Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Taylor House
On 7 October 2008

Before

SENIOR IMMIGRATION JUDGE WARR
IMMIGRATION JUDGE S J CLARKE

Between

IY

Appellant

and

ENTRY CLEARANCE OFFICER - ANKARA

Respondent

Representation:

For the Appellant: Mr Basharat Ali (Kuddus Solicitors)
For the Respondent: Ms J Richards of Counsel instructed by the Treasury Solicitors

The benefits of the Ankara Agreement may if appropriate be denied to applicants who have made fraudulent asylum claims or established businesses unlawfully notwithstanding that the applicant has left the United Kingdom voluntarily to make an application from overseas under the standstill clause.

DETERMINATION AND REASONS

1. The appellant is a citizen of Turkey born on 2 June 1974. He arrived in this country in the back of a lorry on 10 January 1997 and applied for asylum on 24 February 1997. The application was refused on 28 April 2003. The appellant was served with a notice advising him of his liability to detention and removal as an illegal entrant.

2. The appellant appealed against the refusal of his asylum application and his appeal came before an adjudicator at a hearing on 5 August 2003. The adjudicator heard oral evidence from the appellant. The appellant's case was that he was involved with Dev Yol and that he was arrested and detained and interrogated and suffered at the

hands of both the authorities and of fascists. The adjudicator found significant inconsistencies in the appellant's account and rejected the appellant's story. She did not find that he was a supporter of any political group nor did she accept that he had been detained at any time. Further she did not accept that the appellant had been beaten by fascists as he had claimed. She also rejected the account of his method of departure from Turkey. The adjudicator dismissed the appeal on asylum and human rights grounds on 20 August 2003.

3. The appellant has run businesses in the United Kingdom. He purchased a fish and chip shop in October 2000 which he ran for four and a half years. He sold this business in May 2005 for £60,000 and bought a restaurant in June 2005. In October 2006 he bought a kebab take-away for £65,000. His wife is a partner in that enterprise and worked with him there.

4. On 14 October 2003 the appellant submitted an application for leave to remain under the agreement establishing an association between the European Economic Community and Turkey, signed on 12 September 1963 at Ankara – "the Ankara Agreement". Article 41 of the 1970 Additional Protocol to that Agreement – "the standstill clause" – provides that:

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

The effect of the standstill clause is to require applications to be considered by reference to the rules in force when the United Kingdom acceded to the European Community in January 1973. These rules are paragraphs 29 to 32 of HC 509 for out of country applications and paragraph 21 of HC 510 for in country applications. However, the appellant's application was refused on 28 May 2004 and on 8 June 2004 the appellant was issued with a Form IS96 advising him that "you may not enter employment, paid or unpaid, or engage in any business or profession".

5. Although removal directions were set for 22 September 2004 it was subsequently agreed that the appellant would not be removed pending the outcome of the case of Tum and Dari v Secretary of State [2004] EWCA Civ 788. The appellant varied his initial application to reflect his current business circumstances (in particular the acquisition of the restaurant) on 2 November 2005 and on 30 November 2005 the Secretary of State refused it. An application based on human rights grounds was refused on 15 November 2006 and an appeal came before an Immigration Judge on 3 January 2006 brought by both the appellant and his wife. The Immigration Judge found in paragraph 27 that the appellant had exhausted all his appeal rights some years ago and while she accepted that the appellant had established a private and family life in the United Kingdom and had built up two restaurant businesses she found that he had done so whilst in the United Kingdom illegally and she further found that his wife had both arrived illegally and had worked in the United Kingdom illegally and throughout her stay had been an illegal entrant. In respect of both of them any application to remain in the United Kingdom under the Ankara Agreement would have to be made from Turkey and not in-country. The Immigration Judge dismissed the appeal on human rights grounds giving weight to the fact that both appellants had established their private and family lives in the United Kingdom whilst here illegally.

