OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 12 September 2006 [1]

I — Introduction

1. Article 41(1) of the Additional Protocol of 1970 to the Association Agreement between the European Economic Community and Turkey of 1963 prohibits the introduction of new restrictions on the freedom of establishment and the freedom to provide services between the parties to the agreement. The central question to be resolved in this case is whether this provision also precludes Member States from making the conditions for entry of Turkish nationals to their national territory more restrictive than was the case at the entry into force of this provision for the Member State concerned.

II — Relevant provisions

A — *Community law*

2. The Agreement establishing an Association between the European Economic Community and Turkey (hereinafter: 'the Association Agreement') was signed at Ankara on 12 September 1963 by the Republic of Turkey and the Member States of the EEC and the Community. It was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963. [2] The Additional Protocol to the Association Agreement was signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972. [3]

3. Article 13 of the Association Agreement contains the following general provision on

1 — Original language: English.

2 — OJ 1973 C 113, p. 1.

3 — OJ 1973 C 113, p. 17.

the freedom of establishment between the Member States and Turkey:

'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.' [4]

4. Article 41 of the Additional Protocol provides as follows:

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

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.'

The Council of Association has not, as yet, adopted any measures under Article 41(2) of the Additional Protocol.

B — *National law*

5. Section 11(1) of the United Kingdom Immigration Act 1971 provides as follows:

'A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has

4 — Following the renumbering of the EC Treaty resulting from the Treaty of Amsterdam, this provision now refers to Articles 43 to 46 and 48 EC.

not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 of this Act or by Part III of the Immigration and Asylum Act 1999.'

6. As at 1 January 1973, the date of the United Kingdom's accession to the European Community, the relevant immigration rules for the purposes of establishment of business and provision of services were contained in the Statement of Immigration Rules for Control on Entry (HC 509), laid before Parliament on 23 October 1972 (hereinafter: 'the 1973 Immigration Rules'). These rules were summarised in the order for reference as follows. Paragraph 30 of the 1973 Immigration Rules (under the heading 'Businessmen') provides that passengers who are unable to present an entry clearance but nevertheless seem likely to be able to satisfy the requirements of one of the next two paragraphs should be admitted for a period of not more than two months, with a prohibition on employment, and advised to present their case to the Home Office. Paragraph 31 refers to the need for the applicant to have sufficient funds to put into a business, if already established, and to bear his share of its losses; it provides that he must be able to support himself and his dependants; that he must be actively concerned in the running of the business; and various other such matters. Paragraph 32 provides that if the applicant wishes to establish a business on his own account he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.

7. The current rules regarding persons seeking leave to enter the United Kingdom in order to set up a business are now laid down in HC 395 (hereinafter: 'the current immigration rules'). Paragraphs 201 to 205 lay down the following requirements:

'201. The requirements to be met by a person seeking leave to enter the United Kingdom to establish himself in business are: (i) that he satisfies the requirements of either paragraph 202 or paragraph 203; and (ii) that he has not less than £200,000 of his own money under his control and disposable in the United Kingdom which is held in his own name and not by a trust or other investment vehicle and which he will be investing in the business in the United Kingdom; and (iii) that until his business provides him with an income he will have sufficient additional funds to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and (iv) that he will be actively involved full-time in trading or providing services on his own account or in partnership, or in the promotion and management of the company as a director; and (v) that his level of financial investment

will be proportional to his interest in the business; and (vi) that he will have either a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment; and (vii) that he will be able to bear his share of liabilities; and (viii) that there is a genuine need for his investment and services in the United Kingdom; and (ix) that his share of the profits of the business will be sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and (x) that he does not intend to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business; and (xi) that he holds a valid United Kingdom entry clearance for entry in this capacity.

202. Where a person intends to take over or join as a partner or director an existing business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201, to produce: (i) a written statement of the terms on which he is to take over or join the business; and (ii) audited accounts for the business for previous years; and (iii) evidence that his services and investment will result in a net increase in the employment provided by the business to persons settled here to the extent of creating at least 2 new full-time jobs.

203. Where a person intends to establish a new business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201 above, to produce evidence: (i) that he will be bringing into the country sufficient funds of his own to establish a business; and (ii) that the business will create full-time paid employment for at least two persons already settled in the United Kingdom.

Leave to enter the United Kingdom as a person seeking to establish himself in business

204. A person seeking leave to enter the United Kingdom to establish himself in business may be admitted for a period not exceeding 12 months with a condition restricting his freedom to take employment provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

Refusal of leave to enter the United Kingdom as a person seeking to establish himself in business

205. Leave to enter the United Kingdom as a person seeking to establish himself in business is to be refused if a valid United Kingdom entry clearance for entry in this

capacity is not produced to the Immigration Officer on arrival.'

III — Facts and procedure

8. As the facts relating to the cases of Tum and Dari are broadly similar, it is convenient to set them out together.

9. Mr Veli Tum and Mr Mehmet Dari, both of whom are Turkish nationals, arrived in the United Kingdom on 29 November 2001 and 1 October 1998 respectively. They were both granted temporary admission under section 11 of the Immigration Act of 1971, subject to a restriction (in the case of Mr Tum) or a prohibition (in the case of Mr Dari) on taking employment. Both had claimed asylum in the United Kingdom. However, these applications were rejected by the Secretary of State and directions were given for their removal, under the Dublin Convention, [5] to the Member States where they had first applied for asylum, namely Germany (Mr Tum) and France (Mr Dari). Their subsequent attempts to have these decisions judicially reviewed were unsuccessful.

