

# OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 14 April 2011<sup>1</sup>

## I — Introduction

1. The present case concerns Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement. That provision contains a standstill clause, which prohibits the Contracting Parties from introducing any new restrictions on the freedom of establishment and the freedom to provide services after 1 January 1973.

2. In 2008 the appellant in the main proceedings applied for leave to enter self-employed business in the United Kingdom. He did not rely on the current legislation, but on the – more favourable – legislation which applied in 1973. The competent authorities excluded him from relying on the standstill clause with reference to the principle of abuse of rights because he had breached a condition of his previous leave to remain before making the application.

3. After the Court has already been required to rule on the substance and scope of the

standstill clause in Article 41(1) of the Additional Protocol,<sup>2</sup> this case gives it the opportunity to clarify when reliance on the standstill clause may be refused.

## II — Legislative framework

### A — *The EEC-Turkey Association Agreement*

4. In Ankara on 12 September 1963, the Republic of Turkey, of the one part, and the European Economic Community and its Member States, of the other part, signed the Agreement establishing an Association between the European Economic Community and Turkey. That Agreement was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963.<sup>3</sup> Under Article 2(1) of the Association Agreement, the aim of the Agreement is to promote the continuous and

1 — Original language: German.

2 — See, inter alia, Case C-37/98 *Savas* [2000] ECR I-2927, and Case C-16/05 *Tun and Dari* [2007] ECR I-7415.

3 — OJ 1973 C 113, p. 2, 'the Association Agreement'.

balanced strengthening of trade and economic relations between the Contracting Parties, which includes, in relation to the workforce, the progressive securing of freedom of movement for workers and the abolition of restrictions on freedom of establishment and on freedom to provide services, 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.<sup>4</sup>

5. The Additional Protocol, 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,<sup>5</sup> which, under Article 62, 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. It includes Title II, headed ‘Movement of persons and services’, Chapter II of which concerns ‘[r]ight of establishment, services and transport’.

6. 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. ...’

## B — *National law*

7. The conditions under which further leave to remain is granted, which came into force in the United Kingdom on 1 January 1973, were contained in the Statement of Immigration Rules for Control after Entry (House of Commons Paper 510).

8. The Immigration Rules have been amended and replaced many times over the years since. The Immigration Rules in force at the date of the decision by the respondent in the main proceedings to refuse the appellant leave to remain (21 October 2008) were set out in House of Commons Paper 395 (HC 395).

9. The referring court points out – and this is common ground between the parties – that the Immigration Rules applicable in the United Kingdom in October 2008 concerning establishment in that Member State for the purpose of entering into self-employed business are more restrictive than those which were in force on 1 January 1973.

10. One of the parties<sup>6</sup> points out, without being refuted, that a crucial difference is that, in contrast with the rules on leave for self-employed business which applied in 1973, under

<sup>4</sup> — Fourth recital in the preamble and Article 28 of the Association Agreement.

<sup>5</sup> — OJ 1973 C 113, p. 18.

<sup>6</sup> — The Centre for Advice on Individual Rights in Europe, see point 19 of this Opinion.

the more recent rules a foreign national must prove a capital of GBP 200 000.<sup>7</sup>

### III — Facts and main proceedings

11. Mr Oguz ('the appellant in the main proceedings' or 'the appellant') was granted leave to enter the United Kingdom as a student in October 2000. The competent authorities then granted him further leave to remain as a student on successive occasions. These grants of leave were subject to the condition that, among other things, the appellant should engage in a business or profession only with the consent of the Secretary of State for the Home Department.

12. The appellant carried on activity *as an employed person* in the United Kingdom for a few years with the consent of the competent authorities. However, in November 2006 the appellant's employer terminated his employment by reason of redundancy. The appellant's attempts to take up further employment were unsuccessful.

13. On 20 March 2008, the appellant then submitted an application for further leave to

remain in the United Kingdom as a *self-employed* business person. He relied on the Immigration Rules in force in the United Kingdom at 1 January 1973,<sup>8</sup> which are, according to the referring court, more favourable than the Immigrations Rules in force in 2008. In order to justify the applicability of the Rules in force in 1973, the appellant relied on the standstill clause contained in Article 41 of the Additional Protocol.

