

JUDGMENT OF THE COURT (Second Chamber)

20 September 2007*

In Case C-16/05,

REFERENCE for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by decision of 2 December 2004, received at the Court on 19 January 2005, in the proceedings

The Queen, on the application of:

Veli Tum,

Mehmet Dari

v

Secretary of State for the Home Department,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Klučka, R. Silva de Lapuerta and L. Bay Larsen, Judges,

* Language of the case: English.

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2006,

after considering the observations submitted on behalf of:

- V. Tum and M. Dari, by N. Rogers and J. Rothwell, Barristers, and by L. Baratt and M. Kuddus, Solicitors,

- the United Kingdom Government, initially by M. Bethell, and subsequently by E. O'Neill, acting as Agents, and by P. Saini, Barrister,

- the Netherlands Government, by C.M. Wissels, acting as Agent,

- the Slovak Government, by R. Procházka, acting as Agent,

- the Commission of the European Communities, by C. O'Reilly and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60) ('the Additional Protocol').

- 2 The reference was made in the context of two sets of proceedings between Mr Tum and Mr Dari, Turkish nationals, and the Secretary of State for the Home Department ('the Secretary of State'), regarding decisions refusing them permission to enter the territory of the United Kingdom of Great Britain and Northern Ireland for the purpose of establishing themselves in business on their own account and ordering them to leave the country to which they had been admitted only on a provisional basis.

Legal context

The Association between the EEC and Turkey

- 3 According to Article 2(1) of the Agreement establishing an Association between the European Economic Community and Turkey, which was signed on 12 September

1963 at Ankara by the Republic of Turkey and the Member States of the EEC and the Community, and which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1, 'the Association Agreement'), the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties which includes, in relation to the workforce, the progressive securing of free movement for workers (Article 12 of the Association Agreement), the abolition of restrictions on freedom of establishment (Article 13) and on freedom to provide services (Article 14), with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date (see the fourth recital in the preamble and Article 28 of that agreement).

4 To that end, the Association Agreement involves a preparatory stage, enabling the Republic of Turkey to strengthen its economy with aid from the Community (Article 3 of the agreement), a transitional stage covering the progressive establishment of a customs union and the alignment of economic policies (Article 4) and a final stage based on the customs union and entailing closer coordination of the economic policies of the Contracting Parties (Article 5).

5 Article 6 of the Association Agreement is worded as follows:

'To ensure the implementation and progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred on it by this Agreement.'

- 6 According to Article 8 of the Association Agreement, in Title II headed 'Implementation of the transitional stage':

'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.'

- 7 Articles 12 to 14 of the Association Agreement also appear in Title II thereof, under Chapter 3 headed 'Other economic provisions'.

- 8 Article 12 provides:

'The Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing free movement for workers between them.'

- 9 Article 13 provides:

'The Contracting Parties agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them.'

10 Article 14 states:

‘The Contracting Parties agree to be guided by Articles [45 EC], [46 EC] and [48 EC] to [54 EC] for the purpose of abolishing restrictions on freedom to provide services between them.’

11 Article 22(1) of the Association Agreement provides as follows:

‘In order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the parties shall take the measures necessary to implement the decisions taken. ...’

12 The Additional Protocol, which, according to Article 62 thereof, forms an integral part of the Association Agreement, lays down, in Article 1, the conditions, detailed arrangements and timetables for implementing the transitional stage referred to in Article 4 of that agreement.

13 The Additional Protocol includes Title II, headed ‘Movement of persons and services’, Chapter I of which concerns ‘[w]orkers’ and Chapter II of which concerns ‘[r]ight of establishment, services and transport’.

14 Article 36 of the Additional Protocol, which is included in Chapter I, provides that freedom of movement for workers between Member States of the Community and Turkey is to be secured by progressive stages in accordance with the principles set out in Article 12 of the Association Agreement between the end of the 12th and the 22nd year after the entry into force of that agreement and that the Council of Association is to decide on the rules necessary to that end.

15 Article 41 of the Additional Protocol, which is in Chapter II of Title II, is worded as follows:

'1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.'

16 It is common ground that, to date, the Council of Association, set up by the Association Agreement consisting, on the one hand, of members of the Governments of the Member States, of the Council of the European Union and of the Commission of the European Communities and, on the other hand, of members of the Turkish Government ('the Association Council'), has not adopted any decision on the basis of Article 41(2) of the Additional Protocol.

17 The Association Council did, however, adopt Decision No 1/80 on the development of the Association ('Decision No 1/80') on 19 September 1980.

- 18 Article 13 of Decision No 1/80 which belongs to Chapter II, 'Social provisions', section 1, concerning 'Questions relating to employment and the free movement of workers', is worded as follows:

'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.'

National legislation

- 19 Section 11(1) of the Immigration Act 1971 defines 'entry into ... [the] United Kingdom' as follows:

'A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention ...'

- 20 As at 1 January 1973, the date on which the Additional Protocol came into force with regard to the United Kingdom, the relevant Immigration Rules for the purposes of establishment in business and provision of services were contained in the Statement of Immigration Rules for Control on Entry (House of Commons Paper 509, 'the 1973 Immigration Rules').

21 Paragraph 30 of the 1973 Immigration Rules, under the heading 'Businessmen', was worded as follows:

'Passengers who are unable to present ... [an entry] clearance [for the purpose of establishing themselves in business] but nevertheless seem likely to be able to satisfy the requirements of one of the next 2 paragraphs should be admitted for a period of not more than 2 months, with a prohibition on employment, and advised to present their case to the Home Office.'

22 Paragraph 31 of those Rules referred to the need for the applicant to have sufficient funds to put into a business, if already established, and to bear his share of its losses. It provided, inter alia, that the applicant must be able to support himself and his dependants and that he must be actively concerned in the running of the business.

23 Paragraph 32 of the Rules provided:

'If the applicant wishes to establish a business in the United Kingdom on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.'

24 Since then, the United Kingdom has progressively introduced immigration rules that are significantly more onerous with regard to those seeking to enter the United Kingdom with a view to establishing a business or providing services.

- 25 In that regard, detailed provisions are set out in paragraphs 201 to 205 of the Immigration Rules adopted by the House of Commons in 1994 (United Kingdom Immigration Rules 1994, House of Commons Paper 395), as applicable since 1 October 1994 and at present in force as amended ('the 1994 Immigration Rules').
- 26 It is common ground that the 1994 Immigration Rules, currently in force in the United Kingdom, are more restrictive as regards the way in which applications for entry clearance from persons intending to establish a business on their own account are dealt with than the corresponding provisions of the 1973 Immigration Rules.

The disputes in the main proceedings and the question referred for a preliminary ruling

- 27 It is apparent from the order for reference that Mr Tum and Mr Dari arrived in the United Kingdom by ship, Mr Tum in November 2001 from Germany and Mr Dari in October 1998 from France.
- 28 As their applications for asylum were refused, their removal was ordered pursuant to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1), but that measure was not put into effect by the competent national authorities, with the result that the persons concerned are still in United Kingdom territory.

- 29 As, under section 11(1) of the Immigration Act 1971, they were granted only temporary admission to the United Kingdom, which does not amount to formal clearance for entry to the United Kingdom for the purposes of its national legislation and was, moreover, subject to a restriction on taking employment, Mr Tum and Mr Dari applied for visas to enter the United Kingdom for the purposes of establishing themselves in business on their own account.
- 30 To that end, the parties concerned relied on the Association Agreement, claiming in particular that, under Article 41(1) of the Additional Protocol, their applications for leave to enter the host Member State should be assessed on the basis of the national Immigration Rules applicable at the date of the entry into force of that protocol with regard to the United Kingdom, namely the rules in force on 1 January 1973.
- 31 The Secretary of State, however, applying the national Immigration Rules in force at the time when Mr Tum and Mr Dari's applications were lodged, refused to grant those applications.
- 32 Mr Tum and Mr Dari applied for judicial review of the decisions rejecting their applications; their cases were heard together by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), and determined in their favour by judgment of that court of 19 November 2003. That decision was essentially upheld by the judgment of the Court of Appeal (England and Wales) (Civil Division) of 24 May 2004. According to those courts, the position of the two Turkish nationals was not based on deception of any kind and did not call in question the protection of a legitimate national interest such as public policy, public security or public health. Those courts also found that the parties concerned were entitled to rely upon the 'standstill' clause set out in Article 41(1) of the Additional Protocol and claim that their applications to enter the United Kingdom for the purpose of establishing themselves in business on their own account should be considered on the basis of the 1973 Immigration Rules.

33 The Secretary of State was then given leave to appeal to the House of Lords.

34 Since the parties to the main proceedings disagree as to whether the ‘standstill’ clause set out in Article 41(1) of the Additional Protocol applies to the United Kingdom rules on first admission as regards Turkish nationals seeking to benefit from freedom of establishment in that Member State, the House of Lords decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 41(1) of the Additional Protocol ... to be interpreted as prohibiting a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and procedure for entry to its territory for a Turkish national seeking to establish himself in business in that Member State?’

The question referred for a preliminary ruling

Observations submitted to the Court

35 According to the United Kingdom Government, foreign nationals who, like Mr Tum and Mr Dari, have never been formally admitted into the territory of the United Kingdom are not entitled to the protection established by the ‘standstill’ clause set out in Article 41(1) of the Additional Protocol. The sphere of application of that provision is restricted to foreign nationals who, like the Turkish national in the case which gave rise to the judgment in Case C-37/98 *Savas* [2000] ECR I-2927, lawfully entered a Member State and subsequently sought to establish themselves there by setting up a business. The fact that Mr Tum and Mr Dari made an application in the prescribed manner with a view to their entry into the United Kingdom is irrelevant.

36 The United Kingdom Government concludes from this that, as regards the two Turkish nationals concerned in the main proceedings who did not 'enter' the United Kingdom within the meaning of Article 11(1) of the Immigration Act 1971, it was entitled to apply the 1994 Immigration Rules, currently in force, which are more restrictive than those which were applicable as at 1 January 1973, in that they impose, inter alia, a new condition, according to which foreign nationals who intend to exercise freedom of establishment in United Kingdom territory are required to present a valid entry clearance.

37 In support of that line of argument, the United Kingdom Government relies on *Savas*, maintaining that it is apparent from paragraphs 58 to 67 thereof that a person who has not been lawfully admitted into a Member State is to be treated as not entitled to any of the benefits of Article 41(1) of the Additional Protocol, since that provision governs only the conditions of establishment and, as a corollary, of residence. In that regard, there is an important distinction between the decision to grant first entry to the United Kingdom to a Turkish national and the decision to allow a Turkish national who has already been lawfully admitted into the United Kingdom to remain there as a businessman. The *Savas* case established only the proposition that, where a Turkish national has already lawfully entered a Member State, he may seek to claim the benefits of the 'standstill' clause set out in Article 41(1) of the Additional Protocol even if, at the time when he relies on that clause, the party concerned is no longer lawfully resident in that State. On the other hand, that provision simply has no application where a first entry clearance is sought by such a national. As long as the Republic of Turkey is not a Member State of the European Union, that matter will continue to fall within the exclusive competence of each Member State (see, to that effect, inter alia, *Savas*, paragraph 58).

38 In the alternative, the United Kingdom Government submits that the Additional Protocol is not intended to confer any rights upon failed asylum seekers otherwise properly returnable to another Member State under the Dublin Convention of 15 June 1990. In those circumstances Turkish nationals, such as Mr Tum and Mr Dari, who have been granted no right of asylum in the United Kingdom, must be

excluded from entitlement to all the advantages provided for by the Additional Protocol. Any other interpretation could result in an abuse of rights.

39 At the hearing, the Netherlands Government essentially took the same view as that of the United Kingdom Government.

40 Mr Tum and Mr Dari accept that the 'standstill' clause set out in Article 41(1) of the Additional Protocol does not, in itself, confer any right of establishment, right to stay or right of entry in the territory of a Member State and that disputes relating to such rights must in principle be examined by reference only to the domestic law of the Member State concerned. However, they argue that the scope of that clause includes not only conditions of establishment and stay, but, logically, also those conditions directly linked to them, namely conditions relating to the entry of Turkish nationals into the territory of the host Member State. They submit that, as a result, their applications for leave to enter to establish themselves in business on their own account in the United Kingdom have to be examined in the light of immigration rules which are no more restrictive than those that were in force on 1 January 1973.

41 In support of their case, Mr Tum and Mr Dari rely on the following arguments:

- the above interpretation is consistent with the aims of the Association Agreement and the Additional Protocol, namely the progressive abolition of restrictions on freedom of establishment;

- under Community law, freedom of establishment has been interpreted by the Court as being concerned with the conditions of both entry and stay in the territory of a Member State as the necessary corollaries to freedom of establishment (see, to that effect, inter alia Case 48/75 *Royer* [1976] ECR 497, paragraph 50; Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, paragraph 15; and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraphs 44, 50, 58 and 83) and there is no reason why the ‘standstill’ clause set out in Article 41(1) of the Additional Protocol cannot also be interpreted to that effect, particularly bearing in mind the objective set out in Article 13 of the Association Agreement;

- the ‘standstill’ clause would be rendered meaningless and redundant if Member States were permitted to make more difficult or even impossible the entry of Turkish nationals into their territories, in so far as the protection of the status quo as regards the conditions of their establishment and/or their stay would thus have no practical significance;

- there is nothing in the wording of the ‘standstill’ clause or, more generally, in the legislation relating to the EEC-Turkey Association to suggest that the application of that clause is limited to conditions of stay and establishment, excluding conditions of entry. The difference in wording between the ‘standstill’ clause in Article 41(1) of the Additional Protocol and the similar clause in Article 13 of Decision No 1/80 relating to workers is significant in that regard. Furthermore, the relevant case-law of the Court is general in nature.

⁴² Mr Tum and Mr Dari submit that their view is supported by *Savas*, from which it is apparent that the first of the ‘standstill’ clauses in Article 41(1) of the Additional Protocol applied to a person who had been unlawfully present in the United

Kingdom for some 11 years, whereas they themselves have made applications for entry to the United Kingdom in the prescribed manner. As the Court held that Mr Savas was entitled to rely on that clause and thereby have his case determined by national rules that were no more stringent than those in force as at 1 January 1973, Mr Tum and Mr Dari maintain that they should similarly benefit from such an interpretation.

43 Lastly, the refusal of Mr Tum and Mr Dari's applications for asylum is of no relevance for the determination of whether Article 41(1) of the Additional Protocol applies to their circumstances.

44 The Slovak Government and the Commission of the European Communities to a large extent support the interpretation advocated by Mr Tum and Mr Dari.

The Court's reply

45 For the purpose of a reply to the question referred by the national court, it must be borne in mind that, as was noted in paragraph 29 of this judgment, Mr Tum and Mr Dari were regarded, under section 11(1) of the Immigration Act 1971, as not having entered the United Kingdom, as their temporary physical admission, although they have no entry permit for that Member State, does not, under the relevant national legislation, amount to actual clearance for entry to the United Kingdom.

46 In that context, it is not disputed that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish

nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, clearly, precisely and unconditionally, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see *Savas*, paragraphs 46 to 54 and 71, second indent, and Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraphs 58, 59 and 117, first indent).

47 Furthermore, it is common ground that, if Article 41(1) of the Additional Protocol applies to the first admission into a Member State of Turkish nationals who intend to exercise their freedom of establishment there by virtue of the Association Agreement, the Immigration Rules which the Secretary of State applied in deciding on the applications of Mr Tum and Mr Dari constitute a 'new restriction' within the meaning of that provision of the Additional Protocol, since it is accepted by the parties to the main proceedings that those national rules, which have applied as from 1 October 1994, have the objective, or at the very least the result, of making the entry of Turkish nationals into the United Kingdom subject to more stringent substantive and/or procedural conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State, namely 1 January 1973.

48 As regards the material scope of the 'standstill' clause set out in Article 41(1), it must be borne in mind that the very wording of that provision prohibits new restrictions *inter alia* 'on the freedom of establishment'.

49 In that context, it is clear from the case-law of the Court that the 'standstill' clause precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the

time when the Additional Protocol entered into force with regard to the Member State concerned (see *Savas*, paragraph 69, and *Abatay and Others*, paragraph 66).

50 That case-law does not refer expressly to the first admission of Turkish nationals into the territory of the host Member State.

51 Furthermore, in the cases which gave rise to the judgments in *Savas* and *Abatay and Others*, the Court did not have to rule on that issue, since both Mr Savas and the lorry drivers concerned in the cases which gave rise to the judgment in *Abatay and Others* had been admitted to the Member States concerned under visas issued in accordance with the relevant national legislation.

52 As regards the meaning of the ‘standstill’ clause set out in Article 41(1) of the Additional Protocol, it is also apparent from the case-law that neither that clause nor the provision containing it are, in themselves, capable of conferring upon a Turkish national a right of establishment or, as a corollary, a right of residence derived directly from Community provisions (see *Savas*, paragraphs 64 to 71, third indent, and *Abatay and Others*, paragraph 62). The same finding also applies as regards the first entry of a Turkish national into the territory of a Member State.

53 On the other hand, in accordance with that case-law, such a ‘standstill’ clause is to be understood as prohibiting the introduction of any new measures having the object or effect of making the establishment of Turkish nationals in a Member State subject to stricter conditions than those which resulted from the rules which applied to them at the time when the Additional Protocol entered into force with regard to the Member State concerned (see *Savas*, paragraphs 69, 70 and 71, fourth indent, and *Abatay and Others*, paragraphs 66 and 117, second indent).

