Field: BVerwGE: Yes

Immigration law Trade press: Yes

Sources in law:

Association Council Decision 2/76 Article 7
Association Council Decision 1/80 Article 13
Residence Act Section 4 (1) sentence 1, Section 33 sentence 1
Aliens Act 1965 Section 2 (2) No. 1, Section 7 (5)
Aliens Act 1990 Section 3 (1)
Implementing Regulations to the Aliens Act 1990 Section 2 (2)

Headwords:

EEC-Turkey Association law; freedom of movement of workers; subsequent immigration of dependents; new restriction; legal residence; Turkish worker; standstill clause; prohibition on worsening status; proportionality; access to employment; overriding reason in the public interest; immigration control.

Headnotes:

1. The standstill clause under Article 13 of Association Council Decision 1/80 is also applicable to provisions of national law that affect a Turkish worker's right to subsequent immigration of dependents.

2. In deciding whether legal residence within the meaning of Article 13 of Association Council Decision 1/80 is present in the case of subsequent immigration of dependents to join a Turkish worker who can invoke freedom of movement of workers, the determination must focus on the person of the individual holding the original right, and not the person of the family member desiring subsequent immigration.

3. Eliminating the exemption from the residence permit obligation for persons under the age of 16 years does, to be sure, introduce a 'new restriction' within the meaning of Article 13 of Association Council Decision 1/80. However, the measure is justified as an overriding reason in the public interest because of its intent to provide effective control of immigration (see: ECJ, judgment of 10 July 2014 – Case C-138/13, Dogan – InfAuslR 2014, 322).

Judgment of the First Division of 6 November 2014 – BVerwG 1 C 4.14

I. Darmstadt Administrative Court of 18 December 2013
Case: VG 5 K 310/12.DA

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 4.14
VG 5 K 310/12.DA

Released
on 6 November 2014
Ms ...
as Clerk of the Court

In the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 6 November 2014 - 1 C 4.14 - para. …

The First Division of the Federal Administrative Court
upon the hearing of 6 November 2014
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft, Fricke and Dr Rudolph

decides:

The proceedings are discontinued insofar as the parties have agreed in declaring the principal issue of the dispute resolved. To that extent, the judgment of Darmstadt Administrative Court of 18 December 2013 is without effect.

For the remainder, on appeal by the Respondent, the judgment of Darmstadt Administrative Court of 18 December 2013 is amended, and judgment is rendered against the Complainant.

The Complainant shall bear the costs of the proceedings.

Reasons:

I

1 The Complainant, a minor and a Turkish national, seeks a finding that he is allowed to reside in the Federal territory without a permit.

2 The Complainant's father entered the Federal territory in 1994. After initially seeking asylum without success, in 2008 he received a residence permit under a 'grandfather clause'. Since December 2009 he has held a residence permit under Section 4 (5) of the Residence Act, and since 2011 he has additionally held a residence permit under Section 23 (1) of the Residence Act. He has been employed as a worker since 2007.

3 The Complainant's mother entered the Federal territory in 2009 and likewise sought asylum. She withdrew her application for asylum in 2012.

4 The Complainant was born in the Federal territory on 2 May 2011, and holds a Turkish passport and a Turkish ‘Nüfus’ identity card. His asylum proceedings were discontinued in 2013 after his legal representative withdrew his application for asylum.

5 The Complainant applied for a residence permit in May 2011. The Respondent declined this application in a decision of 16 February 2012, and warned the Complainant that he would be deported to Turkey in the event that he did not leave the country within the required time (Nos. 5 and 6 of the decision). As grounds, the Respondent stated in essence that the Complainant had no secure livelihood. In the Respondent’s opinion, the standstill clause under Article 13 of Association Council Decision 1/80 in conjunction with Section 2 (2) of the Implementing Regulations to the Aliens Act of 1990 did not result in permit-free residence for the Complainant, as that clause does not apply to the sphere of family reunification that is concerned here.

6 In the original proceedings, the Complainant most recently asserted only that he did not need a residence permit because he was not yet 16 years of age.