14. The appellant had commenced his business in February 2008, and was actually operating it by the following month. At the time of the application, the appellant had thus already carried on business for a few weeks, in breach of a condition of his leave to remain. The appellant argued in justification that he considered himself entitled to establish his business, having completed an application for a residence permit as a self-employed person.

15. On 11 August 2008, the appellant ceased his self-employed work and informed the competent authority that he would only recommence his self-employed work once a decision had been made on his application.

16. The Secretary of State for the Home Department (also 'the respondent in the main proceedings') refused the appellant's application. He stated as reasons for the refusal that the appellant had established his business in breach of a condition of his previous leave

7 — With reference to the Statement of Changes to Immigration Rules (HC 395) as amended, paragraph 245L(b) and Appendix A, paragraph 35.

8 — House of Commons Paper 510.

to remain. He was therefore excluded from taking the benefit of the standstill clause in Article 41(1) of the Additional Protocol. His application was accordingly refused under the current Immigration Rules. Furthermore, the duration of his existing leave to remain as a work permit holder was curtailed on the grounds that he had failed to continue to meet the requirements under which his leave to remain had been granted.

19. The case is now before the Court of Appeal of England and Wales ('the referring court').<sup>12</sup> That Court granted the Centre for Advice on Individual Rights in Europe ('the AIRE Centre') leave to participate in the main proceedings.

#### **IV — Reference for a preliminary ruling and procedure before the Court**

17. The appellant appealed against that decision to the Asylum and Immigration Tribunal<sup>9</sup> on 4 November 2008. That appeal was dismissed. As grounds for its decision, the Tribunal stated that, whilst the appellant had not acted fraudulently, he had been in breach of the conditions of his leave to remain in setting up, starting and operating the business, and he was not therefore entitled to rely on the standstill clause in Article 41 of the Additional Protocol.

20. By order of 23 March 2010, the Court of Appeal stayed its proceedings and referred the following question to the Court for a preliminary ruling:

18. The appellant sought an order for reconsideration.<sup>10</sup> By a determination of 26 June 2009, Senior Immigration Judge Ward<sup>11</sup> decided that the previous decision, rejecting the complaint, was free of legal error and should therefore stand.

'Where a Turkish national, having leave to remain in the United Kingdom on condition that he does not engage in any business or profession, enters into self-employment in breach of that condition and then applies to the national authorities for further leave to remain on the basis of the business which he has now established, is he entitled to the benefit of Article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey?'

<sup>9</sup> — Footnote does not relate to the English version.

<sup>10</sup> — Footnote does not relate to the English version.

<sup>11</sup> — Footnote does not relate to the English version.

<sup>12</sup> — Footnote does not relate to the English version.

21. In the proceedings before the Court of Justice, written and oral submissions were made by Mr Oguz, the AIRE Centre, the United Kingdom Government and the European Commission.

of a duty to hold a visa in order to perform certain services, which did not apply before the Additional Protocol entered into force, as a 'new restriction' within the meaning of Article 41(1) of the Additional Protocol.<sup>14</sup>

## V — Assessment

22. The present case concerns the interpretation of Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement, which provides that the Contracting Parties must refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

25. The Court has stated that, as the very wording of Article 41(1) shows, this provision lays down, clearly, precisely and unconditionally, an unequivocal standstill clause, prohibiting the Contracting Parties from introducing new restrictions on the freedom of establishment as from the date of entry into force of the Additional Protocol. It inferred from that wording, and from the spirit and purpose of the Association Agreement, that Article 41(1) has direct effect in the Member States.<sup>15</sup>

23. Article 41(1) of the Additional Protocol thus 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, i.e. 1 January 1973.<sup>13</sup>

26. A Turkish national may therefore rely directly upon Article 41(1) vis-à-vis the authorities of a Member State.

24. In terms of substance, the Court of Justice has, for example, regarded the introduction

27. The referring court now asks whether a Member State may exclude a Turkish national who has breached a condition of his leave to remain from relying on the standstill clause

13 — *Savas*, cited in footnote 2, paragraph 69; Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 66; and Case C-16/05 *Tum and Dari*, cited in footnote 2, paragraph 49.

14 — Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 57.

