

# The Protection of Turkish Citizens Against Expulsion—This Far and No Further? The Impact of the *Ziebell* Case

By Kathrin Hamenstädt\*

### A. Abstract

This Article focuses on the *Ziebell* judgment,<sup>1</sup> in which the European Court of Justice rejected the analogous application of the protection against expulsion for Union citizens to Turkish citizens covered by the Association Agreement. The judgment is placed in the context of the opinion of the Advocate General, the pre-*Ziebell* judgments of the Court, and judgments of German courts regarding the expulsion of Turkish citizens. On the one hand, against the background of previous case-law of the Court, the judgment might be seen as a setback. On the other hand, the Court's reference to the Long-Term Residents Directive also provides for new interpretative possibilities. Next to the applicability of the directive and the advantages and disadvantages for Turkish nationals triggered by this shift, the interpretative possibilities are discussed in light of fundamental rights and the stand-still obligation anchored in Association Council Decision 1/80.

### B. Introduction

The judicial activism of the European Court of Justice ("CJEU") regarding the attribution of rights to Turkish citizens covered by the Association Agreement<sup>2</sup> and Association Council Decision 1/80<sup>3</sup> has been more vigorous in the past than in its latest decision regarding the protection of Turkish citizens against expulsion. In its previous decisions, the Court approximated the rights of Turkish workers and their protection against expulsion to the

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\* Kathrin Hamenstädt is a PhD researcher at Maastricht University. She wishes to thank Elise Muir for her useful comments on the article. Email: [kathrin.hamenstadt@maastrichtuniversity.nl](mailto:kathrin.hamenstadt@maastrichtuniversity.nl).

<sup>1</sup> Case C-371/08, *Ziebell v. Baden-Württemberg*, 2011 E.C.R. I-\_\_\_\_, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=116127&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1071413> [hereinafter *Ziebell*].

<sup>2</sup> Agreement Establishing an Association Between the European Economic Community and Turkey, Sept. 12, 1963, [hereinafter *Ankara Agreement*].

<sup>3</sup> Decision No. 1/80, of the Association Council of 19 September 1980 on the Development of the Association, available at [http://www.inis.gov.ie/en/INIS/DECISION\\_No\\_1\\_80\\_eng.pdf/Files/DECISION\\_No\\_1\\_80\\_eng.pdf](http://www.inis.gov.ie/en/INIS/DECISION_No_1_80_eng.pdf/Files/DECISION_No_1_80_eng.pdf) [hereinafter *Decision 1/80*].

rights of workers holding the nationality of a Member State of the European Union.<sup>4</sup> This approximation came to a halt in the *Ziebell* judgment delivered by the Court on 8 December 2011.<sup>5</sup> In recent months, much attention has been devoted to the *Ruiz Zambrano*<sup>6</sup> judgment and subsequent rulings<sup>7</sup> in which the Court was keen not to give any far-reaching interpretation to the concept of Union citizenship which would benefit third country family members of Union citizens.

The Court might have been inspired by this restrictive interpretation when it ruled in *Ziebell* that the protection against expulsion applicable to Union citizens could not be conferred by analogy to individuals covered by the Association Agreement.

The present contribution assesses the possible impact of the *Ziebell* case on the protection of Turkish nationals against expulsions under EU law. First, the context in which the *Ziebell* judgment was delivered is briefly explained by addressing the parallel which the Court traditionally drew between the status of EU workers and Turkish citizens covered by the Association Agreement before focusing on the *Ziebell* judgment itself. The second section focuses on the approaches of domestic courts prior to the *Ziebell* judgment and the question of whether the Association Agreement has a purely economic purpose which was underlying the Court's judgment. The third section highlights Directive 2003/109/EC ("LTR Directive" or "Long Term Residents Directive")<sup>8</sup> on long-term resident third country nationals: *Ziebell* is the first time that the Court has considered the provision on expulsion in the Directive as the relevant framework when assessing the expulsion of a Turkish national covered by the Association Agreement. The last part discusses the stand-still clause which is incumbent on the parties to the Association Agreement and which affects expulsion decisions against Turkish workers. Finally, it addresses the possible implications of the *Ziebell* judgment for Turkish workers and eventually other third country nationals.

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<sup>4</sup> See, e.g., Case C-303/08, *Baden-Württemberg v. Bozkurt*, 2010 E.C.R. I-13445, para. 55; Case C-349/06, *Polat v. Rüsselsheim*, 2007 E.C.R. I-8167, para. 30; Case C-136/03, *Dörr v. Sicherheitsdirektion für das Bundesland Kärnten*, 2005 E.C.R. I-4759, para. 63; Case C-467/02, *Cetinkaya v. Baden-Württemberg*, 2004 E.C.R. I-10895, para. 43; Case C-340/97, *Nazli v. Nürnberg*, 2000 E.C.R. I-957, para. 56.

<sup>5</sup> *Ziebell*, *supra* note 1.

<sup>6</sup> See Case C-34/09, *Ruiz Zambrano v. Office National de l'Emploi*, 2011 E.C.R. I-\_\_\_\_, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML> [hereinafter *Ruiz Zambrano*]. But see Kay Hailbronner & Daniel Thym, *Ruiz Zambrano, Die Entdeckung des Kernbereichs der Unionsbürgerschaft*, 2011 NEUE JURISTISCHE WOCHENSCHRIFT 2008 (criticizing the *Ruiz Zambrano* decision).

<sup>7</sup> Case C-256/11, *Dereci v. Bundesministerium für Inneres*, 2011 E.C.R. I-\_\_\_\_; Case C-40/11, *Iida v. Ulm*, 2012 E.C.R. I-\_\_\_\_; Case C-434/09, *McCarthy v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-\_\_\_\_, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0434:EN:HTML>.

<sup>8</sup> Directive 2003/109/EC, of the Council of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2004 O.J. (L 16) 44 [hereinafter LTR Directive].

### C. Testing the Limits of the Parallel Between EU Citizens and Turkish Nationals?

This section briefly outlines the jurisdiction of the Court regarding the expulsion of Turkish workers prior to the *Ziebell* judgment, before introducing the facts of the *Ziebell* case, the position adopted by Advocate General Bot and the Court's judgment.

#### *I. Interpretation of the Public Policy Exception in Art. 14 Association Council Decision 1/80 Before Ziebell*

The expulsion of Turkish workers covered by the Association Agreement is regulated by Article 14 of Association Council Decision 1/80 which states that “[t]he provisions of this section shall be applied subject to the limitations justified on grounds of public policy, public security or public health.”<sup>9</sup>

Before *Ziebell*, the CJEU made reference to the public policy, security and health exceptions for nationals of the Member States contained in Article 45(3) Treaty on the Functioning of the European Union (formerly Article 39(3) TEC), when determining the public policy exception in Article 14 Decision 1/80.<sup>10</sup> According to the Court, this “parallel interpretation” or analogous application was justified as the wording of Article 14 of Council Decision 1/80 and the wording of the Treaty provision were almost identical. The Treaty provisions which regulate public policy, security and health exceptions regarding the freedom of movement of persons were specified in Council Directive 64/221/EEC.<sup>11</sup> Therefore, the Court had recourse to that Directive when judging whether a restrictive national measure based on public policy considerations was in line with Union law. Council Directive 64/221/EEC was replaced by Council Directive 2004/38/EC (“Citizenship Directive”),<sup>12</sup> and the “Citizenship Directive” provides that “[r]eferences made to the repealed provisions and Directives shall be construed as being made to this Directive.”<sup>13</sup> It was not clear whether the protection against expulsion, granted to Union citizens after ten

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<sup>9</sup> Article 14 is located in Chapter II, Section 1 which is titled “Questions Relating to Employment and the Free Movement of Workers.”

<sup>10</sup> Case C-303/08, *Baden-Württemberg v. Bozkurt*, 2010 E.C.R. I-13445, para. 55; Case C-349/06, *Polat v. Rüsselsheim*, 2007 E.C.R. I-8167, para. 30; Case C-136/03, *Dörr v. Sicherheitsdirektion für das Bundesland Kärnten*, 2005 E.C.R. I-4759, para. 63; Case C-467/02, *Cetinkaya v. Baden-Württemberg*, 2004 E.C.R. I-10895, para. 43; Case C-340/97, *Nazli v. Nürnberg*, 2000 E.C.R. I-957, para. 56.

<sup>11</sup> Directive 64/221/EEC, of the Council 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, 1964 O.J. (56) 850.

<sup>12</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, 2004 O.J. (L 158) 77 [hereinafter *Citizenship Directive*].

<sup>13</sup> *Id.* at art. 38(3).

years of residence in the host state,<sup>14</sup> could be applied by way of analogy to Turkish nationals with the same length of residence.<sup>15</sup> The CJEU was already asked this question by way of preliminary ruling in the *Polat* case, but did not have to decide on this question because the action was brought before the referring German court in 2005 when the deadline for transposition of the Citizenship Directive had not yet expired.<sup>16</sup> The CJEU was again asked by several German courts to give an answer to this question.<sup>17</sup>

## II. The Facts of the Ziebell Case

One of these above mentioned preliminary references was the *Ziebell* case which was registered under the name Örnek prior to the marriage of Mr. Örnek to his wife. Mr. Nural Ziebell was born in Germany in 1973 as the son of a Turkish worker and spent all his life in the Federal Republic of Germany.<sup>18</sup> Since 1991, he had held an unlimited residence permit and even applied for naturalization in Germany (though it was rejected on the basis of his criminal record dating back to 1993). His criminal record included gang-related robbery, theft and aggravated theft, actual control over a prohibited object, money counterfeiting, and grievous bodily harm.<sup>19</sup> He regularly used cocaine and heroin, beginning in 1998. In March 2007, the competent authority issued an order for Mr. Ziebell's expulsion on the ground that his "conduct constitutes a serious disturbance of the social order" and that there was a "specific and high risk that Mr. Ziebell will engage in serious re-offending."<sup>20</sup>

<sup>14</sup> *Id.* at art. 28(3)(a).

