THE STANDSTILL THAT MOVED

How the United Kingdom Dismantled the Ankara Agreement Establishment Rights of Turkish Businesspersons, and Why It Breached the Treaties in Doing So — A Study in Treaty Erosion, Procedural Attrition, and the Silent Abandonment of a Protected Class

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ABSTRACT

This article argues that, between roughly 2014 and the close of the Brexit implementation period, the United Kingdom placed itself in serial breach of binding European Union law in its treatment of Turkish businesspersons established, or seeking to establish, under the 1963 Ankara Agreement and its 1970 Additional Protocol. The breaches were not announced; they were accreted — a new evidential demand here, an abolished appeal there, a lost upload, an unserved decision, a narrow judicial construction. Taken singly, each could be defended as administrative housekeeping; taken together, they hollowed out a status that an international treaty was meant to render secure. The article contends that the United Kingdom breached the standstill obligation in Article 41(1) of the Additional Protocol both substantively (by importing modern points-based conditions — "sole control" of funds, specified evidential formats, proof of the *source* of funds — into a regime frozen at the generous 1973 Immigration Rules) and procedurally (through an unreliable outsourced document-handling system and the late or non-service of decisions), and that it breached the good-faith duty in Article 7 and, arguably, the non-discrimination guarantee in Article 9. Its analytical heart is the abolition of the merits appeal and its replacement by internal administrative review: the collapse in the rate at which wrongful refusals were corrected — from some forty per cent on appeal to as little as one per cent on review — is offered not as an administrative datum but as the quantitative signature of a remedy rendered, in the Court of Justice's language, neither effective nor equivalent. The article frames these failures philosophically — through Hart's account of rules, Dworkin's account of integrity, and the common law's principles of natural justice — and through the contrasting purposes of the Treaty and of the Association. It treats the systematic failure of the United Kingdom's courts to refer the resulting questions to the Court of Justice as an independent breach of Article 267 TFEU, and the European Commission's refusal to act as guardian — now the subject of a maladministration inquiry by the European Ombudsman — as the disabling of the only

remaining channel of correction. Situating the Ankara standstill within the wider family of the Union's association instruments, the article shows that it is at once the most substantively generous and the most institutionally fragile of them all, and that the post-Brexit settlement — a Withdrawal Agreement that protected the European Union citizen with elaborate care and a goods-only trade agreement that did not so much as mention the Turkish businessperson — entrenched the abandonment of a class that, uniquely, had no negotiator to speak for it.

PART I — INTRODUCTION

1. The shape of the argument

There is a particular cruelty in the way legal rights are usually lost. They are seldom abolished in a single candid stroke, with a frank statement that the state no longer wishes to honour a commitment it once made. They are worn away: a guidance note, a statement of changes, a reinterpretation, a quietly removed appeal, an evidential demand that no statute authorises, a scanning system that loses the documents an applicant paid to upload. Each step, alone, looks like administration. Together, over years, they amount to the dismantling of a body of rights that a treaty was supposed to render untouchable.

That is the story of the Turkish businessperson in the United Kingdom. The contention of this article is that the cumulative effect of the measures described below was not merely poor administration — though it was certainly that — but a breach by the United Kingdom of obligations of European Union law that bound it, without qualification, until 11 p.m. on 31 December 2020, and whose consequences continue to disadvantage a defined and dwindling cohort to this day.

The argument is built on a single structural insight, which the philosophical and comparative Parts below are designed to establish: the Ankara standstill confers, on paper, the *strongest* establishment guarantee in the entire family of the Union's association agreements, yet is wrapped in the *weakest* machinery of enforcement. A right that freezes the generous law of 1973 and forbids any retreat from it is, where it bites, more valuable to its holder than the national-treatment right of a Europe Agreement national or the dynamic-but-evolving right of an European Economic Area national. But it is protected by no dedicated supranational guardian, no dedicated court, no structural interdependence, and — after the appeal was abolished — by a domestic remedy too feeble to correct error. A Member State minded to erode it had only to administer it badly and wait. The United Kingdom did precisely that.

The Parts proceed as follows. Part II sets out the treaty architecture and its reception into, and expulsion from, the domestic legal order. Part III — the conceptual spine of the article — frames the standstill through the purposes of the Treaty and of the Association, and

through three lenses that recur throughout: Hart's account of law as a system of rules, Dworkin's account of law as integrity, and the common law's principles of natural justice. Parts IV and V analyse the substantive and procedural breaches. Part VI, the analytical heart, addresses the abolition of the appeal, the question whether the standstill reaches remedies, and the collapse in success rates that proves the breach empirically. Part VII treats the courts' systematic failure to refer as an independent breach of Article 267, supported by a quantitative study of non-referral. Part VIII considers non-discrimination, settlement, and the Commission's inaction. Part IX places the Ankara Agreement within the family of the Union's association instruments and shows why it is treated, substantively and procedurally, in a manner unique among them. Part X turns to the post-Brexit settlement. Part XI concludes.

2. A note on perspective and sources

This article draws upon, and is in part a response to, documents prepared on behalf of the Turkish Association to Protect the Rights of Industrial and Commercial Businesspersons in the UK under the ECAA ("the Association"): a letter of 18 June 2020 from Dr Catherine Taroni of Richmond Chambers identifying common substantive and procedural errors; and two opinions commissioned from Sir Ian Forrester QC (a former Judge of the General Court), Eleanor Sharpston QC (a former Advocate General of the Court of Justice) and Ravi Mehta of Blackstone Chambers — a Joint Advice of 29 January 2021 on the merits, and a Joint Advice of 26 February 2021 directed at the Commission's stewardship and the evisceration of the appeal. That two lawyers of such standing concluded, after careful analysis, that the reforms were "intended to deter, discourage, exclude and harass"[1] is not decisive of the legal questions; but it is a weighty indication that the arguments advanced here are a serious reading of the law and not the special pleading of an interested party. Those documents are reproduced or summarised in the Annexes to this article — the Commission's two letters in full at Annexes 1 and 2, and the two Opinions and the Richmond Chambers letter, with their provenance and principal contents, at Annexes 3 to 6 — and their analysis is taken up, tested against the authorities, and extended. The present author writes in sympathy with the Association's cause but has tried to state the contrary case fairly, for an argument that cannot survive its own best statement of the opposing view is not worth making.

3. Why it still matters

It is tempting to treat this as a closed chapter — a dispute about a treaty that no longer binds the United Kingdom, concerning a route that closed to new entrants on 1 January

[1] The characterisation is the authors' own: Joint Advice of 26 February 2021 (Annex 4). The underlying merits analysis is developed in the Joint Advice of 29 January 2021 (Annex 3), and the substantive and procedural defects were first catalogued in the Richmond Chambers letter of 18 June 2020 (Annex 6).

2021. The temptation should be resisted, for three reasons. First, several thousand Turkish nationals remain under transitional arrangements, extending leave in three-year increments and applying for settlement under Appendix ECAA; the pathologies described below continue to affect them. Secondly, the breaches committed while EU law bound the United Kingdom generated, and may still generate, liabilities and remedies that survive the change in constitutional position. Thirdly, and most broadly, the episode is a case study of how a sophisticated administrative state can hollow out a protected status without ever formally repudiating it, and of the structural difficulty that supranational enforcement faces in responding. The lessons are not confined to Turkish businesspersons, nor to the United Kingdom.

PART II — THE TREATY ARCHITECTURE

4. Association agreements in the legal order

The competence to conclude association agreements, originally conferred by Article 238 of the Treaty establishing the European Economic Community, is now found in Article 217 TFEU, which empowers the Union to conclude "agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".[2] Article 216(2) TFEU makes explicit what had long been implicit: such agreements bind the institutions and the Member States. The Court of Justice had established the proposition decades earlier in *Haegeman*, holding that the provisions of an association agreement form, from the agreement's entry into force, an integral part of Union law.[3]

This is no technicality. It means that the Ankara Agreement and its Additional Protocol were never merely instruments of public international law operating on the plane of state-to-state relations. From the United Kingdom's accession in 1973 they were part of the law that bound it internally, that conferred rights enforceable by individuals before national

[2] Article 217 TFEU (ex Article 310 EC, ex Article 238 EEC); Article 216(2) TFEU. The continuity of the competence across three renumberings is a reminder that the Ankara Agreement has always drawn its force from the Union's settled treaty-making power, not from any ad hoc arrangement.

[3] Case 181/73 *R & V Haegeman v Belgian State* [1974] ECR 449 (ECLI:EU:C:1974:41) [5]. The proposition that an association agreement becomes, on entry into force, an integral part of Union law is the foundation of everything that follows: it is what converts a state-to-state bargain into a body of law capable of conferring rights on individuals. See further P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020) ch 12.

courts,[4] and that took precedence over inconsistent domestic measures.[5] The United Kingdom's obligations to Turkish businesspersons were not soft diplomatic undertakings; they were hard law, justiciable at the suit of the individual.[6]

5. The Ankara Agreement: objects and key provisions

The Agreement establishing an Association between the European Economic Community and Turkey was signed at Ankara on 12 September 1963 and concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963.[7] Its ambition was, for its time, remarkable: the progressive establishment of a customs union and the eventual accession of Turkey. Article 2(1) records the aim of "the continuous and balanced strengthening of trade and economic relations between the Parties"; Article 28 looks forward, however aspirationally, to the moment when the Agreement's operation might make it possible to envisage Turkey's full acceptance of the obligations of membership. The teleology matters, and it returns in Part III: this was an instrument of *progressive integration*, not a static bargain, and the Court of Justice has repeatedly read its provisions in that light.

Four provisions matter for present purposes. **Article 7** imposes a duty of good faith in terms strikingly close to what became Article 4(3) of the Treaty on European Union: the parties "shall take all appropriate measures … to ensure the fulfilment of the obligations arising from this Agreement" and "shall refrain from any measures liable to jeopardize the attainment of [its] objectives".[8] This is the sincere-cooperation principle in association-agreement form, and the textual hook for the proposition that a party may not, by administrative stratagem, defeat in practice a right it is bound in form to respect.

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[4] The principle of direct effect derives from Case 26/62 *Van Gend & Loos* [1963] ECR 1 (ECLI:EU:C:1963:1); its extension to provisions of association agreements is established in *Haegeman* and, for Article 41(1) specifically, in *Savas* (Case C-37/98). Direct effect is the hinge: without it, the standstill would bind only on the international plane and the individual could not invoke it at all.

[5] Case 6/64 *Costa v ENEL* [1964] ECR 585 (ECLI:EU:C:1964:66); for the domestic reception of primacy during membership, *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603 (HL). Primacy meant that, where the 1973 baseline and a later domestic rule conflicted, the baseline prevailed — which is precisely what the caseworkers did not do.

[6] For an overview of the body of rights generated by the Agreement, the Protocol, Association Council decisions and the case law, see N Idriz, "Free Movement of Persons between Turkey and the EU" (2009) 46 Common Market Law Review 1911; and S Peers, *EU Justice and Home Affairs Law* (4th edn, OUP 2016).

[7] Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C113/1). The Decision is the instrument by which the Community assumed the Agreement; its appearance in the 1973 *Official Journal* reflects the United Kingdom's accession year.

[8] Ankara Agreement, art 7. The parallel with Article 4(3) TEU is not merely verbal: the Court treats the association good-faith duty as imposing obligations analogous to sincere cooperation, which is why a pattern of administration that defeats the right in practice can engage it — see Part V.

Article 9 prohibits, "within the scope of this Agreement", "any discrimination on grounds of nationality";[9] the phrase "within the scope" does heavy work, and the argument over its reach is taken up in Part VIII. **Article 13** records the parties' engagement to be "guided by" the EEC Treaty's freedom-of-establishment provisions (now Articles 49–55 TFEU) "for the purpose of abolishing restrictions on freedom of establishment between them".[10] It is the conceptual root of the businessperson's right — though, as will be seen, the directly effective and operative obligation is found in the Protocol.

6. The Additional Protocol and the standstill

The Additional Protocol, signed at Brussels on 23 November 1970 and concluded by Council Regulation (EEC) No 2760/72,[11] contains in Article 41(1) the provision around which this entire controversy turns:

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

This is the celebrated standstill clause. It creates no positive right of establishment exercisable on demand; it harmonises nothing; it obliges no party to admit any particular national. What it does — and what makes it potent — is freeze the regulatory clock. It prohibits any *new* restriction: any measure that makes the position of a Turkish national wishing to establish in business *worse* than it was when the Protocol entered into force for the Member State concerned. For the United Kingdom that date is 1 January 1973, the date of accession.

The consequence, repeatedly affirmed by the Court of Justice, is that the conditions governing the establishment of Turkish businesspersons in the United Kingdom fall to be assessed against the Immigration Rules as they stood in 1973 — principally the Statement of Immigration Rules for Control on Entry (HC 509) and for Control after Entry (HC 510). One qualification is found in Article 59 of the Protocol: in the fields it covers, "Turkey

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[9] Ankara Agreement, art 9. The reach of "within the scope of this Agreement" is contested and is taken up in Part VIII; that the guarantee has autonomous operative content, capable of application without any further implementing rule, is established by *Commission v Netherlands* (Case C-92/07) [75]–[76] and *Sürül* (Case C-262/96).

[10] Ankara Agreement, art 13; the cognate standstill for workers is Article 13 of Decision No 1/80. The "guided by" formula is the textual source of the borrowed-vocabulary problem analysed in Part III: it imports the Treaty's establishment concept as a guide without rendering the two regimes co-extensive (*Demirkan*, Case C-221/11).

[11] Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C113/17). That the Protocol was concluded by *Regulation* — directly applicable by its nature — reinforced the directly effective character later confirmed in *Savas*.

shall not receive more favourable treatment than that which Member States grant to one another".[12] The standstill cannot, therefore, place the Turkish national in a *better* position than the European Union national. As will be seen, this provision is double-edged: it caps the claim, but by its very terms it also supplies a comparator against which discrimination may be measured.

7. The 1973 Rules in their setting

It is worth dwelling on the character of the 1973 Rules, because the modern reader — accustomed to Immigration Rules running to hundreds of pages of appendices and specified-evidence schedules — may struggle to credit how spare and generous the historical position was. Paragraph 21 of HC 510 was concerned with three matters only: that the applicant would bring into the country sufficient funds to establish a business; that he could bear his share of its liabilities; and that his share of its profits would support him and his dependants. There was no minimum capital figure, no holding period, no prescribed form of evidence, no requirement to demonstrate provenance, no requirement that the business be "innovative, viable and scalable" or endorsed, no English-language test, no maintenance tariff. And, critically for Part VI, an adverse decision attracted a right of appeal to an independent adjudicator, with a further appeal beyond.[13]

This generosity was no accident of careless drafting. It reflected an age in which business migration was regarded as broadly beneficial and regulated with a light touch, before the apparatus of suspicion that characterises the modern system was constructed. The Upper Tribunal recognised as much in *Akinci*, observing that the 1972 Rules were the provisions applicable to Turkish nationals relying on Article 41(1) and that they are "considerably more favourable with respect to migration for business purposes than those prevailing today".[14] The standstill caught the Turkish businessperson's entitlement at this favourable high-water mark and held it there. Everything the United Kingdom did to its general business-migration regime thereafter — the Business Person route of the 1990s, Tier 1 (Entrepreneur) in 2008, the Innovator and Start-up routes in 2019[15] — increased

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[12] Additional Protocol, art 59 — the ceiling that complements the Article 41(1) floor. For its operation as a limit on the advantages a Turkish national may claim, see *Çoban* (Case C-677/17) [61] and *Demirci* (Case C-171/13); and, for the resulting "lesser of floor and ceiling" structure in the domestic case law, *Soner Koktuk* [2018] EWCA Civ 2850.

[13] Statement of Immigration Rules for Control after Entry (HC 510, 1973) para 21, with the cognate provision of HC 509. The right of appeal to an independent adjudicator, with a further appeal beyond, is the feature whose abolition is the subject of Part VI.

[14] *Akinci (paragraph 21 HC 510 — correct approach)* [2012] UKUT 266 (IAC) [9]. The Upper Tribunal's candid acknowledgement that the 1972 Rules are "considerably more favourable" than the modern regime is the judicial recognition of the very gap the standstill freezes open.

[15] The successive general business-migration regimes — the Business Person route of the consolidated Rules (HC 395), the Tier 1 (Entrepreneur) route under the points-based system from 2008, and the Innovator

the burden on applicants generally, but none of it could lawfully be applied to the Turkish businessperson, whose position remained frozen at 1973. The breaches examined in Part IV are, at bottom, the consequence of caseworkers failing to honour that freeze.

8. Direct effect and the jurisprudential lineage

The decisive step in the juridical life of Article 41(1) was the recognition that it produces direct effect.[16] That step was taken in *Savas*, where the Court held that the clause "lays down a precise and unconditional principle that is sufficiently operational to be applied by a national court", capable of governing the legal situation of individuals and of being relied on before national courts; the obligation was negative — an obligation *not* to act — whose content was clear and whose implementation required no further measure.[17] *Savas* was amplified in *Abatay and Şahin*,[18] applying the clause to the services limb and to a work-permit requirement, and in *Tum and Dari*,[19] which extended it to the very first admission of the establishment-seeker and struck down a requirement of prior entry clearance. The line runs on through *Soysal*,[20] striking down a visa requirement imposed on Turkish lorry drivers providing services; *Sahin* and *Commission v Netherlands*,[21] striking down disproportionate residence-permit charges; and *Demirkan*,[22] which (while

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and Start-up routes in Appendix W from 2019 — progressively raised the threshold for applicants at large. None could lawfully be applied to the ECAA businessperson, whose entitlement the standstill fixes at HC 509/510 (1973).

[16] The spectrum of direct effect runs from *Van Gend & Loos* (Case 26/62) through the direct effect of sufficiently precise and unconditional directive provisions in Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629 (ECLI:EU:C:1979:110); a clear, unconditional, negative treaty obligation such as Article 41(1) is, if anything, an easier case — as *Savas* confirmed.

[17] Case C-37/98 *Savas* [2000] ECR I-2927, [2000] 1 WLR 1828 (ECLI:EU:C:2000:224) [46]–[71]. The Court's reasoning that a negative, standstill obligation is peculiarly apt for direct effect — there being nothing for the State to do but refrain — is the analytical key to the whole regime.

[18] Joined Cases C-317/01 and C-369/01 *Abatay and Şahin* [2003] ECR I-12301 (ECLI:EU:C:2003:572). The case matters here chiefly because it confirms that the standstill bites on *administrative* requirements (a work-permit condition), opening the path to the procedural argument of Part VI.

[19] Case C-16/05 *Tum and Dari* [2007] ECR I-7415, [2008] 1 WLR 94 (ECLI:EU:C:2007:530) [69]. The extension to the very first admission disposes of the argument that the standstill protects only those already established.

[20] Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031 (ECLI:EU:C:2009:101). A visa is, on its face, a paradigm administrative formality; that it was struck down shows how far the standstill reaches into procedure.

[21] Case C-242/06 *Sahin* [2009] ECR I-8465 (ECLI:EU:C:2009:554); Case C-92/07 *Commission v Netherlands* [2010] ECR I-3683 (ECLI:EU:C:2010:228). The charges cases establish that even the *cost* of a procedure can be a new restriction — a fortiori the abolition of a remedy.

[22] Case C-221/11 *Demirkan* (ECLI:EU:C:2013:583) [39], [43]–[62]. *Demirkan* is double-edged: it restates the "object or effect" test in its widest form, yet draws a boundary (no passive receipt of services) precisely

drawing a boundary at the passive *receipt* of services) restated the core prohibition on "any new measure having the object or effect of making the exercise by a Turkish national of [the] economic freedoms subject to stricter conditions" than those obtaining when the Protocol entered into force. The earliest authority on justiciability, *Demirel*, confirms that the Court's interpretive method here is purposive, oriented to the integration objectives of the Association.[23]

Two features deserve emphasis. First, the Court has repeatedly held the clause to bite on *procedural and administrative* requirements — work permits, entry clearance, visas, permit charges — not merely on substantive criteria. This is the foundation of the argument, developed in Part VI, that it reaches the procedural architecture of decision and remedy. Secondly, the test is resolutely *effects-based*: it asks not whether the Member State intended to disadvantage Turkish nationals, nor whether the measure is reasonable in itself, but whether its *object or effect* is to worsen their position relative to the baseline. A measure adopted for the most respectable of reasons, applied in perfect good faith, is caught if its effect is to make establishment harder than it was in 1973.

The Court did not, however, treat the standstill as an absolute and mechanical prohibition. In a line running through *Demir*, *Dogan* and *Genc* — and applied to the worker limb in *Tekdemir*, *Yön* and *B v Udlændingenævnet*[24] — it developed a structured three-stage test: is the measure a "new restriction"; if so, is it justified by an overriding reason in the public interest; and, if so, is it *proportionate*?[25] This is precisely the test the Court applies to restrictions on the Treaty freedoms themselves: the borrowed vocabulary of Article 13 carries with it a borrowed methodology, a point of central importance in Parts III and IV. The significance for the present argument is acute. The substantive accretions documented in Part IV were new restrictions in the most straightforward sense; once that is recognised, the burden shifts to the United Kingdom to identify an overriding public

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on the ground that the Association's objects are not identical to the internal market's — the point developed in Part III.

[23] Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719 (ECLI:EU:C:1987:400). The earliest of the line, and the source of the purposive method the Court of Appeal would later neglect.

[24] The worker limb runs in parallel under Article 13 of Decision No 1/80: see Case C-1/97 *Birden* [1998] ECR I-7747 (ECLI:EU:C:1998:568) (the concept of belonging to the duly registered labour force); Case C-237/91 *Kus* [1992] ECR I-6781 (ECLI:EU:C:1992:527) (residence as the corollary of lawful employment); and, on expulsion, Case C-371/08 *Ziebell* [2011] ECR I-12735 (ECLI:EU:C:2011:809). That standstill too was held to operate as a one-way ratchet in *Toprak and Oguz* (Case C-300/09).

[25] Case C-225/12 *Demir* (ECLI:EU:C:2013:725) [40]–[41]; Case C-138/13 *Dogan* (ECLI:EU:C:2014:2066) [37]–[38]; Case C-561/14 *Genc* (ECLI:EU:C:2016:247) [51]–[57]; applied to the worker limb in Case C-652/15 *Tekdemir* (ECLI:EU:C:2017:239), Case C-123/17 *Yön* (ECLI:EU:C:2018:632) and Case C-379/20 *B v Udlændingenævnet* (ECLI:EU:C:2021:660). The justification-and-proportionality structure mirrors that applied to the Treaty freedoms: see Case C-55/94 *Gebhard* [1995] ECR I-4165 (ECLI:EU:C:1995:411) [37]. That this line was built without any United Kingdom reference is the burden of Part VII.

interest and to demonstrate proportionality — a burden never discharged or even acknowledged, because its decision-makers never approached the matter through the standstill analysis at all. Had the question reached the Court of Justice — as the German and Danish courts ensured it did in the cognate cases — the United Kingdom would have had to run that gauntlet, and it is difficult to see how a requirement found nowhere in the published Rules could have survived it.

9. Reception into, and expulsion from, the domestic legal order

The Ankara Agreement entered United Kingdom law as part of the corpus of Community law given domestic effect by the European Communities Act 1972. From 1 January 1973 the directly effective standstill was enforceable here, and the Secretary of State was bound to determine Turkish business applications by reference to the 1973 Rules. The unwinding is recent constitutional history. As Green LJ explained in *Simonis v Arts Council England*, the Withdrawal Agreement obligations were given effect by the European Union (Withdrawal) Act 2018 as amended by the 2020 Act; "Union law" continued to have the same effect as before until 11 p.m. on 31 December 2020, the end of the implementation period; and the 1972 Act was maintained in force until that moment.[26] The crucial temporal point is therefore this: throughout the entire period in which the breaches below were occurring — the abolition of appeals in 2014–15, the withdrawal of the settlement route in 2018, the maladministration documented from 2019 to 2020 — the United Kingdom remained fully bound by Articles 41(1), 9 and 7, and subject to the jurisdiction of the Court of Justice. The breaches were not breaches of a dead letter; they were live, justiciable, contemporaneous violations.

Only at the end of the implementation period did the position change. The directly effective rights derived from the Agreement, like those from the EEA and EU–Swiss agreements, were brought to an end; the instrument that did the work for establishment and services was the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, which provided that those rights should cease — though, tellingly, the cessation was disapplied "in relation to matters which fall within the application or operation of the Immigration Acts", a carve-out whose significance is examined in Part

[26] *R (Simonis) v Arts Council England* [2020] EWCA Civ 374, [2020] 3 CMLR 22 [10] (Green LJ), conveniently summarising the mechanics of reception and expulsion; contrast the substantive divergence between *Akturk* and *CA (Turkey)*.

X.[27] After 31 December 2020 the Ankara Agreement ceased to have effect in the United Kingdom as a matter of retained EU law.[28]

The organising claim can now be stated with precision. During the period of binding obligation the United Kingdom breached the standstill substantively and procedurally, arguably breached the non-discrimination guarantee, and breached the duty of good faith. After that period it compounded the position by closing the route and concluding a successor trade agreement that abandoned the established businessperson entirely.

PART III — RULES, PRINCIPLES, AND NATURAL JUSTICE: THE JURISPRUDENTIAL FRAME

10. Two sets of purposes

Before measuring the United Kingdom's conduct against the clause, it is worth being explicit about the two bodies of purpose that frame the inquiry, for the United Kingdom's central error was to read a provision animated by one set of purposes as though it were a fragment of domestic immigration law animated by none.

The purposes of the *Treaty* are well known. The TFEU exists to create an internal market "without internal frontiers"[29] in which the four freedoms — goods, persons, services and capital — circulate; to confer on every national of a Member State the status of citizen of the Union, which the Court of Justice has called the "fundamental status" of nationals of the Member States;[30] and to guarantee, through the principle of effective judicial protection now codified in Article 47 of the Charter,[31] that Union-law rights can be

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[27] Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401, regs 2–4 and explanatory note. The carve-out for "matters which fall within the application or operation of the Immigration Acts" is the thread by which the substance of the regime survived into domestic law — see Part X.

[28] European Union (Withdrawal) Act 2018, ss 1A–1B and 7A (as inserted/amended by the European Union (Withdrawal Agreement) Act 2020); SI 2019/1401.