6. The appellant and his wife and children left the United Kingdom voluntarily in order to make an application under the terms of the Ankara Agreement and they sought to do so at the Ankara Embassy on 26 February 2007. The respondent refused to accept the applications and judicial review proceedings were initiated. The proceedings were stayed by the court pending the ECJ judgement in Tum and Dari. The respondent finally agreed to consider the appellant's application for entry clearance under the Ankara Agreement but the application was refused on 7 January 2008. In the notice of refusal reliance was placed on Tum and Dari v Secretary of State (C-16/05) [2007] INLR 473, in particular on paragraph 64 where the court observed that according to settled case law "community law cannot be relied on for abusive or fraudulent ends..." Having referred to the municipal jurisprudence the respondent set out the appellant's immigration history as follows:

> "You entered the United Kingdom on 10 January 1997 and on 24 January 1997 you made an application for asylum.
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> This asylum claim was refused on 28 April 2003. Your appeal against this decision was dismissed on 20 August 2003 and you became Appeal Rights Exhausted on 6 September 2003. At the point that your appeal rights were exhausted, you no longer had permission to work or set up a business.
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> On 14 October 2003 you make an application for leave to remain under the Turkish ECAA. This application was refused on 15 December 2003.
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> On 8 June 2004 you were issued with an IS96 which stated 'You must not enter employment, paid or unpaid, or engage in any business or profession'.
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> The businesses that provide the basis for your current application for entry clearance 15 November 2007 are '[P] Restaurant' which you have stated commenced trading in July 2005 and '[C] Grill' which you stated commenced trading on 30 August 2006.
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> It is clear that these businesses were started at a time when you did not have permission to engage in business.
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> In light of this it is considered that your immigration history amounts to abusive conduct.
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> Furthermore, it is clear from the facts found by the adjudicator that you put forward and relied upon an account which has been found to be manifestly untrue in its crucial respects in order to seek leave to enter the United Kingdom following your arrival in 1997 on the grounds of asylum/human rights by virtue of paragraphs 6, 7, 8, 10 and 11 of the adjudicator's determination, promulgated on 20 August 2003.
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> In light of this, it is considered your conduct amounts to fraudulent activity.
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> Therefore, it has been decided that you are not entitled to rely on the standstill clause due to your fraudulent activity and abusive conduct. Accordingly, you are not entitled to have your application considered under the Immigration Rules in force in 1973 (HC 509).
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> Consequently, in order to obtain leave to enter to establish in business you would need to meet the requirements of paragraphs 201 and 203 of HC 395, the current Immigration Rules. Your application would fail under these Rules because you have failed to provide evidence that you have 200,000 of your own money that is under your control and held in your name which you intend to invest in your businesses in the United Kingdom.
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> Accordingly your application has been refused."

7. Grounds of appeal were drafted by Mr Ali on 30 January 2008. It was requested that the matter be heard by three legally qualified Immigration Judges and although

attempts were made to achieve this in the absence of the requisite Presidential consent pursuant to paragraph 2.4 of the practice directions, we sat as a panel of two. In the grounds of appeal the background to the Association Agreement and the standstill clause was explained by reference to R (Parmak) v Secretary of State [2006] EWHC 244 (Admin) and R v Secretary of State ex parte Savas (C–37/98) [2000] ECR 1-2927. The specific grounds of appeal are set out in paragraphs 4 to 7 as follows:

> "4. The respondent has erred in law by concluding that the appellant is not entitled to have his application for entry clearance considered under HC 509 and the standstill clause. This error is premised on misdirections in law, principally in misunderstanding the dicta of the authorities cited by the respondent in the notice of decision.
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> 5. The appellant is entitled to bring an appeal under Section 13(2) of the Immigration Act 1971 the appeal provisions that were in force on 1 January 1973. The respondent's purported decision to exclude the appellant from appealing under these appeal provisions is unlawful.
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> 6. The respondent's decision amounts to a permanent exclusion of the appellant for the purpose of HC 509 and is in consequence unlawful under HC 509, under EU law and disproportionate under the ECHR, in particular Article 8 and Protocol 1 of the ECHR.
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> 7. The decision is unlawful under Section 84(1)(c)."