<sup>15</sup> A direct application of Art. 28(3)(a) is not possible as the provision explicitly refers to Union citizens.

<sup>16</sup> Case C-349/06, *Polat v. Rüsselsheim*, 2007 E.C.R. I-8167, paras. 26–27.

<sup>17</sup> See, e.g., Bundesverwaltungsgericht [BVerwG - Federal Administrative Court], Case No. 1 C 25/08, Aug. 25, 2009, 2010 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 392 (Ger.), *CJEU referral dismissed*, Order Removing the Case from the Court's Register, Case C-436/09 *Belkiran v. Oberbürgermeister der Stadt Krefeld*, 2012 E.C.R. I-\_\_\_\_\_, available at [http://eur-law.eu/EN/Case-C-436-09-Reference-preliminary-ruling-Bundesverwaltungsgericht,412672,d;Verwaltungsgericht\\_Berlin](http://eur-law.eu/EN/Case-C-436-09-Reference-preliminary-ruling-Bundesverwaltungsgericht,412672,d;Verwaltungsgericht_Berlin) [VG Berlin - Administrative Court of Berlin], Case No. 21 A 49.08, Sept. 4, 2008 (Ger.), available at <http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=JURE090026726&psml=sammlung.psml&max=true&bs=10>, *CJEU referral dismissed*, Order Removing the Case from the Court's Register, Case C-420/08, *Erdil v. Berlin*, 2012 E.C.R. I-\_\_\_\_\_, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:109:0008:0008:EN:PDF;Verwaltungsgerichtshof\\_Baden-Wuerttemberg](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:109:0008:0008:EN:PDF;Verwaltungsgerichtshof_Baden-Wuerttemberg) [VGH Baden-Württemberg - Administrative Court Baden-Württemberg], Case No. 13 S 1917/07, July 22, 2008, 2009 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 82 (Ger.), *CJEU referral*, Case C-371/08, *Ziebell v. Baden-Württemberg*, 2011 E.C.R. I-\_\_\_\_\_, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=116127&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1071413>.

<sup>18</sup> *Ziebell*, *supra* note 1, at paras. 32–33.

<sup>19</sup> *Id.* at paras. 35, 37.

<sup>20</sup> *Id.* at paras. 41–42.

Mr. Ziebell challenged this decision. In July 2008, the Higher Administrative Court for Baden-Württemberg asked the CJEU, by way of preliminary ruling, whether Article 28(3)(a) of the Citizenship Directive could be applied by way of analogy to a Turkish national covered by Decision 1/80 who had resided in the host Member State for the previous ten years. Mr. Ziebell started a drug therapy in October 2008 which seemed to be successful. Moreover, he had not committed any further offences since then, and married a German national in December 2009, became the father of a child, and found gainful employment.<sup>21</sup>

### *III. Opinion of Advocate General Bot*

Advocate General Bot rejected the analogous application of Article 28(3) of the Citizenship Directive. He stated that the aim of the Association Agreement is “to promote the continuous and balanced strengthening of trade and economic relations between the Republic of Turkey and the European Union.” Regarding Association Council Decision 1/80, he referred to the first and second recital of the Preamble to the Decision and held that it aims to revitalize and develop the Association and seeks to improve the social treatment accorded to workers and members of their families.<sup>22</sup> He emphasized, however, that Turkish nationals are only covered by the Association Agreement and Decision 1/80 in their capacity as a worker. Their capacity as a worker was the common denominator between them and Union workers, and, therefore, the (repealed) Council Directive 64/221/EC was applicable to Turkish workers by analogy. According to Advocate General Bot, the Citizenship Directive which replaces Council Directive 64/221/EEC goes beyond “the purely economic context and the context of workers.”<sup>23</sup> The Citizenship Directive refers to Union citizens and does not require the individual in question to be a worker. Applying the Citizenship Directive to Turkish nationals would result in an equation of these two groups. Bot argued that the Court would exceed its powers if it equated these two groups because this was not the intention of the parties to the Association Agreement.<sup>24</sup> He then emphasized that the years Mr. Ziebell spent on the national territory must also be taken into account. He referred in this context to Article 12 of the LTR Directive which also requires the length of residence to be taken into account and highlighted that “the same must be true, *a fortiori*, as regard Turkish nationals who enjoy a special status in the Union, halfway between the status of a national of a Member State and a third-country national.”<sup>25</sup> Bot then summarized the links Mr. Ziebell established in Germany and recalled

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<sup>21</sup> *Id.* at para. 39.

<sup>22</sup> Opinion of Advocate General Bot in the Ziebell case, at para. 48 available at <http://curia.europa.eu/juris/celex.jsf?celex=62008CC0371&lang1=en&type=NOT&ancre=>.

<sup>23</sup> *Id.* at para. 52.

<sup>24</sup> *Id.* at para. 55.

<sup>25</sup> *Id.* at para. 64.

that the Court is required to take fundamental rights into account when an expulsion decision may interfere with the exercise of fundamental freedoms. In this context, he explicitly referred to the right to respect for family life.<sup>26</sup>

#### *IV. Judgment of the CJEU*

The CJEU also rejected the analogous application of Article 28(3)(a) of the Citizenship Directive to Turkish nationals who are covered by the Association Agreement. It held that Article 14(1) of the Association Council Decision and the protection against expulsion conferred by that provision do not have the same scope as Article 28(3)(a) of the Citizenship Directive.

The Court acknowledged that the principles relating to the freedom of movement of workers, enshrined in the TFEU, have to be extended, as far as possible, to Turkish nationals covered by the Association Agreement.<sup>27</sup> This interpretation, by analogy, must apply, according to the Court, to the secondary legislation specifying these respective Treaty articles.<sup>28</sup> It based its finding on several arguments. The Court concluded that the Association Agreement constitutes an international treaty which has to be interpreted in line with its wording and its objectives.<sup>29</sup> In this context, the Court pointed to Article 2(1) of the Association Agreement, which aims to promote the “continuous and balanced strengthening of trade and economic relations.” From this wording, the CJEU drew the conclusion that the Association has a purely economic nature.<sup>30</sup> This result is, according to the Court, also confirmed by the wording of Article 12 of the Association Agreement and Article 36 of the Additional Protocol.

Regarding the scope of the public policy exceptions enshrined in Article 14 of Decision 1/80, the CJEU held that an analogous interpretation in line with the Article 45 TFEU (formerly Article 39 TEC) was justified because these provisions were formulated in almost identical terms.<sup>31</sup>

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<sup>26</sup> *Id.* at para. 65 (citing the Charter of Fundamental Rights of the European Union art. 7, Dec. 7, 2000, 2000 O.J. (C 364) 1, and the Convention on the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222).

<sup>27</sup> *Ziebell*, *supra* note 1, at para. 58.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at para. 61.

<sup>30</sup> *Id.* at paras. 64, 68.

<sup>31</sup> *Id.* at para. 67.

By contrast, the Citizenship Directive is, according to the Court, far from pursuing a purely economic objective. It rather aims at facilitating and strengthening the right of Union citizens to move and reside freely within the territory of the Union.<sup>32</sup> This is demonstrated by the growing protection against expulsion depending on the length of residence of the Union citizen. Furthermore, the Court pointed out that the concept of “imperative grounds,” which is employed in Article 28(3)(a) of the Citizenship Directive, has no counterpart in Article 14 of Decision 1/80.<sup>33</sup> The concept of Union citizenship is premised upon the fact that the individual is a national of the Member State and not on the fact that he or she is a worker.<sup>34</sup>

Due to these differences between the purpose and objective of the Association Agreement and the Citizenship Directive, the Court held that these two legal regimes cannot be considered equivalent. The differences between these two systems also bar an analogous application of Article 28(3)(a) of the Directive to situations covered by Article 14 of Decision 1/80.<sup>35</sup>

As an alternative solution, the CJEU considered the framework of the LTR Directive to be the appropriate reference for the purpose of applying Article 14(1) of Decision 1/80.<sup>36</sup> The Court stated

[T]hat framework, in the case of a foreign national such as Mr. Ziebell, who has been residing lawfully and continuously in the host Member State for more than 10 years, consists of Article 12 of Directive 2003/109, which, in the absence of more favorable rules in the law under the EEC-Turkey Association, is a rule of minimum protection against expulsion for any national of a non-member State who holds the status of long-term lawful resident in the territory of a Member State.<sup>37</sup>

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<sup>32</sup> *Id.* at para. 69.

<sup>33</sup> *Id.* at para. 71.

<sup>34</sup> *Id.* at para. 73.

<sup>35</sup> *Id.* at para. 74.

<sup>36</sup> *Id.* at paras. 78–79.

<sup>37</sup> *Id.* at para. 79.

