Advice regarding the UK's failure to respect the Ankara Agreement

and its dispositions regarding Turkish citizens

JOINT ADVICE

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1. We have been asked to comment on the questions presented by the correspondence between the Turkish Association to Protect the Rights of Industrial And Commercial Businesspersons in the UK under the ECAA ("**TAPRICB**") and the services of the European Commission, notably the extent to which the Commission's services have been respectful of their duty as guardian of the treaties as regards the observance by the United Kingdom of its obligations under the Ankara Agreement and the so-called Additional Protocol and Decision 1/80. We consider that the complaints made by TAPRICB deserved better.

2. We preface these comments with the elementary observation that the Commission is charged with the duty to ensure that the obligations of the Member States are respected, albeit that the Commission enjoys a discretion as to how it deems that that duty shall be discharged. The Court of Justice of the European Union ("**CJEU**") has often confirmed that private parties cannot challenge the Commission's toleration of imperfect compliance by a Member State with its responsibilities. Nevertheless, we take the liberty of suggesting that although the Commission has a wide discretion as to how it pursues its hortatory responsibilities, and although the Court has confirmed that discretion frequently, the Commission as an EU institution is not thereby dispensed from the need, as part of the duty of good administration, to press Member States to mend their ways even though the political conjuncture may be discouraging. Whatever may be the current state of EU-Turkish relations, that ought not to prejudice the rights of Turkish businesspeople and their families to enjoy treatment at the hands of the UK Home Office which is commensurate with the rules prescribed and accepted by the UK, the EU and Turkey. That a rule may for the moment be politically inconvenient is not a valid ground for disregarding it.

3. We record the curious fact that very few references to the CJEU have been made from UK courts on the new regime made applicable to Turkish nationals in recent years and the equally curious fact that the European Commission has elected not to challenge the practices of the UK regarding the exercise by Turkish citizens of their rights to establish themselves in the UK. It is indeed strange that an institution which is rule-driven and rule-bound should appear to grant institutional toleration to systematic infringements by the Member States. Of course, the Court has always upheld the Commission's right to choose whether or not to open proceedings in a particular case. The most that the complainant can insist upon is a well-reasoned refusal.

4. We suggest that the Commission's duty to act as guardian of the treaties should be approached with particular rigour where there is a pattern of non-referral to the CJEU by national courts. Where judicial entities are in effect muzzled by national procedures,

vigilance by the guardian of the treaties as to the underlying reality is all the more necessary. If a country's judiciary rarely takes the step of seeking guidance from the CJEU, there is an enhanced chance that the level of national observance may be uneven. English courts considering Turkish cases have been very reluctant to refer apparently genuine uncertainties to the CJEU. The statistics are indeed striking.

5. The absence thus far of guidance from the CJEU as to the lawfulness or otherwise of the UK regime makes a vigorous approach by the Commission appropriate; *a fortiori* where the arguments offered to justify the assertion that the new Home Office regime presents no problem are very far from convincing.

6. For the avoidance of doubt, we do not purport to assert that a representative body like TAPRICB has a right to initiate proceedings before the CJEU to complain of the laxness of Commission interventions on matters touching its members. We do suggest, however, that the complaints made by TAPRICB deserve more reflection and respectful analysis than seems thus far to have been deployed in formulating the Commission's responses. We note with sadness that the Windrush episode demonstrates the institutional capacity of the UK Home Office to seek to create a sceptical or hostile atmosphere for persons who have a right to be in the UK but who are for temporary political reasons not welcome there.

7. We submit that a fair review of the status of the rights of appeal granted by the Home Office in the UK would strongly suggest that the recent modifications have the effect – the intended effect – of narrowing and excluding the rights contemplated by the Ankara Agreement and the Protocol and Decision already referred to. It would appear that the changes have indeed been designed to avoid a neutral evaluation in particular cases of the grounds purportedly justifying the rejection of hitherto well-grounded applications. Far from opening to applicants a terrain which is predictable and well signposted, the Home Office has devised an obstacle course policed by hostile referees. It should not be necessary to review the facts of any specific case in order to conclude that the regime's structure is far from satisfying the applicable rules.