15 — *Savas*, cited in footnote 2, paragraph 49, with reference to the Court's case-law, inter alia, on the standstill clause in Article 13 of Decision No 1/80 of the Association Council of 19 September 1980; Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 18 and 26.

in Article 41 of the Additional Protocol. The respondent in the main proceedings and the United Kingdom Government take the view that reliance on the standstill clause in such a case would be an abuse of rights and must therefore be refused. The referring court has expressly acknowledged that the appellant has not acted fraudulently.

28. In my view, the standstill clause in Article 41(1) of the Additional Protocol – as I will explain below – is not capable of excluding reliance on it on grounds of an abuse of rights. Any abuse of rights must be countered, if necessary, in the context of the application of national law.

29. The prohibition of abuse of rights is a general principle of European Union ('EU') law.<sup>16</sup> It is settled case-law that EU law cannot be relied on for abusive or fraudulent ends 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 that law.<sup>17</sup>

30. In *Emsland Stärke* the Court clarified the abuse test in connection with benefits in the agricultural sector. It stated that a finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved.<sup>18</sup> It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.<sup>19</sup>

31. As the Court has already stated, the standstill clause in Article 41(1) 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

16 — See also the Opinion of Advocate General Sharpston in Case C-303/08 *Bozkurt* [2010] ECR I-13445, point 37, and the Opinion of Advocate General Maduro in Case C-255/02 *Halifax* [2006] ECR I-1609, point 63, who both reflect the two main contexts in which the notion of abuse has been analysed by the Court.

17 — See, inter alia, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 25; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68; and Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 47.

18 — Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 52.

19 — *Emsland-Stärke*, cited in footnote 18, paragraph 53.

who wishes to exercise freedom of establishment in a Member State.<sup>20</sup>

determined solely on the basis of national law whether a right of establishment and, as a corollary, a right of residence can be derived from that national law.

32. It is therefore a characteristic of the standstill clause at issue that it does not confer any substantive rights. Neither a right of establishment nor a right of residence can be derived directly from it.<sup>21</sup> It merely provides which provisions of national law are applicable, namely no provisions which are less favourable than those applicable on 1 January 1973.

36. If Article 41 imposes an absolute prohibition, for the breach of which no requirements have to be satisfied, a case of abuse of rights in regard to that provision is difficult to imagine. Because no conditions are laid down for its applicability, such conditions cannot be artificially created in an abusive manner either.

33. In my view, the standstill clause would appear, by its nature, to be incapable of excluding reliance on it on grounds of an abuse of rights.

34. Article 41 does not lay down any conditions for its applicability. Rather, it is applicable unconditionally. As the Court has stated, Article 41(1) imposes 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.<sup>22</sup>

37. The respondent in the main proceedings and the United Kingdom Government claim that the appellant should be excluded from relying on the standstill clause because only by taking up activity as a self-employed person without prior consent – in breach of a condition of his leave to remain – was he able to satisfy the substantive requirements of the 1973 Immigration Rules, which he would otherwise have been unable to satisfy.

35. The standstill clause regulates only which national law is applicable. It can be

38. This shows that any abuse of rights by the appellant concerns the substantive requirements of the *national* Immigration Rules and not the standstill clause. The question of an abuse of rights is thus rightly located in substantive national law. The appellant himself claims that under the 1973 Immigration Rules the competent authorities may take

20 — *Tum and Dari*, cited in footnote 2, paragraph 55.

21 — *Tum and Dari*, cited in footnote 2, paragraph 52.

22 — *Tum and Dari*, cited in footnote 2, paragraph 61.

an appellant's conduct into consideration.<sup>23</sup> The United Kingdom Government also confirmed that possibility at the hearing before the Court.

the case of a sham marriage contracted with the sole aim of enjoying abusively advantages provided for by the law governing the Association.<sup>26</sup>

39. As an interim conclusion, it must therefore be stated that, because of the absolute character of Article 41(1), which does not impose any substantive requirements, but merely determines the applicable law, the notion of abuse of rights is not applicable thereto.

42. Unlike the standstill clause laid down in Article 41, which does not contain any substantive rights, Articles 6 and 7 of Decision No 1/80, which were relevant in the above-mentioned cases, themselves confer substantive rights, namely rights to employment and to residence. The principle of abuse of rights could also therefore be asserted.