The Court then listed the considerations a Member State has to take into account when expelling a long-term resident.<sup>38</sup> The CJEU summarized its settled case law on the interpretation of the EEC-Turkey Agreement and the principles which have to be observed when interpreting the Agreement.<sup>39</sup> The Court emphasized that measures adopted on grounds of public policy or public security have to comply with, among other requirements, the principle of proportionality and the fundamental rights of the person concerned, particularly “the right to privacy and family life”.<sup>40</sup> It recalled that a case-by-case assessment has to be conducted,<sup>41</sup> precluding the possibility that a criminal conviction automatically results in an expulsion. Moreover, expulsions cannot be ordered as “a means of deterring other foreigners from committing offences.”<sup>42</sup> The Court also recalled its *Cetinkaya* judgment<sup>43</sup> and reiterated that domestic courts have to take all factual matters into account which occurred after the decision of the administrative authority when assessing the lawfulness of an expulsion of a Turkish national.<sup>44</sup>

Finally, the CJEU stated that it is for the referring court to balance the interests pursued by the host State against the “actual integration factors enabling the individual concerned to reintegrate into society in the host Member State.”<sup>45</sup> The Court pointed to these considerations and emphasized that domestic courts must take due account of the “particularly close links which the foreign individual has forged with society in the Federal Republic of Germany, on whose territory he was born.” Moreover, the CJEU highlighted that Mr. Ziebell has lived legally and continuously for more than 35 years in Germany and is married to a German national and gainfully employed.<sup>46</sup>

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<sup>38</sup> *Id.* at para. 80.

<sup>39</sup> *Id.* at paras. 81–84.

<sup>40</sup> *Id.* at para. 82.

<sup>41</sup> *Id.* at para. 82.

<sup>42</sup> *Id.* at para. 83.

<sup>43</sup> Case C- 462, *Cetinkaya v. Baden-Württemberg*, 2004 E.C.R. I-10895, para. 43.

<sup>44</sup> *Ziebell*, *supra* note 1, at para. 84.

<sup>45</sup> *Id.* at para. 85.

<sup>46</sup> *Id.*

#### D. Approaches by Domestic Courts and the (Purely) Economic Purpose of the Association Agreement

The subsequent section provides an overview of some of the arguments advanced by domestic courts,<sup>47</sup> prior to *Ziebell*, for and against an analogous application of the protection against expulsion established by the Citizenship Directive to Turkish nationals covered by the Association Agreement. Moreover, it addresses the question that underlies the CJEU ruling in *Ziebell* of whether the Association Agreement and Decision 1/80 have a purely economic purpose.

##### 1. The Judgments of Domestic Courts Prior to the *Ziebell* Judgment

Not all domestic courts felt the need to refer the question of whether Art. 28 (3)(a) of the Citizenship Directive is applicable by analogy to Turkish citizens to the CJEU. But some domestic courts did decide this question prior to the judgment of the CJEU in *Ziebell*. To what extent this non-referral is problematic against the background of Article 267 TFEU is not addressed in the present contribution. Instead, the arguments used by the courts or brought forward by the parties before domestic courts are briefly highlighted.<sup>48</sup>

##### 1. Arguments Against an Application by Analogy

Several domestic courts hold in their judgments<sup>49</sup> and decisions,<sup>50</sup> in line with the later CJEU judgment, that Article 28(3)(a) of the Citizenship Directive is not applicable by way of analogy to Turkish citizens. Some of these domestic courts also employ systematic, historical, and textual interpretation, whereas the CJEU, with a few exceptions,<sup>51</sup> focuses primarily on a teleological interpretation.

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<sup>47</sup> The list of judgments used in this article is not exhaustive.

<sup>48</sup> Courts which referred the case to the CJEU dealt with the arguments for and against an application by analogy. Therefore, it is possible that they are listed in both groups.

<sup>49</sup> See, e.g., Verwaltungsgericht Stuttgart [VG Stuttgart - Administrative Court of Stuttgart], Case No. 5 K 1081/06, Aug. 5, 2008 (Ger.), available at [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=10952](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=10952); Niedersächsisches Oberverwaltungsgericht [NdsOVG - Lower Saxony Higher Administrative Court], Case No. 11 LB 26/08, Mar. 27, 2008.

<sup>50</sup> See, e.g., Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW - Higher Administrative Court North Rhine-Westphalia], Case No. 18 A 855/07, Sept. 5, 2008 (Ger.), available at [http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2008/18\\_A\\_855\\_07beschluss20080905.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2008/18_A_855_07beschluss20080905.html); Oberverwaltungsgericht Saarland [OVG Saarland - Saarland Higher Administrative Court], Case No. 2 B 212/08, July 9, 2008 (Ger.), available at <http://www.rechtsprechung.saarland.de/cgi-bin/rechtsprechung/document.py?Gericht=sl&nr=1888>.

<sup>51</sup> The Court states that the very concept of 'imperative grounds' of public security as set out in Citizenship Directive art. 28 (3)(a) has no counterpart in Decision 1/80 art. 14. *Ziebell*, *supra* note 1, at para. 71.

One line of argumentation uses a systematic interpretation and highlights the meaning and importance of the right of permanent residence.<sup>52</sup> The right of permanent residence grants a certain protection against expulsion as it provides that individuals holding a permanent residence right can only be expelled on serious grounds of public policy or public security.<sup>53</sup> The right of permanent residence cannot be acquired by Turkish nationals, and, therefore, they cannot rely on Article 28(2) of the Citizenship Directive. Article 28(3) of the Citizenship Directive grants a more enhanced protection against expulsion than Article 28(2). An application of Article 28(3) to Turkish citizens by analogy is therefore excluded as a Turkish citizen cannot even rely on the somewhat weaker protection granted by Article 28(2) of the Citizenship Directive.<sup>54</sup>

Another systematic interpretation focuses on the Association Agreement and the Additional Protocol to the Agreement and points out that an analogous application of Article 28(3) to Turkish nationals would infringe Article 59 of the Additional Protocol to the Association Agreement.<sup>55</sup> Article 59 provides that Turkey should not receive a more favorable treatment—in the fields covered by the Protocol—than that which Member States grant each other in the framework of the EEC. This line of argumentation holds that a more favorable treatment occurs with regard to third country family members of Turkish workers who are covered by Article 7 of Decision 1/80. Third country family members of Turkish workers could rely on an analogous application of Article 28(3) of the Citizenship Directive, whereas third country family members of Union citizens could not rely on Article 28(3) because this provision explicitly refers to Union citizens. The expulsion of a third country family member of a Union citizen affects the latter and causes an indirect impairment of his or her rights. In these constellations, a Turkish citizen would be treated more favorably, and the provision of Article 59 of the Additional Protocol to the Association Agreement would therefore be infringed.<sup>56</sup>

Another line of argumentation against an analogous application uses a textual interpretation and highlights the difference in the wording of the two provisions. Article

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<sup>52</sup> Citizenship Directive, *supra* note 12, at ch. IV.

<sup>53</sup> *Id.* at art. 28(2).

<sup>54</sup> Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW - Higher Administrative Court North Rhine-Westphalia], Case No. 18 A 855/07, Sept. 5, 2008, at para. 68 (Ger.), available at [http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2008/18\\_A\\_855\\_07beschluss20080905.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2008/18_A_855_07beschluss20080905.html).

<sup>55</sup> See, e.g., *id.* at para. 74; Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW- Higher Administrative Court North Rhine-Westphalia], Case No. 18 B 2389/06, May 15, 2007.

<sup>56</sup> Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW - Higher Administrative Court North Rhine-Westphalia], Case No. 18 A 855/07, Sept. 5, 2008, para. 74 (Ger.), available at [http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2008/18\\_A\\_855\\_07beschluss20080905.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2008/18_A_855_07beschluss20080905.html).

14 of the Association Council Decision provides for a limitation on grounds of public policy, public security, and public health, whereas Article 28(3) of the Council Directive only provides for a limitation on grounds of public security.<sup>57</sup>

A third line of interpretation uses a textual and a historic approach and argues, like Advocate General Bot,<sup>58</sup> that neither the wording of Article 14 of Decision 1/80 nor the intention of the parties to the original Association Agreement could serve as a basis to argue that Article 14 constitutes a dynamic reference to all changes made at Union level.<sup>59</sup> Therefore, this line of argumentation concludes that an application of Article 28(3) to Turkish citizens would require a decision of the Association Council.<sup>60</sup>

## 2. Arguments for an Application by Analogy

While most domestic courts—and ultimately the CJEU—rejected an analogous application of Article 28(3)(a) of the Citizenship Directive, some courts argued that Article 28(3) can be applied by analogy to Turkish workers.<sup>61</sup> The latter courts highlight that the CJEU even extended the procedural safeguards for Union citizens contained in Council Directive 64/221/EEC to Turkish citizens.<sup>62</sup> Therefore, the (substantive) provision of Article 28(3) of the Citizenship Directive can all the more be applied to them.<sup>63</sup>

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<sup>57</sup> See, e.g., Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg - Administrative Court Baden-Württemberg], Case No. 13 S 1917/07, July 22, 2008, 2009 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 82 (Ger.).

<sup>58</sup> Opinion of Advocate General Bot, *supra* note 22, at para. 55.

<sup>59</sup> See, e.g., Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg - Administrative Court Baden-Württemberg], Case No. 13 S 1917/07, July 22, 2008, 2009 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 82 (Ger.); Oberverwaltungsgericht Saarland [OVG Saarland - Saarland Higher Administrative Court], Case No. 2 B 212/08, July 9, 2008 (Ger.), available at <http://www.rechtsprechung.saarland.de/cgi-bin/rechtsprechung/document.py?Gericht=sl&nr=1888>.

