Upper Tribunal
(Immigration And Asylum Chamber) **Appeal Number: IA/21588/2014**

THE IMMIGRATION ACTS

Heard at: Field House **Decision and Reasons Promulgated**
On: 10 June 2015 **On: 20 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NILUFER ISIK
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr B Ali, Solicitor Advocate (instructed by Stoke and White LLP

DETERMINATION AND REASONS

1. I shall refer to the appellant as the secretary of state and the respondent as 'the claimant'.

2. The claimant is a national of Turkey, born on 1 November 1974. Her appeal against the secretary of state's decision to refuse to grant her indefinite leave to remain as a family member of a business person settled in the UK under the Turkey (European Community Association) Agreement was allowed by First-tier Tribunal Judge Shamash both under the Standstill Clause and under Article 8 of the Human Rights Convention.

3. The grounds of appeal in the permission application related to the ambit of the application of the Turkey EC Association Agreement and in particular the proper construction of Article 41(1) of the additional protocol to the Ankara Agreement.

4. The claimant entered the UK on 22 June 2013, having been granted entry clearance on 31 May 2013 for a period of six months as the dependant of an ECAA business person.

5. Prior to the expiry of her visa, there was communication between her solicitors and an Operation Manager at UKBA. This resulted in advice to the legal representative as to the making of an application using the ECAA 3 form. There were further letters and representations. In due course it was claimed that the general advice given by the official was incorrect.

6. The advice from the official had been that in the circumstances the claimant should apply under the family immigration rules. However, she would not be able to meet the rules under Appendix FM. There was no provision under the Appendix covering her particular circumstances. The Judge had regard to the ECCA signed on 12 September 1963 and set out the relevant articles.

7. The Judge relied on authorities from the European Court. She found that the claimant would have met the requirements for indefinite leave to remain prior to the change in the rules under Appendix FM at the time the eligibility criteria were less stringent.

8. She found that the principles of the Ankara Agreement and the additional protocols apply even after the spouse of a person such as the claimant has been granted permanent settlement or ILR [35].

9. On 25 March 2015, First-tier Tribunal Judge Levin granted the appellant permission to appeal regarding the application of the standstill provisions imposed by the Ankara Agreement, but refused permission in relation to Article 8.

10. Judge Levin considered that it was arguable that the standstill provisions apply only to first admissions to the territory of the member state. Accordingly, the Judge arguably erred by applying the provisions to the claimant, who had not made her application for ILR at the same time as her husband.

11. At the commencement of the hearing on 24 June 2015, Mr Walker stated at the outset that having regard to the grounds of appeal in support of the secretary of state's application for permission to appeal, he was not in a position to make any submissions. He had had the benefit of discussions with Mr Ali and that he accepted that there were no restrictions relating to the claimant.

12. Mr Ali on behalf of the claimant in a helpful note has set out the provisions of Article 41(1) of the Additional Protocol. He submitted that it is clear that the

standstill clause applies to the introduction of any new restrictions on the freedom of establishment and the freedom to provide services.

13. He referred to two authorities. The first was Tum and Dari (External Relations) [2007] EUECJ C 16/05 (20 September 2007). He submitted that the secretary of state erred in her contention in the grounds that the prohibition on restrictions related solely to the first admission. This is inconsistent with the holding paragraph in the decision in Tum and Dari.

14. The ruling by the Court which is to the following effect:

> 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.

15. He submitted that the section in the relevant holding by the Court which refers to the first admission is an illustration of the application of the principles and a statement of the ratio.

16. The second case relied on was Naime Dogan v Bundesrepublik Deutschland (Case) C-138/13), a judgement of the second chamber dated 10 July 2014. He submitted that the secretary of state wrongly concluded that the ratio is qualified or restricted to entry clearance/first admission applications. That decision establishes the principles of the Ankara Agreement and the additional protocol applies even after the spouse of persons such as the respondent have been granted permanent settlement or ILR in a member state.

17. The relevant facts in that case by way of illustration were that the main applicant, Mrs Dogan, applied to join her husband who was a Turkish worker with permanent residence in Germany. She provided a German language certificate but the German authorities dismissed her appeal finding that she was illiterate. The first question was whether Article 41(1) of the additional protocol was to be interpreted as meaning that the standstill clause set out in the provision precludes a measure of national law, introduced after the entry into force of that additional protocol in that Member State, who wished to enter the territory of that state for the purpose of family reunification, the condition that they demonstrate beforehand that they have acquired basic knowledge of the member state.

18. The Court held that it should be noted that it is settled case law that the standstill clause set out in Article 41(1) of the additional protocol prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of the freedom of establishment or the freedom to provide services on the territory of that Member State subject to stricter requirements than

those that applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned – judgment in Dereci and others, C-256/11, para 88.

19. In that case, it was not disputed that the national provision in issue which brought about a tightening of conditions of admission concerning family reunification which had existed previously, at the date after 1 January 1973 on which the Additional Protocol was entered into force. In Dogan, the appellant provided a German national certificate but the German authorities dismissed her appeal, finding that she was illiterate.

20. The Court's ruling with regard to Article 41(1) of the Additional Protocol signed in November 1970 has been interpreted as meaning that the standstill clause set out in the annex must be interpreted as precluding a measure of national law, introduced after the entry into force of that additional protocol in the member state concerned, which imposes on spouses of Turkish nationals residing in that member state, who wish to enter the territory of that state for the purposes of family reunification, the condition that they demonstrate beforehand that they have acquired basic knowledge of the official language of that member state.

21. I have had regard to the grounds of appeal relied on by the secretary of state where it is contended that the First-tier Tribunal Judge failed to consider that the restrictions on introducing less favourable conditions to ECAA applications and the provisions in force in 1973 are clearly stated as relating to the first admission to the territory of the member state. Accordingly, it is contended that the claimant's application was a further application that took place after the first admission.

22. However, I find that the Article as set out by the Judge at paragraph 20 in any event governed the first admission to the territory of that state of Turkish nationals intending to establish themselves in business there on their own account. This was not the basis upon which the claimant sought indefinite leave to remain.

23. In the circumstances the First-tier Tribunal Judge noted that the claimant could not meet the requirements of Appendix FM as she entered the UK on a six month visa. That requirement, however, post dated the Ankara Agreement. She would have met the requirements for ILR prior to the change in the rules under Appendix FM. At that time, the eligibility criteria were less stringent and all she would have to show was that she was legally in the UK at the point of application, which she was. The decision in Dogan establishes that the principles of the Ankara Agreement and the additional protocols apply even after the spouse of a person such as the claimant has been granted permanent settlement or ILR.

24. Having regard to the foregoing analysis, the decision of the First-tier Tribunal Judge was in accordance with the standstill clause.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law and shall accordingly stand.

No anonymity direction is made.

Signed Date**:** 17/July 2015

Deputy Upper Tribunal Judge Mailer