40. This conclusion is confirmed if we look at situations in which the Court has accepted the existence of an abuse of rights in the field of the Association Agreement.

41. Thus, the Court has ruled, with reference to the principle of the abuse of rights, that periods in which a Turkish national was employed only as a result of fraudulent conduct which led to a conviction cannot be regarded as legal in respect of the application of Article 6(1) of Decision No 1/80,<sup>24</sup> as the person concerned did not, in actual fact, satisfy the conditions laid down by that provision and did not therefore legally have a right under that decision.<sup>25</sup> The Court cited as a further possible example of an abuse of rights

43. I will consider below the statement made by the Court in *Tum and Dari*, which is cited by the referring court. The Court states: '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.'<sup>27</sup>

44. It could be inferred from this statement made by the Court that the Court takes the view that there could actually be cases where

23 — The appellant refers in this regard to paragraph 4 of those provisions.

24 — Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association.

25 — See Case C-285/95 *Kol* [1997] ECR I-3069, paragraphs 26 and 27.

26 — Case C-303/08 *Bozkurt*, cited in footnote 17, paragraph 50.

27 — *Tum and Dari*, cited in footnote 2, paragraph 66.



the question of the application of the principle of abuse of rights also arises in connection with the standstill clause in Article 41(1).

45. Even if the abuse test were to be applied to a situation like the present case, however, an abuse of rights could not be taken to exist.

46. The crucial criterion for the existence of an abuse of rights is whether someone relies on a provision of EU law in order to obtain advantages which are manifestly incompatible with the aims of the provision.<sup>28</sup>

47. The spirit and purpose of the standstill clause is to create conditions conducive to the gradual establishment of the right of establishment and of freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms so as not to make the gradual achievement of those freedoms more difficult between the Member States and the Republic of Turkey.<sup>29</sup>

28 — See also the Opinion of Advocate General Sharpston in *Bozkurt*, cited in footnote 16, point 39, and the Opinion of Advocate General Tizzano in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, point 115.

29 — *Abatay and Others*, cited in footnote 13, paragraph 72; see also Joined Cases C-300/09 and C-301/09 *Toprak* [2010] ECR I-12845, paragraph 52.

48. As has already been stated, the standstill clause imposes an ‘absolute prohibition’<sup>30</sup> 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. Its aim is therefore that only the more favourable rules are applied in principle between the Contracting Parties.

49. It is not incompatible with this aim if a Turkish national who has breached a condition of his previous leave to remain is also permitted to rely on the clause.

50. Accordingly, the Court also did not accept the existence of an abuse of rights in the abovementioned *Tum and Dari* case or in the similar *Savas* case.

51. In *Tum and Dari* two people who were resident in a Member State in contravention of an expulsion order after their applications for asylum had been refused relied on the standstill clause. The Court expressly rejected

30 — *Tum and Dari*, cited in footnote 2, paragraph 61.

the argument that a Turkish national can rely on the standstill clause only if he has entered a Member State lawfully.<sup>31</sup> In *Savas* the Turkish national had infringed national immigration rules when he relied on the standstill clause. However, this did not lead the Court to exclude him from invoking the standstill clause.<sup>32</sup>

52. The assessment should therefore be no different in a case like the main proceedings where, unlike the cases already decided, the person relying on the standstill clause even had leave to remain and had merely breached a condition of that leave. Lastly, the appellant in the main proceedings did not enter the United Kingdom unlawfully, but had entry clearance and even a work permit, albeit not for activity as a self-employed person. Only by taking up activity of a self-employed person, which he soon ceased again, did he breach a condition of his leave to remain.

53. It is still necessary to consider the Court's judgment in *Kondova*.<sup>33</sup> That judgment is cited by the respondent in the main proceedings and by the United Kingdom Government.

54. The case concerned the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part.<sup>34</sup>

55. The Court ruled in this connection that a Bulgarian national who intended to take up an activity in a Member State as an employed or self-employed person but who got round the relevant national controls by falsely declaring that he was entering that Member State for the purpose of seasonal work placed himself outside the sphere of protection afforded to him under the Europe Agreement.<sup>35</sup>

56. If Bulgarian nationals had been allowed at any time to apply for establishment in the host Member State, notwithstanding a previous infringement of its national immigration legislation, such nationals might have been encouraged to remain illegally within

31 — *Tum and Dari*, cited in footnote 2, paragraph 59.