<sup>60</sup> See Bundesverwaltungsgericht [BVerwG - Federal Administrative Court], Case No. 1 C 25/08, Aug. 25, 2009, 2010 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 392, 395 (Ger.); Verwaltungsgerichtshof Bayern [VGH Bayern - Higher Administrative Court Bavaria], Case No. 10 B 07.304, Jan. 8 2008, 2008 Die Öffentliche Verwaltung (DÖV) 970 (Ger.) [hereinafter VGH Bayern].

<sup>61</sup> See, e.g., Verwaltungsgericht Karlsruhe [VG Karlsruhe - Administrative Court Karlsruhe], Case No. 2 K 1559/06, Nov. 9, 2006 (Ger.), available at [http://lrwb.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=7715](http://lrwb.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=7715); Hessischer Verwaltungsgerichtshof [VGH Hessen - Higher Administrative Court Hesse], Case No. 12 TG 2190/06, Dec. 4, 2006, 2007 INFORMATIONSBRIEF AUSLÄNDERRECHT (INF AUSIR) 98 (Ger.); Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 488, 490 (Ger.).

<sup>62</sup> Case C-136/03, Dörr v. Sicherheitsdirektion für das Bundesland Kärnten, 2005 E.C.R. I-4759, para. 65.

<sup>63</sup> Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-

Another argument focuses on Article 38 (3) of the Citizenship Directive. Article 38(3) provides that “reference made to the repealed provisions and Directives shall be construed as being made to this Directive.” The CJEU has previously based its interpretation of Article 14 of the Association Council Decision 1/80 on the public policy exception contained in Article 3 of Council Directive 64/221/EEC.<sup>64</sup> Because the Citizenship Directive repealed Council Directive 64/221/EC, the interpretation of Article 14 of the Association Council Decision 1/80 has to be based on Article 28 of the Citizenship Directive.

Another argument points out that Article 28 of the Citizenship Directive merely specifies the protection Union law grants against expulsion but does not extend the scope of this protection compared to earlier legislation.<sup>65</sup> Therefore, Turkish citizens must also be covered by the scope of Article 28(3) of the Citizenship Directive as they were by earlier secondary legislation.<sup>66</sup>

Finally, it is argued that there is no indication that the principles contained in the Citizenship Directive cannot be conferred on Turkish nationals.<sup>67</sup> The Citizenship Directive aims at specifying the requirements for an expulsion of Union citizens and their family members and at limiting the scope of expulsion measures in accordance with the principle of proportionality.<sup>68</sup> The gradual differentiation established by Article 28 of the Citizenship

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REPORT (NVWZ-RR) 488, 490 (Ger.); Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg - Administrative Court Baden-Württemberg], Case No. 13 S 1917/07, July 22, 2008, 2009 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 82, para. 35 (Ger.).

<sup>64</sup> Cetinkaya v. Baden-Württemberg, 2004 E.C.R. I-10895, para. 43.

<sup>65</sup> Rolf Gutmann, *Die neue Unionsbürger-Richtlinie 2004/38/EG und ihr Verhältnis zu Art. 14 Abs. 1 ARB 1/80*, INFAUSIR 401, 402 (2005).

<sup>66</sup> *See id.*

<sup>67</sup> Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 488, 490 (Ger.); Verwaltungsgericht Karlsruhe [VG Karlsruhe - Administrative Court Karlsruhe], Case No. 2 K 1559/06, Nov. 9, 2006 (Ger.), available at [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=7715](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=7715); Hessischer Verwaltungsgerichtshof [VGH Hessen - Higher Administrative Court Hesse], Case No. 12 TG 494/06, July 12, 2006, 2006 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 331, 332.

<sup>68</sup> Hessischer Verwaltungsgerichtshof [VGH Hessen - Higher Administrative Court Hesse], Case No. 11 UE 52/07 (June 25, 2007), <http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/s15/page/bslaredaprod.psm1?&doc.id=JURE080000668%3Ajuris-r01&showdoccase=1&doc.part=L>; Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVWZ-RR) 488, 490 (Ger.); Hessischer Verwaltungsgerichtshof [VGH Hessen - Higher Administrative Court Hesse], Case No. 12 TG 494/06, July 12, 2006, 2006 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 331, 332.

Directive reflects the principle of proportionality,<sup>69</sup> and a conferral of this system to Turkish workers is more plausible than the conferral of procedural safeguards. These procedural safeguards have, however, already been conferred on Turkish citizens by the CJEU.<sup>70</sup>

### 3. Comments Regarding the Approaches of Domestic Courts

When analyzing the judgments of domestic courts issued prior to the CJEU ruling, it stands out that some courts did not refer the question to the CJEU and rather decided either in favor or against an analogous application of Article 28(3) of the Citizenship Directive. Moreover, it is remarkable that some courts argued for an analogous application even though they could have rejected an analogous application with good arguments (discussed above) as neither Union law, domestic law, nor CJEU case law required them to apply the principles contained in Article 28(3) to Turkish workers.

What is the underlying motivation for an analogous application of Article 28(3) of the Citizenship Directive? One motivation could have been that these courts considered Article 28(3) to afford adequate protection. An analysis of the facts of the mentioned cases reveals another aspect. Those cases in which domestic courts accepted an application by analogy and cases in which domestic courts rejected an analogous application display certain differences. These differences relate to the category of criminal offences, the length of prison term, and the place of birth of the respective individual. In cases in which the individuals were mostly born in Germany and committed drug-related offences, assaults, theft, breach of domestic peace, damage to property, or obtained benefits by devious means, the courts accepted an analogous application of Article 28(3).<sup>71</sup> In cases in which the respective individual committed severe offences such as rape, sexual abuse of his daughter, rape of his wife, murder, and attempted manslaughter, the perpetrators received high prison terms and domestic courts rejected an analogous application.<sup>72</sup> It should, however, also be noted that an analogous application of Article 28

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<sup>69</sup> See Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGSREPORT (NVWZ-RR) 488, 490 (Ger.); see also Reinhard Marx, *Aktuelle Entwicklungen im gemeinschaftsrechtlichen Ausweisungsschutz*, 2007 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 142, 147.

<sup>70</sup> Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz - Higher Administrative Court Rheinland-Palatinate], Case No. 7 A 10924/06, Dec. 5, 2006, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGSREPORT (NVWZ-RR) 488, 490 (Ger.).

<sup>71</sup> Hessischer Verwaltungsgerichtshof [VGH Hessen - Higher Administrative Court Hesse], *supra* note 68; Verwaltungsgericht Karlsruhe [VG Karlsruhe - Administrative Court Karlsruhe], *supra* note 61.

<sup>72</sup> See, e.g., Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW - Higher Administrative Court North Rhine-Westphalia], Case No. 18 A 855/07 (Sept. 5, 2008), [http://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2008/18\\_A\\_855\\_07beschluss20080905.html](http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2008/18_A_855_07beschluss20080905.html) (sexual abuse of the daughter); Oberverwaltungsgericht Nordrhein-Westfalen [OVGNRW - Higher Administrative Court North Rhine-Westphalia], Case No. 18 B 2389/06, May 15, 2007, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1445 (rape);

(3)(a) was also rejected in a case concerning drug related offences.<sup>73</sup> Some of these individuals were born outside of Germany, while others were born in Germany. The comparison of these cases might foster the assumption that the question of analogous application has been less a fundamental question for these courts and rather an instrument to achieve the result considered adequate in the respective case.

#### *II. Purely Economic Purpose of the Agreement and Decision 1/80?*

The Court in *Ziebell* referred to the “purely economic purpose” of the Association Agreement and Association Council Decision 1/80. The question of whether the Association Agreement and Decision 1/80 have a purely economic purpose is debatable. Several of these different arguments are discussed below.

It could be argued that Association Council Decision 1/80 is not exclusively based on economic considerations. This is reflected in Recital Three to the Preamble to Decision 1/80, stating “In the social field, and within the framework of the international commitments of each of the Parties, the above considerations make it necessary to improve the treatment accorded to workers and members of their families”.

The second chapter contains, among others, the section on employment and the free movement of workers is entitled “Social Provisions”. Article 15(1) refers to the periodical exchange of information to improve “mutual knowledge of the economic and social situation”. Section 2 is titled “Social and Cultural Advancement and Exchange of Young Workers”, and the first article of that section, Article 17, provides that “Member States and Turkey shall co-operate, in accordance with their domestic situations and their legal systems, in appropriate schemes to promote the social and cultural advancement of Turkish workers and the members of their family”.

Finally, Protocol No. 2 to the Association Agreement provides in Article 8 that “aid to Turkish economic and social development under the conditions set out in this Agreement and in this Protocol shall be supplementary to the endeavors of the Turkish State”.

It must be noted, however, that the recitals of a preamble serve solely as instruments for the interpretation of the object and purpose of the main body of the respective legal instrument. The preamble itself is not legally binding. The same caveat applies to the

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Verwaltungsgericht Stuttgart [VG Stuttgart - Administrative Court of Stuttgart], Case No. 5 K 1081/06, Aug. 5, 2008 (Ger.), available at [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=10952](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=10952) (murder); Niedersächsisches Oberverwaltungsgericht [NdsOVG - Lower Saxony Higher Administrative Court], Case No. 11 LB 26/08, Mar. 27, 2008, 2008 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 970 (Ger.) (attempted murder and aggravated assault of a youth).