8. To commence, we note the basic public facts which are incapable of being denied. Until 6 April 2015, Turkish nationals exercising their rights under the EU-Turkey Association Agreement were able to challenge adverse decisions made by the UK Home Office based on Section 82 of the Nationality, Immigration and Asylum Act 2002 ("NIA"). Till then, the unsuccessful individual had what could be called proper access to a genuine appellate review. However, the effect of the Immigration Act 2014, Section 15, amended Section 82 of the NIA for Turkish nationals was to limit challenges to a very narrow list of situations, and totally eliminate the statutory right of appeal, replacing it with an administrative review procedure ("**ARP**") within the UK Home Office. The theoretically available judicial review of the outcome of that administrative process is virtually meaningless because of the narrowness of the available grounds.

9. The ARP was limited to grounds prescribed in the Appendix to the Immigration Rules. The officials charged with effecting the ARP are of course not independent of the institution for which they work. More to the point, there is no right to be heard during

the ARP and, absent a "*case working error*", there can be no subsequent review of the facts. Judicial scrutiny of the formal legality of such a decision, whilst it exists, is in such circumstances almost pointless. Judicial review is accordingly limited to assessing whether the challenged act is vitiated, not by the novel criteria prescribed, but by irrationality in applying them. Unsurprisingly, successful such appeals are as rare as hens' teeth.

10. Proper review of the merits of a decision offers many benefits. It is quality control which inculcates care on the part of the officials. Even if the climate of the institution for which they work favours the notion of a sceptical or hostile attitude to unwelcome foreigners, the officials (whether working in the UK or subcontracted in other countries charged with the task of processing applications) risk creating trouble for the administration if they are too casual in rejecting candidacies. Conversely, where there is no risk of scrutiny, officials may be tempted to improve their statistics by rejecting applications on specious grounds. We have been informed of the rejection of applications for reasons which sound absurd. We have been told that a professor was rejected because she lacked expertise in the field in which she was a university professor; and that the CEO of a company was told that he lacked experience of the business sector in which that company operated. In another episode, the successful applicant was told that he must come physically to London to collect the official card which awaited him. He remonstrated, observing that because of the pandemic, non-essential travel was to be avoided. No change in official position was made. Reluctantly, he flew to London and collected the card, returned to Turkey, en route contracting Covid, and infected his wife, who succumbed to the disease. Those episodes suggest that a general and troubling casualness afflicts the proper consideration of candidacies and that the diminished rights to challenge bad decisions are a contributing cause of such casualness. Sad to say, there seems to be a lack of humanity in processing the applications to embark on a new business in the UK by those with the right to do so.

11. Although the controversies have been numerous, instances of judicial examination of the realities underlying such controversies have been few. This phenomenon may perhaps be corroborated by the very low level of referrals of cases involving Turkish businesspeople by UK courts to the CJEU. We are informed that in the seven-year period prior to 2015, on average one preliminary reference was made per annum from English and Scottish courts to the CJEU on these questions. The low number of references can be accounted for by the average 80-90% success rate of applications made under the ECAA-Turkey Businessperson entry clearance route during that period. Putting it differently, about nine out of ten applications were successful and only a very small percentage led to judicial proceedings where a reference was necessary for the resolution of the matter.

12. Obviously, the number of references is only an anecdotal indication. However, the changes introduced by the 2014 amendments, which took effect from 6 April 2015, sharply diminished the capacity of Turkish nationals to exercise their rights under the EU-Turkey Association Agreement. We cannot doubt that these changes were intended to deter or exclude applications. The procedural shrivelling of the rights of an applicant was matched by changes in the criteria applied to such applications. Thus, prior to April

2015, ECAA-Turkish Businesspersons had to show that they genuinely meant to set up a viable business, and had sufficient funds to set it up and manage it. In addition, they had to show that the candidate's role would not amount to mere employment and the likely fruits of the business must be realistic enough to feed the candidate and his or her family.