8. At the hearing we had the benefit of skeleton arguments on both sides. We also had an appellant's bundle and supplementary bundle and a respondent's bundle together with authorities provided by both sides. Ms Richards handed in without objection the notices that had been issued to the appellant on 2 May 2003 and 8 June 2004 respectively.

9. Mr Ali intimated that he proposed to call no oral evidence and the case would proceed on the basis of submissions only.

10. Ms Richards accepted that in view of the allegation of fraud the burden of proof lay on the Secretary of State rather than the appellant as had been indicated in the notice of refusal. It was agreed between the representatives that Ms Richards would address us first.

11. Ms Richards referred to the recently filed evidence that had been lodged after she had prepared the skeleton argument concerning the grant of leave under the Ankara Agreement to four individuals including one of the appellants in Tum and Dari. She was not in a position to comment about the facts of these cases or whether similar points had been taken in relation to them as had been taken in this case. In Tum and Dari it was clear there had been no suggestion of fraud – as appears from paragraph of the judgment of the Court of Appeal. Ms Richards outlined the appellant's history and submitted that the appellant was an illegal entrant, liable to detention who had given evidence that was entirely incredible at the hearing of his asylum claim leading the adjudicator wholly to reject it. After the exhaustion of his appeal rights the appellant was given temporary admission on 8 June 2004 and it was plain from the form issued to him on that date that he was not to enter employment or engage in business. There was a clear prohibition. The businesses in question had commenced after the serving of the form on the appellant in 2004. Having referred to the case of Tum and Dari in the ECJ Ms Richards took us to Aksoy v Secretary of State [2006] EWHC 1487 (Admin). Although this was a judicial review application the court had given permission to rely upon it. In that case the applicant was a Turkish national

who had, like this applicant, arrived in this country in the back of a lorry and claimed asylum and had made an appeal which had been dismissed by an adjudicator on the basis that he had invented his claim. An application was subsequently made under the Ankara Agreement. The Secretary of State refused it on the basis that the appellant was not entitled to the benefit of the agreement because he had used fraudulent means to enter the United Kingdom and thus fell within the fraud exception in Tum and Dari. The merits of the application were however considered under the earlier Rules HC 510. The application was refused on the merits, applying the old Rules, on various grounds. Sullivan J noted that there was no substantive challenge to those grounds. Sullivan J concluded his judgment as follows:

> "4. To revert to the fraud exception, the Secretary of State made it plain in the summary grounds that he was not simply relying on the mode of entry of the claimant, which might well not distinguish him from the circumstances in Dari and Tum, but was further relying on the adjudicator's conclusions which I have summarised above. It seems to me that, unless Mr Slatter can persuade me that the decision of Beatson J in Yilmaz and Wilkie J in Taskale were wrong, this is one of those claims that falls within the fraud exception. Of course, much will turn on the particular facts of each case and the particular conclusions reached by the Immigration Judge. It does not follow that simply because a claim for asylum is rejected entry was sought to be obtained by means of a fraudulent story. There is no doubt on the facts of this case that that is precisely what was attempted and the short point that is made in Yilmaz and Taskale is that it cannot make a difference whether the applicant is someone whose false representations enabled him to gain leave of entry, or someone whose false representations were not believed, who was placed on temporary admission, and who then sought to gain entry by repeating those false assertions in front of an Immigration Judge who rejected them. Although those two authorities are merely persuasive and not binding upon me, I am not satisfied that they are wrong and therefore this case falls at that hurdle.
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> 5. There is however a further problem for the claimant in this case. Although the letter of 11 January 2006 states that the claimant has no right of appeal, if he was not excepted from the standstill provisions by reason of the fraud exception, then at best he would have been entitled to an out of country right of appeal against the refusal of his application. That being so, there would be no reason for the defendant not to remove the claimant to Turkey from where he could pursue the out of country right of appeal conferred under the earlier rule.
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> 6. This is not one of those cases where there appears to be any genuine desire to pursue an appeal out of country. The desire is to remain in this country and the challenge to the decision is, in truth, a challenge to the defendant's wish to remove the claimant. In these circumstances, it seems to me that the distinction between no right of appeal and an out of country right of appeal is simply academic and, for this reason also, the application must fail.
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> 7. As I have mentioned, apart from the alleged distinction between HC 509 and HC 510, there is no substantive challenge to the decision on the merits in any event. So even if the fraud exception had not applied, and even if there had been a more extensive right of appeal, the claim would have had to be dismissed."