10. During his stay in the United Kingdom, Mr Dari set up his own pizza business in Herne Bay, Kent. On 30 September 2002, Mr Dari made an application to the immigration authorities to enter the United Kingdom so that he could continue in his business. Similarly, Mr Tum applied for leave to enter the United Kingdom in order to start a cleaning business in North London. As they were in the United Kingdom with temporary admission under section 11 of the 1971 Immigration Act, and so had not formally entered the United Kingdom for immigration purposes, they based their applications on the Association Agreement and the Additional Protocol and requested that their application be considered with reference to the 1973 Immigration Rules.

11. On 12 May 2003, the Secretary of State, having considered the matter under the current immigration rules rather than the 1973 Immigration Rules, refused Mr Tum leave to enter the United Kingdom for the purposes of establishing himself in business, and indicated that arrangements would be made to return him to Germany as soon as possible. Mr Dari's application was dismissed on the same grounds. Mr Tum obtained an injunction in respect of the removal directions.

5 — Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (hereinafter referred to as the Dublin Convention), OJ 1997 C 254, p. 1. This Convention has been replaced by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50, p. 1.

12. Mr Tum and Mr Dari subsequently each made a claim for judicial review. Their cases were heard together by the High Court of Justice, Queen's Bench Division, which found in their favour by judgment of 19 November 2003. The substance of this decision was that Mr Tum and Mr Dari were entitled to rely upon the so-called 'standstill' provisions of Article 41(1) of the Additional Protocol and thereby claim consideration of their applications to enter the United Kingdom as business persons on the basis of the Immigration Rules in force as at the date the United Kingdom acceded to the Community, 1 January 1973.

13. This decision was upheld by the Court of Appeal by judgment dated 24 May 2004.

14. On 9 July 2004, the Secretary of State petitioned the House of Lords for permission to appeal against the judgments of the Court of Appeal in the joined cases. Following an oral hearing on 27 October 2004, the Appellate Committee of the House of Lords ordered that a preliminary ruling be sought from the Court of Justice pursuant to Article 234 EC on the following question:

'Is Article 41(1) of the Additional Protocol to the Association Agreement signed at Brussels on 23 November 1970 to be interpreted as prohibiting a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and procedure for entry into its territory for a Turkish national seeking to establish himself in business in that Member State?'

15. Written observations were submitted by Mr Tum and Mr Dari, by the Slovakian and United Kingdom Governments and by the Commission. At the hearing on 18 May 2006 further observations were made by Mr Tum and Mr Dari, by the United Kingdom and Netherlands Governments and by the Commission.

16. Mr Tum and Mr Dari, the Slovakian Government and the Commission consider that the question referred by the House of Lords should be answered in the affirmative. The United Kingdom and Netherlands Governments take the opposite view and submit that the Court should answer the question in the negative.

IV — Summary of submissions

17. Mr Tum and Mr Dari contend primarily that the standstill provision in Article 41(1) of the Additional Protocol applies not only to

the conditions of establishment as such, but also to the conditions of residence and entry. In Community law, the latter are regarded as the necessary corollary to the freedom of establishment. [6] Mr Tum and Mr Dari accept that Turkish nationals do not derive any direct rights of establishment or the right to enter a Member State from this provision. However, they assert that, under this provision, their application for leave to enter the United Kingdom for purposes of setting up a business should be assessed on the basis of national law as it stood at the time the United Kingdom became a party to the Additional Protocol, i.e. 1 January 1973.

18. Mr Tum and Mr Dari submit that in *Savas*, [7] the Court already made it clear that any Turkish national, even those whose presence in the United Kingdom was wholly irregular, are nonetheless able to rely on the directly effective standstill provision in Article 41(1) of the Additional Protocol. They note that in that case the Court did not have to consider the question of entry, because Mr Savas had already entered lawfully, even though his continued stay in the United Kingdom was unlawful. The Court was therefore only concerned with the conditions under which Mr Savas would be permitted to continue to remain and establish himself in the United Kingdom.

19. In further support of their primary contention concerning the scope of Article 41(1) of the Additional Protocol, Mr Tum and Mr Dari observe that in contrast with similar standstill provisions, [8] there is nothing in its wording that suggests that its application is limited to conditions of stay and establishment, excluding conditions of entry. The standstill clause would be rendered meaningless if Member States were permitted, contrary to the objectives of the Association Agreement, to make the entry into its territory more difficult or even impossible. They emphasise that this reading of Article 41(1) does not affect the Member State's competence regarding the immigration of Turkish nationals. It simply puts those nationals in the position they would have been at the time when the Member State became party to the Additional Protocol as the standstill clause requires.

20. Finally, in response to the United Kingdom's assertion that the protection of Article 41(1) should not be extended to

6 — They refer to Case 48/75 *Royer* [1976] ECR 497, paragraph 50; Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 17; Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, paragraph 15; and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraph 44.

7 — Case C-37/98 [2000] ECR I-2927.