- 54 Article 41(1) of the Additional Protocol does not therefore have the effect of conferring on Turkish nationals a right of entry into the territory of a Member State, since no such positive right can be inferred from the Community rules currently applicable but, on the contrary, remains governed by national law.
- 55 It follows that a 'standstill' clause, such as that in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law it replaces, but as a quasi-procedural rule which stipulates, *ratione temporis*, which are the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State.
- 56 In those circumstances, the argument of the United Kingdom Government that the construction put forward by the applicants in the main proceedings would entail an intolerable infringement of the principle of the exclusive competence of Member States on immigration matters, as it has been interpreted by the settled case-law of the Court, cannot be upheld.
- 57 While it is true that it is apparent from that case-law that, as Community law stands at present, a Turkish national's first admission to the territory of a Member State is, as a rule, governed exclusively by that State's own domestic law (see, inter alia, *Savas*, paragraphs 58 and 65, and *Abatay and Others*, paragraphs 63 and 65), the Court made that finding for the sole purpose of giving a negative answer to the question whether the 'standstill' clause in Article 41(1) of the Additional Protocol could, as such, confer the benefit of certain positive rights in respect of freedom of establishment upon a Turkish national (*Savas*, paragraphs 58 to 67, and *Abatay and Others*, paragraphs 62 to 65).

- 58 However, that 'standstill' clause does not call into question the competence, as a matter of principle, of the Member States to conduct their national immigration policy. The mere fact that, as from its entry into force, such a clause imposes on those States a duty not to act which has the effect of limiting, to some extent, their room for manoeuvre on such matters does not mean that the very substance of their sovereign competence in respect of aliens should be regarded as having been undermined (see, by analogy, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 121).
- 59 The Court cannot accept the interpretation of the United Kingdom Government to the effect that it is apparent from *Savas* that a Turkish national can rely on the 'standstill' clause only if he has entered a Member State lawfully as it is irrelevant whether or not he is legally resident in the host Member State at the time of his application to establish himself, while, conversely, that clause does not apply to the conditions governing a Turkish national's first admission to the territory of a Member State.
- 60 It is important to point out in that respect that Article 41(1) of the Additional Protocol refers, in a general way, to new restrictions inter alia 'on the freedom of establishment' and that it does not limit its sphere of application by excluding, as does Article 13 of Decision No 1/80, certain specific aspects from the sphere of protection afforded on the basis of the first of those two provisions.
- 61 It must be added that Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision of the Additional Protocol thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable

precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Abatay and Others*, paragraphs 68 and 72). Even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained (see, by analogy, Case 77/82 *Peskeloglou* [1983] ECR 1085, paragraph 13, and *Abatay and Others*, paragraph 81), it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment.

62 To date, it is true, the Association Council has not adopted any measure on the basis of Article 41(2) of the Additional Protocol with a view to the actual removal by the Contracting Parties of existing restrictions on freedom of establishment, in accordance with the principles set out in Article 13 of the Association Agreement. Furthermore, it is apparent from the case-law of the Court that neither of those two provisions has direct effect (*Savas*, paragraph 45).

63 For those reasons the ‘standstill’ clause set out in Article 41(1) of the Additional Protocol must be regarded as also applicable to rules relating to the first admission of Turkish nationals into a Member State in whose territory they intend to exercise their freedom of establishment under the Association Agreement.

64 Lastly, as regards the alternative argument of the United Kingdom Government that failed asylum seekers such as the applicants in the main proceedings should not be allowed to rely on Article 41(1) of the Additional Protocol, since any other interpretation would be tantamount to endorsing fraud or abuse, it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68) and that the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the

persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely (see, inter alia, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 25).

65 However, in the cases in the main proceedings, it is apparent from the documents sent to the Court by the national court that the courts which gave rulings on the substance of the cases currently pending before the House of Lords expressly stated that Mr Tum and Mr Dari could not be accused of any fraud and that the protection of a legitimate national interest, such as public policy, public security or public health, was not at issue either (see paragraph 32 of this judgment).

66 Moreover, the Court has been shown no specific evidence to suggest that, in the cases in the main proceedings, the individuals concerned are relying on the application of the 'standstill' clause in Article 41(1) of the Additional Protocol with the sole aim of wrongfully benefiting from advantages provided for by Community law.

67 In those circumstances, the fact that Mr Tum and Mr Dari had, prior to their applications for clearance to enter the United Kingdom for the purpose of exercising freedom of establishment, made applications for asylum which had, however, been refused by the competent authorities of that Member State, cannot be regarded, in itself, as constituting abuse or fraud.

68 Furthermore, Article 41(1) of the Additional Protocol does not lay down any restriction as regards its scope, in particular in so far as concerns Turkish nationals to whom those authorities have refused the status of refugees, with the result that

the refusal of the asylum applications of Mr Tum and Mr Dari is of no relevance for the purpose of deciding whether that provision is applicable in the cases in the main proceedings.

- 69 Having regard to all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article 41(1) of the Additional Protocol is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.

Costs

- 70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the

Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.

[Signatures]