

JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 \*

In Case C-186/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 31 March 2010, received at the Court on 15 April 2010, in the proceedings

**Tural Oguz**

v

**Secretary of State for the Home Department,**

intervener:

**Centre for Advice on Individual Rights in Europe,**

\* Language of the case: English.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: J. Kokott,  
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 February 2011,

after considering the observations submitted on behalf of:

- Mr Oguz, by J. Walsh and P. Haywood, Barristers,
- the Centre for Advice on Individual Rights in Europe, by S. Cox and C. Banner, Barristers, and by L. Barratt, Solicitor,
- the United Kingdom Government, by S. Ossowski, acting as Agent, and by R. Palmer, Barrister,

— the European Commission, by E. Paasivirta and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 41(1) of 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 (OJ 1973 C 113, p. 17; ‘the Additional Protocol’).
- <sup>2</sup> The reference has been made in proceedings between Mr Oguz, a Turkish national, and the Secretary of State for the Home Department (‘the Secretary of State’) concerning the decision of the latter to refuse Mr Oguz further leave to remain in the United Kingdom as a self-employed person.

## Legal context

### *European Union ('EU') legislation*

#### EEC-Turkey Association

- 3 Under Article 2(1) of the Agreement establishing an Association between the European Economic Community and Turkey, signed on 12 September 1963 at Ankara by the Republic of Turkey, of the one part, and the Member States of the EEC and the Community, of the other part, and 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 EEC-Turkey Association Agreement'), the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties, including in the labour sector, by progressively securing freedom of movement for workers and abolishing restrictions on freedom of establishment and freedom to provide services, in order to improve the standard of living of the Turkish people and to facilitate the accession of the Republic of Turkey to the Community at a later date.
- 4 Article 1 of the Additional Protocol, which, under Article 62 thereof, forms an integral part of the EEC-Turkey Association Agreement, lays down the conditions, arrangements and timetables for implementing the transitional stage referred to in Article 4 of that agreement.
- 5 Article 41(1) of the Additional Protocol embodies a standstill clause which provides 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.'

*National legislation*

6 The Immigration Act 1971 provides:

‘ ...

3. General provisions for regulation and control

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen –

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given a limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely –

(i) a condition restricting his employment or occupation in the United Kingdom;

...

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; ...

(3) In the case of a limited leave to enter or remain in the United Kingdom, –

(a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attaching to the leave shall cease to apply'.

7 The 1972 Statement of Immigration Rules for Control after Entry ('the 1972 Immigration Rules') provided:

#### 'PART A. VARIATION OF LEAVE TO ENTER OR REMAIN

#### SECTION I. GENERAL

...

## General considerations

...

4. The succeeding paragraphs set out the main categories of people who may be given limited leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their applications, or in initiating any variation of their leave. In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country.

...

## Businessmen and self-employed persons

21. People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business,

proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required..'

- 8 It is common ground that the 1972 Immigration Rules, in force as at the date on which the Additional Protocol entered into force in respect of the United Kingdom of Great Britain and Northern Ireland – that is to say, on 1 January 1973 – are the provisions applicable to Turkish nationals who are able to rely on Article 41(1) of the Additional Protocol in order to take the benefit of that standstill clause. In the national court's view, when dealing with applications for leave to remain from those seeking to pursue activities as self-employed persons in the United Kingdom, the 1972 Immigration Rules are more favourable than the 2008 Statement of Immigration Rules ('the 2008 Immigration Rules'), in force at the material time.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 9 On 27 October 2000, Mr Oguz was granted leave to enter the United Kingdom as a student. On successive occasions, he was granted further leave to remain as a student, the last time for a period which expired on 31 August 2006. The grants of leave were subject to the condition that Mr Oguz would not '... engage in any business or profession without the consent of the Secretary of State for the Home Department'.



