pursuant to a condition of that permission that the person may be in employment in the State without an employment permit referred to in subsection (1).”

**Immigration Act 2004, as amended**

12. Section 9 of the Immigration Act 2004, as amended (hereinafter referred to “the Immigration Act 2004”) provides, inter alia:-

- “(1) A register of non-nationals who have permission to be in the State shall be established and maintained by registration officers in such manner as the Minister may direct.
- (2) Subject to section 2(2), a non-national shall comply with the following requirements as to registration:
- (a) he or she shall, as soon as may be, furnish to the registration officer for the registration district in which he or she is resident, the particulars set out in the Second Schedule, and, unless he or she gives a satisfactory explanation of the circumstances which prevent his or her doing so, produce to the registration officer a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;
- (b) he or she shall furnish to the registration officer for the registration district in which he or she is resident particulars of any matter affecting in any manner the accuracy of the particulars previously furnished by him or her for the purpose of registration, within 7 days after the matter has occurred, and generally shall supply to the registration officer all information ...that may be necessary for maintaining the accuracy of the register;”

13. However, s.2(2) of the 2004 Act states, *inter alia*:-

“Nothing in this Act shall derogate from—

- (a) any of the obligations of the State under the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003,
- (b) any act adopted by an institution of those Communities.”

**Decision of Respondent**

14. The decision of the Respondent states:-

"According to information and documentation your office submitted on behalf of Ms. Dogan she does not have permission to be in the State or be employed in the State. Article 6 of Decision No 1/80 of the Association Council of 19 September 1980 on the Development of the Association which you refer to in relation to Ms Dogan's application to remain in the State states:-

1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State"

Ms Dogan is not currently registered in employment and has no permission to remain registered in the State since 2016, therefore, she does not fulfil a basic requirement to be considered for permission to remain in work in the State."

### **The Issue Between the Parties**

15. The central issue between the parties is whether the expiration of the Applicant's permission to be in the State had the effect of ending the Applicant's status as a person duly registered as belonging to the labour force.
16. The Applicant asserts that she never registered or de-registered as belonging to the labour force; that her status of being duly registered as belonging to the labour force, in light of her student status with permission to work which she availed of, remained in force regardless of the fact that her permission to be in the State expired. As the Applicant complied with the criteria set out in the first indent of Article 6(1) of Decision 1/80, having lawfully worked for the same employer in excess of one year, she was entitled to a renewal of her work permit in respect of that employer, which implied a right of residence, regardless of the fact that she no longer had permission to be within the State. It was further argued that the Employment Permits Act was not applicable to the Applicant pursuant to s. 2(10)(c) of the Act.
17. The Respondent accepts that the Applicant was recognised as being duly registered as belonging to the labour force on foot of her student permission. However, it was submitted, that once her permission to be in the State expired and was not renewed by her, she no longer had permission to be in the State and therefore no longer was duly registered as belonging to the labour force. It was submitted on behalf of the Respondent that the Applicant was prohibited from working within the State as she has not complied with the registration provisions of the Immigration Act 2004 and therefore was not duly registered as belonging to the labour force.

### **Judgments of the ECJ**

18. The Court has been referred to an array of judgments of the ECJ which have sought to interpret and apply Decision 1/80.
19. In *Sevince v. Staatssecretaris van Justitie* (C-192/89) [1992] 2 CMLR 57, the ECJ stated at p.94, with respect to article 6(1) and a right of residence:-

“[I]t must be stated that the abovementioned provisions merely govern the circumstances of the Turkish worker as regards employment and make no reference to his circumstances concerning the right of residence.

The fact nevertheless remains that those two aspects of the personal situation of a Turkish worker are closely linked and that by granting to such a worker, after a specified period of legal employment in the member-State, access to any paid employment of his choice, the provisions in question necessarily imply-since otherwise the right granted by them to the Turkish worker would be deprived of any effect – the existence, at least at that time, of a right of residence for the person concerned.

The legality of the employment within the meaning of those provisions, even assuming that it is not necessarily conditional upon possession of a properly issued residence permit, nevertheless presupposes a stable and secure situation as a member of the labour force.”