13. The new regime is sharply more intrusive. It introduced an interview requirement (subsequently abandoned, after protests) to assess language and experience. The remaining new rules collectively established a mass of criteria which would permit official rejection of applications on barely verifiable grounds. Thus, applicants had to prepare a business plan and show, through market research surveys, that there was a need for the proposed business in the UK and that the majority of the proposed business's customers would be located in the UK. They likewise had to show that the funds which would drive the new business were coming from the applicant alone and not from a spouse or other family members who might be accompanying the applicant. These measures built into the system structural mechanisms to institutionalise a climate of scepticism whereby applicants could be denied on grounds that were arbitrary or formalistic or indeed pointless. Of significance to the UK's (and EU's) obligations under the Ankara Agreement, these were clearly new and increased obstacles to the freedom of establishment of Turkish nationals in the UK.

14. Worse, the changes had the effect of removing the right to apply for indefinite leave to remain in the UK after four years of continuous residence in the UK. Additionally, to make the process of seeking indefinite leave to remain less attractive and more onerous, very heavy fees were announced: £2,389 for main applicants plus the sum of £2,389 for each dependant. Other fees were comparably high. A requirement to pass a language test was introduced; and with it the so-called 'Life in the UK' test (a form of citizenship examination). Collectively, these changes transformed the previously neutral processing of Turkish applications on a rational basis into an obstacle course which the great majority of applications fail to navigate successfully. And the process for demanding fairness thereafter is close to inaccessible; and predominantly unsuccessful.

15. Thus, we are informed that since April 2015 nearly 2,000 Turkish nationals seeking to assert their rights under the EU-Turkey Association Agreement have sought a preliminary reference through the ARP only to be told that it is not available, purportedly on the grounds that the ARP is conducted by a department of government, and no judicial avenue is available. We are told that numerous bodies and individuals have challenged these "new restrictions" by relying on the various standstill clauses in the Ankara Agreement and that, through the procedure for judicial review, they have sought further review by the Court of Appeal and even the Supreme Court; however, despite relatively clear violations of EU law, there has not been a single preliminary reference to the CJEU.

16. One further manifestation of the deliberate narrowing of the rights afforded to Turkish businesspeople is the differentiation, once a successful application has been made, between the ways in which EU citizens and Turkish citizens are treated. In short, the UK grants settled status to EU nationals quite routinely and smoothly thereafter on the

basis of quite modest proofs such as tickets or receipts to vouch residence. By contrast, Turkish citizens are granted Indefinite Leave to Remain only after three intermediary periods totalling seven years (one plus three plus three). Before each new extension there is an opportunity for extra scrutiny, for additional questions, for expressions of doubt about eligibility. Given the deep scepticism that the April 2015 regime engenders as to its fairness and transparency and even rationality, it is not surprising that we express doubts about whether such treatment is consistent with the duty of non-discrimination.

17. In this light, the elimination of access to judicial review constitutes a significant reduction of the rights previously enjoyed and the mechanisms by which to exercise and defend them. We are informed that before April 2015, Turkish nationals who exercised their statutory right of appeal enjoyed at least a 40% success rate at the Immigration and Asylum Chamber and a near 100% success rate at the Court of Appeal. Since then, the ARP success rate for Turkish nationals exercising their rights under the EU-Turkey Association Agreement has varied from less than 1% to 6%. Similarly, the success rate on judicial review at the paper permission stage is 10% (20% at oral renewal hearings). These figures are of course difficult to verify precisely, but the change is so gross and so remarkable that we consider it is reasonable to assert that the new regime erected a huge procedural obstacle.

18. As a result, Turkish nationals seeking to protect the exercise of their rights under the EU-Turkey Association Agreement have nothing remotely comparable to the rights of EU nationals. This is hardly consistent with the CJEU's ruling in Case C-136/03 Dörr and Ünal v Sicherheitsdirektion für das Bundesland Kärnten [2005] ECR I-4759 (EU:C:2005:340), where the Court stated that it was essential to grant Turkish workers "*the same procedural guarantees as those granted by Community law to nationals of Member States*" (at [67]). The effect of Article 41 of the Additional Protocol ("the standstill clause") should be to "*prohibit*[…] *the introduction* […] *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 to the territory of that state, of Turkish nationals intending to establish themselves in business there on their own account*" (Case C-16/05 R (Tum) v Secretary of State for the Home Department [2007] ECR I-7415; [2008] 1 WLR 94 (EU:C:2007:530) at [69]).

19. The changes were challenged in the UK courts as "*new restrictions*" caught by the standstill clause or as a breach of Article 9 of the Ankara Agreement, unsuccessfully. The EU Commission asserts that Turkish businesspersons are not "*deprived of legal remedies against the decisions taken by the UK Home Office*". In the literal sense this is accurate, in that judicial review of a negative administrative decision is available. But the reality is that such a review is a mere formality.

20. We cannot conceive of an accurate description of the new regime that could fail to acknowledge a diminution of the protections and rights accorded to Turkish businesspeople. Instead of a proper appeal on the merits, the APR functions as a "*new restriction*" not in place at the time of the entry into force of the standstill clause. It impairs the effectiveness and reality of the right of establishment of Turkish

businesspeople since it undermines their ability effectively to assert their rights before domestic authorities.

21. In our view, there is an immense difference between a mere administrative review of the *form* of an adverse decision, checking on whether the applicable procedural rules had been applied, and a thorough rigorous judicial examination of the *merits in fact and in law* of the measure in its full context. It is regrettably the case that Home Office policy has in the very recent past been to create a climate inimical to the enjoyment of the individual's rights. We consider that the triviality of the grounds invoked to reject an application by Turkish applicants is sometimes almost embarrassing. The entire administrative structure is arguably oriented and calibrated to issue negative decisions as opposed to well-balanced assessments of all factors.

22. In those circumstances, an administrative 'check' on whether deadlines were observed, and other such formal procedural questions, is by no means equivalent to the neutral and thorough examination of the merits of an application that a judge can deploy. The statistics of the ARP suggest that the process is perfunctory and formalist. So it is correspondingly difficult to doubt that there has been a reduction in the rights to which Turkish persons and their families are entitled. The evidence which is available about the very different rates of success between the previous statutory appeal procedure and the current ARP would appear to confirm the contrast between the new regime and its predecessor.

23. We are well aware that EU law generally assumes the validity of national law when assessing the propriety of national implementation of EU obligations. But this is not an absolute rule. This brings us to the well-established principle of effectiveness. Where the quality of the new national remedy is substantially inferior to its predecessor, it no longer satisfies the effectiveness test. The critical question would be the relative effectiveness of the new procedure when compared to the previous procedure protected by the standstill clause.

24. We are of course likewise aware of the concept of "*national procedural autonomy*": "[…] *in accordance with the Court's settled case-law, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States having none the less responsibility for ensuring that those rights are effectively protected in each case*" (Case C-425/16, Raimund, ECLI:EU:C:2017:776).

25. But Member States are not given a blank cheque. A particularly relevant case here is C-92/07 Commission v. Netherlands [2010] ECR I-3683 (ECLI:EU:C:2010:228) concerning the imposition of charges on Turkish nationals for applications to obtain or to extend resident permits which were substantially higher than the analogous charges applied to nationals of EU or EEA States. The Court was quite clear: the standstill clause in Article 41(1) "[…] *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".