- 10 On 18 August 2006, Work Permits (UK), the Home Office agency responsible for considering applications for work permits in the United Kingdom, notified The Trade Link Company Limited (“Trade Link”) that it had approved that company’s application for a work permit for Mr Oguz. Subsequently, Mr Oguz was granted further leave to remain for five years as a work permit holder from 29 August 2006. That further leave to remain was subject to the same conditions as those attaching to the leave granted when he entered the United Kingdom.
- 11 On 16 November 2006, Mr Oguz was informed by Trade Link that, for financial reasons, his employment had been terminated with immediate effect. On 14 November 2007, a fresh application by Mr Oguz for a work permit, so that he could work as a sales and marketing manager for a newspaper, was refused by Work Permits (UK) on the grounds that the requirements for the position in question had been too restrictive and could have discouraged resident workers from applying.
- 12 On 20 March 2008, Mr Oguz submitted an application for further leave to remain in the United Kingdom as a self-employed business person under the 1972 Immigration Rules.
- 13 It was apparent from that application for further leave to remain as a financial services and marketing consultant that Mr Oguz had already entered into self-employed business by 20 March 2008. Mr Oguz subsequently confirmed that he had set up his business in February 2008, and that he was operating it by March of that year. On 2 September 2008, however, Mr Oguz informed the relevant authorities that he had ceased his self-employed work on 11 August 2008, and that he did not intend to recommence self-employed work until a decision had been made on his application.

- 14 Mr Oguz's application for further leave to remain was refused by decision of the Secretary of State on 21 October 2008 on the basis of the 2008 Immigration Rules. Additionally, the duration of Mr Oguz's existing leave to remain was curtailed on the ground that he had ceased to satisfy the conditions attaching to his leave to remain.
- 15 The reason for the refusal was that Mr Oguz had established his self-employed business in breach of the conditions attaching to his previous leave to remain as a work permit holder and had not informed the Secretary of State that the employment with Trade Link had been terminated. Such breaches were tantamount to fraudulent or abusive activity which excluded him from taking the benefit of the standstill clause embodied in Article 41(1) of the Additional Protocol.
- 16 Mr Oguz appealed against that decision to the Asylum and Immigration Tribunal on 4 November 2008. By decision of 19 January 2009, the Immigration Judge dismissed that appeal. The Immigration Judge found that Mr Oguz had not acted fraudulently and that the Secretary of State had been informed on 1 June 2007 of the termination of Mr Oguz's employment with Trade Link. Nevertheless, in setting up and operating a business, Mr Oguz had acted in breach of the conditions attaching to his leave to remain as a work permit holder and, in consequence, he was not entitled to rely on the standstill clause.
- 17 Mr Oguz sought an order for reconsideration. By decision of 26 June 2009, the Senior Immigration Judge held that the Immigration Judge had not erred in law and, accordingly, that the decision dismissing Mr Oguz's appeal was well founded.

- 18 On 11 November 2009, Mr Oguz was granted permission to appeal before the Court of Appeal (England and Wales) (Civil Division). The Centre for Advice on Individual Rights in Europe, a charity whose mission is to provide information and advice on human rights, was granted leave to intervene in the proceedings before the national court.
- 19 That court asks whether the reasoning of the Court of Justice in Case C-235/99 *Kondova* [2001] ECR I-6427 can be applied to facts such as those of the case before it. In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘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...?’

### **Consideration of the question referred for a preliminary ruling**

- 20 By its question, the national court asks whether Article 41(1) of the Additional Protocol must be interpreted as meaning that it may be relied on by a Turkish national who, having leave to remain in a Member State on condition that he does not engage in any business or profession, nevertheless enters into self-employment in

breach of that condition and later applies to the national authorities for further leave to remain on the basis of the business which he has meanwhile established.