20. In *R(Payir) v. Secretary of State for the Home Department* (C-294/06) [2008] 1 WLR 1910, the ECJ stated at p. 1931, with respect to the conditions set out in article 6(1) :-

“The first of those conditions concerns the status of worker. It is settled case law that, in order to satisfy that condition, the Turkish national must perform activities which are real and genuine, to the exclusion of activities which are on such a small scale as to be regarded as purely marginal and ancillary...

The second condition concerns the concept of being duly registered as belonging to the workforce. The court has held that that concept embraces all workers who have met the conditions laid down by law or regulation in the host members state and who are thus entitled to pursue an occupation in its territory.

The third condition laid down in article 6(1) of Decision No. 1/80 is that of legal employment, that is to say, a stable and secure situation as a member of the labour force of the host member state and, by virtue of that situation, an undisputed right of residence.”

It further stated at p. 1933:-

“[I]n order to determine whether a Turkish national who has entered the territory of a member state lawfully may, after working for a year in that territory, rely on the rights conferred by article 6(1) of Decision No 1/80, it must be determined whether he meets the objective conditions laid down in that provision, without it being necessary to take into account the reasons for which he was first granted the right to enter that territory or any temporal limitations attached to his right to work. According to settled case law, it is not open to the national authorities to attach conditions to such rights or to restrict their application, as they would otherwise undermine the effect of Decision No. 1/80.

Consequently, in cases such as those before the referring court, the reasons for which leave to enter was granted to the Turkish nationals concerned – to enable them to pursue studies or gain experience as an au pair – cannot in themselves prevent the persons concerned from being able to rely on article 6(1) of Decision No. 1/80. The same applies to statements of intention made by those nationals to the effect that they do not wish to remain in the host member state for more than two years or that they intend to leave it on completion of their studies, and to temporal limitations attaching to their leave to remain.”

21. In *Kus v. Landeshauptstadt Wiesbaden* (C-237/91) [1993] 2 CMLR 887, the ECJ stated at p. 907:-

“[A]ccording to the wording of the provision, it applies to Turkish workers duly registered as belonging to the labour force of a member State and, in particular, pursuant to the first indent of Article 6(1), it is sufficient if a Turkish worker has had legal employment for more than one year for him to be entitled to the renewal of his work permit with the same employer. Therefore this provision does not make recognition of that right dependent on any other condition, particularly the conditions under which the right of entry and residence was obtained....

[I]f a Turkish worker has been employed for more than one year on the basis of a valid work permit, he must be regarded as fulfilling the conditions laid down by the first indent of Article 6(1) of Decision 1/80 even if his residence permit was originally issued for purposes other than that of paid employment...

Decision 1/80 does not encroach on the power of the member-States to regulate the entry of Turkish nationals into their territory and the conditions of their first employment. Article 6 of the decision only regulates the situation of Turkish workers who are already duly registered as belonging to the labour force of the members States. Therefore it cannot justify depriving Turkish workers of the rights laid down by Article 6(1) of Decision 1/80 if they already hold, from the view point of the law of a member-State, a work permit and a right of residence if the latter is required.”

And at p. 909:-

“[A] Turkish worker who fulfils the conditions of the first or third indent of Article 6(1) of Decision 1/80 may rely directly on those provision to obtain an extension of his residence permit, in addition to that of his work permit.”

22. In *Gulbahce v. Freie und Hansestadt Hamburg* (C-268/11) [2013] ICR 389, the ECJ stated at pp. 413-414:-

“It is true that, as European law stands at present, Decision No 1/80 does not at all encroach upon the competence of the member states to refuse Turkish nationals the right of entry into their territories and to take up first employment there. Nor

does that Decision preclude those member states, in principle, from regulating the conditions under which those persons work for up to one year as provided for in the first indent of article 6(1) of Decision No 1/80.

Article 6(1) of Decision No 1/80 cannot, however be construed as permitting a member state to modify unilaterally the scope of the system of gradual integration of Turkish workers in the host member state's labour force by denying to a worker who has been permitted to enter its territory and who has lawfully pursued a genuine and effective economic activity for a continuous period of more than one year with the same employer rights which the three indents of that provision confer on him progressively according to the duration of his employment.

