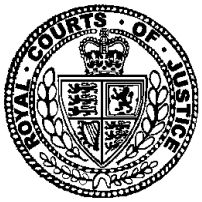

Neutral Citation Number: [2018] EWCA Civ 2850

Case No: C9/2016/2767

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
MR JUSTICE GREEN, SITTING AS AN UPPER TRIBUNAL JUDGE
JR/15777/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE NEWEY
and
LORD JUSTICE LEGGATT

- -

Between:

SONER KOTUK	**Appellant**
- and -	
ENTRY CLEARANCE OFFICER, WARSAW	**Respondent**

- -

Mr John Walsh (instructed by **Regnum Solicitors**) for the **Appellant**
Ms Deok Joo Rhee QC and **Mr David Mitchell** (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 11 December 2018

- -

Approved Judgment

Lord Justice Leggatt:

1. This appeal raises a question about the scope of the 'standstill' provision in article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey signed at Ankara on 12 September 1963 (the "Ankara Agreement").

The dispute

2. On 10 October 2014 the Entry Clearance Officer, Warsaw, who is the respondent to this appeal, granted the appellant Mr Soner Kotuk, who is a Turkish national, a visa which gave Mr Kotuk leave to enter and remain in the United Kingdom for just over nine years until 21 October 2023. In these proceedings Mr Kotuk has applied for judicial review of that decision. He claims that he should have been granted indefinite leave to remain in the UK in circumstances where his wife and sponsor, who is also a Turkish national, had been granted indefinite leave to remain on 22 April 2013. Mr Kotuk's wife had established a business in the UK and had previously been granted limited leave to remain as a businesswoman before she successfully applied for indefinite leave to remain.

3. On 15 June 2016 Green J, sitting as a judge of the Upper Tribunal (Immigration and Asylum Chamber), dismissed the claim. Mr Kotuk appeals against that decision, with permission granted by Sir Stephen Silber sitting as a judge of the Court of Appeal.

The Ankara Agreement

4. As its full name indicates, the Ankara Agreement established an "Association" between the European Economic Community and Turkey, with the aim (set out in article 2) of promoting the strengthening of trade and economic relations between the parties and, to that end, progressively establishing a customs union between Turkey and the Community. The Ankara Agreement includes "economic provisions" whereby the parties agreed to be guided by relevant articles of the Treaty establishing the Community for the purposes of progressively securing freedom of movement for workers between them (article 12), abolishing restrictions on freedom of establishment between them (article 13) and abolishing restrictions on freedom to provide services between them (article 14).

5. The Ankara Agreement also includes an Additional Protocol signed at Brussels on 23 November 1970. Article 41(1) of the Additional Protocol states:

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

This provision has been described as a 'standstill' clause.

6. In *R v Secretary of State for the Home Department, ex parte Savas* (C-37/98) [2000] ECR I-2927; [2000] 3 CMLR 729 the Court of Justice of the European Union (CJEU) held that article 13 of the Ankara Agreement is not sufficiently precise to establish any rule which has direct effect in the internal legal order of member states. However, article 41(1) of the Additional Protocol does have such direct effect. The

CJEU further held that article 41(1) is not in itself capable of conferring upon a Turkish national a right of establishment and, as a corollary, a right of residence in a member state. However, article 41(1) 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 the 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.

The 1973 Immigration Rules

7. The Additional Protocol entered into force with regard to the UK when the UK became a member of the European Economic Community on 1 January 1973. The conditions relating to residence which on that date applied to Turkish nationals (along with other foreign nationals) who wished to establish or had established a business in the UK were contained in the Immigration Rules for Control on Entry (HC 509) and for Control after Entry (HC 510) laid before Parliament on 23 October 1972. In these proceedings Mr Kotuk relies on rule 35 of HC 509, which states:

> "The wife and children under 18 … of a person admitted to the United Kingdom to take or seek employment or as a businessman, a person of independent means or a self-employed person, should be given leave to enter for the period of his authorised stay. Their freedom to take employment should not be restricted …"

It is common ground that, as indicated in the current guidance published by the Home Office on the "business provisions" of the 1973 Immigration Rules, the term "wife" in this rule is to be treated as including a person's husband, civil partner or unmarried or same sex partner.