8 — They refer to Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 on the Development of the Association which provides: '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.' (emphasis added) (hereinafter: 'Decision 1/80').

failed asylum seekers (see point 25 below), Mr Tum and Mr Dari point out that even though they are physically present in the United Kingdom, according to section 11 of the Immigration Act of 1971 they have not formally entered the United Kingdom. The question as to whether or not they are removable to another Member State under the Dublin Convention is irrelevant to the answer to the preliminary question referred by the House of Lords. This question is confined to establishing which rules apply to Mr Tum and Mr Dari's applications for leave to enter for purposes of setting up a business.

21. The Slovakian Government and the Commission broadly support the views expressed by Mr Tum and Mr Dari. Both assert that where Article 41(1) of the Additional Protocol precludes the Member States from making it more difficult for Turkish nationals to establish themselves in business than it was at the date of its entry into force for that Member State, as a corollary of that they may not frustrate that right by introducing new restrictions on the right of residence and the right of entry, insofar as those rights are indissociably linked to the right of establishment.

22. The Commission observes that since the Court, in *Savas*, granted the benefit of the standstill clause of Article 41(1) to a person who was lawfully admitted to, but illegally present in a Member State, it would be paradoxical not to extend it to a person who has duly made an application for entry clearance while in Turkey. It adds that a person who applied for entry as a visitor while in fact having the intention of establishing himself in business once admitted to the Member State would be outside the protection conferred by the Agreement. Such fraudulent intent would, however, be very difficult if not impossible to prove.

23. The Commission points out that, where the Court has confirmed that Decision 1/80 does not affect the competence of the Member States to regulate the first entry of Turkish workers into their territories, this does not imply that neither the Association Agreement nor the Additional Protocol can ever have any effect on the competence of the Member States to regulate the entry of Turkish nationals to their territory. In fact, the Member State's competence to control the first admission of Turkish nationals has been limited. Although this result must be considered to be inevitable, the Commission suggests that the Court should confine the ambit of its reply to restrictions which are indissociably linked to the right of establishment in order to avoid unduly hampering the Member States' entitlement to regulate the first admission to their territory of Turkish nationals.

24. The United Kingdom Government submits primarily that according to well-established case-law of the Court Member States retain the ability to determine their own conditions of first entry by Turkish citizens into their territories. The Association Agreement and the Additional Protocol are not intended to give Turkish nationals rights of establishment which parallel those of citizens of the EU. In the exercise of this power, it was lawful for the United Kingdom to modify the terms upon which it will permit Turkish citizens to enter the United Kingdom for the purposes of establishing a business, even if such modification made it more difficult than it was on 1 January 1973 to enter the United Kingdom. This submission is based on *Savas* where the Court determined that Article 41(1) of the Additional Protocol only regulates the conditions which Member States apply to those seeking to establish themselves in businesses once they have lawfully entered a Member State and that that provision does not encroach upon Member States' freedom to determine conditions of first entry.

25. The United Kingdom submits, alternatively, that if the Court were to find that Article 41(1) of the Additional Protocol does prohibit the Member States from introducing new restrictions on the entry into their territories of Turkish nationals seeking to establish themselves in business there, this does not apply to those who have sought to remain and establish themselves in business following a failed asylum application and are returnable to another Member State under the Dublin Convention or successor legislation. In this regard, the United Kingdom Government points out that Mr Tum and Mr Dari only invoked their claimed rights under Article 41(1) when they were facing removal to France and Germany. To allow persons in such circumstances to claim protection from removal under the Dublin Convention would allow the asylum seeker to defeat the operation of the common European asylum system. This would amount to an abuse of rights in that an asylum seeker would be able to benefit from Community law rights by reason of his unlawful entry into and presence in a Member State.

26. The Netherlands Government also takes the view that the rights under Article 41(1) of the Additional Protocol can only be invoked by Turkish nationals who have complied with national immigration rules on entry and residence. To permit persons who have entered a Member State unlawfully and subsequently have set up a business to benefit from the protection of Article 41(1) would undermine the efficacy of national immigration law, which remains a competence of the Member States. It would also deprive the Community asylum system of its effectiveness. The Netherlands Government considers that if Mr Tum and Mr Dari had, in fact, returned to Turkey and presented a new application for leave to enter the United

Kingdom on the basis of their economic activities during their unlawful stay, they still would not be able to invoke Article 41(1) of the Additional Protocol. To permit such a claim would endanger the effectiveness and credibility of national immigration law.

V — Assessment

27. As was already indicated in the introduction to this Opinion, the basic question to be answered in this case is whether Article 41(1) of the Additional Protocol, which prohibits the introduction of new restrictions on the freedom of establishment and the freedom to provide services as from the entry into force of the Additional Protocol for the Member State concerned, also precludes the Member States from making the conditions of entry more restrictive for Turkish nationals.

28. In their various submissions, all parties rely on the Court's judgment in *Savas* [9] to support their diametrically opposed contentions that this question should be answered either in the positive or the negative. It is therefore first necessary to summarise the essential facts of this case and the Court's judgment.

A — *The Savas Case*

29. Mr Savas, [10] a Turkish national, obtained leave to enter the United Kingdom as a tourist for one month. His entry visa carried an express condition prohibiting him from taking employment or engaging in any business or profession. Notwithstanding the expiry of his visa, Mr Savas remained in the United Kingdom in contravention of national immigration law. Some years later, he started to operate a shirt factory without having sought authorisation to work or to engage in self-employed activity. After having carried on this business for some time, he applied to the national immigration authorities with a view to regularising his position. However, his application for leave to remain was refused and a deportation order was served on him. Mr Savas subsequently appealed against this decision, but this was dismissed.

30. Having initially based his applications on national law alone, Savas later invoked Article 41(1) of the Additional Protocol, asserting that his position should be assessed on the basis of the 1973 Immigration Rules. This argument was rejected by the immigration authorities on the grounds that, on the date of his application for the regularisation of his stay in the United Kingdom, he no longer had leave to remain there and therefore could not benefit from the 1973

9 — Cited in footnote 7.

10 — In fact, Mr Savas was accompanied by his wife in entering the United Kingdom. However, in order to simplify this exposé, I have set out the facts in the singular.

Immigration Rules. Mr Savas then applied to the Queen's Bench Division of the High Court of Justice. This court questioned whether the effect of the Association Agreement is to confer rights on aliens who, like Mr Savas, are in the territory of a Member State unlawfully. It, therefore, decided to refer preliminary questions to the Court of Justice on the direct effect of Article 41 of the Additional Protocol and the scope of protection under this provision.

31. For the purposes of the present case, it is only necessary to refer to the Court's considerations in relation to the scope of Article 41(1) of the Additional Protocol. However, for the sake of completeness, I would note that the Court had no difficulty in establishing that this provision can indeed be invoked in proceedings before the national courts. [11]

32. As to the scope of Article 41(1) of the Additional Protocol, Mr Savas had first argued, in his written observations, that he derived a right of establishment and corresponding right of residence directly from this provision, despite the fact he had set up business in the United Kingdom in breach of that country's immigration law. However, at the oral hearing he abandoned this argument, now contending that this provision entitled him to ask a national court whether the rules applied to him were stricter in relation to freedom of establishment and the right of residence than those which applied at the entry into force of the Additional Protocol for the United Kingdom. The Court addressed both arguments in its judgment.

33. The first argument submitted by Savas prompted the Court to reiterate the basic principles it had established in its settled case-law in relation to Turkish workers. These basic principles are that:

— 'as Community law stands at present, the provisions concerning the EEC-Turkey Association do not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment, but merely regulate the situation of Turkish workers already lawfully integrated into the labour force of Member States'; [12]

— 'unlike nationals of Member States, Turkish workers are not entitled to move freely within the Community but

11 — At paragraphs 46 to 54 of the judgment.

12 — At paragraph 58 of the judgment.

benefit only from certain rights in the host Member State whose territory they have lawfully entered and where they have been in legal employment for a specific period';[13]

— 'the employment rights ... conferred on Turkish workers 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';[14]

— 'the legality of a Turkish national's employment in the host Member State presupposes a stable and secure situation as a member of the labour force of that Member State and, by virtue thereof, entails an undisputed right of residence';[15]

— 'periods in which a Turkish national is employed under a residence permit which was issued to him only as a result of fraudulent conduct which has led to a conviction are not based on a stable situation and such employment cannot be regarded as having been secure in view of the fact that, during the periods in question, the person concerned was not legally entitled to a residence permit ... Employment held by a Turkish national under a residence permit obtained in fraudulent circumstances of that kind could not possibly give rise to any rights in his favour.'[16]

34. The Court next held that '[t]hese principles, established in the context of the interpretation of the provisions of the EEC-Turkey Association Agreement for the progressive achievement of free movement of Turkish workers in the Community, must also apply, by analogy, in the context of the provisions of that Association Agreement concerning the right of establishment'.[17]

35. It concluded on this point that 'the "standstill clause" in Article 41(1) of the Additional Protocol is not in itself capable of conferring upon a Turkish national the benefit of the right of establishment and the right of residence which is its corollary'.[18]

36. The Court went on to establish that 'a Turkish national's first admission to the

13 — At paragraph 59 of the judgment.
14 — At paragraph 60 of the judgment.
15 — Also at paragraph 60 of the judgment.
16 — At paragraphs 61 and 62 of the judgment.
17 — At paragraph 63 of the judgment.
18 — At paragraph 64 of the judgment.

territory of a Member State is governed exclusively by that State's own domestic law, and the person concerned may claim certain rights under Community law in relation to holding employment or exercising self-employed activity, and, correlatively, in relation to residence, only in so far as his position in the Member State concerned is regular'. [19]

37. In view of his immigration status, Mr Savas could not claim a direct right of establishment or residence under Article 41(1) of the Additional Protocol.

38. In response to Mr Savas' second argument, the Court recalled that it had found that Article 41(1) of the Additional Protocol confers rights on individuals which must be safeguarded by the national courts and 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'. [20] It is up to the national courts to determine whether this is the case.

39. The Court summed up its findings on the scope of Article 41(1) of the Additional Protocol in the following terms:

'— Article 41(1) of the Additional Protocol is not in itself capable of conferring upon a Turkish national a right of establishment and, as a corollary, a right of residence in the Member State in whose territory he has remained and carried on business activities as a self-employed person in breach of the domestic immigration law.

— However, Article 41(1) of the Additional Protocol prohibits the introduction of new national restrictions on the freedom of establishment and right of residence of Turkish nationals as from the date on which that protocol entered into force in the host Member State. It is for the national court to interpret domestic law for the purposes of determining whether the rules applied to the applicant in the main proceedings are less favourable than those which were applicable at the time when the Additional Protocol entered into force.' [21]

19 — At paragraph 65 of the judgment.

20 — At paragraph 69 of the judgment.

21 — At paragraph 71, third and fourth indents, of the judgment.

B — *Analysis*

1. Questions left open by *Savas*

40. As was indicated above, Mr Tum and Mr Dari, supported by the Commission and the Slovakian Government, read the Court's judgment in *Savas* to the effect that a Turkish national may invoke Article 41(1) of the Additional Protocol to ensure that the rules on establishment which were applicable at the moment of the entry into force of the Additional Protocol for the United Kingdom are applied to his situation, irrespective of whether or not he is lawfully present in the territory of that Member State. In their submission, the rules on establishment necessarily include the conditions of entry into that Member State. That the Court did not refer to the conditions of entry in this judgment can be explained by the fact that Mr Savas had entered the United Kingdom lawfully. They claim that the Court's observations concerning the Member States' competence in relation to the first admission of Turkish nationals must be seen as the Court's response to Mr Savas' first submission in his written observations and that they do not have a bearing on the Court's answer to Mr Savas' second submission.

41. The United Kingdom Government, supported by the Netherlands Government, by contrast, focuses on the emphasis placed by the Court on the exclusive competence of the Member States to determine the first admission of a Turkish national to their territory. A Turkish national is only entitled to rely on the protection of Article 41(1) of the Additional Protocol once he has been admitted in accordance with the immigration rules in force at the time of his application for leave to enter. It points out that, in paragraph 69 of *Savas* (cited in point 38 above), the Court only referred to the right of establishment and, as its corollary, the right of residence as coming within the scope of Article 41(1) and that it did not, in this context, refer to the conditions of entry.

42. The fact that *Savas* is relied on by all intervening parties in order to support apparently irreconcilable points of view is not surprising as the Court's findings in this judgment themselves appear to be contradictory. On the one hand, the Court emphasises the exclusive competence of the Member States to regulate the first admission of Turkish nationals to their territory and confirms that Turkish nationals may only claim rights of employment or of establishing themselves in business if their position in the Member State concerned is regular. On the other hand, the Court accepts that a Turkish national may invoke Article 41(1) of the Additional Protocol to ensure that no stricter conditions of establishment and residence are applied to him than were applicable at the date of the entry into force of that protocol in the host Member State, even though the Turkish

national concerned was unlawfully present in that Member State. If a Turkish national may only claim a right to establish himself in business under national law if his position in that Member State is regular, why, it may be queried, does he have a right for his application to be examined under older, more generous provisions even if he is present in that Member State in breach of national immigration law?

43. At any rate, it is clear that in *Savas* the Court did not deal explicitly with the exact question as to whether Turkish nationals can invoke Article 41(1) of the Additional Protocol in order to obtain *entry* into a Member State for purposes of establishing themselves in business. The problem in that case was that after having entered the United Kingdom legally on a tourist visa, Savas had *remained* there in breach of domestic immigration law. By contrast, despite their physical presence in the United Kingdom, Mr Tum and Mr Dari have not yet entered that Member State in the legal sense; they only enjoy temporary admission status.

44. The two approaches followed by the intervening parties correspond to two distinct, but related, questions concerning the interpretation of Article 41(1) of the Additional Protocol which were left open by the Court's judgment in *Savas*:

(1) Is it a precondition for invoking the protection of this provision that the Turkish national concerned has been lawfully admitted to the territory of the Member State concerned?

(2) Does the concept of 'the freedom of establishment' in this provision encompass the conditions of entry into a Member State?

2. Legal residence as a precondition for invoking Article 41(1) of the Additional Protocol?

45. In a general sense, the regulation of the immigration of third country nationals, including Turkish nationals, still falls within the competence of the Member States to the extent that national immigration legislation has not been the subject of harmonisation

measures under Article 63, point 3, EC [22] and such measures are applicable to the Member State concerned. [23] This implies that the Member States are entitled to lay down the conditions governing the admission of third country nationals to their territory and, more specifically, to admit them only after an assessment of the individual person concerned and of his or her reasons for seeking entry into their territory.

46. The fact that the Member States retain competence as regards the immigration of Turkish nationals has been recognised emphatically by the Court in a consistent line of judgments concerning both Turkish workers and Turkish nationals engaged in self-employed activities. Reference may be made to the considerations from *Savas*, cited above in point 33, which were confirmed in *Abatay and Sahin*. [24] Member States are, therefore, competent to decide on the admission to their territory of Turkish nationals according to the criteria laid down in their national immigration legislation.

47. This point is not in dispute between the parties to the main proceedings. What divides them is whether it is a prerequisite to invoking the protection of Article 41(1) of the Additional Protocol that the Turkish national concerned has been lawfully admitted to and is lawfully resident in the host Member State. In other words, must they have gained access to the territory of the host Member State in accordance with domestic immigration rules before being able to obtain access to the national markets of that Member State in order to pursue an economic activity in employment or self-employment?

48. On this point the Court, again in *Savas*, ruled unambiguously that Turkish nationals may only claim economic rights in a host Member State in so far as their position is regular in that Member State. [25] As such, Article 41(1) of the Additional Protocol does not confer economic rights directly on Turkish nationals, but merely provides that the rights which may be claimed by those nationals in a host Member State are to be determined by reference to the national law as it stood when the Additional Protocol entered into force for that Member State. Nevertheless, in view of the fact that there is an unmistakable substantive component in determining which law is to apply to an application to pursue an economic activity in a Member State as this determines the extent

22 — A number of Community measures on the admission of third country nationals for specific purposes have been adopted under this provision. See, e.g., Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ 2004 L 375, p. 12, and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ 2005 L 289, p. 15.

23 — In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, neither of these directives applies to the United Kingdom.

24 — Joined Cases C-317/01 and C-369/01 [2003] ECR I-12301, at paragraph 65.

25 — At paragraph 65 of the judgment, cited in point 36 of this Opinion.

of the rights which potentially may be enjoyed under national law, there is no reason why the rule laid down in *Savas* on prior legal admission and the regularity of the Turkish national's stay should not apply to Article 41(1) of the Additional Protocol.

49. Indeed, it would seem that this is the only way in which *Savas* can be read consistently. It must be presumed that where the Court ruled that it was for the national court to determine whether the domestic rules applied to Mr Savas by the competent immigration authorities had the effect of worsening his position in comparison with the application of the 1973 Immigration Rules,[26] this could only relate to the situation after Mr Savas had obtained formal permission to enter the United Kingdom for purposes of establishing himself in business. The fact that Mr Savas was granted permission to enter the United Kingdom on a tourist visa should not be regarded as sufficient in this regard, as establishment by definition implies a stay for a longer period. If, by contrast, it were to be accepted that the Court did not intend this requirement to apply to Mr Savas, this would put him and other Turkish nationals who are present in the United Kingdom in breach of that Member State's immigration law in a more advantageous position than Turkish nationals who seek leave to enter for purposes of establishment in accordance with national immigration rules currently in force. This cannot have been the Court's intention. Community law should not be interpreted and applied in such a way as to facilitate, and even invite, circumvention of national rules which, moreover, still belong to the exclusive competence of the Member States.

50. It was submitted, next, that compared to other standstill provisions, such as Article 13 of Decision 1/80, Article 41(1) of the Additional Protocol contains no restrictions or conditions limiting its applicability. It will be recalled that Article 13 of Decision 1/80 prohibits the introduction of new restrictions on the conditions of access to employment which apply to Turkish workers and their family members 'legally resident and employed' in their territory.

51. I do not find this argument convincing. Article 13 of Decision 1/80 is one of the detailed provisions adopted by the Association Council under Article 36 of the Additional Protocol which provides for measures being adopted by the Association Council aimed at bringing about free movement of workers between the Member States and Turkey by progressive stages. No such provisions have, as yet, been adopted for Turkish nationals seeking to establish themselves in business in a Member State. Their rights are wholly determined by the standstill

26 — At paragraph 70 of the judgment.

provision of Article 41(1) of the Additional Protocol. I would suggest that in this situation where comparable detailed provisions regulating the freedom of establishment are lacking, this cannot imply that Turkish nationals enjoy wider rights to establish themselves in the Member States in order to pursue an economic activity in self-employment than Turkish nationals who seek access to pursue an economic activity, which could be the same type of activity, in an employment relationship. Rather than differentiating between the provisions on workers and self-employed persons in this manner, there is a need for a convergent interpretation of these provisions. This is all the more so, as the interests of the Member States concerning the admission of both categories of Turkish nationals are similar, if not identical.

52. For all these reasons I consider that as a prerequisite to Turkish nationals being entitled to invoke the protection of Article 41(1) of the Additional Protocol in order to ensure that their applications to establish themselves in a Member State are considered under the law in force at the time of entry into force of the Additional Protocol for the host Member State, they must have been first lawfully admitted to and be lawfully resident in that Member State in accordance with domestic immigration law.

3. Does the freedom of establishment in the context of Article 41(1) of the Additional Protocol include a right of entry into a Member State?

53. The parties who intervened in support of an affirmative answer to the preliminary question submitted by the House of Lords refer to Article 13 of the Association Agreement which stipulates that in abolishing restrictions on the freedom of establishment between the contracting parties, Article 43 EC is to serve as the guiding principle. In its case-law on Article 43 EC the Court has consistently held that the exercise of the freedom of establishment between the Member States necessarily implies the right to enter the host Member State.[27] These parties maintain that this must also apply in the context of the Association Agreement.

54. They also point out that in *Barkoci and Malik*[28] in a case concerning the freedom of establishment in the context of the Europe Agreement with the Czech Republic, the Court, referring to its case-law under the EC Treaty and the Association Agreement with

27 — See the case-law cited in footnote 6.

28 — Cited in footnote 6.

Turkey, stated that 'the right to the same treatment as nationals in regard to establishment, ... does indeed mean that a right of entry and residence are conferred, as corollaries of the right of establishment, on Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State'. [29]

55. However, it is questionable, in my view, whether principles which apply in relation to the freedom of establishment within the Community can be transposed, without further qualification, to the exercise of this freedom by third country nationals in the relations between the Community and third countries. The rules and principles which apply to the freedom of establishment within the Community derive from the fundamental objective of the Community to establish an internal market, which, it may be recalled, is described in Article 14 EC as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the EC] Treaty'. Given this objective, the right of entry into the Member States with a view to exercising the freedoms guaranteed by the EC Treaty is essential. If Member States were capable of conditioning the entry of nationals of other Member States to their territories, the internal market would become illusory.

56. The objective of the Association with Turkey is quite different. According to Article 2(1) of the Association Agreement that aim is 'to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'. Ultimately the Agreement seeks to contribute to improving the standard of living of the Turkish people which will facilitate the accession of Turkey to the Community at a later date. [30]

57. To date the cooperation between the Community and Turkey has resulted in the establishment of a customs union, but not, however, of a common or internal market characterised by the absence of internal frontiers. In contrast with customs unions, which are restricted to liberalising trade in goods between the states involved, common markets are designed to establish free movement of goods, services and the factors of production. They consequently must guarantee the free movement of workers and capital and the freedom of establishment. The provisions laid down in the Association Agreement and the Additional Protocol on these subjects are mainly programmatic and only provide for a point of departure for liberalisation at a future date. Even where more detailed arrangements have been agreed upon, as in the case of the free

29 — At paragraph 50 of the judgment.

30 — See the fourth recital to and Article 28 of the Association Agreement.

movement of workers (Article 6 et seq. of Decision 1/80), these provisions cannot be compared with the parallel rights guaranteed by the EC Treaty (Article 39 EC and Regulation No 1612/68). In the absence of similar provisions aimed at bringing about the freedom of establishment, it is evident a fortiori that the provisions on establishment in the context of the Association Agreement cannot be interpreted in parallel to Article 43 EC. More particularly, where borders between the Member States and Turkey have not been eliminated for the purposes of guaranteeing free movement as in the Community's internal market, the right of entry cannot be regarded as the necessary precondition to exercising the rights pertaining to establishment in the framework of the association with Turkey.

58. A second difference between the provisions on the freedom of establishment in the EC Treaty and the Association Agreement and the Additional Protocol is that whereas the former confers a right of establishment which can be enforced directly through the national courts, Turkish nationals do not derive a direct right of establishment from Article 41(1) of the Additional Protocol, as was established by the Court in *Savas*. They may only invoke this provision to ensure that national rules on establishment as they existed at the date of the entry into force of the Additional Protocol for the host Member States are applied to them. This implies that the Member States were permitted to apply such national rules on establishment to Turkish nationals, irrespective of whether these rules could be justified when applied in the context of the EC Treaty. This major difference in the nature of the right of establishment under the EC Treaty and the Association Agreement is the second reason why a convergent interpretation of Article 41(1) of the Additional Protocol and Article 13 of the Association Agreement with Article 43 EC is not obvious.

59. In view of the fact that, unlike nationals of Member States, Turkish nationals do not enjoy a direct and automatic right of establishment in the Member States, it necessarily follows that they do not have an implicit or derived right of entry into the territory of the Member States with a view to setting up business there. Outside the context of intra-Community movement, the issue of gaining access to the territory of a Member State must be distinguished from that of obtaining access to the markets in that Member State. The right to enter a Member State cannot be regarded as the necessary corollary to the freedom of establishment within the framework of the Association Agreement with Turkey. This means that rules governing entry of Turkish nationals to the territory of the Member States do not fall within the scope *ratione materiae* of Article 41(1) of the Additional

Protocol and, consequently, may be adapted or made more restrictive by the Member States in the light of their socio-economic and demographic interests.

61. I, therefore, conclude that the freedom of establishment referred to in Article 41(1) of the Additional Protocol does not include the conditions governing the entry of Turkish nationals to the Member States. This means that this provision cannot be invoked to ward off the application to a Turkish national of stricter entry conditions than were in force at the date of the entry into force of the Additional Protocol for the Member State concerned.

60. It is true that the Court, in *Barkoci and Malik*, indicated that according to its case-law on the freedom of establishment under the EC Treaty and the Association Agreement with Turkey the freedom of establishment implies a right of entry and of residence as its corollaries. The Court referred in this context, as regards Turkish nationals, to its judgment in *Savas*. However, the paragraphs cited by the Court [31] in its judgment only refer to a right of residence as a corollary to the freedom of establishment and do not mention entry at all. Indeed, as I observed earlier, *Savas* does not deal explicitly with the question of entry as that was not at issue in that case. The right of entry of third country nationals to a Member State is wholly distinct from the right of residence in relation to the freedom of establishment and cannot simply be regarded as being implied in that freedom without any further explanation by the Court. The reference to the right of entry in relation to the freedom of establishment for Turkish nationals in *Barkoci and Malik* is therefore not supported by the Court's case-law.

4. Problem that immigration rules lay down conditions on establishment

62. If Article 41(1) of the Additional Protocol may not be relied on by Turkish nationals to challenge the application of stricter immigration conditions, but is restricted to protecting these nationals against the application of stricter establishment criteria, the question arises how these principles are to be applied to provisions such as the United Kingdom's immigration rules at issue, in view of the fact that these rules make the decision on entry into the United Kingdom of Turkish nationals wishing to set up business there dependent on compliance with conditions relating to economic establishment in that country.

31 — Paragraphs 60 and 63, cited in points 33 and 34 of this Opinion.

63. In answering this question it must be emphasised once again that, as Community law stands today, the Member States retain competence in matters of immigration and are therefore entitled to regulate the first admission of third country nationals to their territory. Next, as I concluded above, Turkish nationals may only claim economic rights in the context of the Association Agreement with Turkey after they have been formally admitted to and are lawfully resident in the territory of a Member State in accordance with its immigration criteria and procedures. Conversely, the economic rights which Turkish nationals may potentially be granted in that context cannot be invoked to claim a right of entry into a Member State.

64. It is a fact that since the period of economic stagnation in Western Europe in the 1970s, the immigration policies of the Member States in respect of third country nationals, including Turkish nationals, have become more restrictive. From the Community law perspective this development has remained relatively uncontroversial in view of the fact that immigration policy belongs to the exclusive remit of the Member States. In the context of their immigration policies, besides applying criteria related to public policy, Member States are entitled to lay down criteria related to the purposes for which admission is sought, e.g. study, employment or establishment, and to verify compliance with these criteria prior to granting admission. In this way they can ensure not only that national policy interests are safeguarded, but also that the applicant third country national is likely to succeed in his or her objectives and that the application is serious. In this context it is obvious that an application for leave to enter a Member State for purposes of establishment must be examined more carefully than a request for admission as a tourist and that the latter cannot be used as a basis for activities for which it was not intended. The exclusive competence enjoyed by the Member States to regulate the immigration of third country nationals implies that they are entitled to adapt the criteria they apply for granting permission to enter their territory in the light of their public policy requirements and their evolving socio-economic and demographic interests and also, where necessary, to make these criteria more rigorous.

65. In the light of these principles, it must be acknowledged that Article 41(1) of the Additional Protocol may not be invoked by a Turkish national in order to ensure that his or her application to be admitted to the territory of a Member State for purposes of setting up a business is assessed according to criteria which applied at the entry into force of the Additional Protocol for that Member State. If such a right were to be recognised, this would undermine the Member States' exclusive competence, recognised by the Court in *Savas*, to regulate the first admission of Turkish nationals. This competence does not only include the power to assess applications for admission, but also the

power to adapt assessment criteria. In an area such as immigration policy, Community law should be interpreted and applied in such a way as to ensure that competences remaining to the Member States can be applied effectively. [32]

66. It may be added that where, from the economic perspective, it is immaterial whether economic activities are performed by Turkish nationals in an employment relationship or in a self-employed capacity, it is illogical to maintain that the Member States are subject to a standstill provision as regards the admission of the latter, but not as regards the admission of the former.

67. I am aware of the fact that this approach results *de facto* in Turkish nationals having to comply with stricter criteria for setting up a business in a Member State than was the case at the entry into force of the Additional Protocol for the host Member State. However, this is the inevitable result of the division of competences between the Member States and the Community in the field of immigration. Once a Turkish national has been admitted to the territory of the host Member State he or she may rely on the protection of Article 41(1) of the Additional Protocol to challenge the application of any other conditions of establishment which have been made stricter over time. This right is particularly relevant for Turkish nationals who have been admitted to a Member State as workers and who decide after some time to set up a business for themselves and can then benefit from less restrictive conditions of establishment. It would appear to me that this is the primary purpose of Article 41(1) of the Additional Protocol.

68. These considerations lead to the conclusion that Article 41(1) of the Additional Protocol does not apply to immigration rules, such as those at issue in the main proceedings.

5. Failed asylum seekers

69. Should the Court not share this view, it is next necessary to consider the United Kingdom's alternative submission that failed asylum seekers should not be entitled to invoke the protection of Article 41(1) of the

32 — Cf. in the same sense my Opinion of 27 April 2006 in Case C-1/05 *Jia*, at point 63.

Additional Protocol as this would amount to an abuse of rights.

70. In this respect it is important to point out that both a decision refusing a Turkish national asylum and, in consequence, ordering his deportation to another Member State under the Community's asylum system and a decision refusing a Turkish national the admission to its territory for purposes of establishment are based on national law alone. Article 41(1) of the Additional Protocol merely regulates by reference to which law *ratione temporis* the latter decision is to be taken. It does not provide an independent right of establishment.

71. Without it being necessary to consider whether or not Mr Tum and Mr Dari's attempt to invoke Article 41(1) of the Additional Protocol should be regarded as an abuse of rights, if the Court were to decide that they are entitled to rely on this provision with a view to having their applications being assessed under the 1973 Immigration Rules, this would not — at least from the perspective of Community law — in any way affect the validity of the initial decision taken by the United Kingdom immigration authorities on their application for asylum.

72. Even if they do comply with the criteria laid down in the 1973 Immigration Rules, it should not be overlooked that they were only in a position to do so as a result of activities undertaken during the period in which they had not yet been formally admitted to the territory of the United Kingdom and their legal status was irregular. A factual situation created in such circumstances of unlawful residence cannot, in my view, constitute an adequate basis for creating economic rights of establishment or for a right to have claims to access to the national markets assessed under more beneficial national provisions which since have been replaced. Applications for leave to enter a Member State for the purpose of establishing themselves in business submitted by Turkish nationals, who previously have entered and/or resided in that Member State in breach of domestic immigration law, must be treated on an equal footing with similar applications submitted by other Turkish nationals who are seeking entry in accordance with those national immigration rules. As regards the compatibility of this approach with *Savas*, I refer to my observations in point 49 above.

VI — Conclusion

73. In view of the foregoing observations I consider that the question referred by the House of Lords should be answered as follows:

Article 41(1) of the Additional Protocol to the Association Agreement signed at Brussels on 23 November 1970 does not preclude a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and procedure for entry into its territory for a Turkish national seeking to establish himself in business in that Member State.