Such an interpretation would render Decision No 1/80 meaningless and deprive it of any practical effect, since the wording of article 6(1) of that Decision is general and unconditional in that it does not permit the member states to restrict the rights which that provision confers directly on Turkish workers...

[T]he first indent of article 6(1) of Decision No 1/80 must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the part of that worker and that withdrawal occurs after the completion of the period of one year of legal employment provided for in the first indent of article 6(1) of Decision No 1/80."

#### **Application to Instant Case**

23. The Applicant obtained a student visa which permitted her to enter and work within the State for the duration of her visa. Accordingly, the Applicant lawfully entered the State and lawfully took up employment. She was in the employment of the same employer for a period in excess of two years at the time of the expiration of her student visa. The Applicant registered with the relevant authorities in accordance with the Immigration Act 2004 and was provided with a GNIB card which she later lost. The Applicant continued to work for this employer after the expiration of the student visa. Her current status with respect to that employment is unknown to the Court.
24. Having regard to the first indent of article 6(1) of Decision 1/80, and the factual situation pertaining in the instant case, the Applicant became entitled to a work permit to be employed by the same employer for whom she had worked for the previous twelve months, once that twelve month period expired. At that stage, the Applicant remained in possession of a valid student visa giving her permission to be within this jurisdiction and work in this jurisdiction. The right to a work permit pursuant to Decision 1/80 had already been acquired by the Applicant by the time her student visa expired. Had the Applicant applied for a renewal of a work permit at that stage (which she was not required to do as her student visa remained valid) she would have been entitled to a work permit for such employment.

25. Considering the import of the judgments of the ECJ as set out extensively above, it is apparent that if an entitlement to a work permit arises pursuant to Decision 1/80, then a right of residence is a corollary right. Whilst the Respondent can regulate entry into the State, once a person is lawfully within the State; has complied with the conditions of entry; and has been in lawful employment for a twelve month period with the same employer, then an entitlement to a work permit in respect of that employment arises if a job is available. The fact that the permission to remain in the State expired after the acquisition of the right to a work permit is not of consequence as the right to the work permit had already been acquired which, by necessity, included a corollary right of residence.
26. There was some suggestion, on behalf of the Respondent, that as the Applicant did not indicate, when entering the State that she was seeking or would seek to rely on Decision 1/80, she was restricted to the entitlements of her student visa. That is an incorrect approach by the Respondent, as is apparent from the decision in *R(Payir) v. Secretary of State for the Home Department (C-294/06)* [2008] 1 WLR 1910. An indication by the Applicant of her intentions in this regard is not of significance. Instead, what is of importance, is whether the Applicant met the conditions set out in Article 6(1).
27. In light of the directly effective nature of Decision 1/80 and the fact that it forms part of the corpus of European Law which is specifically exempted from the provisions of the Employment Permits Act, that Act is not applicable to an individual who has already gained an entitlement to work pursuant to Decision 1/80. A requirement to obtain a work permit under the provisions of that Act does not arise for such an individual.
28. Accordingly, the Respondent erred in law in her decision that the Applicant was not duly registered as belonging to the labour force. The Applicant was entitled to a work permit in respect of the same employer she had been working for from 2014, if a job was available with that employer.
29. In light of the Courts determination with respect to Decision 1/80, the claim made with respect to the failure to properly consider the Applicant's Article 8 private life rights does not require to be considered.
30. Accordingly, I will grant the Applicant the relief sought in paragraph (d)1 and (d)2 of the Statement of Grounds.
31. In light of the fact that a work permit pursuant to the first indent of Decision 1/80 can only issue to permit work for the same employer in respect of whom the Applicant had been working for a period of twelve months and that a job must be available with that employer, I will remit the matter to the Respondent for consideration of this issue, as it is unknown to the Court whether a job was available to the Applicant from that employer at the time of the application to the Respondent. The offer of employment exhibited appears to refer to a different employer.
32. The Court will also make an order for the Applicant's costs as against the Respondent.