Mr Kotuk's case

8. Mr Kotuk's case in this action, shortly stated, is that:

(1) By reason of article 41(1) of the Additional Protocol, his right to reside in the UK as the spouse of a person who has a right of establishment and hence a right of residence in the UK is governed by rule 35 of HC 509;

(2) His wife has been granted indefinite leave to remain and thus authorised to reside indefinitely in the UK; and

(3) Applying rule 35, Mr Kotuk was entitled to be given leave to enter the UK with a right to remain for the same period as his wife – i.e. indefinitely.

The decision of the Upper Tribunal

9. In the Upper Tribunal Green J rejected Mr Kotuk's case and dismissed the claim. In summary, the reasons given by the judge were that:

(1) Rule 35 of HC 509, properly interpreted, does not apply where the person who has already been admitted to the UK has been granted indefinite leave to remain in the UK;

(2) Equally, once that person has been granted indefinite leave to remain, the Ankara Agreement is no longer applicable, as any economic rights which he or she is exercising derive from the status of settlement and not from the Ankara Agreement; and

(3) Family members of Turkish nationals cannot in any case benefit from the standstill provision in article 41(1).

The issues on this appeal

10. On this appeal Mr Kotuk challenges these reasons for dismissing the claim. The respondent seeks to defend at the least the first two of the judge's reasons but also, by a respondent's notice, seeks to uphold the decision of the Upper Tribunal on two alternative or additional grounds. The first of these grounds is that the settlement of Turkish nationals and their family members is said to be outside the scope of article 41(1). The second ground is that granting Mr Kotuk indefinite leave to remain would be inconsistent with article 59 of the Additional Protocol, which provides:

> "In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community."

In 1973 a citizen of a member state had no permanent right of residence in another member state. Such a right has since been introduced by Directive 2004/38 (the "Citizens' Directive"). But under the Citizens' Directive a person must be resident in the host member state for at least five years before a permanent right of residence may be acquired. The respondent argues that it would be contrary to article 59 to treat a family member of a Turkish national as entitled to indefinite leave to remain by reason of the Ankara Agreement in circumstances where a family member of an EU national would not have such a right.

The court's approach

11. Showing appropriate realism, Mr Kotuk's counsel, Mr Walsh, did not object to the respondent's application to rely on these additional grounds. Mr Walsh further suggested that the court might wish to consider as the first issue the first additional ground, being the respondent's argument that the settlement of Turkish nationals and their family members is outside the scope of article 41(1) of the Additional Protocol. Although this issue was not raised in the Upper Tribunal, it is a point of law which, if correct, provides a complete answer not only to this claim but also, potentially, to any claim which relies on the Ankara Agreement to assert a right of settlement in the UK.

12. The court agreed that it is appropriate to deal with this point first. In the light of our decision, announced at the hearing and explained below, that the respondent's argument is correct, we did not hear oral argument on the other issues.

The respondent's case on the scope of article 41(1)

13. The respondent's short point, as advanced by Ms Rhee QC, is this. Article 41(1) is concerned with the freedom of establishment (and the freedom to provide services) of

Turkish nationals in what is now the European Union. It does not refer to residence and does not expressly or directly prohibit member states from introducing new restrictions on residence. Article 41(1) applies to residence only by implication, in so far as restrictions on residence prevent or impede the exercise of the right to establish a business (or to provide services) in a host member state. In order to exercise the right of establishment, it is not necessary for the person who wishes to establish or who has established a business to be granted a permanent right of residence, or settlement, in the member state concerned; it is only necessary that this person should be entitled to reside in the member state so long as he or she is exercising the right of establishment there. The same applies *a fortiori* to members of the person's family whose rights are parasitic on the rights of the person who is exercising the right of establishment.

14. It follows, the respondent argues, that article 41(1) does not apply to a claim by a Turkish national or by his or her spouse (or other relevant family member) to be granted a permanent right of residence, or settlement, in the member state where the Turkish national is exercising a right of establishment. Accordingly, Mr Kotuk's application for indefinite leave to remain was not within the scope of article 41(1). In making his application, Mr Kotuk was therefore not entitled to rely on the immigration rules as they stood in 1973 but only on the current, less favourable immigration rules regarding the reunification of family members. It is accepted that, if the current immigration rules are applicable, the respondent was justified in refusing to grant Mr Kotuk indefinite leave to remain.

Authorities

15. The respondent's argument is supported by the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *R (Aydogdu) v Secretary of State for the Home Department (Ankara Agreement – family members – settlement)* [2017] UKUT 00167 (IAC), a case decided by its President, McCloskey J, since the decision of the Upper Tribunal in the present case. The facts of the *Aydogdu* case were similar to those of the present case, save that in the *Aydogdu* case the applicant had already been given leave to enter the UK before applying for indefinite leave to remain. It has not been suggested on behalf of Mr Kotuk that this is a material distinction.

16. At para 30 of the judgment, McCloskey J formulated the main question to be determined in these terms:

> "[C]ould a refusal to grant indefinite leave to remain (i.e. settlement) to the dependants of a Turkish national who has entered the United Kingdom and established a business therein in accordance with the Ankara Agreement frustrate, or extinguish, the ability of a Turkish national to continue to do so?"

McCloskey J answered this question (at para 34) in the following way:

> "The grant of limited leave to enter and remain to the family members of a Turkish national exercising rights will, in all cases bar the most exceptional, suffice to ensure the efficacious exercise and enjoyment of the economic right in play. The

> higher, optimum status of settlement is not necessary for this purpose. In the language of the governing jurisprudence, the grant of settlement status is neither a prerequisite to nor a corollary of the exercise of the primary rights engaged. There is no evidence warranting the assessment that only settlement will suffice to ensure that the rights in question can be efficaciously exercised. Nor is there any basis upon which judicial notice of this detriment is justifiable."

17. In *BA (Turkey) v Advocate General for Scotland* [2017] CSOH 27; 2017 SLT 1061, a Scottish case decided very shortly before the judgment of the Upper Tribunal in the *Aydogdu* case was promulgated (and which was not referred to in it), the Court of Session (Outer House), independently reached a similar conclusion on similar facts and for similar reasons. At para 50 of the judgment, Lord Armstrong said:

> "… I am persuaded that settlement is not a corollary of the freedom of establishment, but that, rather, the nature of the residence which is a corollary of that freedom is that necessary to render the freedom effective in the sense of allowing the setting up of a business and thereafter the maintaining of it. I do not accept that longer-term residence, of the nature of settlement or indefinite leave to remain, is necessary for that purpose."

18. These authorities do not of course bind this court but both judges relied in their reasoning on a decision of the Court of Appeal which, unless distinguishable, is binding. This decision in the case of *R (Buer) v Secretary of State for the Home Department* [2014] EWCA Civ 1109; [2015] 1 CMLR 3, was concerned with the scope and interpretation of a similar standstill clause which prohibits the introduction of new restrictions on the freedom of movement of workers under the Ankara Agreement.

19. Under the Ankara Agreement a body called the Association Council was established which on 19 September 1980 issued Decision No 1/80 (the "Decision"), the relevant provisions of which have the status of directly effective EU law. Article 6(1) of the Decision gives a Turkish worker rights of access to employment in a member state. The Decision also contains, in article 13, a standstill clause of a similar kind to article 41 of the Additional Protocol, which states:

> "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."

20. In the *Buer* case a Turkish national who had been lawfully present in the UK as an employed worker under article 6(1) of the Decision applied after four years for indefinite leave to remain. He relied on the standstill clause in article 13 of the Decision to argue that the immigration rules to be applied were those in force in 1980. The Court of Appeal rejected that argument. One of the two reasons given by Richards LJ (with whose judgment McCombe and Maurice Kay LJJ agreed) for doing

so was that article 13 preserves rights of residence only in so far as such rights are necessary for access to work and does not extend to rights of settlement.

21. Ms Rhee QC on behalf of the respondent in the present case submits that the reasoning of the Court of Appeal applies equally to the standstill clause in article 41(1) and demonstrates that it does not extend to rights of settlement.

The appellant's arguments

22. For Mr Kotuk, Mr Walsh emphasised that the rights of establishment and associated rights of residence on which Mr Kotuk's application for indefinite leave to remain was based are not rights conferred by the Ankara Agreement – which, as mentioned earlier, does not confer any directly effective right of establishment or right of residence: the rights that Mr Kotuk asserts are rights under UK domestic law. The only relevance of the Ankara Agreement to his claim is that article 41(1) of the Additional Protocol entitles Mr Kotuk to have his case considered in accordance with the most favourable domestic rules which have been applicable since the Additional Protocol entered into force in the UK, which are those contained in the Immigration Rules for Control on Entry (HC 509) and Control after Entry (HC 510) as they stood on 1 January 1973.

23. Mr Walsh submitted that the immigration rules applicable on that date which gave rights to persons who wished to establish or had established a business in the UK and to members of their families need to be considered as a whole. He submitted that the applicable rules, and in particular rule 35 of HC 509 on which Mr Kotuk relies, applied equally to residence for a limited period and for an indefinite period (i.e. settlement). Thus, Mr Kotuk is entitled to settle in the UK if, as he maintains, the effect of rule 35 on its proper interpretation is to entitle an applicant who comes within the scope of that rule to be granted leave to remain for the same period as his or her spouse (or partner or parent, as the case may be).

24. Mr Walsh was not able to cite any authority in support of this approach. He accepted that the decisions in the *Aydogdu* and *BA (Turkey)* cases are inconsistent with it but submitted that both those cases were wrongly decided. Mr Walsh further submitted that the present case is distinguishable from the *Buer* case because the scope of article 41(1) is different from the scope of article 13 of the Decision, which was in issue in the *Buer* case. In the *Buer* case the Court of Appeal held that the standstill provision in article 13 of the Decision applies only until a Turkish worker has acquired rights under article 6 of the Decision. It is therefore not concerned with longer term residence or settlement. By contrast, Mr Walsh submits, article 41(1) of the Additional Protocol is not limited in duration in that way, as there is no counterpart to article 6 of the Decision (which confers rights to work in employment) in cases where the economic freedom being exercised is the freedom of establishment or to provide services.

Discussion

25. In my view, none of these arguments – gracefully made as they were by Mr Walsh on Mr Kotuk's behalf – provides any answer to the respondent's case on this issue. There is no doubt that, as Mr Walsh submits, any right which Mr Kotuk has to reside in the UK is a right provided by the UK immigration rules and not by article 41(1) of

the Additional Protocol, which does not confer any substantive rights. But the scope of article 41(1) is nevertheless critical to Mr Kotuk's claim because it is only if a right of residence provided by the UK immigration rules as they stood on 1 January 1973 has been preserved by article 41(1) that Mr Kotuk can rely on such a right.

26. It is clear that article 41(1) does not preserve for Turkish nationals the whole system of immigration rules that was in force on 1 January 1973. The only restrictions introduced since that date which, by reason of article 41(1), do not apply to Turkish nationals are restrictions on freedom of establishment (and to provide services). To show that a right of entry or residence which would have been available to Mr Kotuk on 1 January 1973 has been preserved, it must therefore be shown that the denial of the right would restrict freedom of establishment by making it materially more difficult for his wife to exercise her right to establish a business in the UK. So assuming for present purposes that rule 35 of HC 509, if applied in this case, would give Mr Kotuk a right of settlement in the UK, it is only if denying him that right (and instead granting him limited leave to remain) would interfere with his wife's right of establishment that he can invoke rule 35 (or any other provision of the 1973 immigration rules).

27. Not only is this analysis in my view irrefutable simply as a matter of interpretation of article 41(1), considered apart from authority, but it is confirmed by a clear and consistent line of cases comprising decisions of the CJEU as well as the decisions of the UK courts mentioned above.

28. In addition to the *Savas* case to which I have already referred (at para 6 above), other pertinent decisions of the CJEU cited in the *Aydogdu* and *BA (Turkey)* cases include *Dogan v Bundesrepublik Deutschland* (Case C-138/13) [2015] 1 CMLR 16 and *Genc v Integrationsministeriet* (Case C-561/14) [2016] 3 CMLR 21. In the *Dogan* case the wife of a Turkish national who had a permanent right of residence in Germany where he was carrying on a business applied for a visa to join him. Her application for a visa was refused on the basis that she lacked basic knowledge of the German language, as required by German immigration law. The CJEU held (para 36) that this requirement constituted a "new restriction" on freedom of establishment precluded by article 41(1). The test which the CJEU applied was whether the restriction made family reunification difficult or impossible such that the Turkish national who had decided to establish himself in a member state could find himself obliged to choose between his economic activity in the member state and his family life.

29. In the *Genc* case the Grand Chamber of the CJEU held that the same test should be applied to determine whether a restriction on the entry of a child to join his father who was a Turkish national working in Denmark was covered by article 13 of the Decision. The court reasoned (in para 41) that:

> "… as the standstill clause in article 13 of Decision No 1/80 is of the same kind as that contained in article 41(1) of the Additional Protocol, and as the objective pursued by those two clauses is identical, the interpretation of article 41(1) must be equally valid as regards the standstill obligation which is the basis of article 13 in relation to freedom of movement for workers."

Accordingly, the court held that it is only in so far as a restriction on entry or residence of family members is likely to affect the exercise of the economic activity (be it freedom of movement for workers or freedom of establishment or to provide services) on the territory of the member state concerned that the restriction is covered by the standstill clauses in article 13 of the Decision or article 41(1) of the Additional Protocol (see paras 43-50).

30. The *Genc* case confirms that the decision in the *Buer* case that article 13, on its proper interpretation, does not relate to settlement in the host member state also applies to article 41(1). It is true that, as Mr Walsh emphasised, in the *Buer* case the Court of Appeal held that article 13 does not apply to Turkish workers who already qualify for rights in relation to employment and residence under article 6, and there is no equivalent provision to article 6 of the Decision in the field of freedom of establishment. However, the Court of Appeal also held that, in relation to those workers to whom article 13 is relevant, the standstill provision only applies to residence as a corollary of employment and in order to render access to employment effective, which is very different from a right to settlement or permanent residence: see the *Buer* case at paras 39-42.

31. By the same reasoning, article 41(1) only applies to residence in so far as it is a corollary, or necessary to the effective exercise, of the right to establish a business (or to provide services) in a host member state. Provided that a Turkish national who wishes to establish a business in a member state is entitled to reside in its territory for as long as he or she is carrying on the business, any restriction on settlement or permanent residence does not interfere with the exercise of the economic freedom concerned. The same applies *a fortiori* to any restriction on the settlement of immediate family members, provided they are also entitled to reside in the member state while the right of establishment is being exercised. The suggestion, made by Mr Walsh at one point in argument, that it will act as a disincentive to Turkish nationals to establish themselves in business in the UK if their dependants are not granted permanent rights of residence is not only speculative but irrelevant. The obligation of the UK under the standstill clause in article 41(1) is an obligation not to introduce new restrictions on the freedom of establishment; it is not an obligation to provide positive incentives to Turkish nationals to establish themselves in business in the UK by granting greater rights than they need for that purpose such as rights for themselves or their family members to remain permanently in the UK irrespective of whether the right of establishment is still being exercised.

Conclusion

32. I conclude that the respondent is correct in submitting that restrictions on the settlement in the UK of a Turkish national, or on the spouse, partner or child of a Turkish national, who wishes to exercise or is exercising a right of establishment in the UK is not within the scope of article 41(1) of the Additional Protocol (nor otherwise within the scope of the Ankara Agreement). It follows that Mr Kotuk's claim in these proceedings must fail and his appeal should therefore be dismissed.

33. On this basis the other issues raised on the appeal do not arise and it is unnecessary to consider them.

Newey LJ:

34. I agree.