R (on the application of Aydogdu) v Secretary of State for the Home Department (Ankara Agreement – family members – settlement) [2017] UKUT 00167 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Hacer Aydogdu

Applicant

v

Secretary of State for the Home Department

Respondent

.

Before The Honourable Mr Justice McCloskey, President

Having considered all documents lodged, together with the oral and written submissions of the parties' representatives, Ms Peterson, of counsel, instructed by London Solicitors, on behalf of the Applicant and Ms Rhee QC, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 17 November 2016 and 14 January 2017.

(I) The settlement of migrant Turkish nationals and their family members does not fall within the scope of the "stand-still clause" in Article 41(1) of the Ankara Agreement (ECAA) Additional Protocol as it is not necessary for the exercise of freedom of establishment under Article 13. Thus the status of settlement in the UK for such Turkish nationals and their family members cannot derive in any way from the ECAA or its Additional Protocol;

(II) Where a Turkish national who exercised rights under the ECAA has been granted settlement

in the UK the rights of such person and his family members are not derived from the ECAA or its Additional Protocol.

McCLOSKEY J

Introduction

1. By virtue of Council Regulation (EEC) 2760/72 (commonly known as the "Ankara Agreement") and its Protocol, there are special arrangements and facilities for employed and self-employed Turkish nationals desirous of entering the EU for the purpose of working. This judicial review challenge raises certain questions relating to the construction and scope of this instrument, relating particularly to the operation of the *soi-disant* "standstill clause" as regards family members of self-employed Turkish nationals.

The Two Protagonists

2. The Applicant and her spouse are both Turkish nationals. The Applicant's spouse, now aged 33 years, taking advantage of the Ankara Agreement, lawfully entered the United Kingdom pursuant to a grant of limited leave to remain dated 08 April 2011. On 08 October 2012 he was granted further leave to remain, extended to 08 April 2015. On 09 May 2013 the Applicant and her husband married in Turkey. On 23 September 2013 the Applicant was granted limited leave to enter the United Kingdom, in her capacity of spouse. On 04 February 2015 a son was born to the Applicant and her spouse in the United Kingdom.

Chronology

3. It is convenient to tabulate the most salient dates and events in the history:

   (a) On 08 April 2011 the Applicant's spouse was granted leave to remain in the United Kingdom to establish himself in business under the Ankara Agreement. Pursuant thereto, he established a self-employed landscaping business.

   (b) On 08 October 2012, the Applicant's spouse was granted further leave to remain as a Turkish business person, extending to 08 April 2015.

   (c) On 09 May 2013, the Applicant and her spouse were married in Turkey.

   (d) On 23 September 2013 the Applicant was granted leave to enter and remain in the United Kingdom as the dependent family members of a Turkish business person under the Ankara Agreement, until 08 April 2015.

   (e) On 08 November 2013, the Applicant entered the United Kingdom.

(f) On 04 February 2015 a son was born to the Applicant and her spouse.

(g) On 18 August 2015 the Applicant's spouse was granted indefinite leave to remain in the United Kingdom.

(h) On 23 September 2015 the applications of the Applicant and her son for indefinite leave to remain were refused.

The Ankara Agreement and the "Stand-still" Clause

4. In 1963 the Member States of the European Economic Community and the Republic of Turkey executed an agreement (the "*Ankara Agreement*") establishing an association between the EEC and Turkey. The principles on which the Agreement is based are rehearsed in Title 1. Article 2(1) explains the aim of the Agreement:

> "*The aim of this Agreement is to provide the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people.*"

The basic objectives of the Ankara Agreement (and it's Protocol**,** ***(infra)*** were – and remain – the progressive fortification of trade and economic relations between Turkey and the EC, coupled with the establishment of a customs union in three phases. In the event, the timetable was not met and the final phase of the customs union was not achieved until 31 December 1995, via Decision Number 1/95 of the Association Council. Turkey's efforts to align its national legislation with that of the EC particularly in the fields of customs, trade policy, competition and the protection of intellectual, industrial and commercial property were continuing. Notwithstanding the not insignificant constitutional and legislative changes which have been adopted, the accession of Turkey to the EC has not materialised within the timescale originally envisaged or at all. There are substantial enduring concerns relating to state torture, freedom of expression, religious freedom and the rights of women and minorities. These are documented in official EU publications.

5. Chapters 1 and 2 of the Ankara Agreement contain provisions relating to the development of a customs union and trade in agricultural products. The provisions of the Agreement of most importance in the present context are arranged in Chapter 3 under the rubric of "Other Economic Provisions". Articles 12 - 14 regulate, respectively, freedom of movement of workers, freedom of establishment and the right to provide services. Subject to certain unavoidable textual differences these provisions adopt the same language. Given the context of these proceedings, it suffices to reproduce Article 13:

> **"***The contracting parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom*

of establishment between them. "

(Articles [59] – [63] and [65] – [81] are the updated TFEU provisions).

6. Thus the abolition of restrictions on the three aforementioned core freedoms was identified as one of the principal mechanisms designed to facilitate the promotion and development of trade and economic relations between the EEC and Turkey. The terminology "guided by" is striking. The Agreement did not purport to extend any of the three core Treaty freedoms to the Turkish population. Rather, the Treaty provisions in question were to act as touchstones, points of reference, in the operation of the Agreement. Their function was to steer, rather than mandate.

7. The so-called "stand-still clause" did not form part of the original Ankara Agreement. Rather, it was introduced via the Additional Protocol which was signed on 23 November 1970. The Protocol was based on the recognition that during the previous seven years Turkey had done enough to warrant progressing from the "preparatory" stage to the "transitional" (second) stage. It contains detailed chapters relating to free movement of goods, the elimination of quantitative restrictions and the Community's Common Agricultural Policy. These assorted chapters are followed by Title II which is entitled "Movement of Persons and Services".

8. The first provision of Chapter II, entitled "Right of Establishment, Services and Transport" is Article 41(1), which provides:

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

Article 41 (2) notably, in making reference to Articles 13 and 14 of the Ankara Agreement employs the language of "*principles*". In doing so, it reiterates the objective of –

> "*…. The progressive abolition by the Contracting Parties, between themselves, are 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 this field and also the special economic and social circumstances of Turkey*".

Among the "General and Final Provisions" assembled in Title IV, Article 59 is deserving of attention:

> "*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.*"

I shall make reference *infra* to Decision 1/80 of the Association Council, in particular Article 13 which is the "stand-still clause" relating to the discrete cohort

of Turkish workers.

The United Kingdom's Immigration Rules

9. The United Kingdom, as noted in [1] above, became bound by the Ankara Agreement and Protocol pursuant to Council Regulation (EEC) 2760/72, which came into operation on 1 January 1973. This was one of the series of measures associated with the accession of the United Kingdom to the EU.

10. The exercise of gauging whether any "new" restrictions bearing on the specified "freedoms" have been introduced by the United Kingdom requires identification of the relevant restrictions in force at the material time viz 1973. These restrictions are contained in HC 509 and HC 510 of the Immigration Rules. Paragraph 35 of HC 509, which concerns "on entry" requirements, states with reference to "dependents" (as defined):

> "*The wife and children under 18 …. of a person admitted to the United Kingdom to take or seek employment, or as a business man, a person of independent means or a self-employed person, should be given leave to enter for the period of his authorised stay ….*"

HC 510 regulates "after entry" requirements. Within this instrument the topic of "settlement" is addressed at paragraph 28:

> *"A person who is admitted in the first instance for a limited period and who has remained here for four years in approved employment or as a businessman or a self-employed person or a person of independent means, may have the time limit on his stay removed unless there are grounds for maintaining it. Applications for removal of the time limit are to be considered in the light of all the relevant circumstances, including those set out in paragraph 4. Once the time limit is removed no further permission from the Home Office or the Department of Employment is needed to engage in any kind of business or employment. Applications for variation of leave to enter with a view to settlement may also be received from people originally admitted as, for example, visitors; but permission has to be limited to close relatives of people already accepted for settlement. Particulars are set out in paragraphs 37-44 of the Rules for Control on Entry dated October 1972 (HC 509)."*

Thus, for Turkish businesspersons and the self-employed, four years' economic activity in the United Kingdom is the gateway to securing the status of settlement. This is the status which the Applicant's husband has obtained.

11. The requirements for indefinite leave to remain, or settlement, have evolved substantially since 1973. They have become increasingly strict and exacting. They are now enshrined in Section E-ILRP of Appendix FM (HC 395). There is an assortment of residence, language and financial stipulations. Stated succinctly, the enlightenment which the Secretary of State seeks from the judgment of this Tribunal is whether the relevant current provisions of the Immigration Rules and associated policy relating to settlement apply to the dependants of Turkish business persons

and self-employed persons (as well as to Turkish business persons and self-employed persons) present and settled in the United Kingdom in accordance with the Ankara Agreement.

The Impugned Decision

12. As noted above, a decision was made on behalf of the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), dated 23 September 2015, refusing the leave to remain applications of the Applicant and her son. Following an unsuccessful administrative review process, these decisions were challenged by the initiation of these proceedings on 22 December 2015. The substance and grounds of this decision are discernible from the following passages:

> "**DECISION SUMMARY – *Your application is refused under paragraph 41 of HC 510 which outlines the business requirements under the Immigration Rules in force in 1973 ….***
>
> ***The Secretary of State is not satisfied that you have been living in the United Kingdom with your sponsor for a period of at least two years ….***
>
> *Paragraph 72 of the "Business Applications under the Turkish EC Association Agreement" guidance states:*
>
> > *'The Applicant and the Turkish ECAA business person have been living in the UK in a relationship similar to marriage or civil partnership for a period of at least two years.'"*

The decision maker reasoned that, on the evidence, the Applicant had been living together with her spouse in the United Kingdom for a period of just under 19 months when the application was made. This is undisputed.

The Hearing: First Phase

13. To summarise, the impugned decision states unequivocally that the Applicant's quest for indefinite leave to remain was refused under a combination of paragraph 41 of HC 510 and page 72 of the Secretary of State's guidance. The first incongruity which emerged during the initial, uncompleted hearing was that this guidance did not form part of the (bulky) documentary evidence assembled and did not feature in either party's detailed written submissions. The second, related incongruity is that the aforementioned submissions focus upon new Home Office guidance published on 15 October 2015 which (self-evidently) postdates the impugned decision and played no role therein.

14. As the hearing progressed a further anomaly emerged. The skeleton argument of Ms Rhee QC, representing the Secretary of State, contains the following passage:

"*As the Secretary of State has explained and acknowledged in her Detailed Grounds of Defence, her position … is contradicted by the position set out in the ECAA Guidance which seeks to treat applications for ILR from Turkish business persons on the basis of HC 510 …. and by the fact that the Applicant's husband's application for ILR was in fact considered (and granted) under paragraph 28 thereof ….*

Further, the Applicant's own application for ILR was considered under HC 510 – albeit in conjunction with the provisions of the ECAA Guidance …

The Applicant did not satisfy [the] *requirement* [of two years' cohabitation in the United Kingdom] ….

However, having considered the position with some care, the Secretary of State's position is that settlement is not caught by the stand-still provision [in the Ankara Agreement] .
...

Accordingly, both the Applicant's husband's and her own application for ILR should – on this basis – have been considered under the Immigration Rules. Under the relevant Rules, the qualifying period for the grant of ILR is five years' residence. The Applicant does not satisfy this requirement ….

It is in the interests of certainty and clarity that the Secretary of State seeks a definitive ruling from the Court on this question of principle before seeking to recast her guidance and position to reflect the correct legal position (as confirmed by the Court)."

In short, it was unambiguously acknowledged on behalf of the Secretary of State that the grounds rehearsed in the impugned decision for refusing the Applicant's application are incorrect and unsustainable. Ms Rhee acknowledged that the expressed refusal of the application under paragraph 41 of HC 510 is fundamentally in error. The application should, rather, have been considered under Section E-ILRP of Appendix FM (HC 395) of the Immigration Rules and, specifically, paragraphs 1.1 – 1.5 thereof. Paragraph 1.3 is the key provision.

15. Adjourning the hearing I made the following directions:

(a) The "missing" earlier guidance must be provided;

(b) The Secretary of State must, via a formal letter written by her legal representative, indicate unequivocally the exact provision within Section E-ILRP of Appendix FM which is said to have governed the Applicant's application for indefinite leave to remain at the time when it was made viz 07 April 2015 and decided viz 23 September 2015.

As emphasised in my *ex tempore* ruling, the Tribunal was not purporting to require the Secretary of State to make a fresh or ancillary decision. Rather, taking into

account the incongruities and hypothesis exposed at the hearing, the Tribunal required absolute clarity before proceeding further. Moreover, given the nature of the issue exposed, this was a matter which requires the solemnity and formality of a letter to the Applicant's solicitors, to be contrasted with written/oral submissions of counsel based on instructions.

The Hearing: Second Phase

16. During the interlude occasioned by the aforementioned adjournment, the Home Office wrote to the Applicant, by letter dated 02 December 2016. The purpose of this letter was to set out "*… how your application for settlement would have been treated had it been made under the current and relevant Family Rules*. In order to grasp both the content of this letter and the issues in these proceedings, it is necessary to appreciate that HC 509 and HC 510 were, for present purposes, the relevant provisions of the Immigration Rules in force in 1973 viz at the time when the Ankara Agreement was concluded.

17. The letter further explains:

> "*While the Home Office position is that settlement for Turkish business persons and their dependents does not fall to be considered under HC 510, it has previously allowed indefinite leave to remain ('ILR') to be obtained under the 1973 Rules.*"

Continuing, the letter explains that, in addition to the Rules, there is an instrument of Home Office guidance to be applied. The operative guidance bears the title "Business Applications under the Turkish EC Association Agreement" and was published on 22 April 2015. This made provision, at pages 65 – 67, for the dependent partners of Turkish nationals admitted to the United Kingdom under the Ankara Agreement. *En Passant*, the enquiry directed by the Tribunal at [15](a) above established that pages 65 – 67 of the April 2015 guidance do not differ from their successor (the October 2015 guidance, pages 60 – 62).

18. Having acknowledged the previous Home Office practice whereby settlement for Turkish business persons and their dependants was considered and determined under HC 510, the letter, continuing, indicates the revised approach of the Home Office - namely that settlement for members of this cohort is governed by "*the current Immigration Rules as from time to time revised*". The effect of this is explained in the following terms:

> "*… The relevant applicable rules pertaining at present would mean that Turkish nationals seeking settlement should apply to switch into one of the settlement routes such as the Family Rules within the current Immigration Rules. The Family Rules route would only lead to ILR after completion of five years with the applicant needing to meet all the relevant criteria for leave throughout the qualifying period.*"

The letter further informs the Applicant:

"*In summary, an application for ILR made under the current Family Rules would have been refused under paragraphs E.ILRP. 1.2 … 1.3 …. 1.4 …. 1.5 and … 1.6.*"

I interpose that the Applicant would not have been able to demonstrate five years' continuous residence with her husband in the United Kingdom. The letter states, finally:

"*Should the Home Office position on the limitations of the stand still clause be upheld, we may consider creating a new route enable dependents of those ECAA business persons with ILR to secure further ECAA leave to remain.*"

19. Having considered all of the above, I am satisfied that notwithstanding the admitted error in the impugned decision of the Secretary of State which would, in the ordinary course of events, stimulate a public law obligation to make a fresh decision, thereby rendering any judicial review challenge moot, a useful purpose will be served by permitting these proceedings to reach completion. In particular, the judgment of this Tribunal will provide important guidance to the Secretary of State and others in circumstances where the illumination of the relevant legal rules will affect other cases and will also have an impact on the Secretary of State's future rule making: see R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450. Furthermore, a lawful decision remains to be made and this judgment will contribute to that exercise.

The Competing Arguments

20. I acknowledge the industry and care which both counsel invested in the formulation of their written and oral arguments. It is unnecessary to reproduce these *in extenso* since they resolved to certain core contentions.

21. On behalf of the Applicant, the centrepiece of the argument developed by Ms Peterson was that the imposition of the Secretary of State is in contravention of the stand-still clause. Ms Peterson argued that the settlement application of the Applicant must be determined by reference to the 1973 Immigration Rules, rather than the current Rules and the guidance of the Secretary of State noted in [paragraph 12] above. The decided cases upon which Ms Peterson relied included in particular (and not exhaustively) C-37/98 Savas [2000] ECR 1 – 2927 at [46], [54] and [69] especially and Case C-256/11, Dereci and Others.

22. The second main component of the Applicant's challenge is an asserted breach of the right to respect for family life enjoyed by the three family members concerned under Article 8 ECHR, considered in conjunction with section 55 of the Borders, Citizenship and Immigration Act 2009. In her skeleton argument Ms Petersen formulated this discrete challenge in the following terms:

"*The sponsor has established a successful business … in the United Kingdom and*

cannot leave his business without detriment to the business and provisions for the Claimant. It is submitted that this is a further prohibited frustration of the objects of the [Ankara Agreement] *…. and seeks to deprive the second Claimant* [sic]*, who is less than a year old, of either his father's care or the cessation of the family's income which provides for his care.*"

While the description of the child of the family as "*second Claimant*" is inaccurate this error is of no moment; after the application was lodged the child of the marriage, the "second Claimant', was granted British Citizenship.

23. The core submission of Ms Rhee QC on behalf of the Secretary of State is that indefinite leave to remain (settlement) does not fall within the scope of the stand still clause as it is neither necessary for, nor a corollary of, the exercise of the right in play, namely freedom of establishment on the part of the Turkish business person or self-employed person concerned. Rather, the grant of (mere) limited leave to remain to both the migrant and any of their dependants suffices to give effect to, and further the aims of, the Ankara Agreement. Ms Rhee's second main submission is that the Applicant's husband, having been granted settlement, is no longer exercising his rights under the Agreement. Her argument also invoked Article 59 of the Ankara Agreement (*supra*).

The Decided Cases

24. Both the CJEU and its predecessor (the ECJ) have given consideration to the Ankara Agreement and, specifically, the stand still clause from time to time. In the particular context of freedom of movement of workers (not this case) the applicable clause is contained in Article 13 of Decision Number 1/80 of the Association Council. The rationale and effect of this clause were considered in the case of Sahin [Case C-242/06]. Mr Sahin, a Turkish national, challenged the introduction of a new financial levy to be paid upon making a residence permit application. The Court stated, at [63]:

> "*It is also settled case law that the stand-still clause enacted in Article 13 prohibits generally the introduction of any new measure* ***having the object or effect of making the exercise by a Turkish national in its territory of the freedom of movement for workers subject to more restrictive conditions than those which applied*** *…*"

In its decision the Court also drew on Article 59 of the Additional Protocol holding that, within the compass of the Ankara Agreement, Member States may introduce new restrictions on Turkish nationals provided that the same restrictions apply also to Community nationals. The Court added the rider that in such cases any new restrictions introduced must not have a disproportionate impact on Turkish nationals when compared with the impact on Community nationals. Ultimately, disproportionality was the rationale of the Court's decision, based on the charge of €169 to which Turkish nationals were subjected, compared with the substantially lesser charge of €30 for Community nationals who also received residence permits of

longer temporal validity.

25. The stand-still clause pertaining to Turkish workers viz Article 13 of Decision Number 1/80, *(supra)* featured also in Case C – 561/14, (Genc). There the question posed by the CJEU, at [37], was whether the impugned measure adopted by the Member State concerned would, with reference to the Article 13 standstill clause, be "*… likely to affect* [the Turkish workers] *freedom to carry out paid employment in that Member State*".

At [39], the Court recalled:

> *"In that regard, it is necessary to bear in mind that the Court has previously held that legislation which makes family reunification more difficult, by tightening the conditions of first admission to the territory of the Member State concerned by spouses of Turkish nationals in relation to those conditions applicable when the Additional Protocol entered into force, constitutes a 'new restriction', within the meaning of Article 41(1) of the Additional Protocol, on the exercise of the freedom of establishment by those Turkish nationals (judgment in Dogan, C-138/13, EU:C:2014:2066, paragraph 36)."*

The next ensuing passage, at [40], must also be considered:

> *"That is the case since the decision of a Turkish national to establish himself in a Member State in order there to exercise a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey (see, to that effect, judgment in Dogan, C-138/13, EU:C:2014:2066, paragraph 35)."*

The reasoned basis of the Grand Chamber's ruling under Article 267 TFEU is found in the final paragraph of its judgment:

> *"A national measure such as that at issue in the main proceedings, making family reunification between a Turkish worker residing lawfully in the Member State concerned and his minor child subject to the condition that the latter have, or have the possibility of establishing, sufficient ties with Denmark to enable him successfully to integrate, when the child concerned and his other parent reside in the State of origin or in another State, and the application for family reunification is made more than two years from the date on which the parent residing in the Member State concerned obtained a permanent residence permit or a residence permit with a possibility of permanent residence constitutes a 'new restriction', within the meaning of Article 13 of Decision 1/80 of the Association Council ……. Such a restriction is not justified."*

26. The earlier decision of the Grand Chamber in Case C – 221/11, (Demirkan) contains an admirably succinct formulation of the overarching test at [55]:

> "*Consequently, irrespective of whether freedom of establishment or freedom to provide services is invoked, it is only where the activity in question is the corollary of the exercise of an economic activity that the 'stand still' clause may relate to the conditions of entry and residence of Turkish nationals within the territory of the Member States.*"

I derive assistance also from the formulation of the Court in Joined Cases C – 317/01 and C – 369/01, (Abatay and Sahin), another case concerning the discrete cohort of Turkish workers, at [81]:

> "*… a Turkish national who is already lawfully employed in a Member State no longer needs the protection of a stand-still clause as regards access to employment, as such access has already been allowed and the person concerned subsequently enjoys, for the rest of his career in the host Member State, the rights which Article 6 of that decision expressly confers on him. On the other hand, the stand-still requirement as regards conditions of access to employment is intended to ensure that the national authorities refrain from taking measures likely to compromise the achievement of the objective of Decision No 1/80, which is to allow freedom of movement for workers, even if, initially, with a view to the gradual introduction of that freedom, existing national restrictions as regards access to employment may be retained …*"

27. The issue of family reunification was the subject of specific consideration by the CJEU (Second Chamber) in Case C – 138/13, (Dogan), where the Court stated, at [34]:

> "*In that regard, it must be noted that the Court has held that family reunification constitutes an essential way of making possible the family life of Turkish workers who belong to the labour force of the Member States, and contributes both to improving the quality of their stay and to their integration in those Member States (see judgment in Dülger, C-451/11, EU:C:2012:504, paragraph 42).*"

The judgment continues, at [35]:

> "*The decision of a Turkish national to establish himself in a Member State in order to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey.*"

28. Finally, reference must be made to the decision of the Court of Appeal in R (Buer) v Secretary of State for the Home Department [2014] EWCA Civ 1109. This case concerned the scope and interpretation of Article 13 of Decision Number 1/80. The context was a challenge to the Secretary of State's decision to grant further limited leave to remain in circumstances where the Claimant, a Turkish employed worker, asserted a right to indefinite leave to remain (settlement). In the interests of economy

it is unnecessary make detailed references to certain other pertinent decisions of the CJEU as these are quoted in the following passage in the judgment of Richards LJ. Having considered, *inter alia,* the decision in Sahin, Richards LJ continued, at [39]:

> *"The reason why Article 13 has been held to apply to residence even though it does not contain any express mention of residence is that residence is a corollary of employment: without a right of residence there can be no effective access to employment. This has been brought out clearly in relation to Article 6(1), which is likewise silent as to residence but has been held to imply a right of residence. Thus in Case C-237/91, Kus v Landeshauptstadt Wiesbaden [1992] I-6807, referring back to Case C-192/89, Sevince v Staatssecretaris Van Justitie [1990] ECR I-3461 , the Court said this at paragraphs 29-30:*
>
> > *"It also held, in that judgment, in the context of the third indent of Article 6(1) of Decision No 1/80 that even though that provision governs the situation of the Turkish worker only with respect to employment and not to the right of residence, those two aspects of the personal situation of a Turkish worker are closely linked and that, by granting to such a worker, after a specified period of legal employment in the Member State, access to any paid employment of his choice, the provision in question necessarily implies – since otherwise the right granted by it to the Turkish worker would be deprived of any effect – the existence, at least at that time, of a right of residence for the person concerned ….*
> >
> > *The same is also true as regards the first indent of Article 6(1) of Decision No 1/80, since without a right of residence the grant to the Turkish worker, after one year's legal employment, of the right to renewal of his permit to work for the same employer would likewise be deprived of effect."*