26. We see no grounds for taking a different approach in relation to those businesspersons who fall within the scope of the Ankara Agreement and its Additional Protocol. Here, we disagree with the approach of the English Court of Appeal in SSHD v. CA (Turkey) [2019] 1 W.L.R. 2689, where that Court concluded that in the absence of specific reference to remedies or redress in Article 41, the provision could not be read to extend to such topics. Yet the words of the provision do not introduce any distinction between substantive and procedural measures. They simply refer to: "*new restrictions on the freedom of establishment and the freedom to provide services*". We see no sound basis in the case law of the CJEU for the distinction drawn by the Court of Appeal between procedural conditions for the exercise of the right to establishment and means of redress (or as the Court of Appeal put it, "*legal remedies available to someone alleging breach of his rights*").

27. In our view, the Court of Appeal has taken a particularly "*English*" approach in this case. In other words, it reads the texts narrowly and restrictively, paying little heed to the bigger constitutional picture, the European dimension. From Lord Denning onwards, it is has been a challenge for the English judiciary to approach European law questions in the correct spirit. The big constitutional advances in the law occurred not by minute parsing of the narrowest words as if they were a tax statute but by respectful reference to the big principles of what a founding father of the EEC called "*fair play*". By examining the words in the narrowest possible way but by neglecting the big picture it is possible for an appellate court to produce a conclusion which is narrowly logical and broadly perverse.

28. We note that the objective and requirements of the Ankara Agreement, as set out in Articles 2 and 7, envisage progressive integration between the EU and Turkey. Article 41(1) is directly effective (Case C-37/98 R v Secretary of State for the Home Department, Ex p Savas [2000] 1 WLR 1828; [2000] ECR I-2927 (EU:C:2000:224) ("**Savas**") at [48]-[50]). This was also the obiter approach of Sullivan J in R (oao Parmak) v SSHD [2006] EWHC 244 (Admin); [2006] 2 CMLR 56 at [27].

29. We agree with Holman J's conclusion (at [83]) that "[…] *the effect of article 41 is to require, subject to article 59, that the appeal or review procedure available to the claimant should not be less favourable now than it was in 1973*". That is consistent with the way in which the CJEU analysed Article 41(1) in Savas: "*the 'standstill' clause in Article 41(1) of the Additional Protocol 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*"; and "[i]*t is therefore for the national court, which alone has jurisdiction to interpret its own domestic law, to determine whether the domestic rules applied to Mr Savas by the competent authorities have the effect of worsening his position in comparison with the rules which were applicable in the United*

Kingdom on the date on which the Additional Protocol entered into force in relation to that Member State" (at [69]-[70]). Similarly, in Case C-16/05 R (Tum) v Secretary of State for the Home Department [2007] ECR I-7415; [2008] 1 WLR 94 (EU:C:2007:530) at [69] the CJEU held that "*article 41(1) of the Additional Protocol 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 to the territory of that state, of Turkish nationals intending to establish themselves in business there on their own account*".

30. The provisions of the Ankara Agreement must be read consistently with those principles. There are no grounds for taking a different approach in relation to those businesspersons falling within the scope of the Ankara Agreement and its Additional Protocol.

31. We recall the fundamentals once more. For decades Turkish business people were able to see their applications considered in a transparent and neutral manner. The great majority were successful and the challenges to refusals were in most cases successful. With effect from April 2015 a new regime was instituted: more costly, more potentially arbitrary, more discretionary, more untransparent, lacking hearings and requiring proof of matters which are inherently potentially imprecise. The possibility of reversing an adverse decision has become sharply more difficult and the few attempts to gain judicial scrutiny have been usually doomed to failure. We find it very difficult to consider the new "reforms" as falling within the procedural autonomy of the Member State. To the contrary, the changes are intended to deter, discourage, exclude and harass candidates for establishment in the UK. And they are having those pernicious effects. We repeat that it may be inconvenient to respect the law for political reasons. We repeat that convenience is irrelevant, or should be, for the public authority charged with upholding the law.

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