7 In a judgment of 18 December 2013, the Administrative Court found for the Complainant, set aside Nos. 5 and 6 of the Respondent’s decision of 16 February 2012, and ruled that under the exempting conditions of Section 2 (2) of the Implementing Regulations to the Aliens Act 1990 in conjunction with Article 13 of Association Council Decision 1/80, the Complainant was lawfully resident in the Federal territory. The court ruled that the Complainant met the requirements of Section 3 (1) sentence 2 of the Aliens Act 1990 in conjunction with Section 2 (2) of the Implementing Regulations to the Aliens Act 1990. He was a Turkish national under the age of 16, he had held a national passport since 31 October 2011, and his father already held a residence permit at the time of the Complainant’s birth. At the time when he received a Turkish national passport, the Complainant was also eligible to invoke the standstill clause under Article 13 of Association Council Decision 1/80. That clause prohibits a Member State’s introduction of a new restriction whose purpose or effect is to make the exercise by a Turkish national of the freedom of movement of workers in national territory

subject to conditions more restrictive than those applicable at the date of entry into force of that provision on 1 December 1980. Restrictions in this sense, the court held, meant not only a worsening of status directly aimed at access to employment, but also all provisions that restricted residence rights, or their acquisition, as a prerequisite for access to employment. It held that the Complainant also met the requirements of Article 13 of Association Council Decision 1/80, as he had been legally resident in the Federal territory since birth. Lawful residence proceeded from an application by analogy of Section 33 sentence 3 of the Residence Act. If even an exempted residence or lawful residence on the basis of a visa is favoured, the court held, this must surely also apply to residence of one parent who holds a residence title. Lawful residence associated with being born in the Federal territory is not just a temporary, procedural legal position that cannot establish a basis for legal residence within the meaning of Article 13 of Association Council Decision 1/80. The legislature intended that lawful residence after birth should take due account of the special relationship between a small child and its mother immediately after birth, in the interest of family unity and to maintain the parent-child relationship that receives special protection under Article 6 (1) of the Basic Law. In order for Article 13 of Association Council Decision 1/80 to be applicable, moreover, it is not required that the Complainant must seek access to employment. Rather, the standstill clause under Article 13 of Association Council Decision 1/80 also covers family members who – like the Complainant – live in a common household with the worker without themselves seeking gainful activity, provided that their residence is legal.

8 In the (leapfrog) appeal authorised by the Administrative Court, the Respondent argues that the Complainant cannot invoke the standstill clause of Article 13 of Association Council Decision 1/80. It doubts in the first place that Article 13 of Association Council Decision 1/80 can even apply to a newly introduced restriction of subsequent immigration of dependents to join Turkish nationals who pursue gainful activity in the Federal territory, because there is no adequate link with the promotion of conditions for free access to employment, which the standstill clause is intended to ensure. Furthermore, it argues, Article 13 of Association Council Decision 1/80 is applicable only to Turkish nationals whose

relocation to the Federal territory has already been permitted, and therefore fundamentally has no effect on Member States' authority to issue regulations on the entry of Turkish nationals into their territory. This implication, it argues, is transferable to the situation of the Turkish Complainant, who was born in the Federal territory, and excludes any recourse to Section 2 (2) of the Implementing Regulations to the Aliens Act 1990 in conjunction with Article 13 of Association Council Decision 1/80. Irrespectively of these considerations, the Respondent argues, the Complainant was not 'legally' resident in the Federal territory for the first six months after his birth, within the meaning of the standstill clause. The case configuration that applies to the Complainant is governed by Section 33 sentence 1 of the Residence Act, so that there is no room for an application by analogy of Section 33 sentence 3 of the Residence Act. Even if one were to assume that the Complainant had been permitted to reside for six months in the Federal territory by an analogous application of Section 33 sentence 3 of the Residence Act, this was only a temporary, procedural legal position. It was not sufficient to establish grounds for legal residence within the meaning of Article 13 of Association Council Decision 1/80. Even if the applicability of Article 13 of Association Council Decision 1/80 were to be affirmed, it would not necessarily result in an exemption from a residence permit. Section 2 (2) of the Implementing Regulations to the Aliens Act 1990, the Respondent argues, results only in a procedural facilitation, and does not mean that the substantive review of a right of residence must be waived. The absence of a secure livelihood must be included in the foreigners' authority's discretionary considerations in deciding on a restriction of residence under Section 3 (5) of the Aliens Act 1990. Furthermore, the Complainant was born in the Federal territory, so that the matter at issue did not concern facilitating his entry to join his family, but rather a review in substantive law of whether he could be granted a residence permit on a discretionary basis.