<sup>73</sup> Verwaltungsgerichtshof Bayern [VGH Bayern - Higher Administrative Court Bavaria], Case No. 10 B 07.304, 2008 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 970 (Ger.).

headings of Decision 1/80. Only the provisions of the Association Agreement and Council Decision 1/80 themselves are legally binding. Therefore, it is relevant to assess whether these provisions confer social or other non-economic rights on the individual. According to the CJEU's judgment in *Demirel*, a provision in an agreement concluded between the Community and a third state must be considered "as being directly applicable when, regard being had to its wording and the purpose and the nature of the agreement itself, the provision contains a clear and precise obligation which is not subject in its implementation or effects to the adoption of any subsequent measure".<sup>74</sup> In *Sevince*, the CJEU held that the same requirements apply to provisions of the Association Council Decision 1/80.<sup>75</sup> In light of these criteria, Articles 15 and 17 of Decision 1/80 cannot be considered as being directly applicable. The reference in Article 8 of the Protocol to the Association Agreement to "Turkish economic and social development" is also not phrased in a way as to confer rights on the individual. As an interim result, the Association Agreement pursues a primarily economic objective; whether it pursues a purely economic purpose is debatable.

#### E. The LTR Directive

The subsequent section focuses on the LTR Directive as, for the first time, the Court drew a parallel to the LTR Directive instead of referring to the provisions applicable to nationals of the Member States. It examines the CJEU's reference regarding the applicability of the LTR Directive, the meaning of fundamental rights in the context of Article 12 of the LTR Directive, and the advantages and disadvantages of the LTR Directive vis-à-vis Decision 1/80. Finally, it addresses the differences in the expulsion provisions and case law regarding Union citizens and Turkish workers compared to the wording of Article 12 of the LTR Directive.

##### *I. Applicability of the LTR Directive to the Ziebell Case*

The Court created some uncertainty regarding the applicability of the LTR Directive. It held that, in scenarios in which the Citizenship Directive is not applicable by analogy, "it is appropriate to determine another reference framework under European Union law for the purpose of applying Article 14 (1) of Decision 1/80."<sup>76</sup> The Court then stated that:

The framework, in the case of a foreign national such as Mr. Ziebell, who has been residing lawfully and continuously in the host Member State for more than

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<sup>74</sup> Case C-12/86, *Demirel v. Schwäbisch Gmünd*, 1987 E.C.R. 3747, para. 14.

<sup>75</sup> Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, 1990 E.C.R. I-3497, paras. 14–15.

<sup>76</sup> *Ziebell*, *supra* note 1, at para. 78.

10 years, consists of Art. 12 of Directive 2003/109, which . . . is a rule of minimum protection against expulsion for any national of a non-member State who holds the status of a long-term lawful resident in the territory of a Member State.<sup>77</sup>

It is debatable whether the Court intended to apply the LTR Directive to the case of Mr. Ziebell and other similar cases. On the one hand, to support a claim against applying the LTR Directive to Mr. Ziebell and others similarly situated, it could be argued that the Court's holding that Article 12 of the LTR Directive is a rule of minimum protection for a third country national that *holds* a long-term resident status. By referring to a national who actually holds a long-term resident status, the judgment could be interpreted as excluding all Turkish workers who do not hold long-term resident status. In that regard, it should be noted that the judgment neither gives information that Mr. Ziebell applied for the long-term resident status according to Article 7 of the LTR Directive nor that he acquired that status. Having regard to Article 6 of the LTR Directive—which provides Member States the option to refuse the granting of long-term status on grounds of public policy and public security, as well as the long criminal record of Mr. Ziebell dating back to 1993 and comprising four prison terms of at least two years and one prison term of at least three years<sup>78</sup>—it is highly questionable whether the German authorities would have granted him a long-term resident status.

On the other hand, it could be argued that the Court refers to “another reference framework under European law for the purpose of applying Article 14(1) of Decision 1/80,” thus the LTR Directive could apply to Mr. Ziebell and others similarly situated. Mentioning the LTR Directive as a reference framework would be superfluous if the Directive were directly applicable to Mr. Ziebell. If Mr. Ziebell was a long-term resident pursuant to the Directive, the Court could directly apply Article 12 of the LTR Directive. The application of Article 12 of the LTR Directive as a reference framework shows that it only indirectly applies and that the person concerned is not required to actually hold the long-term resident status.

By establishing a further requirement, the Court demonstrates that Article 12 of the LTR Directive shall apply to a foreign national—such as Mr. Ziebell—who does not hold the status of a long-term resident. The requirement the CJEU refers to is a lawful and continuous residence in the host Member State for more than ten years,<sup>79</sup> whereas the LTR

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<sup>77</sup> *Id.* at para. 79.

<sup>78</sup> *Id.* at para. 37.

<sup>79</sup> *Id.* at para. 79.

Directive only requires a lawful and continuous residence of five years.<sup>80</sup> By setting this “stricter” standard, the Court shows that a longer period of residence than the period provided for in the LTR Directive is necessary for its application as a reference framework.

Finally, the Court also applies the criteria of Article 12 of the LTR Directive to Mr. Ziebell’s case without, however, referring explicitly to the relevant paragraphs. The Court holds that the referring court must conduct a balancing process between the interests of the state and the “actual integration factors enabling the individual concerned to reintegrate into society in the host Member State”.<sup>81</sup> The Court lists the considerations which must be observed by the domestic court. These criteria are taken from Article 12 of the LTR Directive. The Court refers to “the particularly close links the foreign national has forged with society in the Federal Republic of Germany”.<sup>82</sup> It thereby refers to the links with the country of residence as provided for by Article 12(3)(d) of the LTR Directive. The Court states that Mr. Ziebell was born in Germany and has lived there lawfully and continuously for more than 35 years. Thus, the Court hints at Article 12(3)(a) and (b) of the LTR Directive, which obliges Member States to take the duration of residence in their territory into account as well as the age of the person concerned. The Court points to the fact that Mr. Ziebell is married to a German national, and thereby alludes to Article 12(3)(c). This provision stipulates that Member States shall consider the consequences of an expulsion for the person concerned and for the family members. The Court does not elaborate on these aspects, as it is for the domestic court to conduct the assessment and the balancing process. It is interesting that the Court considers Article 12 of the LTR Directive as the relevant reference framework, even though it is most likely that Mr. Ziebell does not hold the long-term resident status and would probably not qualify for it given his criminal record. The Court, it would appear, has thus created a new scope of application for Article 12 of the LTR Directive.

## *II. The Long-Term Residents Directive and Fundamental Rights*

It is notable that the Court does not explicitly mention the Charter of Fundamental Rights of the European Union when referring to the Long-Term Residents Directive,<sup>83</sup> whereas Advocate General Bot made such reference.<sup>84</sup> Elsewhere, namely when summarizing its previous case law, the Court makes reference to fundamental rights by stating that measures taken on grounds of public policy and public security may only be taken after a

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<sup>80</sup> LTR Directive, *supra* note 8, at art. 4(1).

<sup>81</sup> *Ziebell*, *supra* note 1, at para. 85.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at paras. 79–80.

<sup>84</sup> Opinion of Advocate General Bot, *supra* note 22, at para. 65.

case-by-case assessment has been conducted and that the measures have to observe the principle of proportionality and fundamental rights.<sup>85</sup>

The CJEU also indirectly refers to human rights when listing the considerations that have to be observed by domestic courts in the balancing process (the particularly close links which the foreign national has forged and so forth).<sup>86</sup> These requirements correspond to the requirements established by the European Court of Human Rights (ECtHR) in cases regarding interferences with the right to private and family life as well as with the requirements listed in Article 12 of the LTR Directive.

### *III. LTR Directive and Association Agreement*

Focusing on the access to the labor market and social security, Decision 1/80 and 3/80 place Turkish citizens in a more advantageous position than they are given under the LTR Directive.<sup>87</sup> Article 6(1) of Council Decision 1/80 accords a Turkish worker the right to take up any paid employment of his or her choice after four years of legal residence, whereas the long-term resident status, which entails equal treatment with nationals regarding access to employment and self-employed activity,<sup>88</sup> is only acquired after five years of legal residence.<sup>89</sup> In contrast, Council Decision 1/80 contains neither a provision conferring long-term resident status on Turkish citizens nor a provision according internal mobility to them.<sup>90</sup> The access to social assistance and equal treatment is also considered to be more beneficial under the LTR Directive than under Decision 1/80.<sup>91</sup> It is argued that Turkish workers and their family members can benefit from several provisions of the LTR Directive.<sup>92</sup>

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<sup>85</sup> Ziebell, *supra* note 1, at para. 82.

<sup>86</sup> *Id.* at para. 85.

<sup>87</sup> Louise Halleskov, *The Long-Term Residents Directive: A Fulfillment of the Tampere Objective of Near-Equality?*, 7 EUR. J. MIGRATION & L. 185, 192–99 (2005).

<sup>88</sup> LTR Directive, *supra* note 8, at art. 11(1)(a).

<sup>89</sup> *See id.* at art. 4(1); *see also* Halleskov, *supra* note 87, at 192.

<sup>90</sup> Sonja Boelaert-Suominen, *Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back*, 42 COMMON MKT. L. REV. 1011, 1037–39 (2005).

<sup>91</sup> Kees Groenendijk, *The Long-Term Residents Directive, Denizenship and Integration*, in WHOSE FREEDOM, SECURITY, AND JUSTICE?: EU IMMIGRATION AND ASYLUM LAW AND POLICY 429, 441–42 (Anneliese Baldaccini, Elspeth Guild & Hellen Toner eds., 2007).

<sup>92</sup> Boelaert-Suominen, *supra* note 90, at 1037–40.

#### IV. LTR Directive and Expulsion

Focusing on expulsion, Peers points out that the wording of the LTR Directive and the case law of the CJEU regarding Decision 1/80 “is not entirely clear, but it is possible that the ground for expulsion (or at least for the loss of the LTR status) on grounds of public policy, public security and public health is subject to lower procedural and/or substantive standards under the Directive.”<sup>93</sup> Comparing the provisions on expulsion for Union citizens and third country nationals, Langeheine argues that the requirements anchored in Article 12 of the LTR Directive do not correspond with the requirements of Article 27(1) and (2) of the Citizenship Directive, and therefore different standards apply.<sup>94</sup>

The CJEU has not yet provided an interpretation of Article 12 of the LTR Directive. The subsequent analysis which excludes expulsion on grounds of public health is, therefore, based upon the CJEU’s case law regarding Union citizens and Turkish citizens covered by the Association Agreement on the one hand and the wording of the LTR Directive and opinions of scholars on the other. It assesses the components of the substantive provision on expulsion,<sup>95</sup> and it aims at identifying differences and similarities.

##### 1. Economic Considerations

An expulsion which relies upon economic considerations is excluded.<sup>96</sup> Handoll points out that the requirement in Article 12 of the LTR Directive not to base an expulsion decision on economic considerations is also contained in the provisions on the free movement in the TFEU and is likely to be interpreted in the same way.<sup>97</sup>

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<sup>93</sup> Steve Peers, *EU Migration Law and Association Agreements*, in JUSTICE, LIBERTY, SECURITY: NEW CHALLENGES FOR EU EXTERNAL RELATIONS 53, 81 (Bernd Martenczuk & Servaas van Thiel eds., 2008).

<sup>94</sup> Claudia Langeheine, *Section 5 - Aufenthaltsbeendigung, Abschiebung, Sicherheit*, in ZUWANDERUNGSRECHT marginal no. 127 (Winfried Kluth, Michael Hund & Hans-Georg Maaßen eds., 2008).

<sup>95</sup> Procedural aspects were not addressed by the CJEU in *Ziebell* and are not addressed in this contribution. The Higher Administrative Court Baden-Württemberg argues that the so-called ‘four-eyes principle’ enshrined in Article 9 Council Directive 64/221/EEC cannot be applied to Turkish workers any longer and bases its finding on the *Ziebell* judgment. Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg - Administrative Court Baden-Württemberg], Case No. 11 S 1361/11, Feb. 10, 2012, 2012 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT - RECHTSPRECHUNGS-REPORT (NVwZ-RR) 492, para. 35 (Ger.).

<sup>96</sup> See Citizenship Directive, *supra* note 12, at art. 27(1); Directive 64/221/EEC, *supra* note 11, at art. 2(2), see also LTR Directive, *supra* note 8, at art. 12(2) (providing the same protection for long-term residents).

<sup>97</sup> John Handoll, *Art. 12 Council Directive 2003/109/EC*, in EU IMMIGRATION AND ASYLUM LAW: A COMMENTARY marginal no. 7 (Kay Hailbronner ed., 2010).

## 2. Personal Conduct

Article 27(2) of the Citizenship Directive stipulates that expulsion decisions taken against nationals of the EU Member States shall be based “exclusively on the personal conduct of the individual concerned.”<sup>98</sup> Reasons which are detached from the individual case can, according to the CJEU, not be used to justify measures aiming at protecting public policy or public security.<sup>99</sup> The requirement of “personal conduct,” moreover, prohibits an expulsion based on general preventive reasons.<sup>100</sup>

Conferring these principles applicable to Union citizens on Turkish citizens covered by the Association Agreement, the Court held that the personal conduct of the offender has to be assessed.<sup>101</sup> Expulsion decisions against Turkish workers which were based on general preventive reasons are considered to be incompatible with Article 14(1) of the Association Council Decision 1/80 by the CJEU.<sup>102</sup> This was again confirmed by the Court in *Ziebell*.<sup>103</sup>

Article 12 of the LTR Directive does not contain the notion of “personal conduct,” so it has been argued that the Directive does not require that the expulsion decision be based on the “personal conduct” of the long-term resident.<sup>104</sup> Peers rightly points out that it is difficult to assess the “actual and sufficiently serious threat” someone poses to public policy or public security—as stated in Article 12(1) of the LTR Directive—without having recourse to his or her personal conduct.<sup>105</sup> The Court did not yet have the chance to take a stand on this matter, but in (German) doctrine it is argued that Article 12 of the LTR Directive contains an exclusion of expulsions based on general preventive grounds.<sup>106</sup> In Germany, long-term third country nationals enjoy, due to the transposition of the LTR

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<sup>98</sup> See Directive 64/221/EEC, *supra* note 11, at art. 3(1) (containing the same requirement).

<sup>99</sup> Case C-67/74, *Bonsignore v. Köln*, 1975 E.C.R. 297, para. 6.

<sup>100</sup> See Citizenship Directive, *supra* note 12, at art. 27(2); see also *Bonsignore*, 1975 E.C.R. 297, para. 7.

<sup>101</sup> Case C-325/05, *Derin v. Darmstadt-Dieburg*, 2007 E.C.R. I-06495, para. 74; Case C- 340/97, *Nazli v. Nürnberg*, 2000 E.C.R. I-957, para. 61.

<sup>102</sup> *Nazli*, 2000 E.C.R. I-957, at para. 63.

<sup>103</sup> *Ziebell*, *supra* note 1, at para. 83.

<sup>104</sup> MARION SCHMID-DRÜNER, DER BEGRIFF DER ÖFFENTLICHEN SICHERHEIT UND ORDNUNG IM EINWANDERUNGSRECHT AUSGEWÄHLTER EU-MITGLIEDSTAATEN 410, 431 (2007).

<sup>105</sup> Steve Peers, *Implementing Equality? The Directive on Long Term Resident Third Country Nationals*, 29 EUR. L. REV. 427, 452 (2004).

<sup>106</sup> Langeheine, *supra* note 94, at marginal no. 127; Marx, *supra* note 69, at 148; Jürgen Bast, *Transnationale Verwaltung des europäischen Migrationsraums* 17 (Max Planck Inst. for Comparative Pub. Law & Int'l Law, Working Paper No. 9/2006), available at [http://www.mpil.de/shared/data/pdf/bast\\_working\\_paper\\_9-2006.pdf](http://www.mpil.de/shared/data/pdf/bast_working_paper_9-2006.pdf).

Directive, a reinforced protection against expulsion,<sup>107</sup> and the view is advanced that the expulsion of third country nationals covered by the LTR Directive—and § 56(1a) Residence Act—cannot be based on general preventive reasons.<sup>108</sup> Handoll also points to the absence of the criterion of “personal conduct” but refers to the requirement of “an actual and sufficiently serious threat.” He argues that the “cleavage between the rights of Union citizenship and rights of long-term resident third country nationals is less pronounced,” highlights recital 16 of the Preamble to the LTR Directive,<sup>109</sup> and concludes that this “could result in the courts refusing to distinguish between the two”.<sup>110</sup>

### 3. Previous Criminal Convictions

The Union Citizen Directive provides that previous criminal convictions shall not in themselves constitute grounds for taking such measures.<sup>111</sup> Relating to a Turkish citizen, the Court held in *Nazli* that a previous “criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.”<sup>112</sup> The proposal of the LTR Directive contained the reference to criminal convictions and provided that “criminal convictions in themselves shall not automatically warrant an expulsion decision”.<sup>113</sup> This safeguard was removed from the final version of the Directive and could be used as an argument for basing an expulsion of a long-term resident on previous criminal convictions.

The reference to previous criminal convictions, however, relates again to general preventive grounds,<sup>114</sup> which are, according to doctrine, also excluded as a consideration for expelling long-term third country nationals.<sup>115</sup> Moreover, Article 12(1) of the LTR

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<sup>107</sup> Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BGBl. I at 1950, as amended, § 56(1)1a (Ger.).

<sup>108</sup> Hans Alexy, § 56, in *AUSLÄNDERRECHT KOMMENTAR* marginal nos. 3, 24 (Holger Hoffmann & Rainer Hofmann eds., 2008).

<sup>109</sup> “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.” LTR Directive, *supra* note 8, at pmb. recital 16.

<sup>110</sup> Handoll, *supra* note 97, at marginal no. 6.

<sup>111</sup> See Citizenship Directive, *supra* note 12, at art. 27(2); see also Directive 64/221/EEC, *supra* note 11, at art. 3(2).

<sup>112</sup> Case C- 340/97, *Nazli v. Nürnberg*, 2000 E.C.R. I-957, at para. 58.

<sup>113</sup> *Commission Proposal for a Council Directive Concerning the Status of Third-Country Nationals Who Are Long-Term Residents*, at art. 13(3), COM (2001) 127 final (Mar. 13, 2001) [hereinafter *Commission Proposal*].

<sup>114</sup> *Nazli*, 2000 E.C.R. I-957, at paras. 59, 60, 63.

<sup>115</sup> Langeheine, *supra* note 94, at marginal no. 127; Marx, *supra* note 68, at 148; Bast, *supra* note 106, at 17.

Directive requires an actual and sufficiently serious threat to public policy or public security which cannot be sufficiently proven by mere reference to a previous criminal conviction.

*4. The Requirement of a Genuine, Present and Sufficiently Serious Threat Affecting One of the Fundamental Interests of Society*

The Union Citizens Directive requires that the personal conduct of the individual concerned represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”<sup>116</sup> The same criteria apply to Turkish citizens.<sup>117</sup> By way of contrast, the LTR Directive stipulates that the individual must constitute an “actual and sufficiently serious threat to public policy and public security.”<sup>118</sup> Whether there is a difference between a present and an actual threat is questionable: Both notions require that the threat is not only hypothetical. The slightly different wording of the later-adopted Citizenship Directive might have been chosen to avoid an identical wording and thereby a conferment of the case law regarding Union citizens on long-term residents.

The LTR Directive neither requires that a fundamental interest of society must be affected nor a genuine threat be present. In this context, it is interesting that the provisions in the original draft of the LTR Directive required that an expulsion decision can be issued only if the personal conduct “affects a fundamental interest of society.”<sup>119</sup> This and other safeguards were removed before the adoption of the Directive, demonstrating that the Member States did not agree on an unlimited transfer of the case law on Union citizens to third country nationals. It remains to be seen to what extent the different wording matters.

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<sup>116</sup> Citizenship Directive, *supra* note 12, at art. 27(2); Case C-36/75, *Rutili v. Ministre de l'intérieur*, 1975 E.C.R. 1219, para. 28.

<sup>117</sup> *Nazli*, 2000 E.C.R. I-957, at para. 57. *Accord Derin*, 2007 E.C.R. I-06495, at para. 35 (referring to genuine and serious threats).

<sup>118</sup> LTR Directive, *supra* note 8, at art. 12(1).

<sup>119</sup> *Commission Proposal*, *supra* note 113, at art. 13(1).

5. *Principle of Proportionality and the Relevant Considerations in the Balancing Process*

Expulsion decisions against Union citizens<sup>120</sup> and Turkish workers<sup>121</sup> must comply with the principle of proportionality. Even though the LTR Directive does not explicitly refer to the principle of proportionality, it constitutes a principle of Union law<sup>122</sup> and has to be complied with.

Concerning the relevant considerations in the balancing process, Article 28(1) of the Citizenship Directive provides that the competent authority has to take into consideration the length of residence on the territory of the host Member State, the age and the state of health of the individual, his or her family and economic situation, social and cultural integration into the host Member State, and the extent of his or her links with the country of origin.

The LTR Directive prescribes that the duration of residence of the individual in the host Member State, his or her age, the consequences of the expulsion of the person concerned and his or her family members, and the links with the country of residence or the absence of links with the country of origin have to be considered.<sup>123</sup> Article 12(3)(d) does not specify the type of links with the host country, and it could be argued that a national implementation measure taking only economic links or the economic integration into consideration would thereby be sufficient. This argument can be rebutted by a reference to the preamble which provides that “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.”<sup>124</sup> The ECtHR held that the “solidity of social, cultural and family ties in the host country and in the country of destination” has to be assessed.<sup>125</sup> Therefore, an assessment which only focuses on economic links cannot be considered to be sufficient in light of Article 12(3)(d) when read in conjunction with recital 16 of the preamble and the case law of the ECtHR. A criterion of health is mentioned in the Citizenship Directive, but health is not mentioned in Article 12(3) LTR Directive. It should be noted that that the lists of considerations contained in the Citizenship Directive employs the phrase “such as,” and is therefore not exhaustive. The LTR Directive states

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<sup>120</sup> Citizenship Directive, *supra* note 12, at art. 27(2).

<sup>121</sup> *Derin*, 2007 E.C.R. I-06495, at para. 74.

<sup>122</sup> Treaty on European Union art. 5(3), Feb. 11, 1992, 1992 O.J. (C191) 1 [hereinafter TEU].

<sup>123</sup> LTR Directive, *supra* note 8, at art. 12(3)(a)-(d).

<sup>124</sup> LTR Directive, *supra* note 8, at pmb. recital 16.

<sup>125</sup> *Üner v. The Netherlands*, 2006-XII Eur. Ct. H.R. 873, para. 58.

that decisions “must have regard to the following factors”; it is unclear whether other considerations not specifically enumerated are excluded.<sup>126</sup>

#### 6. *Special Protection Against Expulsion in Art. 28 (2) and (3) of the Citizenship Directive*

A major difference between the LTR Directive and the Citizenship Directive is the enhanced protection against expulsion according to Article 28(2) and (3)(a) after five or ten years of residence in the host Member State. This protection is not provided by the LTR Directive, and the Court clarified in *Ziebell* that it cannot be conferred on Turkish citizens. The LTR Directive does, however, require taking the length of residence and other factors into account. It does not expressly prohibit granting long-term residents a similar protection as the protection accorded to Union citizens. Much will depend on the interpretation of Article 12 by the CJEU and the judgments of domestic courts regarding the domestic implementation of Article 12 of the LTR Directive.

The comparison demonstrates that the requirements enshrined in Article 27(1) and (2) of the Citizenship Directive do not differ considerably from those of Article 12 of the LTR Directive. Therefore, the above mentioned statement that different standards apply<sup>127</sup> is questionable, and further case-law might be needed to clarify this question. Acosta observes that there are convincing arguments “that the CJEU will probably interpret the possibility of expelling a long-term resident with the same principles applied to European citizens.”<sup>128</sup> It is true that the enhanced protection against expulsion anchored in Article 28(2) and (3) is not provided for long-term residents in Article 12 of the LTR Directive. It remains to be seen whether the protection granted by Article 12 of the LTR Directive will be interpreted by the CJEU and domestic courts in a similar way as Article 28 (2) and (3) of the Citizenship Directive. The court’s interpretation and application of Article 12 of the LTR Directive should be guided by both the case law of the ECtHR and the Tampere objective<sup>129</sup> of granting long-term third country nationals a set of uniform rights which are as near as possible to those enjoyed by EU citizens.<sup>130</sup>

<sup>126</sup> DIEGO ACOSTA, THE LONG-TERM RESIDENT STATUS AS A SUBSIDIARY FORM OF EU CITIZENSHIP: AN ANALYSIS OF DIRECTIVE 2003/109, at 125 (2011) (arguing that the list in Art. 12(3) LTR Directive is exhaustive).

<sup>127</sup> Langeheine, *supra* note 94, at marginal no. 127.

<sup>128</sup> ACOSTA, *supra* note 126, at 138.

<sup>129</sup> See Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999), para. 21, *see also* LTR Directive, *supra* note 8, at pmb. recital 2 (referring to Tampere Presidency Conclusions). Note that the Tampere Presidency Conclusions are not legally binding.

<sup>130</sup> LTR Directive, *supra* note 8, at pmb. recital 16. The preamble is not legally binding but, Art. 6(3) TEU provides that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States constitute general principles of EU law. Moreover, Acosta argues that the CJEU “will always refer to the case law of the ECtHR” when interpreting the requirements of Art. 12 (3). ACOSTA, *supra* note 126, at 122–23.

## F. Implications of the *Ziebell* judgment

This section first outlines the legal position of Turkish citizens prior to the *Ziebell* judgment in order to subsequently analyze possible advantages and disadvantages implied by the shift to the LTR Directive. Next, the stand-still clause and the resulting obligations are addressed before summarizing the obligations incumbent upon domestic courts when expelling Turkish citizens and the possible positive consequences this shift could have for other long-term third country nationals who are covered by the LTR Directive.

### I. Legal Position of Turkish Citizens

According to Advocate General Bot, Turkish nationals covered by the Association Agreement enjoy a special status which is halfway between the status of a national of a Member State and a third-country national.<sup>131</sup> Groenendijk refers to the Court's judgments and concludes that they moved the status of Turkish citizens from "somewhere half-way between the status of third country nationals and that of EU citizens to a status similar to that of Union citizens in many respects."<sup>132</sup> In many respects, the position of Turkish workers is special or "privileged" vis-à-vis other groups of third country nationals, even vis-à-vis long-term resident third country nationals.

Before the *Ziebell* judgment, some scholars voiced the expectation that the developments regarding Union citizens, especially those triggered by the adoption of the Citizenship Directive, would be reflected in the CJEU's future case-law on the expulsion of Turkish workers.<sup>133</sup> Other scholars even argued that the protection against expulsion granted to Turkish citizens covered by the Association Agreement was put on equal footing with the protection granted to Union citizens.<sup>134</sup> This statement cannot be maintained after the Court's ruling in *Ziebell*.

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<sup>131</sup> Opinion of Advocate General Bot, *supra* note 22, at para. 64.

<sup>132</sup> Groenendijk, *supra* note 91, at 429-431.

<sup>133</sup> Alexy, *supra* note 108, at marginal no. 10; Narin Tezcan-Idriz, *Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The Response of the Judiciary*, 49 COMMON MKT. L. REV. 1621, 1657 (2009).

<sup>134</sup> Levent Güneş & Alexandra Steinebach, *Prekärer Aufenthaltsstatus? Ausweisungsschutz von Unionsbürgern und Drittstaatsangehörigen in der EU—ein Überblick*, 2010 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 97, 99-101 (2010).

## II. *The Ziebell Judgment: Stay at the Status Quo and Changes*

The approximation of rights of Turkish citizens to the status granted to Union citizens came to a halt in the *Ziebell* judgment due to the Court's clarification that the Citizenship Directive cannot serve as a reference framework for determining the rights of Turkish nationals. Given that the Court has repeatedly stated that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States,"<sup>135</sup> it is likely that more and more CJEU judgments will be based on this "fundamental status" and the Citizenship Directive, thereby creating a set of case law which only applies to Union citizens and which cannot be conferred on Turkish workers. This might deepen the gap between Union citizens and Turkish workers who used to be able to rely on the judgments delivered by the CJEU with regard to the expulsion of Union workers.

A positive aspect about the shift to the LTR Directive is that it requires the competent authorities to take the duration of residence into account when expelling a long-term resident third country national,<sup>136</sup> as well as the third country national's connections with the country of residence.<sup>137</sup> It is striking that the wording of neither Council Directive 64/221/EEC nor Article 14 of Council Decision 1/80 refers to the solidity of social and cultural ties. In this regard, Article 12 of the LTR Directive stipulates clearer requirements than Article 14 of Decision 1/80 and provides new interpretative possibilities. Moreover, Article 12(3) of the LTR Directive ensures that Union law corresponds to the requirements established by the ECtHR.<sup>138</sup>

## III. *The Stand-Still Clause*

Future expulsion decisions have to respect the already-acquired rights of Turkish workers which are protected by the stand-still obligation. The Additional Protocol to the Association Agreement and Decisions 1/80 both contain a stand-still clause. The directly applicable stand-still clauses,<sup>139</sup> contained in Article 41(1) of the Additional Protocol and

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<sup>135</sup> *Ruiz Zambrano*, *supra* note 6, at para. 41; Case C-135/08, *Rottmann v. Bavaria*, 2010 E.C.R. I-1449, para. 43; Case C-200/02, *Zhu v. Sec'y of State for the Home Dep't*, 2004 E.C.R. I-9925, para. 25; Case C-148/02, *Garcia Avello v. Belgium*, 2003 E.C.R. I-11613, para. 22; Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, para. 82; Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*, 2000 E.C.R. I-9453, para. 31.

<sup>136</sup> LTR Directive, *supra* note 8, at art. 12(3)(a).

<sup>137</sup> LTR Directive, *supra* note 8, at art. 12(3)(d).

<sup>138</sup> *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 497, para. 39.

<sup>139</sup> Case C-37/98, *The Queen v. Sec'y of State for the Home Dep't ex parte Savas*, 2000 E.C.R. I-2927, para. 48; *Sevince*, 1990 E.C.R. I-03461, at para. 26.

Article 13 of Decision 1/80,<sup>140</sup> pursue identical objectives,<sup>141</sup> even though they do not have an identical wording.<sup>142</sup> Article 13 of Decision 1/80 prohibits the introduction of new measures “having the objective or the effect” of making the exercise of the freedom of movement of workers subject to stricter conditions than those which were applicable at the time when Decision 1/80 entered into force with regard to the respective Member State.<sup>143</sup> Article 41(1) of the Additional Protocol stipulates the same prohibition with regard to the freedom of establishment and the freedom to provide services.<sup>144</sup> In *Toprak*, the Court clarified that this clause does not only apply to measures which are stricter than those applicable at the time the Agreement or Decision 1/80 entered into force. The Court held that the clause also extends by analogy to any new restrictions “which make more stringent the conditions which exist at any given time.”<sup>145</sup> Hence, measures which are stricter than those that were applied when the Agreement or Decision 1/80 entered into force, or at any later point in time, infringe the stand-still obligation.<sup>146</sup>

It would be incompatible with the stand-still clauses if it were argued that decisions taken at the domestic level no longer had to comply with the rules which were previously developed and established by the CJEU with regard to the expulsion of Turkish workers. The stand-still obligation is, according to the wording of Article 13 of Decision 1/80, incumbent on the Member States and Turkey to respect.<sup>147</sup> The Member States in turn are obliged to take the necessary measures to comply with the judgments of the CJEU.<sup>148</sup> This implies that they have to implement the rules established in CJEU judgments and that they become part of their legal system. Any *reformatio in peius*—that is to say, any departure from these rules or any limitation of the rights granted by CJEU judgments—would constitute a restriction and thereby an infringement of the stand-still obligation on the part of a Member State. Moreover, the Court did not revoke its earlier case law and instead

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<sup>140</sup> This supersedes Association Council Decision 2/76. NICOLA ROGERS, A PRACTITIONER'S GUIDE TO THE EC-TURKEY ASSOCIATION AGREEMENT 27–28 (1999).

<sup>141</sup> As to the identical purpose of these two standstill clauses, see *The Queen*, 2000 E.C.R. I-2927, at para. 50.

<sup>142</sup> Case C-317/01, *Abatay v. Bundesanstalt für Arbeit*, 2005 E.C.R. I-12301, para. 69.

<sup>143</sup> Case C-242/06, *Sahin v. Minister voor Vreemdelingenzaken en Integratie*, 2009 E.C.R. I-8465, para. 63; Case C-228/06, *Soysal v. Germany*, 2009 E.C.R. I-1031, para. 47.

<sup>144</sup> See *Abatay*, 2005 E.C.R. I-12301, at paras. 53, 86-117 (noting that the relation between the two provisions is such that they cannot be applied concurrently).

<sup>145</sup> Case C-300/09, *Staatssecretaris van Justitie v. Toprak*, 2010 E.C.R. I-12845, para. 54.

<sup>146</sup> Anusheh Farahat, *Von der Stillhaltepflicht zur “zeitlichen Meistbegünstigung” im Assoziationsrecht mit der Türkei*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 343, 344 (2011).

<sup>147</sup> See Additional Protocol art. 41(1), Nov. 30, 1970, 1972 O.J. (L293) 4 (referring to “contracting parties”).

<sup>148</sup> Treaty on the Functioning of the European Union art. 260, Mar. 25, 1957, 2010 O.J. (C83) 47.

explicitly referred in *Ziebell* to its previous judgments regarding the expulsion of Turkish workers and the rules established therein.<sup>149</sup> Article 3(3)(a) of the LTR Directive makes clear that the Directive applies without prejudice to the more favorable provisions of bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, including the EC/Turkey Association Agreement, on the other.<sup>150</sup> The Court also alluded to this rule in the *Ziebell* judgment.<sup>151</sup> Therefore, domestic courts must have regard to the previous CJEU case law and the rights which were established with regard to Turkish workers. They have to incorporate this already-acquired status of Turkish workers when applying the LTR Directive and the national acts implementing this Directive respectively.

The Court indeed rejected the analogous application of the Citizenship Directive, but it should also be recognized that Turkish workers already acquired a rather privileged status which cannot, unless otherwise decided by the Court, be withdrawn. Other long-term third country nationals who are not covered by a special legal regime might also profit from the Court's shift to the LTR Directive in cases concerning Turkish citizens.

#### *IV. Conclusion and Perspectives*

The CJEU rejected an application of Article 28(3) of the Citizenship Directive to Turkish workers and thereby dismissed an equation of Turkish workers and Union citizens with regards to the protection against expulsion. As things currently stand, the provisions applicable to Union citizens will no longer be applicable by way of analogy to Turkish workers.

The judgment marks a shift in the interpretative framework from the focus on the rights applicable to Union citizens to the rights applicable to long-term residents. The shift to the LTR Directive opens new perspectives and paths which can and should be used for developing the rights of Turkish citizens in line with the status they have already acquired. First, Article 14 of Decision 1/80 must be read and interpreted in light of Article 12 of the LTR Directive if the requirements established by the Court are met. It is remarkable that even though the CJEU underlined the purely economic purpose of the Association Agreement, the shift to Article 12 of the LTR Directive implies that non-economic factors will be considered: The expulsion of (Turkish) individuals in Mr. Ziebell's situation has to be assessed in light of the links the individual has established with the country of residence, the consequence for the person concerned and family members, and so forth. Second, the

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<sup>149</sup> *Ziebell*, *supra* note 1, at paras. 81–84.

<sup>150</sup> John Handoll, *Art.3 Council Directive 2003/109/EC*, in *EU IMMIGRATION AND ASYLUM LAW—COMMENTARY* marginal no. 21 (Kay Hailbronner ed., 2010).

<sup>151</sup> *Ziebell*, *supra* note 1, at para. 79.

rights which were already granted to Turkish nationals, either by Decision 1/80 or by CJEU jurisprudence, have to be considered in future judgments regarding Turkish workers and have to be combined with relevant aspects of the new reference framework. Third, fundamental rights, even though CJEU did not explicitly make a reference to Article 8 of the ECHR or Article 7 of the Charter of Fundamental Rights of the European Union, provide the necessary interpretative instruments to take full account of the special situation of Turkish individuals who were often born in the respective Member State and have established multiple ties with the host country. The CJEU passed the ball to domestic courts, and much will depend on the implementation of the new interpretative framework and the guidelines given by the CJEU by national administrations and courts.

In *Ziebell*, the CJEU strongly emphasized the ties Mr. Ziebell had developed in his host country and pointed to his rehabilitation in the time following his therapy. This emphasis will make it more difficult for the referring domestic court to uphold the expulsion decision against Mr. Ziebell. In case all national courts should not sufficiently respect the right to private and family life, the individual concerned still has the possibility to file a complaint with the European Court of Human Rights after the exhaustion of local remedies.

Future expulsion decisions against Turkish nationals covered by the Association Agreement might lead to a further development of the case law on Article 12 of the LTR Directive and its national implementation respectively, as administrations and courts must not take only human rights into consideration, but also the rights previously acquired by Turkish workers. Such a development of the case law might spill over to benefit other third country nationals covered by the LTR Directive and will hopefully have a positive impact on their legal position.