- 21 According to the file submitted to the Court, if Mr Oguz were not able to rely on the standstill clause embodied in Article 41(1) of the Additional Protocol, his application for further leave to remain as a self-employed business person would be refused automatically on the basis of the 2008 Immigration Rules. By contrast, if the standstill clause were applied, the relevant authorities would be required to assess Mr Oguz's application in accordance with the 1972 Immigration Rules.
- 22 Article 41(1) of the Additional Protocol prohibits the introduction, as from the date of entry into force of the legal act of which that provision forms part in the host Member State, of any new restrictions on the exercise of freedom of establishment or freedom to provide services, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to make use of those economic freedoms (see Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 69, and Case C-92/07 *Commission v Netherlands* [2010] ECR I-3683, paragraph 47).
- 23 It is settled law that Article 41(1) of the Additional Protocol has direct effect in the Member States and, accordingly, 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 Case C-37/98 *Savas* [2000] ECR I-2927, paragraphs 46 to 54, and Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 45).

- <sup>24</sup> Mr Oguz's right to rely before the national courts on Article 41(1) of the Additional Protocol in order to ensure that the 1972 Immigration Rules are applied to him is contested by the Secretary of State on the ground that, where a person has acted in breach of a condition of leave prohibiting him from engaging in self-employment, the lodging of an application for leave to remain based on self-employment constitutes an abuse of rights. Such an abuse precludes that person from relying on the application of the standstill clause.
- <sup>25</sup> It is clear from the case-law of the Court that EU law cannot be relied on for abusive or fraudulent ends and that 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 EU law. However, the national courts must assess such conduct in the light of the objectives pursued by the provisions of EU law concerned (see Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 25, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 42).
- <sup>26</sup> It is noteworthy that Article 41(1) of the Additional Protocol is not capable of conferring on a Turkish national a substantive right, in this case the right of establishment, the latter remaining governed by national law (see, to that effect, *Soysal and Savatli*, paragraph 47).
- <sup>27</sup> The standstill clause embodied in Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of the right of establishment by imposing an absolute prohibition on national authorities, barring them from creating new obstacles 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 (see *Tum and Dari*, paragraph 61, and Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-12845, paragraph 53).

- 28 A standstill clause, such as that embodied 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 which it replaces, but as a quasi-procedural rule which specifies, *ratione temporis*, 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 (*Tum and Dari*, paragraph 55).
- 29 Thus, in the case before the referring court, the standstill clause merely determines the provisions of the UK immigration rules in the light of which the national authorities must decide on Mr Oguz's application for further leave to remain as a self-employed person, and in no way prejudices the assessment of the merits of that application.
- 30 In his written observations, Mr Oguz states that any abuse on his part could still be taken into account at a later stage under the relevant provisions of national law, that is to say, when the 1972 Immigration Rules are applied. At the hearing, the UK Government confirmed that paragraph 4 of those rules provides a mechanism for penalising the abuse of rights.
- 31 The standstill clause does not therefore preclude Member States from penalising, within the framework of national law, abuse relating to immigration.
- 32 The standstill clause must accordingly be understood as applying to a stage before the merits of the case are assessed and before an assessment is made as to whether there is any abuse of rights which may be imputed to the party concerned.

- 33 In that regard, the Court has held that the issue of whether or not a Turkish national is legally resident in the territory of a Member State at the time of his application to establish himself in that State is irrelevant for the purposes of applying the standstill clause (see *Tum and Dari*, paragraph 59).
- 34 Consequently, in accordance with that case-law, the fact that an individual, such as Mr Oguz, has not complied with the conditions attaching to his leave to remain is irrelevant for the purposes of applying Article 41(1) of the Additional Protocol.
- 35 The national court also questions whether the Court's findings in *Kondova* apply to the dispute in the main proceedings.
- 36 In *Kondova*, which 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, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1; 'the EC-Bulgaria Association Agreement'), the Court held that if Bulgarian nationals were allowed to apply at any time for establishment in the host Member State, notwithstanding a previous infringement of its national immigration legislation, such nationals might be encouraged to remain illegally within the territory of that State and not to submit to the national system of control until the substantive requirements under that legislation had been satisfied (see *Kondova*, paragraph 77).
- 37 The Court also made it clear that such an interpretation would risk depriving Article 59(1) of the EC-Bulgaria Association Agreement of its effectiveness and opening the way to abuse by endorsing infringements of national legislation on the admission and residence of foreigners (*Kondova*, paragraph 79).