32 — *Savas*, cited in footnote 2, paragraph 70.

33 — Case C-235/99 [2001] ECR I-6427.

34 — Agreement concluded and approved on behalf of the Community by Decision 94/908/EC, ECSC, Euratom of the Council and the Commission of 19 December 1994, OJ 1994 L 358, p. 1, 'the Europe Agreement'.

35 — *Kondova*, cited in footnote 33, paragraph 80. The Court refers, by analogy, to circumvention of national law by Community nationals improperly or fraudulently invoking Community law, *Centros*, cited in footnote 17, paragraph 24 and the cited case-law.

the territory of that State and submit to the national system of control only once the substantive requirements set out in that legislation had been satisfied.<sup>36</sup>

under Article 59 of the Europe Agreement. It is not therefore surprising that in *Kondova*, in which the Agreement grants a substantive right, the Court also accepted the possibility of excluding reliance on that substantive right on grounds of an abuse of rights.

57. This finding by the Court is cited by the respondent in the main proceedings and the United Kingdom Government in the present case in order to exclude the appellant from relying on the standstill clause. In order to substantiate their argument that these cases are parallel, they refer to the abovementioned argument that the breach of the condition by the appellant meant that he was able to satisfy the substantive 1973 Immigration Rules.

59. However, the finding in *Kondova* cannot be applied to a standstill clause like Article 41(1) of the Additional Protocol. As has already been mentioned, the standstill clause in the Additional Protocol does not confer a substantive right of establishment or of equal treatment with a State's own nationals, but it merely provides which national law is applicable.

58. That judgment cannot be applied to the present case, however. Unlike Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement, the Europe Agreement which was relevant in *Kondova* granted a right of establishment. Article 45 of that Agreement established equal treatment for Bulgarian nationals and nationals of the Member States. Only initial entry fell within the Member States' competence

60. It must thus be concluded that the standstill clause in Article 41(1) of the Additional Protocol is not capable of excluding reliance on it on grounds of an abuse of rights. Any abuse of rights must be countered, if necessary, in the context of the application of national law. According to the parties, national

36 — *Kondova*, cited in footnote 33, paragraph 77.

law also provides for the possibility of taking this into consideration.

place of ignoring a breach of condition of obtaining consent before setting up a business.

61. Lastly, it is necessary briefly to consider an aspect highlighted in the appellant's submissions. In his observations, the appellant points out that there was Published Guidance of the Secretary of State to his caseworkers,<sup>37</sup> instructing them that the actual establishment of a business was acceptable in circumstances where a Turkish national had leave to remain and where he made an application to remain on the basis of being in business. The Secretary of State therefore had a policy in

62. Such a scenario would raise the interesting question of the extent to which a departure from a more favourable policy introduced in the meantime<sup>38</sup> could itself constitute an infringement of the standstill clause. Lastly, the Court has recently ruled that even the abolition of a more favourable rule of law which was introduced after the date indicated in a standstill clause infringes the prohibition on introducing 'new restrictions' under the standstill clause even if the new legal situation does not result in a less favourable position than applied on that date.<sup>39</sup> Because, however, the referring court has not asked a question to this effect, it was not discussed by the parties and the situation in question is also not evident from the order for reference, this question cannot be discussed conclusively in the present case.

37 — Footnote does not relate to the English version.

38 — If this could be seen in the situation described.

39 — See *Toprak*, cited in footnote 29, with regard to the standstill clause in Article 13 of Decision No 1/80 of the Association Council.

## VI — Conclusion

63. In the light of the above arguments, I propose that the Court give the following answer to the question referred for a preliminary ruling by the Court of Appeal of England and Wales:

Where a Turkish national, having leave to remain in a Member State on condition that he does not engage in any business or profession, enters into self-employment in breach of that condition and then applies to the national authorities for further leave to remain on the basis of the business which he has now established, he is entitled, irrespective of a breach of the condition of his leave to remain, to rely on the standstill clause in Article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey.