



## **Turkish Self Employed: The European Court of Justice applies the 1973 Rules strictly**

**Case C-16/05 *Tum & Dari* , Judgement of the ECJ, 20 September 2007**

### ***Introduction***

Two failed Turkish asylum seekers who sought to remain in the UK as self employed persons under the EC Turkey Association Agreement succeeded in their claim according to the judgment of the European Court of Justice 20 September 2007.

The two, who arrived irregularly in the UK in 1998 and 2001, had applied for asylum on arrival. Their applications were rejected and they were liable to removal. They introduced new applications for visas 'to enter' the UK (as they were on temporary admission) as self employed persons as permitted under the 1973 Immigration Rules. The UK Border and Immigration Agency ("BIA") refused this application on two key grounds:

- The UK argued that the EC Turkey Association Agreement standstill provision on the self employed does not apply to first admission;
- The UK argued that as failed asylum seekers they could not, in any event, benefit as this was an abuse and fraud on the system.

Both arguments were rejected by the ECJ.

### ***The Law***

Article 41(1) Additional Protocol EC Turkey Association Agreement prohibits Member States from applying any new restrictions on the freedom of establishment and the freedom to provide services. With the UK's entry into the EU on 1 January 1973, the Immigration Rules were divided into on-entry and after-entry rules, the former then in force being HC 509. Under para 32 of those rules:

'If the applicant wishes to establish a business in the United Kingdom on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.'

The European Court of Justice found that these rules must be applied to the applications for visas to enter the UK made by failed asylum seekers who have been on temporary admission since arrival. As they were never admitted to the UK, the after-entry rules do not apply. On the question of whether the standstill clause applies to entry to the UK the court stated:

'In that context, it is clear from the case-law of the Court that the 'standstill' clause precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish

national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned (see *Savas*, paragraph 69, and *Abatay and Others*, paragraph 66).’

On the question whether this principle applies to first admission, the court said “yes” most emphatically (paragraph 57 – with a marvellously confusing reference to national sovereignty in the following paragraph).

Regarding the UK’s allegations that to permit failed asylum seekers to benefit from the standstill clause would be abuse and fraud, the court noted first that the national court specifically exonerated the two of any fraud and stated that no national interest element was engaged. It went further and held that the fact that the two were failed asylum seekers “is of no relevance for the purpose of deciding whether [Article 41(1)] is applicable to the cases...”

### ***The Implications***

There are three key implications of the judgment:

- Turkish nationals are entitled to apply on entry to establish themselves as business persons or service providers or recipients irrespective on whether they have entry clearance in that category. The application must be considered under the UK’s 1973 Immigration Rules;
- Visas and entry clearance: Turkish nationals cannot be subject to more disadvantageous immigration rules, including on entry, now than applied in 1973 where they are coming to the UK for self employment, service provision (or receipt); the EU definition of service provision and receipt covers just about everyone including tourists; is the UK’s mandatory visa obligation on Turkish nationals in these categories lawful? At paragraph 51 the court specifically notes that in the earlier cases (*Savas* and *Abatay*) it did not make a finding on the legality of the visa requirement as in both cases the individuals already had visas. There is a strong indication that the UK’s mandatory visa requirements for Turks who come within the class are unlawful.
- Abuse: relying a provision of EU law is not abuse! The court states that it is for the UK authorities who allege abuse to produce evidence of it which can be examined. There was no evidence of abuse or fraud here.

The full judgement can be accessed at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&jurcdj=jurcdj&docj=docj&alldocnored=alldocnored&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=Tum&domaine=&mots=&resmax=100>

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