- 38 On the basis of those considerations, the Court held that a Bulgarian national who intends to take up an activity in a Member State as an employed or self-employed person but who circumvents the relevant national controls by falsely declaring that he is entering that Member State for the purpose of seasonal work places himself outside the sphere of protection afforded to him under the association agreement in question (*Kondova*, paragraph 80).
- 39 Relying on that case-law, the UK Government contends that the standstill clause embodied in Article 41(1) of the Additional Protocol should be interpreted as meaning that a person cannot invoke that provision so as improperly to circumvent a national system of prior control. Indeed, just as the Court pointed out in *Kondova*, if Turkish nationals were allowed to apply at any time for establishment in the host Member State, such nationals might rely on the clientele and business assets which they may have built up during an unlawful stay in the host Member State, or on funds accrued there, perhaps through taking employment, and so present themselves to the national authorities as self-employed persons now engaged in, or likely to be engaged in, a viable activity, whose rights ought to be recognised pursuant to the EEC-Turkey Association Agreement.
- 40 Such an argument cannot succeed.
- 41 First of all, it must be emphasised that the facts which gave rise to the judgment in *Kondova* differed significantly from the facts of the case before the referring court.



- 42 In contrast to Mr Oguz, who was lawfully granted leave to enter and to remain in the United Kingdom and who was not in breach of the requirements laid down by the national legislation until he established a business, eight years after his entry into that Member State, Ms Kondova had acknowledged that, in order to gain entry to the United Kingdom, she had knowingly misled the entry clearance officer for that Member State, who had granted her her visa in Bulgaria, and the immigration officer who had questioned her on her arrival in the United Kingdom.
- 43 Thus, it is not disputed that, by that conduct, Ms Kondova had infringed the United Kingdom rules on the initial entry of third-country nationals to the territory of that Member State, for which that State was responsible.
- 44 Moreover, the regulatory framework at issue in *Kondova* was also different. By contrast with Article 41(1) of the Additional Protocol, Article 45(1) of the EC-Bulgaria Association Agreement was the rule of substantive law on the basis of which the merits of an application for establishment fell to be assessed and which was allegedly infringed in Ms Kondova's case. In accordance with that provision, each Member State was to grant Bulgarian nationals established in its territory treatment no less favourable than that accorded to its own nationals. In the light of those considerations and of the fact that no standstill clause is contained in Article 45(1) of the EC-Bulgaria Association Agreement, that provision must be regarded as being different in nature from Article 41(1) of the Additional Protocol.
- 45 In those circumstances, as the Advocate General pointed out at points 58 and 59 of her Opinion, it is not surprising that in *Kondova* the Court accepted that the benefit of that substantive right could be denied on grounds of abuse of rights. The finding in *Kondova* cannot be transposed to the case of a standstill clause such as that embodied in Article 41(1) of the Additional Protocol, since that clause does not confer

a substantive right of establishment; nor does it provide for equal treatment with the Member State's own nationals.

- <sup>46</sup> In the light of the foregoing, the answer to the question is that Article 41(1) of the Additional Protocol must be interpreted as meaning that it may be relied on by a Turkish national who, having leave to remain in a Member State on condition that he does not engage in any business or profession, nevertheless enters into self-employment in breach of that condition and later applies to the national authorities for further leave to remain on the basis of the business which he has meanwhile established.

## **Costs**

- <sup>47</sup> 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, 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, must be interpreted as meaning that it may be relied on by a Turkish national who, having leave to remain in a Member State on condition that he does not engage in any business**

**or profession, nevertheless enters into self-employment in breach of that condition and later applies to the national authorities for further leave to remain on the basis of the business which he has meanwhile established.**

[Signatures]