9 The Complainant defends the challenged decision.

II

10 Insofar as the parties have declared the dispute settled with regard to the complaint against the Respondent's order to leave the country together with a warning of deportation (Nos. 5 and 6 of the Respondent's decision of 16 February 2012), the proceedings are to be discontinued, by an according application of Section 92 (3) of the Code of Administrative Court Procedure. Within the scope of this partial settlement, the Administrative Court's judgment of 18 December 2013 is without effect (Section 173 of the Code of Administrative Court Procedure in conjunction with Section 269 (3) sentence 1 of the Code of Civil Procedure).

11 For the remainder, the Respondent's (leapfrog) appeal meets with success. The Administrative Court's judgment is founded on an incompatibility with federal law (Section 137 (1) No. 1 of the Code of Administrative Court Procedure). The Complainant has no claim to a finding that he can be legally resident in the Federal territory without a permit. It is true that the requirements under Article 13 of Association Council Decision 1/80 are met in the person of his father (1.). It is also true that eliminating residence without a permit for Turkish nationals under the age of 16 constitutes a new restriction within the meaning of the standstill clause (2.). However, this restriction is justified in order to maintain effective control of immigration (3.).

12 1. The Administrative Court is ultimately correct at first in holding that the Complainant can invoke the standstill clause under Article 13 of Association Council Decision 1/80. This clause provides that 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.

13 a) The standstill clause under Article 13 of Association Council Decision 1/80 stands alongside the directly applicable rights under Articles 6 and 7 of Association Council Decision 1/80, under which Turkish workers and their family members are granted rights of employment and residence founded in Union law. The

clause is directed to the powers still held by the Member States to regulate the entry of Turkish nationals into their territory and those persons' initiation of employment there (judgment of 30 April 2009 – BVerwG 1 C 6.08 – BVerwGE 134, 27 = Buchholz 451.901 Association Law No. 52, each at para. 19; ECJ, judgment of 21 October 2003 – Case C-317/01, C-369/01, Abatay et al. – InfAuslR 2004, 32 at para. 80).

14 b) The matter falls within the substantive sphere of application of this standstill clause under Association law. Recent case law of the Court of Justice of the European Union (judgment of 10 July 2014 – Case C-138/13, Dogan – Inf AuslR 2014, 322) clarifies, with reference to the standstill clause contained in Article 41 (1) of the Additional Protocol, that this clause is applicable not only to provisions that directly address the conditions for a Turkish national's exercise of freedom of establishment, but also those that affect family members' rights in the sphere of family reunification. This is because a provision that hampers or prevents family reunification may adversely affect a Turkish national's decision to pursue permanent employment in a Member State. According to the case law of the Court of Justice of the European Union (judgments of 17 September 2009 – Case C-242/06, Sahin – ECR 2009, I-8465 at para. 65; of 21 October 2003, op. cit., at para. 83; and of 11 May 2000 – Case C-37/98, Savas – ECR 2000, I-2927 at para. 50), Article 41 of the Additional Protocol and Article 13 of Association Council Decision 1/80 are of the same kind, and pursue the same objective, irrespective of their different wording. The standstill clause in Article 13 of Association Council Decision 1/80 must therefore also be interpreted as providing that with regard to Turkish workers who hold the underlying rights, provisions on family reunification are not automatically excluded from the scope of application. In a further development of the case law of the present Court (judgment of 30 March 2010 – BVerwG 1 C 8.09 – BVerwGE 136, 231 = Buchholz 402.242 Section 30 Residence Act No. 2), therefore, a close family member who is not himself or herself seeking access to employment, but desires to immigrate as a dependent, can also invoke the standstill clause. After all, denying the subsequent immigration of a dependent does result in a new, indirect restriction of the originally entitled individual's freedom of movement as a worker. Therefore new obstacles to the subsequent immigration of dependents also affect the rights of an

originally entitled individual living in Germany, inasmuch as a refusal to let dependents immigrate can adversely affect the exercise of the Turkish worker's freedom of movement. This effect would therefore not be compatible with the Association Agreement's objective of encouraging the Turkish worker's employment and residence by guaranteeing the preservation of his or her family bonds.

15 c) In order for the requirements of fact for Article 13 of Association Council Decision 1/80 to be met, it is necessary that the beneficiary of the provision must be legally resident and legally employed. According to established case law of the Court of Justice of the European Union, the term 'legally' means that the Turkish worker or member of his family must have complied with the rules of the host Member State as to entry and residence, with the result that he is lawfully present in the territory of that State (judgments of 17 September 2009, op. cit., at para. 53 and of 7 November 2013 – Case C-225/12, Demir – NVwZ-RR 2014, 115 at para. 35). Contrary to the Administrative Court's opinion, in order to be legally resident within the meaning of the standstill clause, it is not necessary that the family member desiring subsequent immigration – in the instant case, the Complainant – must already be legally resident in the Federal territory. Even if his residence does not prove to be legal, in a case of subsequent immigration of a dependent it is sufficient to focus on the person of the individual holding the underlying right, the Turkish worker. As the standstill clause of Article 13 of Association Council Decision 1/80 is intended to protect freedom of movement of workers, and a restriction of subsequent immigration of close family members would result in an interference with the original rights of the Turkish worker, the matter falls within the scope of application of the standstill clause once the more rigorous requirements for subsequent immigration of a dependent come to compromise the protected freedom of movement of workers and therefore also the legal status of the person holding the original right. The legality of the residence of the person holding the original right is beyond question in the instant case, as the Complainant's father has held a residence permit since 2008. Because Article 13 of Association Council Decision 1/80 is applicable here, and in the meantime has also come to include residence without a permit that applied to Turkish nationals under age 16 until 1 January 1991, we

may leave aside the question of whether Association Council Decision No. 2/76 on the implementation of Article 12 of the Ankara Agreement, which had already been drafted and come into force on 20 December 1976, has been entirely displaced by Decision No. 1/80 or whether the standstill clause under Article 7 of Association Council Decision 2/76 remains in force alongside Article 13 of Association Council Decision 1/80, with the consequence that one would have to decide on the basis of whichever is the most favourable provision for a Turkish national since Association Council Decision 2/76 went into force on 1 December 1976.

16 2. The elimination of permit-free residence by introducing an obligation to obtain a residence permit does establish a ‘new restriction’ within the meaning of Article 13 of Association Council Decision 1/80, because the previous legal situation was more favourable to the Complainant.

17 a) Article 13 of Association Council Decision 1/80 contains a prohibition on worsening a person’s status. It provides that the Member States cannot introduce any new measure having the object or effect of making the exercise by a Turkish national, or by a family member, in its territory of the freedom of movement for workers subject to conditions more restrictive than those which applied at the time when the provision entered into force with regard to the Member State concerned (ECJ, judgment of 17 September 2009, op. cit., at para. 63). At any rate, the defining factor for this comparison is the legal situation in force at 1 December 1980 (Article 16 (1) of Association Council Decision 1/80; ECJ, judgment of 9 December 2010 – Case C-300/09, C-301/09, Toprak and Oguz – ECR 2010, I-12845 at para. 62). In addition, the standstill clause also extends to any new further restriction of a provision which was introduced after that date in respect of freedom of movement of workers and which eased the terms in effect at the time, even if the new restriction did not worsen the conditions for granting a permit in comparison to the conditions applicable at the date when the Association Council Decision went into force (ECJ, judgment of 9 December 2010, op. cit., at para. 50 et seq.). This means that a comparison of the legal situation must focus on whichever is the more favourable provision introduced since the standstill clause took effect.

18 Under the situation of law in force at the effective date of Decision 1/80, foreigners who had not yet reached the age of 16 years did not need a residence permit (see Section 2 (2) No. 1 Aliens Act 1965). The provision of Section 2 (2) of the Implementing Regulations to the Aliens Act 1990 cited by the Administrative Court, which includes the rule that Turkish nationals under the age of 16 did not need a residence permit provided that one parent did have a residence permit, only partially maintained the situation of law under the Aliens Act of 1965, at any rate so far as concerns Turkish nationals. Therefore the provision under Section 2 (2) No. 1 of the Aliens Act 1965 represents the standard of review for a worsening of status within the meaning of the standstill clause.

19 b) A comparison of the situation of law under the Aliens Act of 1965 and Section 33 of the Residence Act that applies today shows that the former situation of law was more favourable to the Complainant, so that the obligation to obtain a residence permit under Section 4 (1) sentence 1 of the Residence Act introduces a ‘new restriction’ within the meaning of Article 13 of Association Council Decision 1/80. The exempting conditions under Section 2 (2) No. 1 of the Aliens Act 1965 endowed young foreigners with a (permanent) right of residence, and therefore set them equal to foreigners who held a residence permit (judgment of 23 February 1993 – BVerwG 1 C 45.90 – BVerwGE 92, 116 <126 ff.> = Buchholz 133 AG-StlMindÜbk No. 1 p. 6). It is true that under Section 7 (4) and (5) of the Aliens Act 1965 (see also Section 3 (5) of the Aliens Act 1990), a residence permit could still be limited, at the authorities’ conscientious discretion, for a young foreigner whose age exempted him from the residence permit obligation. The possibility of subsequently placing a time limit on permit-free residence in a specific case is not, however, qualitatively equivalent to a general permit obligation under which residence is legal only and solely with the grant of a residence title. Rather, the introduction of a permit obligation constitutes a deterioration of status in comparison with permit-free residence with the possibility of a time limitation. It reverses the relationship between the rule and the exception in implementing residence requirements under substantive law, even if the requirements themselves are and remain identical, and it subjects the young foreigners to a reservation of permission that exerts a preventive effect.

20 3. However, the Administrative Court's judgment is in conflict with law subject to supreme court review insofar as it does not examine and affirm that the extension of the residence permit obligation to foreigners under age 16 is justified by a compelling reason in the public interest, and proves to be proportionate.

21 a) According to the case law of the Court of Justice of the European Union (judgment of 7 November 2013 – Case C-225/12, Demir – NVwZ-RR 2014, 115 at para. 40), a restriction whose purpose or effect is to make the exercise by a Turkish national of the freedom of movement of workers in national territory subject to conditions more restrictive than those applicable at the date of entry into force of Decision No 1/80 may be justified by an overriding reason in the public interest (see, mutatis mutandis, on Article 41 (1) of the Additional Protocol: judgment of 10 July 2014 – Case C-138/13, Dogan – InfAuslR 2014, 322 at para. 37). In addition to the written reasons for justification (Article 14 of Association Council Decision 1/80), the Court of Justice of the European Union also examines unwritten reasons in the public interest which, like the basic freedoms under Union law, may also embrace a large number of public concerns (see, e.g., judgment of 12 July 2012 – Case C-176/11, HIT and HIT LARIX – ZfWG 2012, 334 – juris at para. 20 et seq.), but which must also be found to be overriding. This transposition of a legal configuration under Union law to Association law is founded on the fact that according to the established case law of the Court of Justice of the European Union, the principles that apply under Union law to the free movement of Union citizens and their family members must also 'so far as possible' inform the treatment of Turkish workers who enjoy the rights conferred by Decision No. 1/80 (judgments of 6 June 1995 – Case C-434/93, Bozkurt – ECR 1995, I-01475 at para. 20 and of 23 January 1997 – Case C-171/95, Tetik – ECR 1997, I-329 at para. 28; see also: Hailbronner, ZAR 2011, 322 <324 f.>; Thym, ZAR 2014, 301 <303>).

22 b) The suspension of the exemption from the residence permit obligation for those under the age of 16 is justified by such an overriding reason in the public interest, for it alone establishes the basic conditions for being able to pursue with sufficient efficacy the high-priority public-interest goal of controlling immi-

gration under conditions of quantitatively and qualitatively changing migration movements. Effective control of migration flows is a legitimate purpose under Union law (see Article 79 (1) TFEU) and proves to be an overriding reason in the public interest for the reasons explained below. Although the legislature enacting the Aliens Act 1965 did not yet view the presence of children under age 16 as so incompatible with the public interest as to make prior control of immigration by way of a permit procedure appear generally necessary (see judgment of 23 February 1993, op. cit., <127> with further references), the general exemption from the residence permit obligation for foreigners under age 16 had already been eliminated (Section 3 (1) sentence 1 Aliens Act 1990) even by the time the Aliens Act 1990 came into force. In this way, the legislature intended to take due account of the fact that first of all, immigration of young foreigners for the purpose of obtaining permanent residence was no longer an isolated phenomenon, and second, even young foreigners could not be allowed unrestrictedly and unconditionally to reside in the Federal territory (General Part IV 2. of the official statement of reasons, Bundestag Printed Paper 11/6321 p. 43 f.). Furthermore, the legislature assumed that because of the exemption, the necessary monitoring of whether the foreigner was also entitled to a right of residence under substantive law was not adequately ensured (official statement of reasons to Section 3 (1) Aliens Act 1990, Bundestag Printed Paper 11/6321 p. 54).