The judgment continues, at [40]:

> *"The focus in that passage is on a right of residence in order to render effective the right of access to work, which is very different from a right to settlement or permanent residence. The same reasoning ought to apply to Article 13. In the case of Article 13, moreover, the point is underlined by the limited scope of the article, discussed above. If the article is not intended to protect those who are already integrated into the labour force of the host Member State but is intended to apply only to those who do not yet qualify for rights under Article 6(1), its concern must be with residence up to the point where rights are acquired under Article 6(1) , not with longer-term residence or settlement."*

And at [41]:

> *"The close relationship between residence and employment is further illustrated by Bozkurt (see paragraph 33 above). One of the questions in that case was whether Article 6(1) entitled the applicant to remain in the territory of the host Member State following*

an accident at work which rendered him permanently incapacitated for work. The Court of Justice answered that question in the negative, stating at paragraphs 39-40 of the judgment:

> *"It follows that Article 6 of Decision No 1/80 covers the situation of Turkish workers who are working or are temporarily incapacitated for work. It does not, on the other hand, cover the situation of a Turkish worker who has definitively ceased to belong to the labour force of a Member State because he has, for example, reached retirement age or, as in the present case, become totally and permanently incapacitated for work."*

This reasoning impelled the Court to conclude, at [46] that Article 13 –

> *"… does not relate to settlement in the host Member State and does not therefore prohibit the introduction of new restrictions on the right of settlement."*

My Conclusions

29. I consider that the first main principle to be distilled from the cases considered above is that any EU Member State measure introduced post-1980 which has the effect of rendering family reunification or the enjoyment of family life difficult or impossible may constitute a "new restriction" on the ability of a Turkish national to work or to provide services or to become established in the Member State concerned. The second, related principle is that family reunification may be an essential element of a Turkish national's ability to become, or remain, economically active in the host Member State under the Ankara Agreement. In both of these scenarios the applicable stand-still clause may be contravened.

30. In my judgement, the main question to be determined is to be formulated in the following terms: **could 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 the Turkish national to continue to do so?**

31. To the common law judge, the formulation of the question in this way might tend to invite the conclusion that a general, abstract response is not possible. This follows from the unavoidable reality that every case will be intensively fact sensitive. Thus, in some cases, the factual matrix may be such that an affirmative answer to the question is appropriate. Equally, in other cases with their distinctive factual framework, a negative answer may be indicated.

32. However, having registered this initial reservation, I disclaim any reluctance to provide a concrete, concluded answer to the question posed. I do so on the basis that a confident answer lies in the terms and aims of the Ankara Agreement, its Protocol and the jurisprudence, European and domestic, considered above.

33. Under United Kingdom law settlement is the optimum status achievable by those who are not British nationals. It carries with it all of the rights, advantages and obligations of British nationality. This includes exemption from the deportation provisions of statutes such as the UK Borders Act 2007. The ultimate sanction is deprivation of nationality. See generally the recent decision of the Upper Tribunal in Ahmed & Ors v SSHD [2017] UKUT 118 (IAC) at [26] - [31].

34. The correct answer to the question posed above does not, in my view, require any particular sophistication. 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. Furthermore, nothing has been identified in evidence or argument to warrant any distinction between Turkish self – employed entrepreneurs and Turkish workers.

35. Thus I apply the principles in Sahin, Buer and the other cases noted above to the discrete context of establishment under Article 13 of the Ankara Agreement. In particular, there is nothing in the Ankara measures to suggest that the heavier investment in the economy of EU Member States which some Turkish national entrepreneurs might achieve, depending on the fact sensitive context of individual cases, justifies treatment preferential to that accorded to Turkish workers. In passing *(obiter*) there is no apparent reason why the provision of services (Article 14) should be treated any differently.