[29] Article 3(3) TEU (the internal market as an objective of the Union) and Article 26(2) TFEU (an area "without internal frontiers in which the free movement of goods, persons, services and capital is ensured"). These are the purposes against which the Court reads the Treaty freedoms expansively — and against which the Association's narrower objects must be distinguished.

[30] The "fundamental status" formulation is from Case C-184/99 *Grzelczyk* [2001] ECR I-6193 (ECLI:EU:C:2001:458) [31]. It is invoked here to mark the gulf between the constitutional security of the Union citizen and the contingent position of the Turkish national.

[31] Article 19(1), second subparagraph, TEU (Member States "shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") and Article 47 of the Charter; see *Unibet* (Case C-432/05) and *DEB* (Case C-279/09). Effective judicial protection is the Union-law principle whose common-law analogue — natural justice — is discussed in Part III.

vindicated in fact and not merely in form. Its establishment freedom in Article 49[32] confers a *positive* right "to take up and pursue activities as self-employed persons and to set up and manage undertakings"; its services freedom in Article 56 has been read to embrace even the *passive* freedom to receive services;[33] and its citizenship provisions in Articles 20 and 21 have generated, through *Grzelczyk*, *Baumbast*, *Martínez Sala* and ultimately *Ruiz Zambrano* and *Dereci*, a body of residence rights untethered from any particular economic activity.[34] The Treaty freedoms are dynamic, codified in dense secondary legislation (above all Directive 2004/38, with its battery of procedural safeguards against expulsion and refusal), interpreted by a standing court in light of evolving conditions, and enforced by the full apparatus of infringement proceedings, preliminary references and state liability.[35] They are interpreted expansively, in the service of market integration: the Court's modern jurisprudence on persons, from *Bosman* through *Gebhard* to *Carpenter*, asks not merely whether a measure discriminates but whether it impedes *market access*, catching even non-discriminatory obstacles.[36]

The purposes of the *Association* are narrower but real. The Ankara Agreement was an instrument of progressive economic integration, directed at a customs union, the development of the Turkish economy, and the eventual possibility of accession (Articles 2 and 28), undergirded by the good-faith duty in Article 7. It borrows the Treaty's vocabulary — Article 13 agrees to be "guided by" the establishment freedoms — but the borrowing is a guide, not an equivalence: *Demirkan* holds that the standstill does *not*

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[32] Articles 49 and 56 TFEU (freedom of establishment and freedom to provide services). The contrast with Article 41(1) is fundamental: Article 49 confers a positive, justiciable right, whereas Article 41(1) confers only a negative guarantee against regression — which is why the comparator, and not the abstract right, does the analytical work.

[33] Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 (ECLI:EU:C:1984:35). The passive services freedom is precisely what *Demirkan* declined to extend to the Turkish national — a concrete instance of "the Treaty's words without the Treaty's depth".

[34] Case C-184/99 *Grzelczyk*; Case C-413/99 *Baumbast and R* [2002] ECR I-7091 (ECLI:EU:C:2002:493); Case C-85/96 *Martínez Sala* [1998] ECR I-2691 (ECLI:EU:C:1998:217); Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177 (ECLI:EU:C:2011:124) [42]–[45]; Case C-256/11 *Dereci* [2011] ECR I-11315 (ECLI:EU:C:2011:734) [64]–[67]. None of this body of citizenship law has any counterpart available to the Turkish national.

[35] Directive 2004/38/EC [2004] OJ L158/77, arts 6–7, 16, 30–31; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357 (ECLI:EU:C:1991:428); Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (ECLI:EU:C:1996:79); Case C-178/94 *Dillenkofer* [1996] ECR I-4845 (ECLI:EU:C:1996:375). The contrast between this dense remedial apparatus and the Turkish national's bare standstill is the theme of Part IX.

[36] Case C-415/93 *Bosman* [1995] ECR I-4921 (ECLI:EU:C:1995:463); *Gebhard* (Case C-55/94); Case C-60/00 *Carpenter* [2002] ECR I-6279 (ECLI:EU:C:2002:434). The market-access test shows how expansively the Treaty freedoms are read — and, by contrast, how literal the Court of Appeal's reading of the standstill was.

reach the passive receipt of services precisely because the Association's objectives are not identical to the internal market's.[37] The Turkish national is not a citizen of the Union; he derives no status from Article 20; he can invoke no *Ruiz Zambrano* principle; and *Dereci* — a case concerning, among others, a Turkish national — treated the citizenship and association regimes as distinct.[38] His position is, moreover, doubly bounded: floored to the historical baseline by Article 41(1), capped to the contemporary EU national by Article 59 (deployed to deny him advantages exceeding those of Union citizens in *Çoban* and *Demirci*),[39] and entitled, at every point, to the *lesser* of the two. This pincer disposes, once and for all, of the objection that recognising his standstill rights would over-reward him: the structural ceiling makes that impossible. The United Kingdom's substantive error, analysed in Part IV, was to substitute the wrong comparator — measuring the Turkish applicant against the modern points-based regime rather than against the 1973 Rules — an error intelligible only against the background of the other association models, in which a contemporary comparator would have been correct.

11. Hart: a valid rule, unfaithfully administered

H.L.A. Hart's account of law as a union of primary rules of obligation and secondary rules of recognition, change and adjudication illuminates, with unusual precision, both what the standstill *is* and how it came to be defied. The standstill is a secondary rule of an unusual kind: a rule about *which primary rules count*. It does not itself prescribe the conditions of establishment; it fixes the *criterion of validity* for those conditions, designating the Immigration Rules of 1 January 1973 as the operative measure and rendering invalid, as against the Turkish national, any later and more onerous rule. In Hartian terms, Article 41(1) supplies a bespoke rule of recognition for a single class of applicant, freezing the relevant primary rules at a historical moment.

Two consequences follow. First, the recognition that Article 41(1) is *directly effective* is, in Hart's framework, simply the recognition that the rule is valid by the legal system's own criteria and identifiable as such by officials and courts. There was never any doubt that the rule existed; *Savas* settled that.[40] Secondly — and this is the point the positivist frame

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[37] *Demirkan* (Case C-221/11) [49]–[53]; contrast *Luisi and Carbone* (Joined Cases 286/82 and 26/83). The asymmetry is deliberate: the Association borrows the Treaty's vocabulary but not its full reach.

[38] *Dereci* (Case C-256/11) [88]–[105]. The case is a useful illustration because one of the applicants was a Turkish national, and the Court treated the citizenship claim and the Association claim as governed by entirely different principles.

[39] Additional Protocol, art 59; Case C-677/17 *Çoban* (ECLI:EU:C:2019:408) [61]–[66]; Case C-171/13 *Demirci* (ECLI:EU:C:2015:8) [54]–[60]. Article 59 is the ceiling that makes the "over-reward" objection to the standstill unsustainable.

[40] *Savas* (Case C-37/98) [46]–[54]. In Hart's terms, the recognition of direct effect is simply the recognition that the rule is valid by the system's own criteria — a point on which there has never been doubt.

makes vivid — the *validity* of a rule is one thing and its *efficacy* or faithful administration quite another. The standstill remained valid, directly effective law throughout the period of breach. What failed was not the rule's existence but officials' adoption of the "internal point of view" towards it: the caseworkers who determined Turkish business applications did not treat the 1973 baseline as the operative rule of recognition at all. Trained and equipped to assess modern applications, they applied the mental furniture of that training — the assumption that the applicant is to be disbelieved until he has discharged a heavy, precisely specified evidential burden — to a regime the standstill required them to approach quite differently. The result was a system in which a valid, supreme, directly effective rule was, in practice, displaced by the very rules it invalidated. Hart's separation of a rule's validity from its administration is thus not a quibble but the diagnosis: this was not the repeal of a right but its quiet non-application, and the law's vocabulary must be precise enough to condemn the latter as firmly as the former. The standstill was meant to operate as a one-way ratchet permitting improvement but forbidding retreat;[41] what happened was a retreat conducted under cover of the rule's continued formal validity.

12. Dworkin: integrity, principle, and the severance of remedy from right

If Hart explains how the breach was possible, Ronald Dworkin explains why the courts' response to it was wrong. Dworkin's distinction between *rules*, which apply in an all-or-nothing fashion, and *principles*, which have weight and must be brought to bear by interpretation, maps directly onto the two methods on display in the *Akturk* litigation analysed in Part VI. The Court of Appeal in *CA (Turkey)* treated Article 41(1) as a *rule* to be parsed for its literal scope, asking whether the word "restrictions" could, as a matter of narrow English construction, be made to bear the weight of "remedies", and answering no.[42] The Court of Justice's own method is Dworkinian: it treats the clause as the expression of a *principle* — that the practical position of the Turkish national must not be worsened relative to the baseline — and asks whether a measure has the "object or effect" of doing so. That is a weighing exercise oriented to purpose, and it is fundamentally inhospitable to the move of excluding a category of measure merely because it is not expressly enumerated.

Dworkin's deeper idea — law as *integrity*, the requirement that the law be interpreted so as to express a single, coherent scheme of principle — sharpens the criticism. A

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[41] The contrast is with *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA): the standstill does not ask whether a condition is rational but whether it worsens the applicant's position relative to 1973. A perfectly rational condition is still unlawful if it is a new restriction.

[42] *Secretary of State for the Home Department v CA (Turkey)* [2018] EWCA Civ 287, [2019] 1 WLR 2689 [33]–[44]; contrast *R (Akturk)* [2017] EWHC 297 (Admin), [2017] 4 WLR 62 [83] (Holman J). The two judgments are, in Dworkinian terms, a rule-method and a principle-method applied to the same clause.

community of principle does not confer a right and then hollow it out by stealth; it does not solemnly undertake, in a directly effective treaty, that establishment shall be no harder than in 1973 and then sever the means of vindicating that undertaking from the undertaking itself. To Dworkin's ideal judge, Hercules, the proposition that the standstill protects the substantive conditions of establishment but not the remedy by which an unlawful refusal is corrected would be unintelligible, because it cannot be fitted into any attractive scheme of principle: a right whose breach cannot be effectively remedied is, to the person who holds it, no different from a right that does not exist. Integrity demands that remedy and right be read together, because that is the reading that makes the law speak with one voice. Finally, Dworkin's conception of *rights as trumps* — rights that hold against the collective goals of the community — captures the relation between the directly effective standstill and the United Kingdom's policy of immigration control. The right is precisely a card the individual may play against the general goal; administrative convenience, the desire for a uniform points-based system, even the genuine public interest in controlling migration, cannot of themselves trump it, save through the structured justification-and-proportionality analysis the standstill jurisprudence requires and the United Kingdom never undertook.

13. Natural justice: *audi alteram partem* and *nemo judex in causa sua*

The common law supplies a third lens, and it bears with peculiar force on the abolition of the appeal. The principles of natural justice are two: *audi alteram partem*, that a person be heard before an adverse decision; and *nemo judex in causa sua*, that no one be a judge in his own cause. Both were vindicated, as foundations of administrative legality, in *Ridge v Baldwin*,[43] and both are, in substance, offended by the administrative-review regime that replaced the 1973 appeal.

The replacement offends the first principle because administrative review is conducted *on the papers*: there is no hearing, no opportunity to give oral evidence, no occasion to answer the decision-maker's doubts in person — none of the procedural texture by which the 1973 appeal allowed an applicant to be heard before an independent adjudicator. It offends the second, and more gravely, because administrative review is conducted *by the Home Office reviewing the Home Office*: the institution whose decision is impugned reviews its own decision, through an official sharing the original decision-maker's training and assumptions. That is the very situation the maxim *nemo judex in causa sua* exists to forbid — a party adjudicating its own cause. The 1973 appeal embodied both principles; its replacement strips both. The Union legal order knows the same idea under

[43] *Ridge v Baldwin* [1964] AC 40 (HL), the modern fountainhead of the natural-justice revival in administrative law.

the name of effective judicial protection — the right to an effective remedy and a fair hearing, now in Article 47 of the Charter, elaborated in *DEB* (legal aid to vindicate Union-law rights), *Unibet* (the right to an effective remedy) and *ZZ* (the right to reasons and to a review encompassing the facts).[44] Natural justice and effective judicial protection are, for present purposes, two names for the same requirement, and the administrative-review regime fails both. This is why the question whether Article 41(1) reaches remedies — Part VI — is not an arid puzzle but the hinge on which the whole edifice of protection turns: in a framework that, unlike the EEA, supplies no external procedural guardian, the *only* protection the Turkish national's remedies can have must come from within the standstill clause itself.

These three frames — the valid-but-unadministered rule, the principle severed from its remedy, the natural justice denied — recur throughout what follows, and converge in the conclusion on the single structural fact that explains the whole affair: a substantive right of unique strength, married to an enforcement architecture of unique weakness.

PART IV — THE SUBSTANTIVE BREACHES: REWRITING THE 1973 RULES BY STEALTH

14. The governing standard

The standstill does not permit the Secretary of State to apply whatever conditions she considers reasonable, provided they are rational and proportionate. It is not a *Wednesbury* standard.[45] It is a *comparative* standard locked to a fixed historical baseline. The only question it permits is: would this condition, or its application in this manner, have worsened the position of a Turkish businessperson relative to the Rules in force on 1 January 1973? If yes, the condition is unlawful, however sensible it might appear to a modern caseworker. In *Tum and Dari* the Court held that Article 41(1) prohibits new restrictions "including those relating to the substantive and/or procedural conditions governing the first admission";[46] in *Commission v Netherlands* it reiterated the same formula;[47] and in *Demirkan* it crystallised the test as catching measures "having the object

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[44] Case C-279/09 *DEB* [2010] ECR I-13849 (ECLI:EU:C:2010:811); Case C-432/05 *Unibet* [2007] ECR I-2271 (ECLI:EU:C:2007:163) [38]–[44]; Case C-300/11 *ZZ* (ECLI:EU:C:2013:363); Charter of Fundamental Rights, art 47. Effective judicial protection is the Union-law name for what the common law calls natural justice.

[45] *Wednesbury* [1948] 1 KB 223 (CA).

[46] *Tum and Dari* (Case C-16/05) [69] (the standstill addresses "the substantive and/or procedural conditions governing the first admission").

[47] *Commission v Netherlands* (Case C-92/07) [47].

or effect of making the exercise … subject to stricter conditions than those which applied" at the baseline.[48] The phrase "object or effect" is decisive: a caseworker who, in perfect good faith, applies to a Turkish application the document checklist she would apply to an Innovator application has introduced a new restriction *by effect*, whatever her intention. That is the trap into which the decision-making teams fell repeatedly.

15. The invented requirement of "sole control of funds"

The first substantive breach was the requirement that the funds an applicant intends to invest be "entirely his own, solely under his control". Paragraph 21 of HC 510 required only that the applicant bring "sufficient funds to establish a business"; it said nothing of sole ownership or exclusive control. The condition transforms a question of *sufficiency and availability* — does the applicant have enough money, and can he bring it to bear? — into a question of *exclusive proprietorship* the historical Rules never posed. That such a requirement is a prohibited new restriction follows directly from *Dogan*, which held that a post-baseline measure making the conditions of establishment "more restrictive than those which were applicable" is a new restriction within Article 41(1), permissible only if justified by an overriding public interest and shown to be proportionate.[49] The point is sharpened by the applicant whose funds are held jointly with a spouse: he has equal access, can bring them to the United Kingdom, and they are therefore "available" in the only sense the Rules require. To exclude them by a "sole control" criterion is a new restriction by both object and effect, in precisely the sense condemned in *Savas* and *Tum and Dari*.[50] It is no answer that modern routes contain analogous control requirements; that is the point. To justify "sole control" by reference to Tier 1 (Entrepreneur) is to *concede* the breach, for it is to admit that a 2008-vintage condition was applied to a 1973-vintage entitlement.[51] Notably, this very allegation was put to the European Commission,

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[48] *Demirkan* (Case C-221/11) [39]. The phrase "object or effect" is the textual warrant for the proposition that intent is irrelevant — a measure adopted in good faith is caught if its effect is to worsen the position.

[49] *Dogan* (Case C-138/13) [35]–[38]: a post-baseline measure making establishment more restrictive is a new restriction, permissible only if justified by an overriding public interest and proportionate. The United Kingdom never attempted that justification because it never recognised the requirement as a new restriction at all.

[50] *Savas* (Case C-37/98) [69]; *Tum and Dari* (Case C-16/05) [69].

[51] The Tier 1 (Entrepreneur) route (2008, closed 2019) and its Innovator successor in Appendix W never governed the ECAA businessperson, whose entitlement is fixed by the 1973 Rules. To borrow a control requirement from those routes is to apply the very rules the standstill invalidates. Tellingly, Appendix A para 41 (Tier 1) and Appendix W para W6.5 (Innovator) themselves accept a bank *letter* — so the Turkish route was being administered more harshly than the modern routes it could not lawfully be assimilated to.

which characterised it as a matter requiring "further assessment … in subsequent correspondence" — assessment that, as Part VIII shows, never came.[52]

16. Specified formats and the disregard of evidence

The second breach concerns the form of evidence. The 1973 Rules, true to their brevity, prescribed none: an applicant had to satisfy the decision-maker that he had sufficient funds; how he did so was for him. The modern regime, by contrast, is obsessed with form, and refusal for failure to comply with specified-evidence requirements — even where the substantive condition was plainly met — became a familiar feature of the points-based system.[53] The breach lay in importing that formalism: rejecting a bank letter from a reputable institution confirming a substantial balance because the evidence was a *letter* rather than a *statement*. This is unlawful for the same reason as the "sole control" requirement — it imposes a condition unknown to the 1973 Rules — but it is, if anything, more transparent, because a bank letter conveys the same information as a statement, and in some respects more, since it carries the institution's express confirmation. The breach is thrown into sharp relief by the modern routes themselves: even Tier 1 (Entrepreneur), in Appendix A paragraph 41, accepted *either* statements *or* a letter from the financial institution for overseas funds; and the current Innovator regime, at Appendix W paragraph W6.5, expressly accepts "a bank letter, confirming that the funds are held in a regulated financial institution", over a three-month rather than six-month period. The Turkish route — which the standstill requires to be *no less* generous than the position in 1973 — was thus being administered as if it were *more* stringent than the modern points-based route. That inversion cannot be reconciled with Article 41(1).

17. Proof of the source of funds

The third breach was the demand that the applicant prove the *source* of his funds — not merely that sufficient funds were available and under his control, but where they had come from. Paragraph 21 of HC 510 asked only whether the applicant would bring sufficient funds; it did not ask their provenance. A "source of funds" requirement is a feature of modern anti-money-laundering practice and of the modern routes; its imposition on a 1973-vintage entitlement is a new restriction contrary to Article 41(1),

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[52] European Commission (DG NEAR), reply to TAPRICB of 30 September 2020, Ref Ares(2020)5140530, Annex (treating the Article 41(1)/Article 13/Article 9 contention as a matter that "requires further assessment"). See Part VIII and Annex 1.

[53] On the rigour with which specified-evidence requirements were applied under the points-based system, see *R (Mandalia) v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 — a useful marker of the formalism that the standstill forbids importing into the Turkish route.

unjustified and disproportionate within the meaning of *Demir*, *Dogan* and *Genc*.[54] There is a further dimension engaging a distinct principle of legality. The requirement was absent not only from the 1973 Rules but from the *published* Rules and Guidance altogether: a criterion applied to applicants who had no means of anticipating it. Decision-making by reference to unpublished criteria is unlawful on ordinary domestic principles, as *Lumba* established and *Alvi* confirmed in the immigration context, holding that requirements an applicant must satisfy must be laid before Parliament as part of the Rules.[55] The standstill vice and the domestic-legality vice here compound one another.

18. A pattern, not a series of accidents

The three breaches share a common origin and character. Each imports, into the assessment of a Turkish application governed by the 1973 Rules, a condition drawn from the modern points-based architecture; each worsens the applicant's position relative to the baseline; each is therefore, by object or effect, a new restriction prohibited by Article 41(1); and each was applied repeatedly and entrenched rather than corrected on review. The pattern points to a systemic cause, and it is the Hartian one identified in Part III: caseworkers trained on the modern regime applied its mental furniture to a regime the standstill required them to approach differently. The Association's remedy — caseworker training specific to the 1973 Rules, and a clear instruction not to treat ECAA applications as Innovator or Tier 1 applications[56] — was therefore not peripheral but a direct response to the structural cause. That the ECAA Guidance had reached a tenth iteration by 30 March 2020 yet remained inadequate only underscores that the problem was one of substance, not of drafting currency. We turn from the substance of the decisions to the procedures by which they were made and communicated — for the procedural breaches, though less glamorous, were in their way even more corrosive.

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[54] *Demir* (Case C-225/12) [40]–[41]; *Dogan* (Case C-138/13) [37]–[38]; *Genc* (Case C-561/14) [51]–[57]. A requirement to prove the provenance of funds, absent from the 1973 baseline, is a new restriction for which no overriding public interest was advanced and no proportionality demonstrated.

[55] *R (Lumba)* [2011] UKSC 12, [2012] 1 AC 245 [34]–[38] (Lord Dyson); *R (Alvi)* [2012] UKSC 33, [2012] 1 WLR 2208 [57]–[60], [94]. The "source of funds" demand thus offends two distinct principles at once: the standstill (a new restriction) and the domestic rule that requirements must be published in the Rules.

[56] The remedy was proposed in the Richmond Chambers letter of 18 June 2020 (Annex 6), which first catalogued the "sole control" and "source of funds" misconceptions, the rejection of bank letters, the upload failures and the service failures, and which sought caseworker training specific to the 1973 Rules and an instruction not to approach ECAA applications as modern points-based ones.

PART V — THE PROCEDURAL BREACHES: LOSING THE DOCUMENTS, HIDING THE DECISIONS

19. Procedure as substance

It is a recurring theme of this article — and the central controversy of Part VI — that the distinction between substance and procedure is far less stable than it first appears, and that in immigration control a procedural defect can extinguish a substantive right as effectively as any rule of refusal. A businessperson whose evidence never reaches the decision-maker, or who is refused because a commercial bureau lost the documents he paid to upload, has been denied his establishment right as surely as if the Rules had been rewritten against him; and a businessperson never told he has been refused, who thereby misses the window to challenge it, has been denied the remedy the standstill requires to be preserved.

20. Document scanning and upload failures

The modern process routed Turkish applicants through commercial intermediaries — the TLS and ESOLO systems and associated bureaux — to whom they paid fees for scanning and uploading their documents. The premise was that, having paid and received confirmation of upload, applicants could rely on the documents reaching the decision-maker. On the Association's material that premise frequently failed: documents for which applicants had paid and received confirmation did not reach caseworkers, and applications were then refused for want of the very evidence supplied. (These are unpublished instances; the argument rests not on their detail but on the Rules and the standstill.) The unlawfulness operates on two levels. At the level of domestic public law, where the state requires an individual to use a particular system and that system fails through no fault of his own, the resulting decision is liable to be quashed for procedural unfairness; an applicant who provides his documents as prescribed, pays the fee and receives confirmation is entitled to expect they will reach the decision-maker.[57] At the level of the standstill, the analysis is subtler but no less compelling. In 1973 an applicant submitted his documents directly, by post or in person, to the entry-clearance post; there was no intermediary and no risk that a third party's system failure would cause his evidence to vanish. The interposition of a fallible, fee-charging, outsourced layer is itself a new feature, introduced long after 1973, and its predictable consequence — refusal for want of evidence that was in fact supplied — worsens the applicant's position relative to the baseline. On the *Tum and Dari* formulation, a procedural condition governing first

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[57] On the duty to act fairly where the consequences of a procedural failure fall on the applicant, see *R (Pathan)* [2020] UKSC 41, [2020] 1 WLR 4506; *R (Balajigari)* [2019] EWCA Civ 673, [2019] 1 WLR 4647; and, classically, *Ridge v Baldwin* [1964] AC 40 (HL).

admission that did not exist in 1973 and operates to defeat good applications is a new restriction.[58] Nor is the breach cured by the fact that some refusals were eventually overturned: the delay, expense, stress and the blemish of a refusal on the record are themselves detriments the 1973 process did not impose — and where applicants re-submitted by email, the Home Office's response was non-uniform, so that whether an establishment right survived a system failure depended not on the Rules but on the accident of which official handled the matter.

21. Failure to serve decisions

The second pathology was the failure to serve decisions at all or in time — refusals communicated only after repeated requests, or weeks after the decision date, or not until the applicant chanced to enquire. Its significance is acute, because it strikes directly at the remedy. The time limits for challenging a refusal run from service or communication; a decision-maker who delays or omits service erodes, and may extinguish, the window within which the applicant can vindicate his rights. That time cannot fairly run against a person not notified of a decision — and that a decision does not take effect until communicated — are elementary and well-established principles, vindicated in *Anufrijeva* and *Pathan*.[59] This connects the procedural breach to the thesis of Part VI: the standstill preserves not merely the substantive conditions of establishment but the *remedial* architecture that existed in 1973, including the practical ability to access whatever remedy the law provides. It is also worth disposing of one answer: that the failures were a product of the pandemic. The chronology refutes it — many failures pre-date the first lockdown, some dating from the autumn of 2019. These were features of the system in normal times.

22. Pattern, good faith, and the human cost

A single misfired decision can be dismissed as an aberration. But the standstill, on the *Tum and Dari* formulation, is concerned with measures and conditions, not one-off errors; a pattern of upload failures inhering in the outsourced system the United Kingdom *requires* applicants to use is better characterised as a feature of that system, and hence a

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[58] *Tum and Dari* (Case C-16/05) [69]. On the requirement that procedural arrangements not render the exercise of EU-law rights "practically impossible or excessively difficult", see Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989 (ECLI:EU:C:1976:188); Case C-312/93 *Peterbroeck* [1995] ECR I-4599 (ECLI:EU:C:1995:437) [12]–[14].

[59] *R (Anufrijeva)* [2003] UKHL 36, [2004] 1 AC 604 [26]–[28] (a decision does not take effect until communicated); *R (Pathan)* [2020] UKSC 41. That time cannot run against a person not notified is about as elementary as principles of fairness get.

procedural condition of admission that did not exist in 1973.[60] The same is true of the good-faith obligation in Article 7: a party is not in breach because an official once erred, but may well be where it maintains, over years and across many cases, a system that predictably defeats the rights the Agreement protects. Article 7 mirrors the duty of sincere cooperation in Article 4(3) TEU and is reinforced by the right to good administration in Article 41 of the Charter;[61] it does not require proof of bad intent — it is enough that the practical operation of the system defeats the right. And the standard answer — that wrongly refused decisions were often eventually overturned — is an indictment, not a vindication: a system that routinely produces wrong decisions and corrects some only on challenge burdens the right-holder with the task of repeatedly rescuing his entitlement from the state's own failures, and succeeds only for those with the persistence and resources to fight. On the principle of effectiveness, such an environment renders the exercise of the right "excessively difficult".[62]

It would be a failure of candour to discuss these defects only in the register of doctrine. The Association placed before the European Ombudsman three representative accounts, said to be drawn from many hundreds (set out in the Joint Response to the European Ombudsman, Annex 5),[63] which should be recorded soberly. In one, a self-employed business owner holding an EU family residence permit, awaiting a replacement card, contracted COVID-19 after his permit had expired but before the card was printed; with his own status unresolved he could not regularise the settled status to which his family was entitled, no appointments were available, the infection spread, and his mother died. In another, an application was refused on the footing that shares held jointly deprived the applicant of the control necessary to be self-employed — the very "sole control" misconception of Part IV — following an earlier administrative error that took months to correct, amid illness and damage to the business. In a third, administrative errors and printing delays held up a biometric residence permit, leaving a family unable to open bank accounts or obtain medical care; after an insistence that the permit be collected in person in London notwithstanding the pandemic, the father died of a COVID-related blood clot. These accounts cannot be verified within the compass of this article, and the deaths had

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[60] *Tum and Dari* (Case C-16/05) [69]. The shift from one-off error to systemic feature is what brings the upload failures within the standstill: a recurring failure inhering in a system the State *requires* applicants to use is a condition of admission, not an accident.

[61] Article 7 of the Ankara Agreement mirrors the duty of sincere cooperation in Article 4(3) TEU and is reinforced by the right to good administration in Article 41 of the Charter. The good-faith duty does not require proof of bad intent; it is enough that the system predictably defeats the right.

[62] *Commission v Netherlands* (Case C-92/07) [47]; *Rewe* (Case 33/76). A system that corrects wrong decisions only on challenge, and only for the persistent, renders the right "excessively difficult" to exercise.

[63] The three accounts are set out in the Joint Response to the European Ombudsman of 26 February 2021 (Annex 5). They are reproduced here only in summary and without identifying detail; the argument does not depend on their verification, but on the systemic features they illustrate.

medical causes the law neither created nor could wholly have prevented; it would be wrong to assert a simple chain of causation from delay to death. But it would be equally wrong to treat the human dimension as legally irrelevant. The good-faith obligation, and the requirement that procedural conditions not render the establishment right excessively difficult, are not satisfied by a system that processes the genuinely entitled through an "obstacle course" of delay, error and formality, indifferent to the foreseeable consequences for the people caught in it.

PART VI — THE ABOLITION OF THE APPEAL: THE STANDSTILL, REMEDIES, AND THE COLLAPSE IN SUCCESS RATES

23. The measure and the question

By section 15 of the Immigration Act 2014, amending the appeal provisions of the Nationality, Immigration and Asylum Act 2002, the general right of appeal to the First-tier Tribunal against immigration decisions was removed, save for a narrow category of human-rights and protection claims. In its place, for the refusal of an ECAA business application, the disappointed applicant was left with administrative review by a Home Office official and, beyond that, judicial review. In 1973 the position was wholly different: a refused businessperson enjoyed a statutory right of appeal to an independent judicial body, with a further appeal beyond; oral evidence could be and routinely was heard; the tribunal could substitute its own assessment of the facts and its own discretion for that of the Secretary of State. It was a full merits appeal before an independent judge.

The question is whether the replacement breached the standstill. It divides in two: whether Article 41(1) reaches procedural guarantees and remedies at all (*scope*); and, if it does, whether the new remedy is in fact inferior to the old (*effectiveness*). The first is a question of law on which the High Court and the Court of Appeal sharply divided in the *Akturk* litigation; the second is, in the end, a question of fact, and it is there that the collapse in success rates does its decisive work.

24. Does the standstill reach remedies? The text and the case law

Article 41(1) speaks, without qualification, of "any new restrictions on the freedom of establishment". It draws no distinction between substantive and procedural restrictions; it does not say "any new *substantive* restrictions". On the most natural reading, a measure that removes the means by which an unlawful refusal can be corrected is a restriction on the freedom of establishment, because it makes the right harder to vindicate and easier for the state to defeat with impunity. The case law supports this. It is settled — and was accepted by the Court of Appeal — that the clause reaches procedural requirements: an

administrative authorisation such as a work permit (*Abatay*), pre-arrival entry clearance (*Tum*), a visa (*Soysal*), residence-permit charges (*Sahin*).[64] The decisive synthesis is *Commission v Netherlands*, where the Court held the clause prohibits new restrictions "including those relating to the substantive *and/or procedural* conditions governing the first admission".[65] The contested step is whether "procedural conditions" extends beyond the hurdles erected *before* a decision (entry clearance, visas, permits) to the *remedies* available *after* an adverse decision.

25. *Akturk*: the High Court and the Court of Appeal

In *R (Akturk)*, Holman J held that the standstill did reach the appellate remedy: "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".[66] He found administrative review "markedly less favourable" than the statutory appeal it replaced, its shortcomings "very obvious" and "well illustrated by the history of this case".[67] His reasoning was structurally elegant and faithful to the logic of the clause: he did not hold administrative review *inherently* unlawful, nor the United Kingdom frozen forever in the procedural forms of 1973; his holding was comparative and effects-based — the new remedy was unlawful *because and to the extent that* it was less favourable than the old. A Member State remains free to reform its procedures, provided the reforms do not worsen the Turkish national's position below the baseline. That is a principled and administrable test.

The Court of Appeal reversed in *CA (Turkey)*.[68] Newey LJ, with whom Irwin and Flaux LJJ agreed, held that Article 41(1) did not extend to the legal remedies available to someone alleging breach of his rights. The reasoning ran along two lines: as to language, that in the absence of any specific reference to remedies, the provision could not be read to reach them;[69] and as to purpose, that extending the standstill to remedies would cut

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[64] *Abatay and Şahin* (Joined Cases C-317/01 and C-369/01); *Tum and Dari* (Case C-16/05); *Soysal* (Case C-228/06); *Sahin* (Case C-242/06). That the clause reaches work permits, entry clearance, visas and charges was common ground; the only question was whether it reaches one step further, to remedies.

[65] *Commission v Netherlands* (Case C-92/07) [47] (emphasis added). The words "and/or procedural" are the textual bridge from pre-decision hurdles to post-decision remedies.

[66] *R (Akturk)* [2017] EWHC 297 (Admin) [83] (Holman J). Holman J's formulation — the procedure must be "no less favourable now than it was in 1973" — is comparative and effects-based, and so faithful to the Court of Justice's own method.

[67] ibid [83], [71]. That the shortcomings were "well illustrated by the history of this case" is a reminder that the judge had watched the new procedure operate at first hand.

[68] *Secretary of State for the Home Department v CA (Turkey)* [2018] EWCA Civ 287, [2019] 1 WLR 2689.

[69] ibid [33]–[35] (Newey LJ).

across national procedural autonomy.[70] Irwin LJ was troubled by a "ratchet" effect: if the standstill froze the 1973 remedies, a Member State could never reform them, and the result would be a patchwork of frozen procedural regimes varying by the historical accident of what each State provided when the Protocol took effect — the worker-limb analogue, Article 13 of Decision No 1/80, having likewise been held to operate as a one-way ratchet in *Toprak and Oguz*.[71]

26. Why the Court of Appeal was wrong

There are powerful reasons to prefer the High Court's analysis. *First*, the language point cuts the other way. "Any new restrictions" is broad and unqualified; a drafter intending to exclude remedies could have said so. The absence of an express *inclusion* is not evidence of exclusion but the natural consequence of a provision drafted to prohibit a *category of effects*, and the Court of Justice has never construed the clause by asking whether a particular type of measure was expressly mentioned, but by asking whether it has the object or effect of worsening the national's position. This is the Dworkinian point of Part III: the Court of Appeal applied a rule-method to a principle-clause. *Secondly*, the procedural/substantive distinction is artificial: a right whose breach cannot be effectively remedied is, to its holder, no different from a right that does not exist, and the Court of Justice has repeatedly emphasised the effective enforcement of rights — from *DEB* on legal aid through the whole effectiveness jurisprudence — as a fundamental feature of the legal order.[72] *Thirdly*, the most concrete authority against the Court of Appeal is *Dörr and Ünal*, in which the Court held that Turkish workers were entitled to "the same procedural guarantees as those granted by Community law to nationals of Member States".[73] The Court of Appeal distinguished it on the grounds that it concerned the "further" integration effected by Decision 1/80 and a directly effective individual right not present in *Akturk*. Neither ground survives scrutiny: the objectives of progressive integration are written into Articles 2 and 7 of the Agreement itself, and Article 41(1) *is* directly effective, as *Savas* squarely held.[74] *Fourthly*, the "ratchet" is the point, not the objection: the standstill *is* a

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[70] ibid [36] (Newey LJ), [44] (Irwin LJ).

[71] ibid [40], [43] (Irwin LJ); the ratchet analysis for the worker limb is in Case C-300/09 *Toprak and Oguz* [2010] ECR I-12845 (ECLI:EU:C:2010:756). That Article 13 of Decision 1/80 was held to ratchet is, if anything, support for reading Article 41(1) the same way.

[72] Case C-279/09 *DEB* [2010] ECR I-13849 (ECLI:EU:C:2010:811). The whole effectiveness jurisprudence is premised on the idea that a right without an effective remedy is no right at all.

[73] Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759 (ECLI:EU:C:2005:340) [67]. The holding that Turkish workers enjoy "the same procedural guarantees" as Union nationals is the most concrete authority against the Court of Appeal's severance of remedy from right.

[74] *Savas* (Case C-37/98) [48]–[50], [69]; the integration objectives are written into Articles 2 and 7 of the Agreement, so the *Dörr* reasoning is not confined to Decision 1/80.

ratchet, whose whole purpose is to prevent backsliding, and that different Member States are frozen at different baselines is the intended consequence of a clause operating by reference to each State's position when the Protocol took effect. National procedural autonomy is preserved, subject to the single constraint that its exercise may not worsen the national's position below the baseline. *Fifthly*, the High Court's test coheres with the Court of Justice's own formulations in *Savas* and *Tum*: a remedy markedly less favourable than its 1973 predecessor "worsens the position" of the Turkish national in exactly the sense those passages contemplate.[75]

The 26 February 2021 Joint Advice adds a further, more uncomfortable, objection — directed not at the logic but at the method. The Court of Appeal, the authors suggest, took a "particularly English approach", reading the text "narrowly and restrictively, paying little heed to the bigger constitutional picture, the European dimension", such that "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".[76] The charge should not be overstated — there is nothing improper in close textual analysis. But it has real force, because the interpretive method the Court of Justice applies to the standstill is demonstrably not the method the Court of Appeal applied: the one asks whether a measure has the *effect* of worsening the national's position; the other asked whether "restrictions" could, as a matter of narrow construction, bear the weight of "remedies". The mismatch between the two methods is the deepest reason to doubt *CA (Turkey)*, and it is a mismatch only the Court of Justice could authoritatively have corrected — which brings us to the failure that made correction impossible, in Part VII.

27. The empirical heart: the collapse in success rates

The foregoing is an argument of law. But the standstill, on either analysis, ultimately turns on a question of fact: is the new remedy materially less favourable — less effective — than the old? The EU-law principle of effectiveness requires that procedural rules not render the exercise of rights "practically impossible or excessively difficult"; the principle of equivalence requires that they be no less favourable than those governing similar domestic actions.[77] In the standstill context the comparator the clause supplies is not a parallel domestic action but the *historical* remedy — the 1973 appeal — and the most

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[75] *Savas* (Case C-37/98) [69]–[70]; *Tum and Dari* (Case C-16/05) [69].

[76] Joint Advice of 26 February 2021 (Annex 4) para 27. The phrase "narrowly logical and broadly perverse" captures the mismatch between the Court of Appeal's construction method and the Court of Justice's.

[77] The principles originate in *Rewe* (Case 33/76) and Case 45/76 *Comet* [1976] ECR 2043 (ECLI:EU:C:1976:191); see also *Peterbroeck* (Case C-312/93) [12]; Case C-425/16 *Raimund* (ECLI:EU:C:2017:776) [40]; *Unibet* (Case C-432/05) [38]–[44]; and generally M Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004).

direct measure of "excessive difficulty" is the rate at which the two mechanisms actually correct erroneous refusals.

There are structural reasons to expect a collapse, all identified by Holman J. The appeal was heard by an independent judge; administrative review is conducted by a Home Office official reviewing a Home Office colleague — the *nemo judex* problem of Part III. The appeal admitted oral evidence; review is confined to the papers — the *audi alteram partem* problem. The appeal could remake the decision on the merits and substitute its own discretion; review is confined to identifying a defined "case-working error" and cannot reassess the merits. A refusal based on a wrong but rationally expressed assessment of funds — or on the unlawful "sole control" or "source of funds" requirements of Part IV — is precisely the error a merits appeal would catch and a review, confined to its narrow categories and conducted by an official sharing the original decision-maker's training, will tend to miss or to ratify.[78] The new remedy does not merely fail to correct legal errors; it *launders* them, conferring on a flawed decision the appearance of having survived independent scrutiny.

The figures borne out the structure. They must be approached with the candour their authors urged — "these figures are of course difficult to verify precisely" — but their orders of magnitude make precision, for the purpose of establishing breach, beside the point. Before 6 April 2015, ECAA business-person entry-clearance applications enjoyed a first-instance success rate of some 80–90 per cent;[79] of the minority refused, those who appealed enjoyed a success rate of at least 40 per cent before the Immigration and Asylum Chamber and approaching 100 per cent before the Court of Appeal.[80] The appellate system that policed a generous first-instance regime was a genuine and frequently successful corrective. After 6 April 2015 the picture is transformed: the success rate on administrative review for Turkish nationals asserting Association rights "varied from less than 1% to 6%";[81] the residual remedy of judicial review fared scarcely better, around 10 per cent at the paper stage rising to some 20 per cent on oral renewal.[82] A mechanism that overturned 40 per cent of refusals at first appellate instance, and almost all that reached the Court of Appeal, was replaced by one that overturns at best 6 per cent and routinely fewer than one in a hundred. That is not a marginal diminution in the

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[78] Independent Chief Inspector of Borders and Immigration, *An Inspection of the Administrative Review Processes Introduced Following the 2014 Immigration Act* (HMSO 2017), documenting low overturn rates and deficiencies in the independence and quality of review across the system — independent corroboration that the defect was structural, not particular to the Turkish route.

[79] Joint Advice of 26 February 2021 (Annex 4) para 11 (pre-2015 first-instance grant rate of some 80–90%).

[80] ibid para 17 (at least 40% at the Immigration and Asylum Chamber; near 100% at the Court of Appeal).

[81] ibid para 17 (administrative-review success "less than 1% to 6%").

[82] ibid para 17 (judicial-review success of about 10% on the papers, 20% on oral renewal).

favourability of a remedy; it is the difference between a remedy that works and a remedy that does not. Successful challenges, the authors observed, are "as rare as hens' teeth"; the review, conducted by officials "not independent of the institution for which they work", affords "no right to be heard" and, absent a "case working error", "no subsequent review of the facts"; judicial review is "almost pointless", a "mere formality"; the Home Office had "devised an obstacle course policed by hostile referees".[83] These are not the words of an excitable advocate but the considered conclusions of a former Judge of the General Court and a former Advocate General.

The comparison's limits must be stated candidly, as the authors stated them. The two mechanisms do not share a denominator: a generous 80–90 per cent first-instance grant rate means the pre-2015 appellate figures relate to a pre-filtered minority of hard cases. But that scepticism cannot survive contact with the magnitude of the change. Even making every allowance for imperfect comparability, a fall from a 40 per cent appellate success rate to a sub-6 per cent review rate — coupled with a near-total first-instance grant rate before 2015 and a far harsher first-instance regime after it — cannot plausibly be explained by anything other than a remedy that has ceased to function as a corrective. The point is reinforced by the qualitative evidence: refusals on grounds that "sound absurd" — a professor refused for want of expertise in the very field in which she held a chair, a chief executive told he lacked experience of the sector in which his company operated.[84] If decisions of that quality are upheld at 94 per cent or more on review, the conclusion is not that the decisions are sound but that the review is not examining them. Holman J, who watched the system operate in the case before him, reached the identical assessment, describing the process as a "trivial formality".[85]

The significance is this. The standstill, on the correct analysis, prohibits a remedy materially less favourable than the 1973 appeal. "Less favourable" is measurable, and the natural measure is the rate at which the remedy delivers what a remedy is for — the correction of wrong decisions. A mechanism that corrects one error in ten, where its predecessor corrected four or five, is not a slightly less generous version of the same remedy; it is a different and inferior thing. The drop-off is therefore not merely consistent with the breach; it *is* the breach, expressed quantitatively, demonstrating that the new procedure renders vindication "excessively difficult" relative to the baseline and so fails both the standstill comparator and the principle of effectiveness.

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[83] ibid paras 7, 9, 19. The metaphors — "obstacle course policed by hostile referees", "as rare as hens' teeth" — are arresting, but the figures behind them are what matter.

[84] ibid para 10 (refusals that "sound absurd", including the professor and chief-executive examples). If decisions of that quality survive review at 94%+, the review is plainly not examining them.

[85] *R (Akturk)* [2017] EWHC 297 (Admin) [72] ("trivial formality").

28. A worked comparison, and the equivalence dimension

It may assist to trace how a flawed refusal would fare under each regime. Take a refusal on the ground that the applicant had not shown his funds "entirely his own, solely under his control", and had not demonstrated their source, notwithstanding a bank letter evidencing funds well in excess of any plausible threshold held in his sole name for over six months. Under the 1973 appellate regime, that refusal went before an independent adjudicator: the applicant could give oral evidence, explain provenance, call his accountant; the adjudicator, applying the 1973 Rules, would ask the only question those Rules pose — would he bring sufficient funds? — would identify the "sole control" and "source of funds" requirements as legally irrelevant, and would allow the appeal, substituting his own decision. Under the administrative-review regime, the same refusal was reviewed by a Home Office official, on the papers, by reference to a closed list of "case-working errors", with no power to hear the applicant, no power to remake the decision, and no remit to ask whether the substantive requirements applied were the legally correct ones. He asked only whether they had been applied correctly *on their own terms*, concluded that they had, and upheld the refusal. The same flawed decision is corrected by the old remedy and ratified by the new. Multiply that across the cohort, and the collapse in success rates is not merely explicable but inevitable.

A further dimension engages the principle of equivalence, which the standstill analysis alone does not. In *Littlewoods Retail* the Court held that equivalence does not require a Member State to extend its most favourable procedural regime to all actions in a field, and that it is for the national court, with its direct knowledge of the procedural landscape, to determine whether the actions said to be comparable are truly similar; *ET Agrokonsulting* and *Raimund* reaffirm that this comparative exercise is for the national court.[86] The two principles are complementary: equivalence asks whether the EU-law claimant is treated as well as a comparable domestic claimant *today*; the standstill asks whether the Turkish national is treated as well as he would have been *in 1973*. The administrative-review regime arguably fails both. But it is the standstill comparator that does the decisive work, because it fixes the benchmark at the favourable historical level rather than at whatever diminished level the modern domestic system happens to provide.

29. Interim conclusion

The abolition of the statutory right of appeal, and its replacement by administrative review, was a breach of Article 41(1). The clause reaches procedural conditions and the

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[86] Case C-591/10 *Littlewoods Retail* (ECLI:EU:C:2012:478) [31]; Case C-93/12 *ET Agrokonsulting* (ECLI:EU:C:2013:432) [39]; *Raimund* (Case C-425/16) [40]. Equivalence and the standstill comparator are complementary; it is the standstill that fixes the benchmark at the favourable 1973 level.

remedies for breach of the establishment right; the High Court was right and the Court of Appeal wrong on scope; and the replacement remedy is, on both structural and empirical grounds, dramatically less favourable than the appeal it replaced. The collapse in the rate at which wrongful refusals were corrected is the decisive evidence. That the Court of Appeal reached the contrary conclusion does not settle the matter as one of EU law; it is, as the Joint Advice of 26 February 2021 observes (Annex 4), a conclusion the Commission could and should have investigated, and one that — had a reference been made — the Court of Justice might well have decided differently. Whether a reference was *required*, and what follows from the fact that none was made, is the subject of Part VII.

PART VII — THE SILENCE OF THE COURTS: NON-REFERRAL AS AN INDEPENDENT BREACH

30. The duty to refer

The abolition of the appeal was the United Kingdom's procedural breach by the executive. There was a second, distinct failure, attributable to the courts: the systematic failure to refer the contested questions of EU law to the Court of Justice under Article 267 TFEU. Article 267 permits any national court to refer a question of EU law and *requires* a court "against whose decisions there is no judicial remedy under national law" to do so, unless the question is irrelevant, has already been answered (*acte éclairé*), or is so obvious as to leave no scope for reasonable doubt (*acte clair*) — the *CILFIT* doctrine, recently reaffirmed and tightened in *Consorzio Italian Management*, which insists that a court of last resort declining to refer be satisfied that the matter is equally obvious to the courts of other Member States and to the Court of Justice, and give reasons demonstrating as much.[87] The rationale is the uniform interpretation of Union law: if final courts could decide contested questions for themselves, directly effective rights would mean different things in different States. The duty falls with particular weight where a question is both genuinely uncertain and outcome-determinative — and the scope of Article 41(1), on which the High Court and the Court of Appeal had openly divided, was precisely such a question.

31. The statistics of non-referral

The empirical record is striking. In the seven years before 2015, English and Scottish courts referred, on average, about one Turkish-establishment question per year — a

[87] Case 283/81 *CILFIT* [1982] ECR 3415 (ECLI:EU:C:1982:335) [16]–[21]; Case C-561/19 *Consorzio Italian Management* (ECLI:EU:C:2021:799) [39]–[51], which tightened the conditions and underscored the duty to give reasons for declining to refer.

modest but real flow.[88] After April 2015, despite the wholesale transformation of the regime, the open judicial disagreement in *Akturk*, and — on the figures — nearly two thousand Turkish nationals pursuing challenges as far as the Court of Appeal and the Supreme Court, there was "not a single preliminary reference to the CJEU".[89] The following table sets the United Kingdom's overall and Ankara-specific record against total references and the practice of the highest-referring Member States across the decade to the end of transition. The general figures are drawn from the Court of Justice's Annual Reports; the United Kingdom and Ankara-specific columns combine those reports with the case law and the figures supplied to the Association's experts; all are indicative of trend and order of magnitude, not an exact league table.[90]

Year	Total references (all MS)	Germany	France	Netherlands	Italy	UK (all subjects)	UK Ankara/Turkish establishment
2010	~385	~71	~33	~28	~44	~29	~1
2011	~423	~83	~31	~44	~31	~26	~1
2012	~404	~68	~15	~44	~65	~16	0–1
2013	~450	~97	~26	~54	~62	~14	0–1
2014	~428	~87	~20	~30	~52	~12	0–1
2015	~436	~79	~25	~40	~47	~16	0
2016	~470	~84	~23	~26	~62	~23	0
2017	~533	~149	~25	~38	~57	~11	0
2018	~568	~78	~41	~35	~68	~14	0
2019	~641	~114	~32	~28	~70	~18	0
2020	~556	~140	~20	~47	~44	~9	0

[88] Joint Advice of 26 February 2021 (Annex 4) para 11 (on average about one reference per year from English and Scottish courts in the seven years before 2015).

[89] ibid paras 11, 15 (nearly 2,000 Turkish nationals pursuing challenges since April 2015; challenges to the Court of Appeal and Supreme Court; "not a single preliminary reference to the CJEU").

[90] The all-Member-State and per-State totals are drawn from the Court of Justice's Annual Reports (Judicial Activity), which tabulate references for a preliminary ruling by referring Member State; the United Kingdom and Ankara-specific columns combine those reports with the case law and the figures supplied to the Association's experts in the Joint Advice of 26 February 2021 (Annex 4). The figures are indicative of trend and magnitude, not an exact tally.

Two features demand comment. The first is the consistency of referral by the larger civilian jurisdictions — Germany above all, referring seventy to a hundred and fifty questions a year — which treat the reference as a routine part of adjudication. The second is the vanishing Ankara-specific sub-count within the United Kingdom's already modest figure: about one per year until 2014, and nil from 2015. It was not that the United Kingdom's courts never referred; it was that, on the specific and contested questions of Turkish-association law, where guidance was most needed and the courts were openly divided, they referred nothing.

The more revealing exercise is to map the seminal association rulings onto their referring courts.[91]

Case	Year	Referring State	Subject
Demirel	1987	Germany	Justiciability of the Agreement
Savas	2000	United Kingdom	Direct effect of Art 41(1); establishment
Abatay and Şahin	2003	Germany	Standstill; services; work permits
Dörr and Ünal	2005	Austria	Procedural guarantees for Turkish workers
Tum and Dari	2007	United Kingdom	Standstill; first admission; establishment
Soysal	2009	Germany	Standstill; visa; services
Sahin	2009	Netherlands	Standstill; residence-permit charges
Commission v Netherlands	2010	(infringement)	Disproportionate charges; Arts 41(1) and 13
Toprak and Oguz	2010	Netherlands	Standstill (Decision 1/80) as one-way ratchet
Oguz	2011	United Kingdom	Standstill; abuse of rights
Dereci	2011	Austria	Citizenship and association rights distinguished
Ziebell	2011	Germany	Expulsion; Decision 1/80

[91] The referring State for each ruling is taken from the judgment and the Court's Reports; the synthesis of the line — and the demonstration that the United Kingdom's contribution ceased after 2011 — draws on the case-by-case analysis in the Joint Response to the European Ombudsman (Annex 5) and on K Groenendijk, "The Court of Justice and the Development of EEC–Turkey Association Law" in D Thym and M Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* (Brill Nijhoff 2015).

Case	Year	Referring State	Subject
Dülger	2012	Germany	Family members of Turkish workers
Demir	2013	Germany	Standstill; justification and proportionality
Demirkan	2013	Germany	Standstill; passive services excluded
Dogan	2014	Germany	Standstill; establishment; proportionality
Demirci	2015	Netherlands	Article 59 ceiling (Decision 3/80)
Genc	2016	Denmark	Standstill; family reunification; proportionality
Tekdemir	2017	Germany	Standstill; residence permit; proportionality
Yön	2018	Germany	Standstill; visa; justification
A	2019	Denmark	Standstill; family reunification
Çoban	2019	Netherlands	Article 59 ceiling
B v Udlændingenævnet	2021	Denmark	Standstill; family reunification; age condition

The pattern is decisive. Of the seminal rulings listed, the United Kingdom's courts were the source of three — *Savas* (2000), *Tum and Dari* (2007) and *Oguz* (2011) — and *all three predate the 2015 reforms*. After 2011, as the domestic stakes rose and the United Kingdom began systematically curtailing the rights of Turkish businesspersons, it contributed *nothing* to the Court's docket, while the German and Danish courts drove the most important modern development of all: the *Demir–Dogan–Genc* line establishing that a standstill restriction must be justified by an overriding public interest and satisfy proportionality. That development occurred entirely without United Kingdom participation, even though it was dispositive of the very questions the United Kingdom's courts were deciding against Turkish nationals in *Akturk*, *Aydogdu*, *Soner Koktuk* and *AoTBPL*.

32. Why the non-referral was a breach

The most obvious innocent explanation — that there were no referable questions — is untenable. The questions were numerous and live: whether Article 41(1) reaches remedies (divided in *Akturk*); whether it protects a right of settlement (contested in *BA (Turkey)*, *Aydogdu*, *Soner Koktuk* and *AoTBPL*); whether Article 9 has autonomous content (assumed away in *Alacakanat* contrary to *Commission v Netherlands*); whether the post-

2015 requirements were new restrictions requiring justification and proportionality under *Dogan* and *Genc*. Each is a question of the interpretation of the Agreement — quintessentially a matter for the Court of Justice — and on several the domestic courts themselves acknowledged uncertainty or divided.[92] Where a final court confronts a question on which reasonable judicial minds have differed, the *CILFIT* conditions for dispensing with a reference are not met: the question is not *acte clair* (the High Court and Court of Appeal reached opposite conclusions, the paradigm of reasonable doubt); not *acte éclairé* (the Court of Justice had never ruled on it); and not irrelevant (it was dispositive). None of the three exceptions was available, yet the Court of Appeal decided the question and the Supreme Court refused permission, neither referring nor giving *CILFIT*-compliant reasons.[93] The same analysis applies, *mutatis mutandis*, to the settlement question and to the autonomous content of Article 9. Each was a discrete breach of the third paragraph of Article 267; cumulatively they constitute the systemic failure the tables portray.

There is a particular irony in the timing. In the very years the United Kingdom's courts declined to refer — 2013 to 2018 — the German and Danish courts were obtaining, in *Demir*, *Dogan*, *Genc*, *Tekdemir* and *Yön*, the proportionality rulings that would have condemned the "sole control", "source of funds" and specified-format requirements, none of which was ever justified by reference to any public interest.[94] Whether or not that was the conscious reason for non-referral, it was its effect: the reference channel was kept closed precisely while the Court of Justice was building the doctrine that would have reopened the Turkish businessperson's case.

The deepest significance is causal. The substantive and procedural breaches of Parts IV to VI were able to occur, and to go uncorrected, *because* the reference channel was closed. Had any contested question been referred, the Court of Justice would have given an authoritative ruling binding on the United Kingdom,[95] and the "particularly English"

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[92] See *R (Buer)* [2014] EWCA Civ 1109 [36] (acknowledging possible ambiguity in the Court of Justice's case law); and the open divergence between *Akturk* and *CA (Turkey)* on the reach of Article 41(1) — the paradigm of a question not *acte clair*.

[93] *CILFIT* (Case 283/81) [10]–[21] (the three exceptions: irrelevance, *acte éclairé*, *acte clair*); on the consequences of a manifest failure to refer, Case C-224/01 *Köbler* [2003] ECR I-10239 (ECLI:EU:C:2003:513).

[94] *Demir* (Case C-225/12); *Dogan* (Case C-138/13); *Genc* (Case C-561/14); *Tekdemir* (Case C-652/15); *Yön* (Case C-123/17). The proportionality doctrine that would have condemned the United Kingdom's requirements was being built, contemporaneously, on German and Danish references.

[95] The point is sharpened by the limited duty to reopen final decisions: even a later favourable ruling of the Court of Justice does not generally oblige a Member State to revisit administrative decisions that have become final, save in the narrow circumstances identified in Case C-453/00 *Kühne & Heitz* [2004] ECR I-837 (ECLI:EU:C:2004:17). A refusal that was never referred, and has become final, is therefore largely beyond rescue — which is precisely why the failure to refer at the time was so consequential.

construction of the Court of Appeal could not have stood as the final word. The non-referral was thus not a discrete breach but the *enabling condition* of the others. And the machinery for treating judicial non-referral as a breach exists: *Köbler* holds that a Member State may incur liability in damages for a sufficiently serious breach by a court of last resort, including a manifest failure to refer; *Commission v France* (and *Commission v Spain*) accepts that a persistent failure by a supreme court, resulting in a settled misapplication a reference would have avoided, may itself found infringement proceedings.[96] The pattern disclosed — a decade of contested litigation reaching the Court of Appeal and the Supreme Court without a single reference — is, on its face, capable of meeting that threshold. That no such proceedings were brought returns us to the failure of the Commission.

PART VIII — NON-DISCRIMINATION, SETTLEMENT, AND THE GUARDIAN THAT WOULD NOT ACT

33. Article 9: the non-discrimination guarantee

Article 9 prohibits, "within the scope of this Agreement", any discrimination on grounds of nationality. Does it add anything to the standstill analysis — in particular, is the abolition of the appeal for Turkish nationals, where comparators retained a superior remedy, independently a breach? The question is finely balanced, and both sides deserve statement. On a *narrow* reading, Article 9 adds nothing: if Article 41(1) reaches remedies, Article 9 is otiose; if it does not, the removal of the appeal is not "within the scope" of the Agreement and Article 9 is not engaged. The High Court lent some support to this in *Alacakanat*, holding that Article 9 (even with Article 41(1)) does not in itself contain a substantive right to equal treatment.[97] On a *broader* reading, the dichotomy is too neat: the matters complained of plainly *concern* the exercise of the establishment right — how applications are decided and how adverse decisions may be challenged — and that is enough to bring them "within the scope" for Article 9, whatever the precise reach of Article 41(1). The Court of Justice's case law supports this: the contrast between *Taflan-Met*, where the claimant failed because the relevant coordination required implementing rules that did not yet exist, and *Sürül*, where the claimant succeeded because nothing was

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[96] *Köbler* (Case C-224/01) [50]–[59]; Case C-416/17 *Commission v France* (ECLI:EU:C:2018:811) [105]–[114]; Case C-154/08 *Commission v Spain* (ECLI:EU:C:2009:695). Together they show that judicial non-referral is not beyond the reach of Union law — though enforcement depends on a Commission willing to act.

[97] *Alacakanat v General Medical Council* [2013] EWHC 1866 (Admin), [2014] 1 CMLR 5 [20] (Edwards-Stuart J). The reasoning is criticised in the Joint Response to the Ombudsman (Annex 5), paras 35–36, as ignoring the autonomous content of Article 9 recognised in *Commission v Netherlands* (Case C-92/07) [75]–[76].

needed beyond the basic rule against discrimination, shows that a non-discrimination guarantee can have independent operative effect where the discrimination falls within scope and no further implementing rule is required.[98]

The abstract argument acquires a hard edge when one identifies the precise discrimination. The same reform — section 15 of the 2014 Act, amending section 82 of the 2002 Act — operated very differently across classes. European Union nationals exercising free-movement rights, and their family members, retained throughout a right of appeal to an independent tribunal under the Immigration (European Economic Area) Regulations, determined by a judge who could hear evidence and decide the merits. Turkish nationals exercising establishment rights under the Agreement were stripped of any equivalent and confined to internal administrative review and a near-futile judicial review. Two classes of economically active beneficiaries of directly effective Union-law rights, both lawfully present, were afforded radically different procedural protection — a merits appeal for the one, a paper review by the deciding department for the other. This is discrimination of exactly the kind Article 9 exists to prohibit: it falls within scope (it concerns the procedural protection of the establishment right); it requires no implementing rule (one need only compare the remedies); and it bites a second time at settlement, where the United Kingdom grants settled status to EU nationals "quite routinely and smoothly … on the basis of quite modest proofs such as tickets or receipts" while Turkish citizens obtain indefinite leave "only after three intermediary periods totalling seven years", each furnishing a fresh "opportunity for extra scrutiny … for expressions of doubt about eligibility".[99] The objection that the two are not true comparators — different instruments, different positions — has force at the margins but cannot carry the whole weight: Article 9 requires not identity of legal source but that, within scope, there be no discrimination on grounds of nationality, and the only material difference determining who gets an appeal is nationality. It is not necessary to resolve the question definitively; at the lowest, the argument is strong enough that it ought to have been investigated rather than waved away — and that it was not, by the Commission and by a domestic court that gave it short shrift, is itself part of the story.

34. The settlement controversy

Until 2015 the settled understanding, reflected in published guidance, was that a Turkish businessperson established for four years could obtain indefinite leave, relying on

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[98] Case C-277/94 *Taflan-Met* [1996] ECR I-4085 (ECLI:EU:C:1996:315) (failure where implementing rules were needed) contrasted with Case C-262/96 *Sürül* [1999] ECR I-2685 (ECLI:EU:C:1999:228) (success where the bare non-discrimination rule sufficed). The contrast shows that a non-discrimination clause can be operative of itself where no further rule is required — as here.

[99] Joint Advice of 26 February 2021 (Annex 4) para 16 (routine grant of settled status to EU nationals on modest proof, against the seven-year, thrice-scrutinised route imposed on Turkish nationals).

paragraph 28 of HC 510. That understanding was withdrawn: following *BA (Turkey)* and *Aydogdu*, the Home Office concluded that the standstill did not protect a right to settlement at all, paused processing between March and July 2017, withdrew the guidance on 16 March 2018, and introduced a bespoke five-year route in Appendix ECAA with a fee and English-language and Life-in-the-UK requirements.[100] The lawfulness of the change was tested in *R (Alliance of Turkish Business People Ltd)*: at first instance Dingemans J found a legitimate expectation; the Court of Appeal reversed, holding no clear promise had been made and, following *Buer*, *BA (Turkey)* and *Aydogdu*, that the standstill did not extend to settlement because settlement was not essential to the exercise of establishment.[101] The high-water mark is *Soner Koktuk*, where Leggatt LJ held that "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".[102]

The doubt is rooted in *Savas* itself, which the domestic courts read too narrowly. There the Court emphasised that the employment and establishment rights conferred under the Agreement "necessarily imply the existence of a corresponding right of residence … since otherwise the right … would be rendered entirely ineffective".[103] The principle is one of effectiveness: residence is implied to the extent necessary to render the economic right effective. The domestic courts treated that as exhausted by a *temporary* right to reside for the duration of the business. But whether a merely precarious, perpetually renewable right genuinely renders establishment "effective" is itself a question of EU law on which the Court of Justice had not ruled, and on which there was much to be said the other way: a businessperson whose enterprise depends on long-term relationships, the confidence of lenders, and the ability to plan over years may find the activity economically possible only by virtue of settled status, and the interest in stable family integration is not readily severable from the economic activity the Agreement protects — a point reinforced by the Court's substantial case law on the family-reunification rights of Turkish nationals (*Dülger*, *Tekdemir*, *A*), which the domestic courts declined to engage or to refer.[104] The

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[100] Statement of Changes in Immigration Rules HC 813 (22 October 2020); *BA, MA, CA, HA (AP) v Secretary of State for the Home Department* [2017] CSOH 27 [50]; *R (Aydogdu)* [2017] UKUT 167 (IAC) [34].

[101] *R (Alliance of Turkish Business People Ltd)* [2020] EWCA Civ 553, [2020] 1 WLR 2436 [7]–[8]; following *R (Buer)* [2014] EWCA Civ 1109. The case affected, on the figures, some 6,000 individuals then on the path to indefinite leave — and was decided without a reference.

[102] *Soner Koktuk v Entry Clearance Officer (Warsaw)* [2018] EWCA Civ 2850, [2019] 4 WLR 10 [31] (Leggatt LJ).

[103] *Savas* (Case C-37/98) [60] (employment and establishment rights "necessarily imply the existence of a corresponding right of residence … since otherwise the right … would be rendered entirely ineffective"). The domestic courts read this as exhausted by a temporary right; whether that is so is itself a question of EU law on which they did not refer.

[104] Case C-451/11 *Dülger* (ECLI:EU:C:2012:504) [42], [52], [65]; *Tekdemir* (Case C-652/15) [31]–[32]; Case C-89/18 *A* (ECLI:EU:C:2019:580) [47]; on Article 59 as a ceiling, *Çoban* (Case C-677/17) [61]. The family-

better analysis is that the answer is not all-or-nothing: ultimate settled status may not be a necessary corollary, but a *limited* right of settled residence, linked to the scope and duration of establishment, is, so that the wholesale withdrawal of the four-year route required examination of whether the change worsened the security of residence necessary to effective establishment. A separate argument — that Turkish nationals are discriminated against because EU nationals obtained settled status on more favourable terms under the EU Settlement Scheme — is the weakest of the settlement points, for that scheme is an optional arrangement under the Withdrawal Agreement, taking effect only after transition, and the comparator derives its rights from an entirely different instrument; it should be abandoned in favour of the stronger standstill and appeal arguments.

35. The guardian that would not act

The final strand concerns the European Commission, and the uncomfortable fact that the institution charged with ensuring the application of the Treaties declined, throughout, to take up the businesspersons' cause. By Article 17(1) TEU the Commission is "guardian of the Treaties";[105] one might expect it to be obliged to pursue clear infringements. It is not. The settled jurisprudence — *Sonito* and the *Sateba* line, on which DG NEAR rested its reply of 30 September 2020 — is that the Commission enjoys a very wide discretion whether to bring infringement proceedings under Article 258 TFEU, which "excludes the right for individuals to require it to adopt a specific position", a discretion unreviewable at the suit of a complainant; *Lord Bethell* and *Automec* illustrate the same in the competition sphere.[106] That proposition is correct as far as it goes. But the citation of *Sonito* and *Sateba* answers a question the Association was not asking. Those authorities establish that the Commission cannot be *compelled* to litigate; they say nothing about whether it has discharged its distinct duty of good administration in the *handling* of a complaint. To meet a detailed, evidenced complaint of systematic treaty violation with a recitation of the discretion not to litigate is to deploy a true proposition as a shield against a different and legitimate demand — not that the Commission sue, but that it *engage*.

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reunification jurisprudence the domestic courts declined to engage bears directly on whether secure residence is necessary to effective establishment.

[105] Article 17(1) TEU (the Commission "shall ensure the application of the Treaties" and oversee the application of Union law "under the control of the Court of Justice of the European Union"); the enforcement power is in Articles 258–260 TFEU. The guardianship is a duty of oversight; what it is not, on the authorities discussed in the text, is a duty enforceable at the suit of the individual complainant.

[106] European Commission reply of 30 September 2020 (Annex 1), citing Case C-87/89 *Sonito* [1990] ECR I-1981 (ECLI:EU:C:1990:213) and Case C-422/97 P *Sateba* [1998] ECR I-4913 (ECLI:EU:C:1998:395); see also Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277 (ECLI:EU:C:1982:224) and Case T-24/90 *Automec* [1992] ECR II-2223 (ECLI:EU:T:1992:97). These authorities answer the question whether the Commission can be *compelled* to litigate; they do not answer whether it has *engaged* a complaint properly.

Where the Commission did engage the merits, its engagement was either erroneous or deferred. Most strikingly, addressing the abolition of the appeal, it stated that, having considered the legislation "in its consolidated up to date version", "[i]t appears that this legislation provides for the right of appeal of adverse immigration decisions".[107] That is the opposite of the truth: the object and effect of section 15 of the 2014 Act was to *remove* the statutory appeal for these decisions. A guardian that disposes of a central allegation on a plain misreading of the impugned statute has not exercised a reasoned discretion; it has erred — and its error tracks exactly the misconception at the heart of the United Kingdom's own position. On three of the most important questions — the points-based requirements under Articles 41(1), 13 of Decision 1/80 and 9; the abolition of residence; and out-of-time extensions during the pandemic — it deferred in identical terms: each "requires further assessment and will be addressed in subsequent correspondence".[108] That assessment never materialised; the complaint culminated in recourse to the European Ombudsman. The deferral was a refusal dressed as a postponement. And the access-to-documents decision of 2 October 2020 is perhaps the most revealing: asked to identify any action taken to protect the rights of Turkish nationals, DG NEAR could locate only the traces of two historic complaints, each *closed* without infringement proceedings; and asked what action it had taken during the Withdrawal Agreement, transition period or post-Brexit trade agreement, it stated that it "does not hold any documents that would correspond to this request".[109] That is an admission, from the Commission's own files, that across the entire Brexit process — precisely when the businesspersons' position was being permanently degraded — the guardian of the Treaties took no documented action whatsoever.

The Association's experts drew the right distinction: between the *outcome* (whether to litigate), discretionary and unreviewable, and the *process* of stewardship (whether to engage, analyse, and exert pressure), governed by the duty of good administration in Article 41 of the Charter. The discretion does not dispense the Commission "from the need, as part of the duty of good administration, to press Member States to mend their

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[107] European Commission reply of 30 September 2020 (Annex 1), Commission services' comments. The statement that the legislation "provides for the right of appeal" is the precise opposite of the effect of section 15 of the 2014 Act — an error that tracks the United Kingdom's own misconception.

[108] ibid Annex (the points-based/Article 41(1)/Article 9 contention; the abolition of residence; and the COVID-19 out-of-time point, each deferred to "subsequent correspondence" that never came).

[109] European Commission decision of 2 October 2020 (Annex 2), Ref GestDem 2020/5481, Ref Ares(2020)5190401 (the only responsive documents being the files of two complaints closed without infringement proceedings; "the Commission does not hold any documents" corresponding to action during the Withdrawal Agreement, transition period or trade agreement). An admission, from the guardian's own files, of documented inaction.

ways even though the political conjuncture may be discouraging".[110] That duty "should be approached with particular rigour where there is a pattern of non-referral to the CJEU by national courts", because where the national judiciary is "in effect muzzled by national procedures, vigilance by the guardian of the treaties as to the underlying reality is all the more necessary".[111] The logic is compelling: the reference procedure and Commission enforcement are the two principal channels by which compliance with directly effective rights is policed; where the first is blocked, the second becomes not less but more important. A Commission that declines to act *precisely where references have dried up* compounds the problem, leaving the directly effective right with no guardian at all. The experts' case-by-case review, set out in the Joint Response to the European Ombudsman (Annex 5), demonstrated that the non-referral was a pattern across the whole line — *Alacakanat*, *Buer*, *BA (Turkey)*, *Aydogdu*, *Soner Koktuk* and *AoTBPL* (the last affecting, on the figures, some six thousand individuals then on the path to indefinite leave) — and concluded: "there should and can come a point where the trend of a country's cases is so askew that a correction via a reference to Luxembourg or via an expression of anxiety from the guardian of the treaties is necessary and required by those Treaties."[112] That point, they submitted, had been reached.

The more ambitious routes — annulment of the Commission's inaction under Article 263 TFEU, or damages under Articles 268 and 340 TFEU[113] — face very long odds, and the Joint Advice of 26 February 2021 (Annex 4) is realistic in concluding that they would stand little prospect; the Commission's discretion not to pursue an infringement is not a justiciable wrong at the suit of a complainant. That is not a satisfactory state of affairs — institutional toleration of a Member State's infringements — but it is the law. That the critique nonetheless has substance is confirmed by the European Ombudsman's decision to open an investigation into whether the Commission's "persistent toleration (shading to neglect) of a Member State's dubious policy" amounted to maladministration: the office exists precisely to scrutinise the *quality of administration* where the *substantive*

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[110] Joint Advice of 26 February 2021 (Annex 4) paras 4–5; Joint Response to the European Ombudsman (Annex 5), para 7.

[111] Joint Response to the European Ombudsman of 26 February 2021 (Annex 5), paras 4–5. The logic is that reference and enforcement are complementary channels; the blocking of one makes the other more, not less, important.

[112] ibid paras 35–50, esp para 50 ("there should and can come a point where the trend of a country's cases is so askew that a correction via a reference to Luxembourg or via an expression of anxiety from the guardian of the treaties is necessary and required by those Treaties").

[113] An action for failure to act under Article 265 TFEU founders on the complainant's lack of standing and the discretionary character of the decision (*Lord Bethell*, Case 246/81; *Automec*, Case T-24/90); an action for annulment under Article 263 TFEU meets the same obstacles; and Union non-contractual liability under Articles 268 and 340 TFEU would require a sufficiently serious breach of a rule intended to confer rights on individuals, which the discretion not to litigate is not. The Joint Advice (Annex 4) is right to treat these routes as realistically closed.

discretion is unreviewable, and the experts put the matter with restraint and precision — "Official passivity in the face of wrongdoing may be convenient but it is not a lawful policy."[114] The opening of that investigation does not establish that the Commission acted unlawfully, but it does refute the suggestion that the grievance was fanciful: it was serious enough to prompt the Union's own administrative watchdog to ask whether the guardian of the Treaties had been asleep at its post. The practical upshot is sobering. The directly effective right could be enforced before national courts — but the highest court to consider the appeal question construed it narrowly, and no reference corrected it. The supranational guardian could have acted — but enjoyed an unreviewable discretion not to, and exercised it. A clear set of arguable breaches went substantially unremedied, not because they were doubtful, but because every mechanism for their correction, for different reasons, failed to engage. That is the institutional tragedy at the centre of this story.

PART IX — THE ANKARA AGREEMENT AMONG THE ASSOCIATION AGREEMENTS

36. Why the comparison matters

The Ankara Agreement does not stand alone. It is one member of a numerous family of instruments by which the Union has extended elements of its internal-market discipline to third states: the Agreement on the European Economic Area; the sectoral bilateral agreements with Switzerland; the "Europe Agreements" concluded with the central and eastern European states in the 1990s as antechambers to accession; the Euro-Mediterranean agreements; and the more recent association and "deep and comprehensive free trade" agreement with Ukraine. Each addresses, in its own way, the establishment and economic activity of the partner state's nationals, with a markedly different legal technique, intensity of obligation and machinery of enforcement. The comparison illuminates two propositions central to this article: that the standstill technique is genuinely distinctive — neither the dynamic, homogeneity-driven incorporation of the EEA, nor the express, proviso-laden national-treatment right of the Europe Agreements, but a third thing, a negative, comparative freeze; and, more troublingly, that the very features that make the Ankara standstill substantively powerful are coupled with an enforcement architecture so much weaker than the comparators' that

[114] Joint Response to the European Ombudsman of 26 February 2021 (Annex 5), paras 1, 3, 51 ("Official passivity in the face of wrongdoing may be convenient but it is not a lawful policy"), recording the Ombudsman's commitment to investigate possible maladministration by the Commission.

a determined Member State could erode the substantive right with comparative impunity. The United Kingdom exploited precisely this asymmetry.

37. The EEA: dynamic homogeneity and robust surveillance

At one end of the spectrum lies the EEA Agreement, in force since 1 January 1994, which extends the four freedoms to Norway, Iceland and Liechtenstein. It differs from the Ankara model in three respects that bear directly on the analysis. As to *substance*, it does not freeze the partner state's nationals at a historical baseline; the governing principle is homogeneity — EEA law is interpreted in conformity with the rulings of the Court of Justice, and EEA-relevant acts are continuously incorporated through the EEA Joint Committee.[115] Where the Ankara standstill looks backward (what were the conditions in 1973?), the EEA looks sideways and forward (are the conditions the same as in the Union now?). As to *procedure and remedy*, the EEA is policed by a dedicated apparatus: the EFTA Surveillance Authority performs the Commission's function and may bring infringement proceedings before the EFTA Court, which mirrors the Court of Justice and delivers rulings, in direct actions and on references, that national authorities are expected to follow.[116] The individual thus has both a supranational guardian with a mandate to act and a supranational court to give authoritative interpretation. As to *consequences*, refusal to accept incorporated acquis jeopardises the operation of the Agreement as a whole, giving participating states a powerful incentive to comply. The contrast with the Turkish businessperson — whose guardian enjoyed an unreviewable discretion *not* to act, and whose national courts proved reluctant to refer — could hardly be more complete. A right is only as secure as the machinery that protects it.

38. Switzerland: static bilateralism and the guillotine

Between the EEA and the Ankara Agreement, in technique if not generosity, lie the sectoral bilateral agreements with Switzerland, concluded after the Swiss rejection of EEA membership in 1992. The Agreement on the Free Movement of Persons confers rights of entry, residence, establishment and economic activity on terms approximating the internal market. It is, like the Ankara Agreement, *static* rather than dynamic: it does not automatically incorporate the evolving acquis, and the Court of Justice has held that concepts in the EU–Swiss agreement need not be given the same interpretation as the

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[115] Agreement on the European Economic Area (Porto, 2 May 1992) (OJ 1994 L1/3) arts 6 and 105–106 (homogeneity); on the EFTA Court's reception of homogeneity, Case E-1/94 *Restamark* [1994–1995] EFTA Ct Rep 15. The EEA looks sideways and forward; the Ankara standstill looks backward.

[116] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (OJ 1994 L344/3); on EEA state liability, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95. ESA and the EFTA Court are exactly the supranational guardian and court the Turkish national lacked.

identical concepts in EU law, since Switzerland did not accede to the internal market.[117] But the resemblance is superficial in two respects that favour the Swiss national. First, the Bilateral I agreements are mutually interdependent and subject to a *guillotine*: denunciation or non-renewal of any one brings all to an end six months later,[118] giving each party a structural stake in the whole and a powerful disincentive to chip away at the rights of the other's nationals. The Ankara Agreement contains no such linkage; the establishment rights of Turkish nationals could be, and were, eroded in isolation. Secondly, the Swiss agreement is administered by joint committees with a developed practice of consultation, contrasting with the comparatively inert Association Council machinery. The Swiss national is the beneficiary of a structure that makes erosion costly to the host state; the Turkish national was not.

39. The Europe Agreements: the closest comparator — and the most revealing contrast

It is the Europe Agreements that furnish the most illuminating comparison, for three reasons: they dealt with precisely the same activity (the establishment of self-employed nationals of the partner state); they were litigated against precisely the same defendant (the United Kingdom Secretary of State); and they were decided in a trilogy that exposes, with unusual clarity, what the Ankara standstill does and does not do. In *Gloszczuk* (Poland), *Kondova* (Bulgaria) and *Barkoci and Malik* (Czech Republic), all decided on 27 September 2001, the Court held that the establishment provisions *were* directly effective, so that a national could rely on them before a national court.[119] To that extent the two families stand together. There the resemblance ends.

First, the Europe Agreements contained *no standstill clause*. The right they conferred was a right to *national treatment* — to be treated no less favourably than the host state's own nationals — but it was not pinned to any historical baseline; the host state remained free to apply its *current* rules, provided it did not discriminate. The Ankara Agreement confers no national-treatment establishment right in that sense; what it confers is the guarantee that conditions will not be made *stricter than in 1973*. The Europe Agreement national was protected against discrimination relative to a *contemporary domestic* comparator;

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[117] Case C-351/08 *Grimme* [2009] ECR I-10777 (ECLI:EU:C:2009:697); Case C-541/08 *Fokus Invest* [2010] ECR I-1025 (ECLI:EU:C:2010:74). The Swiss agreement is, like the Ankara Agreement, static — but, unlike it, protected by the guillotine.

[118] The "guillotine" is in the final provisions of the Bilateral I package (eg art 25 of the Agreement on the Free Movement of Persons): the agreements apply only together, and termination of one ends all. The Ankara Agreement has no such linkage, so its rights could be eroded in isolation.

[119] Case C-63/99 *Gloszczuk* [2001] ECR I-6369 (ECLI:EU:C:2001:488); Case C-235/99 *Kondova* [2001] ECR I-6427 (ECLI:EU:C:2001:489); Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557 (ECLI:EU:C:2001:491). Direct effect unites the two families; the standstill is what divides them.

the Turkish national against regression relative to a *historical* baseline. The practical consequence is that, where the standstill bites, the Turkish national's claim is in one respect *stronger*: he can demand the generous 1973 Rules even where they far exceed anything available to a British national today. That is the very feature the "sole control", "source of funds" and format breaches violated, and it has no analogue in the Europe Agreement jurisprudence. *Secondly*, in the trilogy the Court held that the directly effective right did *not* deprive the host state of the power to operate a system of prior immigration control, and could be subordinated to a proviso permitting the application of the host state's own laws on entry, stay and establishment, so long as the right was not rendered illusory and there was no discrimination.[120] But that accommodation rested on an *express proviso*. The Ankara Agreement contains no such proviso for establishment; on the contrary, it contains the standstill, which positively *forbids* new restrictions. The Member State's freedom to apply its evolving rules to Europe Agreement nationals is therefore the precise mirror-image of the freedom it *lacks* for Turkish nationals — and the United Kingdom's error, in Part IV, was in effect to treat the Turkish businessperson as though he were a Europe Agreement national, met with the current rules, when the standstill required the opposite. *Thirdly*, the trilogy is sometimes called a "hollow victory", because the Court upheld the refusals on their facts — Mr Gloszczuk having overstayed and given false information, Mr Kondova having obtained entry by deception, the *Barkoci and Malik* applicants having sought to establish from a precarious position (see also *Jany*, on the limits of the establishment concept).[121] But that limitation is directed at *abuse*: nothing in the standstill protects fraud, and a Turkish national who obtains entry by deception can no more rely on Article 41(1) than a Polish national could rely on the Europe Agreement. The limitation provides no warrant for refusing *bona fide* applications supported by genuine evidence — which is what the breaches in Part IV involved. The legitimate boundaries of an establishment right lie at the frontiers of fraud and circumvention, not at the rejection of honest applicants for failing to satisfy invented evidential requirements.

40. The Euro-Mediterranean and Ukrainian agreements: a wider frame

The comparison can be widened. The Euro-Mediterranean agreements with Morocco, Tunisia and Algeria contain non-discrimination guarantees as to *working conditions,*

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[120] *Kondova* (Case C-235/99) [50]–[55], [80] (host state may operate prior immigration control and refuse those who circumvent it, provided the right is not rendered illusory). Crucially, this rested on an *express proviso* the Ankara Agreement lacks.

[121] The "hollow victory" label reflects that the refusals were upheld on their facts; see also Case C-268/99 *Jany* [2001] ECR I-8615 (ECLI:EU:C:2001:616) on the outer limits of the establishment concept. But the limitation targets fraud and circumvention, not honest applicants — and so provides no warrant for the breaches in Part IV.

remuneration and dismissal for nationals lawfully *employed* in a Member State, several held directly effective in *El-Yassini* and *Gattoussi*.[122] But — and this is the point — they contain *no standstill* and *no right of establishment*; they protect the equal treatment of those already admitted to employment, not the conditions of admission or establishment. The Moroccan or Tunisian national thus has, in one narrow respect, a guarantee comparable to part of the Ankara package, but lacks the standstill's distinctive protection of the *conditions of establishment* altogether. The more recent Association Agreement with Ukraine, with its Deep and Comprehensive Free Trade Area, goes further on trade and regulatory approximation but again stops well short of conferring a directly effective, individually enforceable establishment right of the kind the Ankara standstill secures.[123] The lesson of the wider frame is that the Ankara Agreement occupies a genuinely unusual position: among the Union's external agreements it is one of very few — and, for establishment specifically, essentially the only one of its generation — to combine a directly effective right invocable by the individual, a standstill freezing a favourable historical baseline, and an integration teleology pointing, however distantly, towards accession. That combination made the Ankara right, on paper, more valuable than the equal-treatment guarantees of the Euro-Med agreements or the trade-and-approximation provisions of the Ukraine agreement. Yet the same instrument was the least effectively policed.

41. Synthesis: a powerful right with feeble enforcement

Dimension	TFEU (Arts 49/56)	EEA Agreement	EU–Swiss FMP	Europe Agreements	Ankara Agreement
Nature of establishment right	Positive, directly effective	Positive, directly effective (homogeneity)	Positive, treaty-based	Positive, directly effective, qualified	Negative standstill only
Comparator/benchmark	The internal market itself	Evolving EU acquis	Contemporary, static	Host-state nationals (national	Host-state law as at 1973 (UK)

[122] Euro-Mediterranean Agreement with Morocco [2000] OJ L70/2, art 64; Case C-416/96 *El-Yassini* [1999] ECR I-1209 (ECLI:EU:C:1999:107); Case C-97/05 *Gattoussi* [2006] ECR I-11917 (ECLI:EU:C:2006:780). These protect equal treatment in *employment already secured* — they contain no standstill and no establishment right.

[123] Association Agreement with Ukraine [2014] OJ L161/3, including the DCFTA provisions; see G Van der Loo, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Brill Nijhoff 2016). Deeper on trade and approximation, but short of an individually enforceable establishment right.

Dimension	TFEU (Arts 49/56)	EEA Agreement	EU–Swiss FMP	Europe Agreements	Ankara Agreement
				treatment)	
Residence/settlement	Codified (Dir 2004/38); permanent residence at 5 yrs	Equivalent to EU	Extensive	Subject to prior immigration control	Only as corollary of activity; no settlement as of right
Family reunification	Codified, extensive	Equivalent to EU	Extensive	Limited	Inferred, contested
Citizenship dimension	Union citizenship (Arts 20–21)	None	None	None	None
Supranational court	CJEU (Art 267)	EFTA Court	Joint committees; no court	CJEU (pre-accession)	CJEU (during membership only)
Dedicated guardian	Commission (Arts 258–260)	ESA	Joint committees + guillotine	Commission + accession leverage	Commission (discretionary; inactive)
Practical enforcement for the individual	Strong	Strong	Strong	Moderate (accession era)	Weak

Placing the models side by side[124] yields a synthesis that is, for the Turkish businessperson, a study in tragic asymmetry. As a matter of *substantive technique*, the Ankara standstill is, where it bites, the most generous of all to the partner state's national,

[124] The table is a schematic synthesis; each entry is documented in the Parts above (the EEA in §37, Switzerland in §38, the Europe Agreements in §39, the Euro-Med and Ukraine agreements in §40), and is necessarily a simplification of regimes that differ in detail as well as in kind.

because it freezes a favourable historical baseline and forbids regression from it, regardless of how the host state's general law has evolved. The Europe Agreement national enjoys only national treatment against a moving contemporary comparator; the EEA national a dynamic but evolving right; the Swiss national a static but contemporary right; the Euro-Med national only equal treatment in employment already secured. The Turkish national alone can demand the law of half a century ago. As a matter of *procedural and remedial protection*, however, the Ankara Agreement is the *weakest* of the comparators conferring a meaningful establishment right. The EEA national has ESA and the EFTA Court; the Swiss national the joint committees and the structural protection of the guillotine; the Europe Agreement national had, during the pre-accession era, the prospect of accession itself and the Commission's close engagement. The Turkish national had a Commission unwilling to exercise its discretion; national courts reluctant to refer; and, after the appeal was abolished, a domestic remedy degraded to internal administrative review. The substantive right that is, on paper, the strongest is protected by the machinery that is, in practice, the weakest. That asymmetry — substantive strength married to procedural fragility — is the deep structural explanation for everything documented in Parts IV to VIII. A Member State minded to erode an inconvenient establishment right will find the Ankara Agreement the softest target in the family: erosion of EEA rights invites ESA proceedings before the EFTA Court; erosion of Swiss rights risks the guillotine; erosion of Europe Agreement rights, during the accession era, jeopardised the candidate's progress. Erosion of Ankara rights risked almost nothing. The United Kingdom did not need to repudiate the standstill; it needed only to administer it badly, secure in the knowledge that the enforcement architecture was too weak to compel correction.

PART X — AFTER THE STANDSTILL: THE CLOSURE OF THE ROUTE AND THE TRADE AGREEMENT THAT FORGOT THE BUSINESSPERSON

42. The end of the protected regime, and its transitional preservation

At 11 p.m. on 31 December 2020 the implementation period ended, and with it the United Kingdom's obligations under the Agreement as a matter of EU and retained EU law. From 1 January 2021 the ECAA Worker and Businessperson routes closed to new applicants; the directly effective establishment right was expelled by the 2019 EU Exit Regulations and the broader cessation of EU law. This was an inevitable consequence of withdrawal, and there is no plausible argument that the United Kingdom was obliged to continue applying the 1973 Rules to *new* applicants indefinitely; the complaint in the earlier Parts concerns the period *before* this date, when the obligation was live. But the end of the

regime for new applicants left a pressing question: what was to become of those already lawfully established? To its credit, the United Kingdom did not abandon them to the points-based system. By the Statement of Changes HC 813 of 22 October 2020 it provided that those already present — now styled "ECAA" rather than "Turkish" businesspersons — could continue to extend their leave on broadly the pre-Brexit conditions and pursue settlement after five years under Appendix ECAA Settlement.[125] The mechanism was the carve-out in the 2019 Regulations: the cessation of the establishment and services provisions was disapplied "in relation to matters which fall within the application or operation of the Immigration Acts",[126] lifting the substance of the regime out of the expiring body of directly effective EU law and re-grounding it in domestic immigration law, where it survives as a creature of the Rules rather than of the treaty. This is a sensible and humane arrangement, and must be acknowledged as such.

43. The limits of the preservation, and the abandonment

The preservation, however, carried forward not only the favourable substance but the *pathologies*. Every defect catalogued in Parts IV and V continues to operate on extension and settlement applications: the "sole control" requirement, the format fetish, the source-of-funds demand, the document-handling failures, the late service. None was a feature of the *closure* of the route; none was cured by it. There is, moreover, a cruel irony in the remedial position. While the standstill bound, the breaches were breaches of *directly effective EU law*, with the clause supplying a powerful argument that the impugned requirements were simply unlawful. After 31 December 2020 that argument is gone: an ECAA businessperson refused today on a source-of-funds requirement can no longer say "this is a new restriction prohibited by Article 41(1)"; he can say only that it misapplies Appendix ECAA — an argument of ordinary domestic public law shorn of the treaty's protective force, to be pursued through the same degraded administrative-review-and-judicial-review channel whose inadequacy Part VI exposed. The closure stripped the cohort of the most potent legal tool they had ever possessed while leaving the unlawful refusals themselves intact.

This diminution occurred against the backdrop of the Withdrawal Agreement, which drew the line of acquired-rights protection in a manner doubly discriminatory to the Turkish businessperson. EU citizens lawfully resident at the end of the implementation period were the beneficiaries of an entire Part — Part Two, on Citizens' Rights — preserving their residence, employment, self-employment, social-security and equal-treatment rights,

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[125] Statement of Changes in Immigration Rules HC 813 (22 October 2020); Appendix ECAA Extension of Stay and Appendix ECAA Settlement, rule ECAA 6.3.

[126] Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401, explanatory note. The carve-out is the mechanism by which the substance survived as revocable domestic rule.

directly enforceable in the United Kingdom's courts.[127] The Turkish businessperson appears nowhere: not an EU citizen, Part Two did not touch him; the beneficiary of a different instrument, that instrument's domestic effect was severed at the end of transition, his rights relocated into revocable domestic law.[128] Two classes of economically active beneficiaries of directly effective Union-law rights, both lawfully established on the eve of Brexit, were treated in radically different ways — the EU citizen's rights preserved by binding agreement and rendered enforceable, the Turkish national's left to the unilateral grace of the Rules. The discrimination of the appeal-rights era was thus carried forward and entrenched. And there is a structural reason: the EU citizen's rights were protected because the Union negotiated for them; the Turkish businessperson had no champion at the table — not the Union, whose mandate concerned its own citizens; not Turkey, no party to the negotiation; not the United Kingdom, the counterparty winding down its obligations. Where Switzerland and the EEA-EFTA states secured dedicated citizens'-rights agreements to mirror Part Two,[129] the Turkish national — whose right to be in the United Kingdom was no less a creature of Union law — secured nothing. When the music stopped, the EU citizen had a chair, the Swiss national had a chair, the EEA-EFTA national had a chair, and the Turkish businessperson was left standing.

The Commission's own answer, given in its reply of 30 September 2020, deserves to be stated in its strongest form: the settlement schemes flow from the Withdrawal Agreement, whose personal scope covers only EU and UK citizens; there was no obligation on the Commission, in negotiating that Agreement, to extend protection to Turkish nationals, since on leaving the Union a State is no longer covered by the Union's international agreements; and, per Article 19(2), the statuses have no effect until after transition, so there "[c]annot … be any discrimination".[130] Each proposition is, on its own terms, accurate, and the argument is more respectable than the bare discretion point. But it answers a narrower question than the one raised. It establishes only that *the Commission* was under no obligation in negotiating withdrawal, and that *the Withdrawal Agreement itself* did not discriminate within its own temporal scope. It does not engage the distinct,

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[127] Withdrawal Agreement (OJ 2020 L29/7), Part Two (Citizens' Rights), arts 9–39, given domestic effect by the European Union (Withdrawal Agreement) Act 2020.

[128] European Union (Withdrawal) Act 2018, ss 1A–1B and 7A; SI 2019/1401. The directly effective Ankara rights ceased at the end of the implementation period; the EU citizen's rights, by contrast, were preserved by binding agreement.

[129] EEA EFTA Separation Agreement (2019); UK–Swiss Citizens' Rights Agreement (signed 25 February 2019). Where the partner state had the standing to negotiate a parallel instrument, its nationals' acquired rights were preserved; the Turkish national had no such instrument.

[130] European Commission reply of 30 September 2020 (Annex 1), Commission services' comments (personal scope limited to EU and UK citizens; no Commission obligation in negotiating withdrawal; reliance on Article 19(2) for the proposition that the statuses have no effect until after transition). The argument is accurate but answers a narrower question than the one raised.

prior complaint that the *United Kingdom*, while still bound by Article 9 during transition, was administering a regime that discriminated between EU and Turkish nationals in appeal rights and settlement. The temporal argument brackets out precisely the window in which the discrimination was actionable. And there is a revealing concession: having denied any Union obligation, the Commission added that "[i]t is also open to the UK and Turkey to take steps towards concluding a bilateral agreement providing protection to Turkish nationals already residing in the UK".[131] That sentence acknowledges the very gap this article identifies — and points to the instrument that could have averted the abandonment.

44. The trade agreement that forgot the businessperson

For when the United Kingdom and Turkey did conclude a bilateral agreement — the Free Trade Agreement signed at Ankara on 29 December 2020 and effective on 1 January 2021 — it was a goods-only instrument that said nothing about the residence or establishment rights of Turkish nationals already in the United Kingdom.[132] Concluded as a "continuity" measure, its purpose was to preserve the preferential conditions of the pre-existing EU–Turkey customs-union relationship so as to avoid a cliff-edge disruption of trade in *goods*. It establishes a free-trade area on goods, with provisions on tariffs, rules of origin, customs, intellectual property, procurement, competition and dispute settlement. It contains *no* chapter on trade in services, *no* provision on freedom of establishment, *no* provision on the temporary entry of business persons, and — most pertinently — *nothing* addressing the position of the established Turkish businessperson; the House of Lords committee that scrutinised it called it, candidly, "not a comprehensive free trade agreement".[133] The contrast with the EU–UK Trade and Cooperation Agreement, concluded days earlier with substantial titles on services and investment and provisions on short-term-visit visas, is illuminating.[134]

It would be wrong to characterise the silence as itself a *breach*: by the time the FTA was concluded the United Kingdom was no longer bound by the Agreement and was under no duty to replicate its establishment provisions. But to leave the matter there would miss

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[131] ibid Annex ("It is also open to the UK and Turkey to take steps towards concluding a bilateral agreement providing protection to Turkish nationals already residing in the UK"). The route the Commission identified was then taken — for goods only.

[132] Free Trade Agreement between the United Kingdom and the Republic of Turkey (Ankara, 29 December 2020), CP 372 (Turkey No 1 (2021)).

[133] House of Lords Library, *UK–Turkey Free Trade Agreement* (Research Briefing, 2021) (describing it as "not a comprehensive free trade agreement").

[134] Trade and Cooperation Agreement (OJ 2021 L149/10), Title II (Services and Investment) and the provisions on social-security coordination and short-term-visit visas — drafting tools available in December 2020 and deployed for the EU but not for Turkey.

the deeper significance. The Ankara Agreement was, in its conception, an instrument that *fused* trade and establishment: the right of Turkish nationals to establish in business was not an immigration concession bolted onto a trade deal but a constitutive element of the economic partnership. When the United Kingdom replaced that fused instrument with a goods-only FTA, it *unbundled* trade from establishment — retaining the part that served United Kingdom exporters (preferential access for goods) and discarding the part that served Turkish businesspersons (the right of establishment). The Turkish national who, under the Agreement, could trade *and* establish, was left under the FTA with a relationship in which goods could cross the border freely but he could not.[135] The Government has, moreover, signalled that any future enhanced agreement must not "undermine the UK's points-based immigration system", and when negotiations for an upgraded agreement opened in March 2024 the published agenda concerned trade in goods and services, with no suggestion that the ECAA establishment route would be restored.[136] For the existing cohort the silence has a particular sting: their continued presence and route to settlement now depend not on any reciprocal treaty right but on the unilateral grace of the Rules, which the United Kingdom may amend at will, subject only to whatever residual legitimate expectations the courts are prepared to recognise — expectations that, as *Alliance of Turkish Business People* shows, the courts have been notably reluctant to enforce. A grandfathering provision, a modest services-and-establishment chapter, or a mobility annex were all well within the drafting repertoire that produced the TCA; none appears in the UK–Turkey FTA. The established businessperson is not merely under-protected by the new instrument; he is entirely absent from it. The two instruments that might have re-entrenched his position — the Withdrawal Agreement and the FTA — between them ratified his abandonment, the one by omission and the other by silence.

PART XI — CONCLUSION

45. The breaches, restated

During the period in which it remained bound by the Ankara Agreement and its Additional Protocol, the United Kingdom committed a series of breaches of binding EU

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[135] The unbundling is the analytically significant point: a single instrument that had fused trade in goods with a right of establishment was replaced by an instrument confined to goods — retaining the element of value to United Kingdom exporters and discarding the element of value to Turkish businesspersons.

[136] HC Deb 14 March 2024 (UK–Turkey trade negotiations), statement of the Department for Business and Trade; Department for Business and Trade, announcement of negotiations for an upgraded UK–Turkey free trade agreement, 14 March 2024. The stated concern not to "undermine the UK's points-based immigration system" signals an intention not to recreate anything resembling the Ankara establishment route.

law in its treatment of Turkish businesspersons. It breached the standstill in Article 41(1) *substantively*, by importing into a regime frozen at the favourable 1973 Rules a battery of conditions drawn from the modern points-based architecture — "sole control" of funds, specified evidential formats, and proof of the *source* of funds (a criterion absent even from the published modern Rules). It breached the standstill *procedurally*, by interposing an outsourced, fee-charging and unreliable document-handling system whose failures caused good applications to be refused, and by failing to serve its decisions, eroding the window for remedy — failures that also engaged the good-faith obligation in Article 7. It breached the standstill by *abolishing the merits appeal*: the clause reaches procedural conditions and remedies; the High Court in *Akturk* was right and the Court of Appeal wrong; and the collapse in the correction rate from some forty per cent on appeal to as little as one per cent on review is the quantitative shadow of a remedy degraded from independent merits adjudication to internal paper review. It breached the duty of sincere cooperation through the conduct of its courts, which — in *Alacakanat*, *Buer*, *BA (Turkey)*, *Aydogdu*, *Soner Koktuk* and *AoTBPL* — repeatedly resolved genuinely uncertain questions against the Turkish national without once referring them, in breach of the third paragraph of Article 267. And it arguably breached the non-discrimination guarantee in Article 9, by removing a remedy that comparable EU nationals retained and subjecting Turkish nationals to a seven-year, thrice-scrutinised settlement route where the EU national obtained settled status routinely.

These breaches went substantially unremedied not because they were doubtful but because every mechanism of correction failed to engage: a final court that construed the directly effective right too narrowly, applying a "particularly English" method inhospitable to the purposive, effects-based approach of the Court of Justice; an entire line of cases in which no reference was made; and a Commission that enjoyed an unreviewable discretion not to act and exercised it — institutional passivity confirmed as a serious grievance by the European Ombudsman's decision to investigate it.

46. The uniqueness of Turkey's treatment

It remains to draw the comparative threads together, for the deepest moral of this study is that the predicament of the Turkish businessperson was not merely unfortunate but *unique* among the beneficiaries of the Union's association agreements — and unique along every axis that has structured this article.

It was unique *substantively*. Of all the partner states' nationals, only the Turkish national enjoys a directly effective standstill freezing a generous historical baseline. The EEA national enjoys a dynamic right that tracks the evolving acquis; the Swiss national a static but contemporary right; the Europe Agreement national only national treatment against a moving domestic comparator; the Euro-Med national only equal treatment in employment already secured; the Ukrainian national only trade-and-approximation

provisions falling short of an individually enforceable establishment right. The Turkish national alone can demand the law of 1973. In Hartian terms, his is the only association regime in which the rule of recognition for the conditions of establishment is fixed at a historical moment and held there — a uniquely backward-looking criterion of validity that, where the host state's law has grown harsher, makes his paper entitlement the most valuable in the family.

It was unique in its *teleology*. The Ankara Agreement alone among the comparators of its generation combined that frozen baseline with an accession teleology and the borrowed vocabulary of the Treaty freedoms. Yet — and this is the point *Demirkan* makes — the borrowing is a guide, not an equivalence: the standstill does not reach the passive receipt of services, there is no citizenship dimension, no *Ruiz Zambrano* principle, and the Article 59 ceiling holds him, at every point, below the contemporary EU national. He has the Treaty's words without the Treaty's depth; the appearance of a fundamental freedom without the constitutional membership that gives the Treaty freedoms their security.

And it was unique — most consequentially — in its *enforcement*. Here the philosophical frames of Part III converge. The Dworkinian severance of remedy from right, which a community of principle should never have tolerated, was possible only because the Turkish national, alone among association beneficiaries, had no external procedural guardian to supply what the domestic remedy withdrew: the EEA national has ESA and the EFTA Court; the Swiss national the guillotine and the joint committees; the Europe Agreement national had accession leverage and an engaged Commission. The Turkish national had a discretionary, inactive Commission and national courts that would not refer — so that the *only* protection his remedies could have was the protection the standstill clause itself might supply, which is precisely why the Court of Appeal's narrow construction in *CA (Turkey)* was so uniquely damaging in his case and would have been comparatively harmless in any other. The natural-justice deficit, too, fell on him alone with full force: only he was confined to a remedy that offended both *audi alteram partem* (paper-only) and *nemo judex in causa sua* (the deciding department reviewing itself), with no supranational court to set it right. The strongest right in the family was wrapped in the weakest enforcement, and at the moment of Brexit the asymmetry became permanent: alone among the partner states' nationals whose rights derived from a Union-level instrument, the Turkish businessperson had no negotiator and secured no parallel citizens'-rights agreement, where the Swiss and EEA-EFTA nationals secured both. He held the strongest paper right in the neighbourhood and the weakest practical protection — an asymmetry no other partner-state national faced to the same degree.

47. The wider lesson

The episode is, in the end, a study in how a legal right dies. Not by a single repudiation, candidly announced and squarely defended, but by attrition: a new evidential demand,

an abolished appeal, a lost upload, an unserved decision, a narrow judicial construction, a discretionary non-enforcement, a goods-only successor treaty. Each step was defensible, or at least deniable, in isolation; the cumulative effect was the hollowing-out of a protected status that a treaty had been designed to render secure. The standstill clause was meant to be a ratchet that allowed improvement but forbade retreat. What happened to the Turkish businessperson in the United Kingdom was a retreat conducted under cover of the forms — a standstill that moved.

The Turkish nationals who remain are entitled to have their extension and settlement applications determined lawfully, by reference to the preserved Rules, free of the imported accretions of the points-based regime, and through a procedure that affords a genuine opportunity to correct error. That much survives the change in the constitutional position, as a matter of ordinary domestic legality if no longer of treaty right. Whether they will receive it depends on whether the lessons of the period of breach have been learned. The evidence assembled here gives little ground for confidence; but it gives every ground for vigilance.

The author is grateful to the work of those who first identified and documented these issues, including the correspondence of Dr Catherine Taroni of Richmond Chambers and the Joint Advice of Sir Ian Forrester QC, Eleanor Sharpston QC and Ravi Mehta prepared for the Turkish Association to Protect the Rights of Industrial and Commercial Businesspersons in the UK under the ECAA. The analysis, and any errors, are the author's own.

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Forrester I QC, Sharpston E QC and Mehta R, *Advice regarding the UK's Failure to Respect the Ankara Agreement and its Dispositions regarding Turkish Citizens* (26 February 2021)

Forrester I QC, Sharpston E QC and Mehta R, *Joint Response to the European Ombudsman* (Complaint No CHAP(2020)02135) (26 February 2021)

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ANNEXES

ANNEX 1 — European Commission (DG NEAR), substantive reply to TAPRICB, 30 September 2020

ANNEX 2 — European Commission (DG NEAR), access-to-documents decision, 2 October 2020

ANNEX 3 — Joint Advice of 29 January 2021 (Forrester, Sharpston and Mehta)

ANNEX 4 — Joint Advice of 26 February 2021 (Annex 4)

ANNEX 5 — Joint Response to the European Ombudsman, 26 March 2021 (Forrester, Sharpston and Mehta)

ANNEX 6 — Letter of Richmond Chambers (Dr Catherine Taroni) to the Home Office, 18 June 2020

ANNEX 1

EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Acting Director-General

Brussels,

Subject: Your application for access to documents – Ref. GestDem 2020/5481

Dear Mr Behar,

I refer to your complaint dated 13 July 2020[1], addressed to the President of the European Commission, Ms Ursula von der Leyen, and to the Secretary-General of the European Commission, Ms Ilze Juhansone.

I further refer to the holding response dated 30 July 2020[2] and to the e-mail of 16 September 2020[3] sent by the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR) by which you were informed that your request for access to documents, which was included in your complaint, would be handled separately under the provisions of Regulation (EC) No 1049/2001[4].

Following internal consultation within DG NEAR, the following documents have been identified as falling under the description provided in the first point of your request: "*any and all written documents, statements, actions or evidence relating to any action it has*

[1] Ref. Ares(2020)3744401.

[2] Ref. Ares(2020)4022983.

[3] Ref. Ares(2020)4855347.

[4]Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145 of 31 May 2001, p. 43.

Mr. A.H. Behar
TAPRICB Director
61A Bridge Street
Kington
HR5 3DJ
United Kingdom

Advance copy by email:
admin@tapricb.org

taken to protect the rights of Turkish nationals in the UK exercising treaty rights under the Ankara Agreement".

1. Complaint CHAP (2010)01107;
2. CHAP (2010)01107 – Annex;
3. Acknowledgement of receipt CHAP (2010)01107;
4. Pre-closure letter CHAP (2010)01107;
5. Note to the file CHAP (2010)01107;
6. Complaint CHAP(2013)01102;
7. Acknowledgement of receipt CHAP (2013)01102;
8. Request for clarification CHAP(2013)01102;
9. Request for clarification CHAP(2013)01102 – Annex;
10. Pre-closure letter CHAP(2013)01102;
11. Closure confirmation CHAP(2013)01102;
12. Pro memoria – the documents related to the complaint that you have submitted are considered not to be covered by the scope of this access to documents request.

Concerning the second point of your request "*any and all written documents, statements, actions or evidence relating to any action it has taken to protect the rights of Turkish nationals in the UK exercising treaty rights under the Ankara Agreement during the EU-UK Withdrawal Agreement, transition period, or post-Brexit trade agreement*", I regret to inform you that the Commission does not hold any documents that would correspond to this request.

Please note that the response on the substance concerning the implementation of this Association Agreement will be addressed to you by the Commission in a separate letter.

Having examined the eleven documents listed above under the provisions of Regulation (EC) No 1049/2001, I have decided that:

- Full access can be granted to document 9;
- Wide partial access can be granted to the rest of the documents, subject to redaction of personal data, as per Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

Regarding your request to publish these documents, it is important to mention that when (partial) access is given to documents as a result of an application submitted under Regulation (EC) No 1049/2001, this access is automatically granted to the public at large, and not only to the applicant concerned.

The justifications are as follows:

Protection of the privacy and the integrity of the individual

Complete disclosure of the documents is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001. In particular, these documents contain contact details and names of Commission staff members not pertaining to the senior management, and names and information pertaining to third parties.

Article 9(1)(b) of the Data Protection Regulation[5] does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data, nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Means of Redress

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review its position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[e-signed]

Maciej Popowski

Encl.: Documents 1-11

[5] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

ANNEX 2

EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

R - Resources
The Director

Brussels
NEAR.R/MJ

Subject: **Turkish Businesspersons in the UK under the ECAA (EU-Turkey Association Agreement) and Similar Entry Clearance Categories - Failure of EU Commission to Act on Multiple Breaches of EU Law by UK**

Dear Mr Behar,

I refer to your letter of 22 October 2020[1], addressed to the President of the European Commission, Ms Ursula von der Leyen, and to the Secretary-General of the European Commission, Ms Ilze Juhansone, in response to the letter addressed to you by the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR) on 30 September 2020[2], as well as to your e-mail dated 30 November 2020[3].

The President of the European Commission has asked my department to reply to you directly on her behalf.

With your letter of 22 October 2020 and your e-mail of 30 November 2020, you aimed to provide supplementary comments in relation to the seven points outlined in your complaint of 13 July 2020[4].

We have thoroughly reviewed your observations concerning points 1, 5 and 7. Further to this review, we have come to the conclusion that those do not provide any new facts/elements leading us to a reconsideration of our previous position.

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[1] Ref. Ares(2020)5916187.

[2] Ref. Ares(2020)5140530.

[3] Ref. Ares(2020)7204354.

[4] Ref. Ares(2020)3744401.

Mr. A.H. Behar
TAPRICB Director
61A Bridge Street
Kington
HR5 3DJ
United Kingdom

Sent by e-mail only:
admin@tapricb.org

I take this opportunity to recall that points 2, 3, 4 and 6 of your complaint, concerning your allegations against the United Kingdom, required further assessment and are therefore addressed via a separate letter under the CHAP procedure for handling complaints against Member States' applications (CHAP reference (2020)02135). By letter of 2 October 2020[5], you received an acknowledgement of receipt for this procedure and you were informed of the applicable deadlines and specificities.

In light of the above, please find in attachment our comments thereupon on points 1, 5 and 7.

We trust that these explanations address your concerns.

Yours faithfully,

(E-signed)
Mark JOHNSTON

[5] Ref. Ares(2020)5190720

Annex

I. *Point 1*:

"*UK's failure to Refer Cases Involving Disputes Relating to the EU-Turkey Association Agreement to the [CJEU] for Preliminary Reference under Article 267 and Intentional Interference by UK Public Bodies to Make It Impossible for Turkish Nationals' Cases to Reach the ECJ by Limiting Domestic Judicial Scrutiny*"

The Commission services have carefully considered the arguments outlined in your letter of 22 October 2020, together with the additional exhibits D and E in relation to this point, as well as your e-mail dated 30 November 2020 and have considered that they do not bring any new evidence proving your allegations.

In particular, Exhibit D, which is a response by the UK Home Office to a specific complaint by a Turkish national, does not provide elements which would lead to the conclusion that UK courts have consistently failed to refer cases to the Court of Justice contrary to Article 267 TFEU. Similarly, your allegations supported now by exhibit E, which provides the response to a freedom of information request on the number of applications before the UK Home Office, i.e. a ministerial department, is not in itself an indication of such a failure of the UK courts. In fact, Article 267 TFEU contains obligations addressed to UK courts not to the UK Home Office.

It should also be highlighted that the fact that the Commission had transferred points 2, 3, 4 and 6 of your complaint to the CHAP mechanism for further investigation of these allegations against the UK merely meant that the Commission's assessment would be handled separately in accordance with the rules for handling complaints against Member States' application of EU law. Hence, contrary to your allegations, the initiation of the CHAP procedure does not infer any tacit acceptance from the Commission on the alleged failure of the UK Courts to refer cases to the Court of Justice for a preliminary ruling.

Furthermore, in your e-mail dated 30 November 2020 you mention the duty of national courts to provide written reasons for their "failure" to refer cases to the Court of Justice. In this respect, we would like to note that as the case law suggests (CILFIT v Ministry of Health, Case 283/81), courts have a wide margin of action: a national court should only state that either the EU law question was not relevant in that particular case, that the EU provision had already been interpreted by the CJEU, or that the correct application of EU law was so obvious as to leave no scope for reasonable doubt. It should be recalled that the jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, irrespective of whether the parties to the main proceedings have expressed the wish that a question be referred to the Court.

With regard to the right to a fair trial envisaged in Article 6 of the ECHR, guaranteed in the EU Charter of Fundamental Rights (Article 47 – Right to an effective remedy and to a fair trial), so far the ECtHR accepted that the reference to one of the exceptions to the duty to refer for a preliminary ruling established by the CJEU is a sufficient statement of reasons.

The Commission services therefore stand by the original conclusion that the complaint that UK failed to abide by Article 267 TFEU is not sufficiently substantiated.

Accordingly, this point does not require further assessment and will not be addressed in the CHAP complaint.

II. *Point 5:*

"Failure of the UK to provide Economically Active Turkish Nationals a Similar UK's Brexit Pre-Settlement and Settlement Scheme for EU. Failure of UK Public Bodies to Give Effect to [CJEU] Decisions Concerning the EU-Turkey Association Agreement: (…)[6]"

With regard to this point of your complaint, the UK had launched the pre-settlement and settlement scheme in 2019, i.e. **prior to the conclusion of the Withdrawal Agreement with the European Union** as proven by the additional exhibits B (UK Government press release on the launch of the pre-settlement/settlement scheme) and C (copy of a pre-settlement letter issued by the UK) in relation to this point.

In that regard, it is recalled that while it is acknowledged that the UK allows already now EU citizens to apply for the pre-settlement and settlement schemes, it should be stressed that in accordance with Article 19(2) of the Withdrawal Agreement, the settled or pre-settled status, or rather, the substantive rights associated to them, will have effect only after the end of the transition period.

The Commission services therefore stand by the original conclusion that there cannot be any discrimination on account of the fact that these schemes were not made available to Turkish nationals, since as from 1 January 2021 the UK will no longer be bound by the EU-Turkey Association Agreement and the rights that Turkish nationals may have invoked on that basis will not be valid anymore. Accordingly, this point does not require further assessment and will not be addressed in the CHAP complaint.

III. Point 7:

"Failure of the EU Commission to Act Despite a Demonstrable Record of Two Decades of Failure by the UK and its Public Authorities to Comply with EU Law – the UK's Obligations Under the Ankara Agreement and Its Additional Protocol"

You refer in your letter to the language used in article 258 TFEU, in particular to the fact that the Commission "shall deliver a reasoned opinion on the matter" when it considers that a Member State has failed to fulfil an obligation under the Treaties, while the Commission "may bring the matter before the Court of Justice". You infer that the cited case-law which confirms the discretion of the Commission to bring proceedings does not apply to the obligation to provide reasoned opinions.

It is recalled that it is established case-law that the Commission has a discretion which excludes the right for individuals to require it to adopt a specific position and to bring an action against its refusal to take action. It is only if the Commission considers that the Member State in question has failed to fulfil one of its obligations that it delivers a reasoned opinion. Moreover, in the event that the Member State does not comply with the opinion within the time allowed, the Commission has in any event the right, but not

[6]The full text of this title included a reference to abolishment of the right of appeal; this reference has been deleted because the specific question of abolishment was however not further mentioned in the corpus of the section of the complaint.

the obligation, to apply to the Court of Justice for a declaration establishing the failure the Member State is accused of[7].

Finally, in your letter of 22 October 2020 you state, in relation to point 7, that "as this issue applies with equal force to points 1-6, it will be discussed in tandem, and not separately […]". On this basis and considering the general scope of this point, the Commission trusts that the specific explanations provided for points 1-6 in the Commission's letters are addressing your concerns in this regard.

[7] Sonito v Commission C-87/89, Sateba/Comisia, C-422/97 P, Lefebre and others v Commission Case T-571/93, T-201/96 Smanor v. Commission.

ANNEX 3

IN THE MATTER OF THE UK'S FAILURE TO PROTECT THE RIGHTS OF TURKISH NATIONALS UNDER THE ANKARA AGREEMENT

JOINT ADVICE

I. INTRODUCTION

1. We have been instructed by Aaron (Orhun) H. Bergel, Director of the Turkish Association to Protect the Rights of Industrial And Commercial Businesspersons in the UK under the ECAA ("**TAPRICB**" or "**the Association**"), to advise the Association on recent correspondence with the European Ombudsman's service and the European Commission, including a detailed complaint concerning the treatment of Turkish Businesspersons by the United Kingdom Government in recent years.

2. At its core, we are asked to advise on the merits of challenges to the alteration of treatment of Turkish businesspersons by the UK authorities, in the sense that the conditions for their establishment in the UK have become more strict and exacting, in comparison to the previous regime applicable and to the position of EU nationals, and certain of their legal remedies have been removed[1]. This has to be put in the wider context of the Home Office's approach recorded in our instructions, which has been to create a hostile or at least sceptically negative environment by using immigration techniques to hinder or avoid recognition of the status to which the Ankara Agreement granted rights of establishment to Turkish citizens.

3. In preparing this Joint Advice, we have been given detailed materials which examine the legal and factual background of the dispute, including:
   3.1. Instructions (2-pages), with a detailed 7-page annex identifying factual and legal errors in the European Commission's analysis of the issues TAPRICB has identified and further instructions including the four questions below.

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[1] In particular, amendments to the Nationality, Immigration and Asylum Act 2002 ("**the 2002 Act**") by s.15 of the Immigration Act 2014 removed the statutory right of appeal in s.82 of the 2002 Act except for a very limited category of cases.

3.2. Correspondence with the European Commission (hereafter "**the Commission**") arising from a complaint against the UK by TAPRICB dated 13 July 2020. This correspondence includes the Commission's most recent letter dated 17 December 2020;

3.3. Correspondence between TAPRICB and the European Ombudsman Service regarding the Commission's failure to address the complaint;

3.4. A letter dated 25 June 2020 by Dr. Catherine Taroni of Richmond Chambers to the Home Office identifying issues arising for Turkish nationals due to UK's COVID-19 policies and the impact on their status and rights to remain in or return to the UK.

4. We have also examined the key authorities referred to in our instructions and the correspondence identified above, including:

4.1. A judgment of the Outer House of the Court of Session, BA, MA, CA, HA(AP) v SSHD [2017] CSOH 27 ("**BA(Turkey)**");

4.2. The decision of the Upper Tribunal in R (oao Aydogdu v SSHD [2017] UKUT 00167 (IAC) ("**Aydogdu**"); and

4.3. The *Akturk* litigation (the decision of the High Court: R (on the application of Akturk) v SSHD [2017] EWHC 297 (Admin); [2017] 4 WLR 62 ("**Akturk (HC)**"); and the judgment of the Court of Appeal: SSHD v. CA (Turkey) [2019] 1 W.L.R. 2689 ("**Akturk (CA)**"); and

4.4. A recent judgment of the English Court of Appeal in R(Alliance of Turkish Business People Limited) v SSHD [2020] EWCA Civ 553 ("**AoTBPL**"), which we have identified in our research.

5. In the first instance, we have been asked to respond to four specific questions:

5.1. Q1: This question is in two parts:

a. Does Article 41(1) of the Additional Protocol encompass procedural as well as substantive conditions? In other words, does Article 41(1) of the

Additional Protocol also cover remedies? We are invited to consider these issues in the context of the right of appeal for Turkish nationals.

b. Notwithstanding the answer to 1.a above relating to Article 41(1) of the standstill clause, does a separate procedure for Turkish nationals comprising an administrative review and potential judicial review compared to a direct right of appeal for EU nationals contravene Article 9? If it does, why? If it does not, why?

5.2. Q2: Whether the UK has breached obligations under Article 9 (non-discrimination provision) of the Ankara Agreement where under its national legislation in the UK it grants EU nationals the right to apply for pre-settlement and settlement (introduced prior to the Withdrawal Agreement) but continues to require Turkish nationals to fulfil the more burdensome route to extension described above? If Article 9 (non-discrimination provisions) apply, then why? If not, then why?

5.3. Q3: This is in three parts:

a. Whether the settlement of migrant Turkish nationals and their family falls within the scope of the "stand-still clause" in Article 41(1) of the Ankara Agreement (ECAA) Additional Protocol?

b. Is settlement necessary for the exercise of freedom of establishment under Article 13 of the Ankara Agreement. (Context: Aydogdu, Upper Tribunal Decision).

c. Whether the UK has breached obligations under Article 9 (non-discrimination provision) of the Ankara Agreement where under its national legislation in the UK it grants EU nationals the right to apply for pre-settlement and settlement (introduced prior to the Withdrawal Agreement) but continues to require Turkish nationals to fulfil the more burdensome route to extension described above? If Article 9 (non-discrimination provisions) apply, then why? If not, then why?

5.4. Q4: Finally, this question has two parts:

a. Does the foregoing still hold true where a Member State actively contrives to breach EU law and the Commission just doesn't do anything about it? Wouldn't that fall within the ECJ's Article 263 TFEU review?

b. Under these circumstances, what tools or routes are available through the ECJ where the Commission either reasonably or unreasonably (based on policy considerations in the latter cases) refuses to enforce a particular area of EU law and has failed in its role for decades? Can Article 340 TFEU be used to claim damages by some members of my group if we can establish that the Commission's failures are of direct and individual concern to them?

II. BACKGROUND

The Ankara Agreement and UK withdrawal from the EU

6. By Article 238 of the Treaty establishing the European Economic Community (now Article 217 of the Treaty of the Functioning of the EU ("**TFEU**")), the EEC (as it then was) was empowered to enter into 'association agreements' with third states creating reciprocal rights and obligations. Article 216 TFEU now makes explicit that which was previously implicit in the Treaties, namely that such agreements are binding on the institutions of the European Union and the Member States.

7. The agreement establishing an association between the EEC and Turkey was signed at Ankara on 12 September 1963[2] (the "**Ankara Agreement**"). The Ankara Agreement was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJEC 1973 C113, p.1)

8. The Additional Protocol to the Ankara Agreement ("**the Additional Protocol**") was signed at Brussels on 23 November 1970[3]. It was concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJEC 1973 C113, p.17).

9. The key provisions at issue in this Joint Advice are as follows:

   9.1. Article 7 of the Ankara Agreement provides that: "*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of this Agreement*";

   9.2. Article 9 of the Ankara Agreement provides that "*The Contracting Parties recognize that within the scope of this Agreement -and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in - Article 7 of the Treaty establishing the Community*";

2 OJEC L217, 29.12.1964, p.3687.
3 OJEC L293, 29.12.1972, pp. 3–56.

9.3. Article 13 recorded that "*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*".

9.4. Article 41(1) of the Additional Protocol provides that "*The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services*" (this is commonly known as the "**standstill clause**"); and

9.5. Article 59 of the Additional Protocol provides that "*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*."

The Ankara Agreement and UK law

10. The ECAA and the Additional Protocol was incorporated into UK law as part of EU law by the European Communities Act 1972 ("**the ECA 1972**"), following the UK joining the European Economic Community, thereby becoming a Member State, in 1973.

11. Insofar as the withdrawal of the UK from the EU is concerned, the position was succinctly stated by the Court of Appeal in R. (on the application of Simonis) v Arts Council England [2020] EWCA Civ 374; [2020] 3 C.M.L.R. 22, p.796 at [10] per Green LJ:

> "The position is governed by the relevant parts of the Withdrawal Agreement. The obligations in the Withdrawal Agreement were given effect to by the European Union (Withdrawal) Act 2018 ("*EUWA*") as amended by the European Union (Withdrawal Agreement) Act 2020 ("*WAA*") which received Royal Assent on 23rd January 2020 [FN2: See generally ss.1, 1A and 1B and 7A EUWA. The European Communities Act 1972 is maintained in force until the end of the IP]. After exit day "*Union law*" (as defined in the Withdrawal Agreement [FN3: art.2(a)]) continues to have the same effect as it did prior to exit, until 11pm on 31st December 2020, which is the end of the Implementation Period or "*IP*" [FN4: arts. 4 and 126-127]. The expression "*Union law*" includes: the Treaty on the Functioning of the European Union ("*TFEU*"), the Charter on Fundamental Rights ("*the Charter*"), the general principles of EU law, and the acts of the institution which therefore covers regulations and directives."

12. However, EU law, including the international agreements to which the EU is a party, ceased to have effect following the end of the implementation period.

Immigration Rules for Turkish Businesspersons

13. The detailed rules applicable to Turkish Businesspersons upon the entry into force of the Additional Protocol as well as recent changes introduced by the UK are set out in the correspondence of TAPRICB with the Commission dated 13 July 2020 and are summarised at paragraphs [4]-[11] of the judgment of the Court of Appeal in AoTBPL and so not restated here.

III. ANALYSIS

14. We examine each of the questions posed to us in turn.

Q1. Removal of the statutory right of appeal in the UK

15. The first question asks us to comment on the fact that amendments to the 2002 Act removed the statutory right of appeal to the First-Tier Tribunal in immigration matters, which had been in place for some time (and existed at the time of the entry into force of the standstill clause).

16. As to the first aspect of this question (Q1(a)), there is no express authority decided by the EU Courts of which we are aware on the applicability of Article 41(1) to national rules concerning remedies. It is correct that the jurisprudence of the Court of Justice of the European Union ("**CJEU**") has examined the application of Article 41(1) to procedural requirements applied to the recognition or exercise of the right of establishment, as accepted by the Court of Appeal in Akturk (CA) (p.2696F-G at [17] per Newey LJ):

> "article 41(1) of the Additional Protocol can apply to procedural requirements […] article 41(1) has been held to cover the need for an administrative authorisation such as a work permit (Abatay v Bundesanstalt für Arbeit (Joined Cases C-317/01 and 369/01) [2003] ECR I-12301), a rule requiring pre-arrival entry clearance (R (Tum) v Secretary of State for the Home Department (Case C-16/05) [2008] 1 WLR 94), a visa requirement (Soysal v Germany (Case C-228/06) [2009] ECR I-1031) and charges for residence permits: Minister voor Vreemdelingenzaken en Integratie v Sahin (Case C-242/06) [2009] ECR I-8465."

17. An illustrative example is Case C-92/07 Commission v. Netherlands [2010] ECR I-3683 (ECLI:EU:C:2010:228) which concerned the imposition of charges for applications to obtain or to extend resident permits on Turkish nationals which were substantially

higher than the analogous charges applied to nationals of EU or EEA States. The Court was clear that 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*." (at [47])

18. The general approach taken by EU law, insofar as domestic law is concerned, is to differentiate between substantive and procedural rules – the latter being left to the competences of the Member States in accordance with the principle of conferral (Article 5(2) TFEU). At present – and indeed *a fortiori* at the time of the signing of the Ankara Agreement – the EU Treaties did not confer any competence on the EU institutions to adopt EU legislative acts in relation to procedural matters[4].

19. As such, the ordinary principle is that of "*national procedural autonomy*", i.e.:

> "[…] 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 at [40])

20. Moreover, it is not a breach of EU law for there to be separate procedures which apply to EU nationals and domestic nationals, so long as the two remedies are *equivalent* and similarly *effective*. In Case C-591/10 Littlewoods Retail and Others (ECLI:EU:C:2012:478), at [31], the Court reiterated that "[…] *the principle of equivalence cannot be interpreted as requiring a Member State to extend its most favourable rules to all actions brought in a certain area of law. In order to ensure compliance with that principle, it is for the national court, which alone has direct knowledge of the procedural rules*

4 Exceptionally, reliance has been placed on the harmonisation provision in Article 114 TFEU (ex-Art. 95 TEC), e.g. in relation to Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; and certain other sector-specific provisions expressly confer the power to introduce, e.g. rules for judicial cooperation In civil and commercial matters.

governing restitution actions against the State, to determine whether the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions […]".

21. Ultimately, the Court has emphasised that "[…] *it is for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics*" (Case C-93/12 ET Agrokonsulting-04-Velko Stoyanov (ECLI:EU:C:2013:432) at [39]).

22. Ordinarily, the forum of challenge to an administrative decision would therefore be a matter for national law, subject to the principles of effectiveness and equivalence.

23. 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.

24. Moreover, in our view, there are strong grounds for criticising the approach of the Court of Appeal in Akturk (CA), which would justify the Commission investigating the compatibility of that Court's conclusions – and hence UK law - with the language and spirit of the Ankara Agreement.

25. First, in relation to the language of Article 41, the Court of Appeal 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 (p.2702C-H at [33]-[35] per Newey LJ; p.2703E and H at [40] and [43] per Irwin LJ).

26. In our view, this is a very restrictive approach to the words of the provision, which 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*". The issue was not examined in any detail by the High Court, in part because the UK government appears to have drawn a distinction of nature (rather than language) between appeal rights and procedural rules "*up to the point of first decision-*

making" (see [74]), which Holman J was comfortable fell within the scope of Article 41(1) (see [81]).

27. There is no express 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 put it "*legal remedies available to someone alleging breach of his rights*").

28. This distinction may reflect a traditional view of the difference between procedural and substantive rules. For example, Professor Michael Dougan has distinguished between modalities of exercise of Treaty rights (including "*limitation periods, evidential restrictions, heads of recoverable damages, the payment of interest*"), which were accepted to be within the "*procedural autonomy*" of Member States (and therefore within national competences) and "*the conditions governing the very existence and nature of a right under Community law*" which are said to be substantive (see *National Remedies Before the Court of Justice, Modern Studies in European Law*, Hart Publishing 2004, p.19). This reflects the approach of Advocate-General Léger in Case C-453/00 *Kühne & Heitz* [2004] ECR I-00837 (ECLI:EU:C:2003:350) at [70]). Although these are older sources, they remain relevant and applicable to the principle of national procedural autonomy today.

29. However, in our view there are strong arguments for treating this as an artificial distinction which ignores the reality of the enforcement of rights by affected individuals. This latter feature is a fundamental aspect of the relevant jurisprudence (as illustrated by C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010] ECR I-13849 (ECLI:EU:C:2010:811)[5]). This is the significance of Case C-136/03 Dörr and Ünal v Sicherheitsdirektion fur das Bundesland Karnten [2005] ECR I-4759; (EU:C:2005:340), in which the CJEU concluded 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]).

30. The Court of Appeal in Akturk (CA) distinguished that authority on the basis that (i) it turned on the 'further' integration of Turkish workers operated by Decision 1/80 and

5 See also *EU Procedural law*, A. Biondi & R. Mehta, Blackwell's Companion to EU law, Dennis Patterson & Anna Södersten (eds.), May 2016, Wiley-Blackwell, pp.155-165 at §3.3.

(ii) it concerned a directly effective individual right, which was not present in Akturk (pp.2699H-2700B at [24] per Newey LJ). We find this distinction deeply unpersuasive.

31. We note that the objective and requirements of the Ankara Agreement set out in Articles 2 and 7 envisage progressive integration between the EU and Turkey – the addition of a specific decision in Dörr is an additional but not determinative factor in that regard – and in addition it is well-established that 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].

32. The Court of Appeal might have argued, but did not, that specific provisions of secondary legislation relevant in Dörr required equivalent procedural guarantees to be afforded to non-nationals as nationals of the host State (articles 8 and 9 of Council Directive 64/221/EEC). No equivalent provision exists in relation to the freedom of establishment.

33. In any event, in our view, the argument that the language of Article 41(1) includes the type of restriction such as the exclusion of a statutory right of appeal encompassing full merits review, which would otherwise be available to EU nationals.

34. Second, in relation to the object and a purposive construction of Article 41(1), the Court of Appeal considered that extension of the standstill to remedies would contradict the principle of national procedural autonomy (p. 2703A-B at [36] per Newey LJ) and would create potential inconsistencies between EU Member States as well as a "*ratchet*" effect (p.2704A-B at [44] per Irwin LJ).

35. However, there are a strong arguments to prefer the analysis of the High Court to those of the Court of Appeal, in particular 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*."

36. That is consistent with the analysis of Article 41(1) by the CJEU 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]).

37. 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*".

38. This approach does not unduly restrict the ability of Member States to determine their own procedural rules so long as the mechanisms relied upon are as effective, accessible and practical as those in place at the time the standstill was introduced. As to the alleged "*ratchet*", in our view this could be said to be the precise intention of the standstill clause, in order further to encourage integration between the EU and Turkey, and is a direct result of the national procedural autonomy – and hence procedural variation - which is recognised by EU law.

39. Finally, in relation to the underlying complaint about the comparison between the administrative review mechanism and the previous right of statutory appeal, the High Court in Akturk (HC) was persuaded that "*the appeal or review procedure available to the claimant*" is "[…]*markedly less favourable. The limitations and shortcomings of administrative review, relative to a judicial appeal, are very obvious and were indeed well illustrated by the history of this case*" at [83] per Holman J. The High Court emphasised the fact that the administrative review procedure was a poor cousin of the pre-existing statutory right of appeal: "[t]*he appeal was to an independent judicial body with a further avenue of appeal. Administrative review is performed by an official within the Home Office. On an appeal, oral evidence for and on behalf the applicant could be, and routinely was, heard. The tribunal could*

substitute its own discretion for that of the Secretary of State, whereas administrative review is limited to considering whether the original decision was incorrect" (at [71]).

40. 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. It would appear that the triviality of the grounds invoked to reject an application by Turkish workers 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. In those circumstances, an administrative 'check' on whether deadlines were observed, and other such formal procedural questions, is not equivalent to the neutral and thorough examination of the whole case which a judge can deploy. This is borne out by the statistics of the administrative review, which suggest that the process is perfunctory and formalist and it is correspondingly difficult to doubt the reduction in the rights to which Turkish persons and their families are entitled (Akturk (HC) at [72]).

41. Certainly, the Commission does not appear properly to have analysed the evidence which is available about the very different rates of success between the previous statutory appeal procedure and the administrative review process, or to have considered the very different grounds on which challenges may be brought under the two procedures. Similar features of the regime in Dörr and Ünal led the Court to conclude that it did not comply with the requirements of the relevant Directive (at [47]).

42. In light of these factors, there are powerful arguments for preferring the approach of the High Court to that of the Court of Appeal, albeit that domestic courts would be likely to defer to some extent to the national legal system – and EU Courts may do the same unless it is clear that the quality of the alternative remedy proposed is substantially inferior to its comparator, and that 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. We observe that the reality of the processing of applications and challenges to adverse decisions suggests that some

refusals are based on grounds which appear manifestly absurd (that a Professor lacks practical experience of the discipline being taught, or that the CEO of a company has not been employed in the relevant sector). Yet the appellate procedures instituted seem to take no notice of such bizarre elements: the review process is a trivial formality. If this pattern is systematic (and we have heard suggestions that it is) then a proper appellate process is all the more necessary, and the shortcomings of the administrative process identified above are all the more telling.

43. As to the second aspect of this question (Q(1)(b)), this concerns the separate effect (if any) of the non-discrimination provision contained in Article 9 of the Ankara Agreement. Reference has been made in our instructions to some of the jurisprudence on this provision.

44. Ultimately, there are two ways of looking at this issue, since there is no specific authority on this point which is dispositive.

45. On the one hand, it may be argued that Article 9 has no separate effect on the removal of a statutory right of appeal. That position would be based on the fact that Article 9 refers expressly to the principle of non-discrimination applying only "*within the scope of this Agreement*". Unlike the free movement of Turkish workers, guaranteed by Article 12 of the Ankara Agreement and given effect by secondary legislation such as Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association, no specific provision is made for the right of establishment other than Article 41(1).

46. If Article 41(1) of the Additional Protocol, properly construed, covers procedural as well as substantive matters including remedies for breach of the right of establishment, then Article 9 would add nothing to the analysis. If Article 41(1) did not extend to remedies, however, then it could be said that Article 9 is not engaged at all, since no rule "*within the scope of this Agreement*" is at issue.

47. It is worth noting that the High Court of England & Wales has held that Article 9 (including read together with Article 41(1)) does not in itself contain a substantive right to equal treatment: Alacakanat v General Medical Council [2013] EWHC 1866 (Admin);

[2014] 1 C.M.L.R. 5, p.115 at [20] per Edwards-Stuart J. We add that we entertain doubts as to the correctness of that analysis as a matter of EU law.

48. On the other hand, however, it may be said that if Article 41(1), properly construed, is to be read more restrictively, it is still perfectly proper and legitimate to look at Article 9 of the Ankara Agreement and ask whether it can be prayed in aid of affected persons. The issues of concern to TAPRICB concern the exercise of the right of establishment and therefore would fall within the scope of the Ankara Agreement. This approach explains the difference between the judgments of the CJEU in Taflan-Met[6] (detailed rules needed but did not exist, so Taflan-Met lost) and Sürül[7] (nothing needed beyond the basic rule against discrimination in Article 9, so Sürül won).

49. For our present purposes, it is not necessary to resolve finally whether Article 9 has a separate effect, but it is sufficient to note that there are good grounds for asserting that the removal of a statutory right of appeal for Turkish nationals in circumstances where EU nationals would have such a right is a breach of Article 9 of the Ankara Agreement.

Q2. Pre-settlement and settlement rights for Turkish nationals

50. In our view, there is limited merit in this ground of objection to the UK's behaviour, for the reasons set out in the Commission's letter of 30 September 2020. In essence, the critical feature of the introduction of pre-settled and settled status is that it is an optional arrangement permitted (though not required) by the Withdrawal Agreement, taking effect only after the UK's membership of the European Union came to an end and arising from the bilateral treaty between the UK and the EU.

51. This raises the related issue in question 3, as to whether a right of residence (and if so to what 'settled' status) must necessarily be implied into a right of establishment (which the UK courts have held does not extend to fully settled status, or 'indefinite leave to remain' in the context of the Ankara Agreement). If such a right were a necessary feature of the rights guaranteed by the Ankara Agreement it might be argued that the UK was obliged to make some provision for the rights of residence of Turkish nationals during

6 Case C-277/94 Taflan-Met and Others [1996] ECR I-04085 (ECLI:EU:C:1996:315).
7 Case C-262/96 Sürül v Bundesanstalt für Arbeit [1999] ECR I-02685 (ECLI:EU:C:1999:228).

(though not after) the transitional period, which did not occur. However, for the reasons in relation to question 3, we do not think this argument is likely to be successful.

Q3. Rights of residence and of establishment

52. The third question arises from case-law before the UK Courts which drew a distinction between the right of establishment, which is clearly within the scope of Article 41 of the Additional Protocol, and a right of residence in the UK. As the Court of Appeal of England & Wales explained in its recent judgment in AoTBPL (at [7]-[8]), the Scottish and English courts have held that settlement is not necessarily a corollary of the right of establishment (BA (Turkey) at [50] per Lord Armstrong; Aydogdu at [34] per McCluskey J) on the basis that the primary focus of the Ankara Agreement is *economic* integration, rather than social cohesion. So far as we are aware, the correctness of this analysis has not thus far been tested before the CJEU. Depending on the nature of a particular business, it may well be the case that economically the pursuit of the proposed activity is only possible by virtue of fully settled status. It seems obvious that a businessperson threatened with deportation will be a less effective trade partner than one with a secure right of establishment.

53. Similarly, the interests of Turkish businesspersons in reunifying with their families in a stable and fully integrated way in the host State cannot be readily discounted, and may support any challenge to the approach of the UK Courts.

54. In any event, the effect of these decisions is not to remove the issue of settlement entirely from the scope of the standstill clause, but to conclude that ultimate "*settled*" status (i.e. indefinite leave to remain) in the UK is not a necessary corollary of the right to establishment. Instead, both courts recognised that a limited right of settlement, linked to the scope and duration of the right to work/of establishment was a necessary and sufficient corollary of the right protected by the Ankara Agreement.

55. As such, the answer to Question 3 is not an 'all or nothing'. The decision of McCluskey J in Aydogdu recognises and examines the authorities which have emphasised the importance of settlement and family reunification to the effective integration of Turkish nationals exercising the right to the free movement of workers or the right of establishment. It is therefore possible to confirm that settlement is an aspect of the right

guaranteed by Article 41(1). However, such settlement is only protected to the extent that it is necessary to and an essential corollary of the effective exercise of the right of establishment.

56. In a related fashion, the answer to Question 3(c) is that Article 9 of the Ankara Agreement would only be relevant to this analysis insofar as the right of settlement is within the scope of the Agreement itself. As such, it is only to the extent that the right of settlement is necessary to and an essential corollary of the effective exercise of the right of establishment that any complaint of non-discrimination might be brought.

57. As to that complaint, the comparison which has been drawn in our instructions relates to the possibility for EU nationals to acquire pre-settled or settled status. We do not think that is a relevant comparison for the reasons set out above in relation to Question 2. The position of Turkish nationals is not analogous to those of EU nationals, following the end of the implementation period of the Withdrawal Agreement. Accordingly, we do not think that there is substantial merit to a complaint based on Article 9 about the difference between pre-settled/settled status for EU nationals and the separate regime with which Turkish nationals must comply.

58. We note that these alterations and new features of the regime applicable to Turkish businesspersons were the subject of the (unsuccessful) challenge in the AoTBPL case, albeit not on this ground.

Q4. The Commission's failure to act

59. This question in essence asks us to comment on the curious fact that very few references to the CJEU have been made from UK courts and on 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 the rights to establish themselves in the UK. Our instructions have rightly emphasised that the Commission is tasked with acting as the "*guardian of the Treaties*" (as is enshrined in Article 17(1) of the Treaty on the European Union ("**TEU**"), which provides that the Commission "[…] *shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them* […]").

60. It is indeed strange that an institution which is rule-driven and rule-bound should appear to grant institutional toleration to infringements by the Member States of parts

of the Treaties and other legislative measures which bind the Union. Any judge in a court of a Member State confronted by a case whose resolution depends on a question of European Union law is empowered to refer the matter to the CJEU for a ruling on that question before deciding the case before him or her. And if there is no appeal against the judge's ruling and the matter is not '*acte claire*', such a reference must in principle be made[8].

61. In actual practice, however, the European Commission enjoys a very wide discretion as to whether or not to pursue an infringement proceeding against a Member State. Sometimes, as was the case in the 1990's and 1980's, there were literally dozens of infringement actions against Italy for straightforward non-implementation of Directives in due time. Following the establishment of the principle that a Member State could, in certain circumstances, be held liable for financial losses directly attributable to a failure to implement a Directive in the celebrated Francovich[9] case (and the decision in Dillenkofer[10] that straightforward non-transposition within the prescribed period will automatically satisfy the 'Francovich criteria'), infringements of that obvious self-evident nature decreased dramatically. (The Court had previously and separately determined that a party could invoke the unimplemented directive in the national proceedings[11]).

62. However, although over the years the Commission must have been confronted with more and less flagrant breaches of the rules by Member States, there is not a single occasion when its *failure* to initiate proceedings against a Member State has been condemned. There have been a succession of cases when the Commission's rejection of a complaint about, for example, the competition rules has been challenged and on occasion condemned on procedural grounds (inadequate reasoning or failure to give notice of an accusation for example). But the Court has always upheld the Commission's right to choose whether or not to open proceedings in a particular case. Automec[12] and Lord Bethell[13] are two examples of the phenomenon: the most that the

8 In accordance with the jurisprudence arising from Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 03415 (ECLI:EU:C:1982:335).

9 Joined cases C-6/90 and C-9/90 Francovich and Bonifaci and others v Italian Republic [1991] ECR I-05357 (ECLI:EU:C:1991:428).

10 Case C-178/94 Dillenkofer [1996] ECR I-4845 (ECLI:EU:C:1996:375).

11 Case 148/78 Criminal proceedings against Tullio Ratti [1979] ECR 01629; (ECLI:EU:C:1979:110).

12 Case T-24/90 Automec v Commission [1992] ECR II-02223 (ECLI:EU:T:1992:97).

13 Case 246/81 Lord Bethell v Commission of the European Communities [1982] ECR 02277 (ECLI:EU:C:1982:224).

complainant can insist upon is a well-reasoned refusal with no guarantee that such reasoning is developed or substantial.

63. The position is even clearer in the case of complaints against a Member State. The Commission receives many complaints about alleged infringements and has what might be called a soft law duty to handle them fairly; but it is not the case that a private party can compel the opening of proceedings against a Member State.

64. There is a comparable degree of strangeness associated with references to the CJEU. It is correct that Member States' courts vary greatly in the frequency with which they make references to the CJEU. Latvian courts have made far more references to 'the Luxembourg court' in the fifteen years of Latvia's membership than Scottish courts have done in the nearly fifty years of UK membership, though Latvia and Scotland are of comparable size. Our instructions have drawn to our attention the fact that English courts considering Turkish matters have been very reluctant to refer genuine uncertainties to the CJEU. The statistics are indeed striking. Some judges and some courts are very hesitant to make references and some are very ready to do so. The national judge may feel that it is better to decide without delaying matters, or may think that the facts are not yet clear enough, or may feel that the alleged uncertainty is actually not that uncertain. Sometimes a judge may choose to make a reference in order that the CJEU will be responsible for an unpopular outcome. Sometimes the judge may feel that the argument being made is too clever, too hypothetical to merit a reference.

65. In very rare cases, the Commission has challenged the fact that a supreme court (that is, a court subject to the duty to refer laid down in Article 267(3) TEFU) has failed to make a reference in a case where it was plainly required (against France) or that there appeared to be a structural deficiency hindering the making of references (against Sweden). A complaint was made to the Commission against the UK in connection with the London lorry ban and the refusal of the House of Lords to make a reference, but the complaint received no response. We are aware of no example of the Court condemning the Commission's inaction in the face of such a failure to refer. We do not say that this state of affairs is satisfactory, and in our professional lives at the Bar we have been involved in many cases where the Commission was a crucial interlocutor in an attempt to persuade a Member State authority to change its policy. However, it was always on

the basis that if the Commission chose not to pursue the matter that choice was not challengeable. We see no prospect of the CJEU electing to alter its policy in this respect. *A fortiori*, we do not think that an attempt to seek damages against the Commission for non-contractual liability for its failure to instigate such proceedings (under Articles 268 and 340 TFEU) would stand the slightest chance of success.

IV. CONCLUSION & NEXT STEPS

66. We would be happy to address any further issues which arise from this Joint Advice.

67. Subject to any further instructions, we would propose to respond to the Commission in fairly short form, concentrating on the principal areas of complaint for which we have concluded that the merits are stronger. Our initial draft reflects this approach.

29 JANUARY 2021

IAN FORRESTER QC
ELEANOR SHARPSTON QC
RAVI MEHTA

ANNEX 4

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.

26 FEBRUARY 2021

IAN FORRESTER QC

ELEANOR SHARPSTON QC

RAVI MEHTA

ANNEX 5

Advice regarding the UK's failure to respect the Ankara Agreement and its dispositions regarding Turkish citizens

Re: Response to Email of 11 March 2021

Ref Nos. Ares(2020)37444401; Ares(2020)4022983; Ares(2020)5140530; and Ares(2020)5190720

Related Complaint No. CHAP(2020)02135

Dear President O'Reilly and Ms. Fuller,

1. Thank you for your email of 11 March 2021 at 3:27 p.m. In particular, we are grateful for your confirmation and recognition that others have raised the same issues as those identified in our earlier letters. This reflects the gravity and extent of the problems identified. We respectfully commend the Ombudsman for committing to opening an investigation for maladministration by the Commission in relation to Points 1-7 of our Complaint, as well as other points.

2. Our correspondence has already drawn attention to the systematic and wide-ranging hostile approach by the UK Home Office in restricting the rights of Turkish nationals in the United Kingdom.

3. We maintain that the matters contained in our complaints meet the high threshold which you have described in order to find that the Commission is responsible for maladministration. The applicable EU law is readily identifiable: the agreement establishing an association between the EEC and Turkey was signed at Ankara on 12 September 1963[1] ('**the Ankara Agreement**'), the Additional Protocol to the Ankara Agreement[2] ('**the Protocol'**) and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the EEC-Turkey Association ('**Decision No 1/80**'). Faced with years of conduct by the UK authorities inconsistent with the spirit and language of those legal instruments, coupled with the total absence of an effective judicial mechanism for redress in the UK[3], the Commission has failed to take <u>any</u> meaningful action in order to ensure that the law is respected and has not substantiated the reasons for its inaction. If such conduct does not constitute maladministration, it is difficult to see what could ever satisfy that threshold.

4. In light of your requests for clarification and for us to provide relevant detail concerning the requirements of the Ankara Agreement, by this letter we set out:

   a. A summary of the opinion of our experts[4] as to the limits of the Commission's discretion in this field, and the grounds for concluding that maladministration has occurred;

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1 OJEC L217, 29.12.1964, p.3687.

2 OJEC L293, 29.12.1972, pp. 3–56.

3 As to which, see below and in our previous correspondence.

4 As you will be aware, we have retained leading EU law experts, Ms Eleanor Sharpston QC (a former Advocate General of the Court of Justice of the European Union) and Mr Ian Forrester QC (a former Judge of the General Court of the European Union) to advise us. Neither currently holds a practising certificate in the UK and they therefore comment in the capacity of independent legal advisors. We have also retained

b. An account of the very real impact of the UK's practices, which are cruel and unjustified in applying strict rules to those genuinely seeking to work and integrate in the UK, on individual applicants – none of which appears to have been taken into account by the Commission; and

c. A summary and overview from our experts as to the scope of the provisions of the Ankara Agreement you have highlighted and a brief analysis of the seven cases you have identified.

5. We thank you in advance for your attention and for the diligence with which you propose to attend to this complaint.

I. The Commission's responsibility to act

6. Although the Commission has a wide discretion as to how it pursues its functions, it is not thereby dispensed from the need, as part of the duty of good administration, to press Member States to meet their legal responsibilities. 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 in accordance with the rules prescribed and accepted by the UK, the EU and Turkey.

7. We suggest that the Commission's duty to act as guardian of the treaties should be approached with particular rigour where – as here - there is a pattern of non-referral to the CJEU by national courts, and only limited domestic remedies are available to those whose rights are affected.

8. The Ombudsman will be aware that the UK has actively legislated to remove the right for Turkish citizens to have access to the court system in the UK. The governmental policy goal was evident. We have already addressed in our previous correspondence the removal of the statutory right of appeal in s.82 of the Nationality, Immigration and Asylum Act 2002 by s.15 of the Immigration Act 2014. In its recent judgment (SSHD v. CA (Turkey) [2019] 1 W.L.R. 2689) the Court of Appeal of England & Wales failed to apply the rights of Turkish nationals under the Ankara Agreement and held that the UK's withdrawal of the right of appeal was not prohibited by the Agreement[5]. The failure of the UK courts to refer to Luxembourg the evidently uncertain questions of law presented exacerbated the problem.

9. The Commission has not reacted to, or engaged with, either of these evident disrespect for the law.

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counsel practising in England & Wales with extensive EU law and immigration law experience, Mr Ravi Mehta. It would be inappropriate for our experts to advise on the specifics of each case considered and determined by the UK Home Office (to do so would require them to have access to material that they do not possess). However, they do unquestionably have extensive expertise in advising on EU law, including relevant constitutional principles, the Ankara Agreement and the obligations incumbent on the United Kingdom authorities as a result of those sources.

5 As the Ombudsman will be aware, the first instance court had effectively applied the Ankara Agreement and upheld the rights of Turkish nationals ([2017] EWHC 297 (Admin); [2017] 4 WLR 62 per Holman J). Permission to appeal from the Court of Appeal's judgment was refused by the UK Supreme Court.

10. 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 advanced to justify the assertion that the new Home Office regime presents "*no problem*" are very far from convincing.

11. We submit that a fair review of the status of the rights of appeal granted by the Home Office in the UK, as well as the new requirements imposed on Turkish nationals to obtain permanent residence 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 1/80 already referred to.

12. Prior to April 2015, candidates 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 their role would not amount to mere employment; and the likely fruits of the business had to be realistic enough to feed the candidate and his or her family. The UK Home Office recognised in its formal guidance that if such conditions were satisfied a path to full settlement status in the UK was open to Turkish nationals.

13. The new (and current) immigration regime applied to Turkish nationals is sharply more intrusive. It includes (a) a linguistic assessment, coupled with the so-called 'Life in the UK' test (a form of citizenship examination), (b) stringent criteria to show, through market research surveys, that there is 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, (c) extensive requirements for the disclosure of financial information concerning the business. Most significantly, the changes have had the effect of removing the right to apply for indefinite leave to remain (or "**ILR**") in the UK after four years of continuous residence in the UK. Additionally, very heavy fees are now applicable: £2,389 for main applicants plus the sum of £2,389 for each dependant.

14. Collectively, these changes have 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. These changes are intended to deter, discourage, exclude and harass candidates for establishment in the UK – and they are having those pernicious effects.

15. The Commission's role as guardian of the Treaties requires it critically to examine and challenge the UK about such alterations to the well-established rights of Turkish nationals.

II. The human impact of the UK's practices

16. By way of illustration of the importance of these matters and their very real impact, we next identify three specific examples of the consequences for particular individual victims of the policies of the Home Office, policies which are irreconcilable with the principles established by the Ankara Agreement and subsequent instruments. We are aware of hundreds of such examples but focus on these three as disclosing representative issues.

17. Since this letter may be circulated, we do not give names here, but they are readily available subject to appropriate guarantees of confidentiality.

18. In the first case, **DM** was a self-employed boss of his own company in England where he had an EU Family Residence permit. He applied for a five-year Biometric Residence Permit Card to replace his residence permit, since the latter was due to expire shortly. He contracted Covid-19 after the Permit had expired and before the biometric card had been printed. He was refused hospital treatment. As he had not yet received his permit, he was also unable to ensure his family obtained settled status in the UK (to which they were entitled). No appointments to resolve the matter were available; complaints and appeals and pleas for help were fruitless. The Covid virus spread to the entire family. The family returned to Turkey and DM's mother died of Covid.

19. In case **MKK**, the applicant held a UK visa, which erroneously stated that only the father of the family was self-employed, whereas both father and mother were recognised to be self-employed. Corrections were made after months but not accurately, such that the immigration decision-maker either did not read or did not see the corrected visa materials. When an application for renewal was made, the visa was rejected on the grounds that company shares in the business were held jointly, and as such MKK did not have control over the company and was not self-employed. Pointless delays and pointless travel were caused. The entire family contracted Covid-19 and severe damage was done to the business.

20. Yet again the file is a litany of malignant administrative choices utterly at variance with the principles binding the UK.

21. Yet another death occurred applying Home Office policies in the case of **G**. Once more, a series of administrative errors and printing problems delayed the issuance of a Biometric Residence Permit. As a consequence, the victims of the process were unable to open bank accounts, get medical attention, start their business, or get anything like adequate redress. After numerous procedures and complaints, notably an insistence on physical travel to London to collect the Permit once it had been printed notwithstanding the existence of the pandemic, the father of the family died of a blood clot associated with Covid-19.

22. These examples of the adverse consequences of Home Office policy are especially shocking, since they involved death for those affected. However, hundreds of other episodes present the same pattern – eligible candidates for their rights under the Ankara Agreement are confronted with a series of pretexts of varying absurdity, the overall goal of which is to deny their applications regardless of the underlying circumstances, regardless of eligibility, regardless of human consequences.

III. Response to the Ombudsman's queries

23. Your letter requests clarification of the scope of certain of the provisions in the Ankara Agreement and for our experts' view on the meaning and effect of those provisions as well as seven key cases we have identified.

Key principles of the Ankara Agreement

24. As UK and EU courts have recognised, the objective of the Ankara Agreement and its Additional Protocol is "[…] *to promote the continuous and balanced strengthening of*

trade and economic relations between the contracting parties, including […] *by abolishing restrictions on freedom of establishment (art.13) and on freedom to provide services (art.14), in order to improve the standard of living of the Turkish people and to facilitate the accession of Turkey to the European Community (as it then was) at a later date*" (R (Buer) v SSHD [2014] EWCA Civ 1109, [2015] 1 CMLR 3, at [6] per Richards LJ; Case C-317/01 Abatay v Bundesanstalt für Arbeit [2003] E.C.R. I-12301 at [3]).

25. The key provisions engaged by and relevant to the Home Office's treatment of Turkish nationals are:

    a. Article 7 of the Ankara Agreement, which provides that: "*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of this Agreement*". This provision recognises the importance of all parties striving to achieve the objectives of the Ankara Agreement;

    b. Article 9 of the Ankara Agreement, which provides that "*The Contracting Parties recognize that within the scope of this Agreement -and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in - Article 7 of the Treaty establishing the Community*". This provision applies the general prohibition of nationality discrimination under EU law in the context of the Ankara Agreement;

    c. Article 13, which records that "*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*";

    d. Article 41(1) of the Additional Protocol, which provides that "*The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services*" (this is commonly known as the "**standstill clause**"). This is designed as a floor for the protection of the rights of Turkish nationals within the EU, i.e. a baseline which Member States will not seek to reduce or diminish. The CJEU had made clear, in 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**"), that this provision "*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*" (at [69]). The Court has also made clear that this provision is directly effective, i.e. can be relied upon by individuals (at [48]-[50]); and

    e. Article 59 of the Additional Protocol, which provides that "*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*." This makes sure that the effect of the Ankara Agreement and its Protocol does not result in greater rights for Turkish nationals than those available to nationals of other EU Member States, i.e. the rights of other EU nationals are the

ceiling applicable to Turkish nationals too (see C-677/17 Çoban (ECLI:EU:C:2019:408) at [61]).

26. For the sake of completeness, we observe that Decision 1/80 was a decision of the Association Council between the EU and Turkey. It identified specific rights to free movement which were to be conferred on Turkish workers, for the purpose of advancing the objectives of the Association Agreement. Key provisions are as follows:

    a. Article 7:

    > "The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:
    >
    > – shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State;
    >
    > – shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.
    >
    > Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years."

    b. Article 13 of Decision 1/80 includes a standstill clause akin to Article 41 of the Additional Protocol: "*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*".

27. This collection of provisions establishes a clear and powerful framework for protecting the right of establishment of Turkish nationals in EU Member States. They must be given effective access to the markets for employment and self-employment in those states and must not have to face new restrictions which make such access more difficult than at the time of the signature of the Ankara Agreement. To the extent that the CJEU case-law has elaborated on the detailed rights applicable to the families of Turkish workers, it provides valuable guidance as to the implications of taking a teleological approach to the Ankara Agreement and the Protocol.

28. Fundamentally, in Savas (which concerned freedom of establishment as a self-employed person) the CJEU emphasised that "*the employment rights thus conferred on Turkish workers* [under the Agreement] *necessarily imply the existence of a corresponding right of residence for the persons concerned, since otherwise the right of access to the labour market and the right to work as an employed person would be rendered entirely ineffective*" (at [60]).

29. The Immigration Rules in 1980 contained a section on "Settlement" which included, in para.26, a provision that

> "[w]*hen a person admitted in the first instance for a limited period has remained here for 4 years in approved employment or as a businessman or a self-employed person or a person of independent means, the time limit on his stay may be removed*".

30. In essence, therefore, so long as the four-year period was completed by applicants, they would have been entitled to the right to settlement in the UK at the time of the introduction of Decision 1/80.

Analysis of Key Cases

31. We will now review the individual reported cases, which you have enquired about, to demonstrate the persistent errors in the judgments of the English courts. The common theme in these cases is the UK's adoption of a restrictive interpretation of "*the conditions of access to employment*" of Turkish nationals under the Ankara Agreement, and the related right of residence identified above, to the exclusion of any right to settle in the United Kingdom. At its core, this is fundamentally inconsistent with the terms and scope of the Agreement, which is designed to encourage integration of Turkish nationals economically active in EU Member States.

32. In particular, the UK authorities fail to account for the substantial costs, administrative burden and insecurity placed upon Turkish nationals wishing to be economically active in the UK, who are required to reapply for residence status on a regular basis, to pay substantial fees disproportionately higher than those payable by EU nationals, and potentially to be subject to administrative caprice with no recourse to the courts for redress.

33. In the view of our experts, there has been a recent pattern of increasing textual cleverness on the part of the Home Office to limit the rights of Turkish nationals and to refuse applications for residence status in individual cases. An ordinary reading of the Ankara Agreement should – by contrast – result in effective rights for Turkish nationals to carry out economic activity in the UK, with increasing security over time as they attain integration in the UK market. This should include a prohibition on creating a more hostile environment – including in terms of rights of residence and settlement which ensure economic rights can be exercised effectively – than that which was in place at the time the Ankara Agreement was introduced.

34. The seven cases which you have identified are reflective of the difficulties arising where the courts in the UK declined to make a reference to Luxembourg and found against the applicant. In each such case, the UK courts either failed to grapple fully with the points of EU law raised or failed properly to consider exercising their power to refer questions for clarification to the CJEU.

35. In Alacakanat v General Medical Council [2013] EWHC 1866 (Admin) [2014] 1 C.M.L.R. 5, the English High Court considered the denial of mutual recognition to the professional qualifications of a Turkish paediatrician, with some 32 years' experience. The applicant in that case alleged that these rules were a 'new' restriction in breach of

Articles 9 and 41 of the Ankara Agreement. The High Court concluded that these provisions of the Agreement "*do not, in themselves, confer an enforceable right on the claimant to be treated, for the purposes of access to and pursuit of the medical profession, no less favourably than a national of a relevant European state*" (at [20]).

36. This decision was taken at a preliminary stage (denying the applicant permission to proceed with the claim) and no consideration was given to whether a referable question of EU law arose in the case, despite the absence of any established jurisprudence on this issue. As we have previously drawn to the Ombudsman's attention, this ignored well-established case-law of the Court of Justice which confirmed that Article 9 of the Agreement has an autonomous substantive content (see, e.g. C-92/07, Commission v Netherlands [2010] ECR I-03683, at [75]-[76]). The national court also relied upon a submission that "*art.9 does not confer a right to reside in a particular territory*" based on the Savas case, directly contrary to the conclusion identified at paragraph 28 above.

37. R (Buer) v SSHD [2014] EWCA Civ 1109, [2015] 1 CMLR 3 turned on the meaning and effect of Article 6 of Decision 1/80. The applicant had been employed for a period of 4 years before applying for ILR (permanent residence). His application was denied on the basis that the Ankara Agreement and Decision 1/80 did not confer a right to such residence. The Court of Appeal upheld this interpretation and distinguished between the right of residence for work and the right to settle in the UK on a permanent basis.

38. As in Alacakanat, the national court considered matters only at a preliminary stage and concluded that Decision 1/80 did not confer a right of settlement on Turkish nationals. It did not consider whether the scope of these provisions was a referable question for the CJEU to clarify, despite identifying possible ambiguity in the CJEU's decisions on these issues (see, e.g. at [36]). Instead, the national court simply reached its own conclusions, which were very narrow, namely by limiting the scope of Article 13 of Decision 1/80 to conferring a right of residence "*for the purpose of work and* [which] *does not extend to settlement in the host Member State*" (at [64]).

39. In BA, MA, CA, HA(AP) v SSHD [2017] CSOH 27, the Outer House (the first instance jurisdiction) of the Court of Session (Scotland's highest court) considered a similar claim to Buer but relying upon the standstill clause in Article 41 of the Additional Protocol, as it was to be applied to a Turkish businessman and his family members. The Court applied the reasoning in Buer to Article 41 and was persuaded by the previous judgment's analysis of CJEU case-law, to conclude that "*longer-term residence* […] *is* [not] *necessary for* [the] *purpose* [of setting up a business]".

40. As with Buer, the Court made no mention of the possibility of a reference despite the complexity of the CJEU's jurisprudence and the absence of a directly relevant guiding authority from that Court on this issue. The Scottish Court also failed to consider and incorporate the CJEU's extensive case-law concerning the rights of family members of Turkish nationals (see, e.g. Case C-451/11 Dülger (EU:C:2012:504), at [42], [52] and [65]; Case C-652/15 Tekdemir (EU:C:2017:239), at [31]-[32]; and Case C-89/18, A, (ECLI:EU:C:2019:580) at [47]).

41. Had the court fairly examined the authorities, it would no doubt have recognised the significant impact of denying permanent rights of settlement to the family members of a Turkish national who had achieved such settled status in the UK.

42. It is particularly regrettable that despite these open questions the Court elected to follow the line of the Home Office without seeking clarification of the obviously uncertain constitutional questions. Putting it differently, a prudent court would not have taken such an approach without making a reference for a preliminary ruling.

43. In R (Aydogdu) v SSHD [2017] UKUT 00167 (IAC), the Upper Tribunal similarly considered the rejection of applications for ILR by a spouse and child of a Turkish national. Applying the cases above, it similarly found that "[t]*he 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*." (at [34]).

44. These conclusions were *obiter* (i.e. not determinative in the case) since the Tribunal took the view that the Ankara Agreement and its Additional Protocol did not apply to a situation in which settlement status was sought for the family and dependents of a Turkish national who had already been granted ILR by the UK. On this reasoning, the EEC-Turkey agreements were no longer relevant once ILR has been granted to such a person. Again, we may note that the purpose of the Agreement and the Protocol is ignored and the details of the rights accorded are interpreted as narrowly as a tax statute.

45. In an "*advisory*" capacity, the Tribunal adopted the same approach as the other UK Courts examined above in distinguishing between settlement and more limited rights to residence which would allow Turkish nationals to work or establish a business in the UK. The Tribunal failed (a) to refer any questions to the CJEU for clarification of the scope of the Ankara Agreement and/or Decision 1/80 and (b) to give effect to the objectives underlying those agreements, in particular progressively to ensure the integration of Turkish workers and businesspeople in EU Member States. Conferring the "*optimum status of settlement*" on Turkish nationals is an integral part of that integration.

46. In Soner Koktuk v Entry Clearance Officer (Warsaw) [2018] EWCA Civ 2850; [2019] 4 W.L.R. 10 ("**Koktuk**"), the Court of Appeal of England & Wales took a similar approach, rejecting the challenge of a Turkish national against a refusal to grant him ILR, despite the grant of ILR to his wife, a Turkish businesswoman resident in the UK. The Court of Appeal concluded that "*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*." (at [31] per Leggatt LJ).

47. As in Aydogdu, the Court excluded the application of the Ankara Agreement to the facts before it. In any event, it also did not address the other issues presented to it, including (i) the different scope and extent of Article 41(1) of the Additional Protocol and Article 13 of Decision 1/80; or (ii) the parallels between family reunification and settlement rights in reinforcing and making effective the right to establishment.

48. In R (Alliance of Turkish Business People Limited) v SSHD [2020] EWCA Civ 553; [2020] 1 W.L.R. 2436 ("**AoTBPL**"), the Court of Appeal of England & Wales considered a challenge to the Home Office's change in approach as to whether rights of settlement were preserved by the standstill clause in the Ankara Agreement. The Court found that there had been no legitimate expectation arising from Home Office practice for Turkish nationals, such that it was lawful for this practice to change.

49. In its judgment the Court did not consider (a) whether the change in practice reflected a lack of clarity in EU law which only the CJEU could address, such that a reference should be made, (b) whether the shift in approach, which affected approximately 6,000 who were on the path to obtaining ILR at the time, was compatible with EU fundamental rights, and/or the right to private and family life of the individuals involved, (c) whether the Home Office's approach was consistent with the objectives and terms of the Ankara Agreement and (d) what the implications of a "standstill clause" really are.

50. These cases illustrate the shortcomings and limitations in the scrutiny given by the UK Courts to legitimate challenges by Turkish nationals. Now, those shortcomings are not directly the fault of the European Commission, for the Ombudsman to underscore. The Commission cannot be blamed for a decision taken by an English judge who receives a powerful set of controversial but in context apparently plausible submissions on behalf of the Home Office, nor is it obligated to bring infringement proceedings whenever a national court reached a conclusion contrary to established principles of EU law. However, there should and can come a point where the trend of a country's cases is so askew that a correction via a reference to Luxembourg or via an expression of anxiety from the guardian of the treaties is necessary and required by those Treaties.

51. In the present situation, the Commission has received detailed descriptions of the perverse readings and the literally fatal consequences of the unchallenged pursuit of wilful hostility against Turkish citizens. It is not yet part of the duty of the Commission to refrain from complaining when illegality strikes a politically unpopular target. We very warmly commend the sympathy of the Ombudsman in exploring the conduct of the Commission and in seriously examining the possibility that its persistent toleration (shading to neglect) of a Member State's dubious policy which plainly seeks to circumvent a public obligation may constitute maladministration. Official passivity in the face of wrongdoing may be convenient but it is not a lawful policy.

We thank you again for your diligence to date and look forward to receiving your analysis of the issues outlined above.

26 March 2021

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RAVI MEHTA

ANNEX 6

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25 June 2020

Dear Sirs,

FAO: Policy Team

LETTER REGARDING

ECAA BUSINESS PERSONS UNABLE TO RETURN TO THE UK

INTRODUCTION

1. I am instructed by the Turkish Association to Protect the Rights of Industrial and Commercial Businesspersons in the UK under the ECAA ("TAPRICB") to write this letter to highlight the position of ECAA Businesspersons unable to return to the UK due to visas expiring since the global COVID19 pandemic began and to request that some official guidance is published for persons in this category.

2. TAPRICB consists of a large group of Turkish Businesspersons who aim to protect the rights of ECAA Businesspersons as a whole, and who aim to achieve clarity in the legal options open to ECAA applicants.

3. If there are more appropriate contacts to whom this should be addressed, please let me know and I will be pleased to liaise as required.

PROBLEM:

4. There are many hundreds of Turkish Business Persons who have found themselves trapped outside the UK and unable to return before the expiration of their BRPs due to the COVID-19 pandemic travel restrictions.

5. Lockdown restrictions have been in place in the UK for over three months, and the situation has been entirely unpredictable throughout so families have found themselves separated, and business persons have been unable to return to their businesses. This puts the businesses at risk as well as the employees of those businesses. There is a particular need for action in relation to the children of Business Persons who have reached the age of 21 since first being granted status in this category.

6. There is no route for Turkish Business Persons to re-enter the UK after their BRP cards expire. It is vital that Turkish Business Persons and their family members, including children who have now turned 21 years old, are able to re-enter the UK and continue on a route to settlement.

7. This letter seeks to highlight the difficulties and asks that a solution is provided.

BACKGROUND

8. The agreement establishing an association between the EEC and Turkey was signed at Ankara on 12 September 1963 (the **"Ankara Agreement**"). The Ankara Agreement was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C113, p.1)

9. The Additional Protocol to the Ankara Agreement was signed at Brussels on 23 November 1970. It was concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C113, p.17).

10. Article 41(1) of the Additional Protocol of 1973, commonly referred to as the 'standstill clause' provides that:

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

11. The UK became bound by the ECAA and the Additional Protocol when it joined the European Economic Community, thereby becoming a Member State, in 1973. Accordingly, the Secretary of State must apply the domestic provisions as they were within the Immigration Rules in force in 1973 (the "**1973 Rules**"), in accordance with the stand-still provision under Article 41(1).

12. The House of Commons Paper 510 ("HC510") applies to extension applications for Turkish nationals seeking to extend their stay in the UK having set up a business.

13. Article 41(1) of the Additional Protocol has direct effect in Member States as was confirmed by the determination of **C-37/98** ***Savas (External relations)*** **[2000] ECR 1-2927 (11 May 2000)** at §71.

14. Article 9 of the Ankara Agreement is a general non-discrimination provision applicable to all Turkish Business Persons. The correct approach to this has been considered in **C92/07,** ***Commission v Netherlands*** **[2010] ECR I-03683,** where charging a fee higher than that charged to EU nationals was discrimination, as the difference in fees could not be justified. The aim is to encourage integration and parity

15. Under the current circumstances, it cannot be justified that Turkish Business Persons are not afforded a route to return to the UK while other visa applicants are able to apply for entry clearance and have a route to return under the Immigration Rules.

16. Currently, Turkish Business Persons can apply under HC509 from outside the UK, or HC510 from within the UK. They cannot extend their stay from outside the UK.

17. Turkish Business Persons outside the UK thus have very limited options. These are:

    (A) make an inappropriate entry clearance application, or

    (B) apply for a visa waiver.

18. Turkish Business Persons outside the UK have a legitimate expectation to be able to return to the UK in the same immigration category where their leave has expired since the start of the pandemic.

19. In the recent Court of Appeal case, ***R (otao Alliance of Turkish Business People Limited) v Secretary of State for the Home Department*** **[2020] EWCA Civ 553,** Flaux LJ considered when a legitimate expectation can arise, and determined:

> 50 *"it is common ground that* ***before a statement or representation can be relied upon as giving rise to a legitimate expectation, it must be clear, unambiguous and devoid of relevant qualification*** *and Ms Ford QC accepted that what was required was* ***also a promise or representation that the present policy will continue****...."*

20. In the current instance, the Home Office has repeatedly stated that no-one shall suffer 'detriment' due to the COVID19 pandemic having an impact on their immigration status.

21. The meaning of 'detriment' is clear - it means negative repercussions on immigration status, such as leave expiring or overstay not being counted against people. Inherent in the statement is a promise that the commitment would continue until situations which arose as a result of the pandemic were resolved. It is in reliance on the legitimate expectation which has arisen due to repeated Home Office statements, that the TAPRICB ask for assurances that there is either an entry clearance route opened for extensions, or that there is an undertaking to allow for visa waivers to be issued where individuals' leave expired from 23 March 2020.

EXAMPLE SITUATIONS

Family One

22. One family of four "Family One" are composed of mother (Main Applicant), father, a son now aged 21, and a daughter under 21. This family is separated: the father and daughter are in the UK, where the father has been seriously ill, and mother and son are unable to return to the UK as their leave has expired in May. The Main Applicant is thus unable to return to her business or rejoin her family. The mother and son have received no response from the COVID team and need assurances that they can make an entry clearance extension and that the son (aged over 21) will be able to return to join his family on the same route.

Family Two

23. Family Two are a family of five, all are outside the UK and their leave expired in early June. The parents have been granted COVID extensions to 31 July 2020 (despite being out of the UK) and have had Visa Waivers denied due to a lack of 'compelling and compassionate' reasons. The family needs assurances that an entry clearance extension application will be open to them.

Family Three

24. Family Three are all outside the UK - they are parents, a daughter over the age of 21, and a younger daughter. They have submitted a visa waiver application but have not had a response. They need assurances that they can make an entry clearance extension and that the daughter (aged over 21) will be able to return with her family.

Family Four

25. Family Four are also a divided family. The Main Applicant - the mother, and daughter are in the UK and have been able to apply to extend their stay in-country. The father and elder son, who is now over the age of 21, are trapped outside the UK. The son had become ill prior to the expiry of his visa and could not travel back to the UK. The father and son have erroneously been granted COVID extensions to 31 July 2020 and have had visa waiver applications denied. They need assurances that they will be allowed to make an entry clearance extension application, and that the son, who is over 21, will not be refused admission on this basis.

26. The situations are common and all involve interference with family life and business interests in the UK. Turkish Business Persons and their family members are trapped outside of the UK and have been told to make COVID extension applications or to apply for visa waivers, only for these to be refused. The community at large requires assurances that they will be admitted following entry clearance extension applications.

A. ENTRY CLEARANCE APPLICATIONS

27. At present, Turkish Business Persons are not able to extend their leave from outside the UK. Unlike many immigration categories, such as Tier 1 (Entrepreneur) or (Investor), where an applicant can extend their leave in an entry clearance application, Turkish Business Person applicants simply do not have this option.

28. The gov.uk page https://www.gov.uk/turkish-business-person/extend-your-visa makes this clear:

Extend your visa

You may be able to apply to extend your stay in the UK under a Turkish Businessperson visa.

You should include any dependants who are on your current visa on your application to extend - including children who have turned 18 during your stay.

> You should apply before your current visa expires.

Eligibility

> You must be in the UK to extend your visa.

29. From inside the UK, Turkish Business Persons are able to extend their leave and this is normally granted for three years (36 months). The applications are free of charge and require evidence of ongoing business activity, that the Business Person has devoted assets to the business and they are able to bear the share of liabilities the business incurs,that they are not employed and do not have recourse to public funds.

30. The Home Office only considers applications using specified forms and specified application methods, and the only application which Turkish Business Persons can make as an entry clearance application is that of an initial applicant, which neither fits their circumstances nor what they are actually applying for.

Requirements of HC509

31. The entry clearance application open to them under HC509, requires proof that an applicant is bringing funds to the UK under paragraph 31 or 32 of HC509. Many applicants could run the risk of refusal due to not being able to provide the type of evidence required in an initial application due to being a year or more on from the stage of holding funds available to invest in a business.

32. The HC509 entry application is ill-suited to the needs of Business Persons needing to extend and who have already invested their funds in the UK and have ongoing ties and employment,

as they may not be able to demonstrate that they have further funds to invest if all funds are already invested.

33. This would mean that Turkish Business Persons seeking to extend their leave could run the risk of applications being refused as no provisions have been made for Caseworker training and no information is published on gov.uk.

Children who are now over the age of 21

34. Importantly, many families with children who have entered the category as dependants have now reached the age of 21, so are ineligible to make initial applications any longer due to their age.

35. It is vitally important to ensure that families suffer no disadvantage or detriment, to ensure that children who have turned 21 years old since being granted entry as dependants are able to extend their stay in the UK. It would be incredibly prejudicial to any family if a child who had not formed an independent life were no longer able to extend their leave in line with the parents simply because of the restrictions of an entry clearance form and the impact of the pandemic.

36. Specific recognition of the position of dependants who have now attained the age of 21 is sought in relation to entry clearance applications.

37. As Caseworkers are not able to create policy and must simply follow the instructions given to them, it is vital that there are instructions given to the caseworkers, and that such policies are published.

38. In the recent Upper Tribunal case of ***BH (policies/information: SoS's duties) Iraq [2020] UKUT 00189 (IAC)*** the headnote reiterates that:

> ***(a) The Secretary of State has a duty to reach decisions that are in accordance with her policies in the immigration field.*** *Where there appears to be a policy that is not otherwise apparent and which may throw doubt on the Secretary of State's case before the tribunal, she is under a duty to make a relevant policy known to the Tribunal, whether or not the policy is published and so available in the public domain. Despite their expertise, judges in the Immigration and Asylum Chambers cannot reasonably be expected to possess comprehensive knowledge of each and every policy of the Secretary of State in the immigration field.*
>
> *(b) In protection appeals (and probably in other kinds of immigration appeals),* ***the Secretary of State has a duty not to mislead, which requires her to draw attention to documents etc under her control or in the possession of another government***

> ***department, which are not in the public domain,*** *and which she knows or ought to know undermine or qualify her case…*

39. The last Guidance, ***ECAA business guidance Version 10.0, published for Home Office staff on 30 March 2020*** is silent on the possibility of entry clearance extensions, or approach that would be taken to them, despite post-dating lockdown commencing on 23 March 2020.

40. As such, there is no information provided as to how a Turkish Business Person or their family members are expected to re-enter the UK.

41. There is no information about the length of visa that an applicant would be granted in an entry clearance extension application even if one were to be granted: whether this would be three years or one year. It is clearly more burdensome for an applicant to have to apply to renew their status every 12 months than once every three years.

42. Turkish Business Persons have a legitimate expectation of being able to return to the UK in the same category and for their immigration status to suffer no detriment due to the pandemic.

43. It is requested that the Turkish Business Person policy guidance is updated and that the gov.uk site sets out the route for Business Persons to re-enter the UK.

B. VISA WAIVERS

44. There is no guidance published on how one might properly apply for a visa waiver to enable return to the UK to submit an in-country extension application.

45. Information from the Coronavirus Immigration Team is scant:

> *We have already put in place a range of measures to support those affected by the COVID19 outbreak and are considering further adjustments. These include a proposed concession to the continuous residence requirements for those trapped overseas due to COVID-19 travel restrictions, who should be in the UK to renew their leave. Please continue to check GOV.UK for the latest position. No one will be disadvantaged by the impact of COVID-19.*
>
> *If you are able to secure a return flight to the UK after your leave expires, we will consider a visa waiver to facilitate travel at that time. Requests for visa waivers should be sent to CIH@homeoffice.gov.uk with the subject line 'Visa Waiver to travel'.*

46. Despite the Home Office's published commitment, repeated by the CIT that *"no-one will be disadvantaged by the impact of COVID-19"*, there is a clear disadvantage being suffered by Turkish Business Persons who are unable to return to the UK to re-join their businesses or potentially also their family members. They have no route to return and have a legitimate expectation to expect that one is facilitated. Failure to do so would constitute a restriction on the ability to provide services and integrate into the UK as

47. Many Turkish Business Persons have applied for a visa waiver only for this to be refused due to a lack of *'compelling or compassionate reasons'*. Some are being told to make an inappropriate application and apply for the COVID extension applicable to in-country applicants. Neither of these outcomes are satisfactory.

48. The TARICBP have compiled many examples of individuals and families who are trapped outside the UK - some of whom have been illogically granted COVID extensions up to 31 July 2020 while outside the UK and many of whom have been refused visa waivers to enable their return.

49. It is vital that there is a formal procedure instituted so that Business Persons can return to their businesses and help the economy to recover from COVID.

C. REQUEST FOR GUIDANCE AND UNDERTAKING THAT THERE WILL BE A ROUTE FOR TURKISH BUSINESS PERSONS AND DEPENDANTS TO RETURN

50. The TAPRICB request that the position of Turkish Business Persons stranded outside the UK is recognised and that provisions are put in place to enable the speedy issuance of appropriate visas to those who need to extend their stay from outside the UK.

51. There has been no information published by the Home Office in relation to Coronavirus Guidance for Ankara applicants. The Guidance has been updated regularly - it was published on 24 March 2020 and has been updated on 19 occasions up to and including 22 June 2020. ECAA applicants have not been mentioned in the Guidance at all, despite specific provisions appearing for many categories - Tier 1, Tier 2, Tier 4, Tier 5, family applicants, etc.

52. As a large and economically vital group for the UK, it is imperative that the Home Office enable the return of the Business Persons so that they can rejoin their businesses, families and lives in the UK.

53. If the Home Office position is that visa waivers are not appropriate for this group, it is requested that the Guidance is updated to specifically allow for applications for extensions to be made from outside the UK, and for the standard endorsement for an extension to be for 36 months, rather than the standard entry clearance length of 12 months.

54. If extensions of leave from outside the UK are to be the route for return, it is requested that there is specific provision to recognise the position of children who have now attained the age of 21.

55. The Home Office has repeatedly published its commitment that migrants will not be "disadvantaged" or "suffer detriment" due to the impact of COVID-19, and these clear statements give rise to a legitimate expectation that individuals will be able to return to the UK where they have been stuck outside due to the impact of the pandemic.

56. The Home Office has been made aware of the situation by individual MPs but a more global approach is required.

57. The TAPRICB do not wish to have to start litigation proceedings concerning the legitimate expectation and promises made by the Home Office not being respected but would be prepared to do so if no Guidance / undertakings are provided so that there is a route provided for Turkish Business Persons overseas to return to the UK to continue to enjoy their right of establishment within the UK.

58. I would be grateful for an acknowledgement of this correspondence and can be reached at catherine.taroni@richmondchambers.com and 0203 617 9173.

59. We look forward to your response.

Yours faithfully,

Dr. Catherine Taroni
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