23 However, this new provision in the Aliens Act 1990 did not eliminate permit-free residence for Turkish nationals under age 16 finally and without replacement. First of all, under the transitional provision of Section 96 (1) sentence 1 Aliens Act 1990, young foreigners who had until then been legally resident in the Federal territory without a permit could obtain a residence permit, on application, that could be granted under sentence 2 of the provision in derogation from certain requirements for conferral (e.g., a secure livelihood). Second, Section 2 (2) of the Regulation Implementing the Aliens Act of 18 December 1990 – the Implementing Regulations to the Aliens Act 1990 – (BGBl I p. 2983) still provided permit-free residence in the Federal territory for Turkish nationals under age 16 who had at least one parent holding a residence permit. This provision was abrogated only by the Amending Regulation of 11 January 1997 (BGBl I p. 4), but

as compensation here, the regulator provided in Section 28 (4) of the Implementing Regulations to the Aliens Act that this group of persons could apply for a residence permit until 31 December 1997. This right of application was amended in the Amending Regulation of 2 April 1997 (BGBl I p. 751) in that the persons concerned were even granted a residence permit ex officio until 30 June 1998. Finally, in the Amending Act of 29 October 1997 (BGBl I p. 2584), the legislature provided in Section 96 (4) of the Aliens Act 1990, that among others, Turkish nationals under age 16 who had been exempt from the residence permit requirement before 15 January 1997 and had been lawfully resident in the Federal territory were granted a residence permit for family reunification, in derogation from the requirement, among others, of a secure livelihood.

24 This legal effect shows that the national legislature and regulators did not further restrict the requirements of substantive law for subsequent immigration of Turkish nationals under the age of 16, but rather, in extending the reservation of a residence permit to this group of persons as well, intended only to ensure effective preventive oversight of immigration. Therefore, suspending permit-free residence is justified and proves to be an overriding reason, because in view of rising numbers of immigrants, effective control of immigration could no longer be ensured while maintaining an exemption from the residence permit obligation. As Section 1 (1) sentence 1 of the Residence Act states, the aim of effectively controlling the influx of foreigners was also behind the Immigration Act that took effect on 1 January 2005.

25 c) Finally, the residence permit obligation in Section 4 (1) sentence 1 of the Residence Act that also extends to Turkish nationals under age 16 is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to obtain that objective (on these requirements, see: ECJ, judgment of 7 November 2013 – Case C 225/12, Demir – NVwZ-RR 2014, 115 at para. 40). Any disproportionality of the measure must in particular be denied because even before the residence permit obligation was introduced, it was possible to impose a time limit on permit-free residence under Section 7 (5) of the Aliens Act 1965 (for example in the absence of a secure livelihood). The introduction of a reporting obligation for young foreigners as the prerequisite for

lawful residence – which was still permit-free – would not have been an equally suitable means, because the substantive legality of residence would not have been contingent on compliance with the obligation to report one's entry into the country or residence here. An exception for persons born in the Federal territory could likewise not have been monitored effectively. A case also cannot be made for disproportionality on grounds that the special circumstances of the individual case may not be taken into account under Section 4 (1) in conjunction with Section 33 sentence 1 of the Residence Act (on this aspect, see: ECJ, judgment of 10 July 2014 – Case C-138/13, Dogan – InfAuslR 2014, 322 at para. 38). This is because the provision under Section 33 sentence 1 of the Residence Act, structured as a discretionary rule, specifically does permit the circumstances in the individual case to be taken into account, with the consequence that the fact of recourse to public funds within the meaning of Section 2 (3) of the Residence Act does not lead 'automatically' to the denial of an application for a residence permit.

26 4. The disposition as to costs is founded on Section 154 (1) and Section 162 (2) of the Code of Administrative Court Procedure. Under Section 154 (1) of the Code of Administrative Court Procedure, the Complainant must bear the costs associated with the decision reached in this Court on appeal. With regard to the portion of the proceedings declared settled by mutual agreement, the costs were to likewise to be imposed on the Complainant at the Court's discretion, taking account of the status of the facts and the dispute to date, because had a decision been reached in court, the Complainant would presumably not have prevailed on that aspect as well.

Prof. Dr Berlit Prof. Dr Dörig Prof. Dr Kraft

Fricke Dr Rudolph

O r d e r

The value at issue – amending the order of Darmstadt Administrative Court of 18 December 2013 – for both stages of the proceedings is set at €5,000 each (Section 47 (1), Section 52 (2), Section 63 (3) No. 2 Court Costs Act).

Prof. Dr Berlit Prof. Dr Dörig Dr Rudolph