36. Insofar as necessary, my primary conclusion, rehearsed above, is buttressed by Article 59 of the Additional Protocol. Turkey has at all material times been a non-EU Member State. Taking into account the context of recent history it has not even achieved the status of a pre-accession state. While at this remove the noble aspirations which underpinned the 1963 accord may seem more distant than ever, having regard to political and related realities, this does not alter the juridical framework. In particular, by 1980 the principle of non-discrimination had become firmly embedded in EU Law. Article 59 of the Additional Protocol reflects this. More recently, Directive 2004/38 (the "Citizens Directive") contains the outworkings of the rights attainable by the family members of EU nationals. Stated succinctly, it would be incongruous if the Ankara Agreement and its Additional Protocol were to confer on Turkish nationals and their family members rights superior to those available to EU nationals and their family members. Parity is the most which, in this Article 59, clearly contemplates. Any other conclusion is, in my judgement, confounded by the terms and aims of the two main Ankara instruments considered as a whole, basic principles of EU law and the applicable EU and domestic

jurisprudence considered above.

37. There is a further, subsidiary question: does the answer to the main question formulated above differ if the economically active Turkish national has acquired the status of indefinite leave to remain (i.e. settlement) in the United Kingdom? In my view, where this is the case the economic rights of the person concerned derive from the status of settlement and not the Ankara Agreement. The fact that, historically, the Turkish national was exercising rights under the Ankara Agreement does not in my estimation alter this analysis. The rights asserted by family members of the Turkish national concerned – such as this Applicant – depend upon the status of the relevant Turkish national. They are contingent rights. It follows, in my judgement, that the Ankara Agreement and its Additional Protocol have no application to the matrix of the present challenge. Thus in such cases the main question posed in [30] does not arise. I agree with Ms Rhee's submission to this effect.

38. But for my main conclusions above further evidence, likely to include witness statements and other materials together with further argument relating to the family reunification, Article 8 ECHR and section 55 issues would have been necessary in order to determine this challenge. However, this is rendered otiose by my main conclusions.

Order

39. First, I make an order quashing the impugned decision of the Secretary of State dated 23 September 2015. Second, I consider a declaratory order reflecting my conclusions in [34] – [37] above appropriate, in the following terms:

    (i) The settlement in the UK of a migrant Turkish national who has exercised the right of establishment under the ECAA and their family members does not fall within the scope of the "stand-still clause" in Article 41(1) of the ECAA Additional Protocol as it is not necessary for the exercise of freedom of establishment under Article 13 of the ECAA;

    (ii) Where a Turkish national who exercised rights under the ECAA has been granted settlement in the UK the rights of such persons and his family members are not referable to or conferred by the ECAA or its Additional Protocol.

Costs

40. I have considered the submissions of both parties on this issue. In exercising my discretion I have had particular regard to the history, evolution and ultimate main purpose of these proceedings. There are in my estimation two main considerations to be balanced. The first is that by the initiation and prosecution of this challenge the Applicant has exposed and established that the Secretary of State's impugned decision is unlawful, to the extent that there is no dispute that an order quashing the decision should be made.

41. The second principal consideration is that while the Secretary of State's arguments on the issue bearing on the declaratory order which I have decided to make have prevailed, this judgment has, ultimately, acquired the status of an advisory opinion predominantly for the benefit of the Secretary of State. This judgment will, predictably, influence changes in the Immigration Rules and the Secretary of State's associated policies. The circumstances in which I was agreeable to the proceedings continuing are rehearsed in [12] – [19] above. In securing an order quashing the impugned decision of the Secretary of State the Applicant must be considered the winner in substance. In the matter of costs, I conclude that this analysis is not offset sufficiently by the declaratory order favouring the Secretary of State's arguments on the broader issue of legal principle debated and determined.

42. I add that if the only outcome of these proceedings had been the declaratory order I would have made no order as to costs *inter-partes*. I conclude, on balance, that the quashing order in favour of the Applicant is the decisive factor in the costs debate. Accordingly, I order that the Secretary of State pay the Applicant's reasonable costs, to be assessed in default of agreement.

Liberty to apply

43. I include this facility.

Permission to appeal

This will be decided separately.

Signed: 

The President, The Honourable Mr Justice McCloskey

Dated: **18 February 2017 [initially]**
08 March 2017 [finally]