12. Ms Richards referred us to Taskale [2006] EWHC 712 (Admin). In this case the applicant had again arrived in the United Kingdom in the back of a lorry and had claimed asylum and an adjudicator had dismissed his appeal. The appellant had applied for leave to remain under the Ankara Agreement which the Secretary of State had refused, not relying expressly on the fraud exception. However the court took the point for itself. Ms Richards referred us to paragraphs 29 to 34 of the judgment of Wilkie J. We reproduce paragraphs 32 to 34:

> 32. In his summary grounds of resistance set out in the acknowledgment of service, reference is made to the question of fraud, but it is limited to what was said about the precise circumstances of his entry, namely, by deception in the back of a lorry. In the fuller grounds of resistance the

full history of the matter, including the consideration of the application for asylum by the adjudicator, is referred to as part of the history, though it is right to say that once again it appears that the question of fraud is only adverted to by reference to the mode of entry in the back of the lorry.

33. It therefore seems to me that, were I only considering the decision letter, it would not be open to the Secretary of State to take the fraud point because that is not the basis upon which the application was dealt with. However, it is the case that, were I wrong about the substance of the matter and the decision letter could not stand, a question might arise as to whether any remedy should be granted to the claimant. The circumstances were not only that he sought entry clandestinely in the back of a lorry, but when he made an application for asylum he did so by giving an account of how and in what circumstances he had left Turkey. That account was the subject of examination by the adjudicator when hearing the appeal against a refusal of asylum. It is perfectly plain from the terms of the adjudicator's decision, in particular paragraphs 20 to 22 and 25 and 26 of his reasons, that the adjudicator concluded that the claimant had put forward a fraudulent and false account in order to support his claim for asylum. It describes the claim as obviously false. It describes the only inference that he could draw from various matters was that the appellant put forward a false story from the moment he arrived in the UK.

34. In my judgment and consistent with the approach taken by the Court of Appeal in Dari v Tum and having regard to the judgment of Beatson J in Yilmaz, the Secretary of State would be entitled to have regard to the findings of the adjudicator (apparently unappealed) of fraud on the part of the claimant, not so much in the way in which he gained entry by being hidden in the back of a lorry, but subsequently by giving a false and fraudulent account to immigration officers and thereafter to the adjudicator. In those circumstances it would be open to the Secretary of State to have rejected this application at the outset by saying that this claimant was not entitled to the benefit of the agreement scheme on account of his having attempted, albeit unsuccessfully, to gain entry by the use of fraud. Accordingly, if I were wrong about the matter of substance, I would have been minded to have refused the claimant permission in any event as, inevitably, the Secretary of State would, lawfully, have been entitled to decline to give him the benefit of the scheme had he been required to consider the matter afresh and so it is not arguable that the claimant would have obtained any remedy.

35. However, essentially on the matter of substance, this application for judicial review must be dismissed."

13. Ms Richards referred us to Temiz v Secretary of State [2006] EWHC 2450 (Admin) a decision of Collins J. The applicant had attempted to enter hidden in a van but had been discovered while on a ferry crossing the channel. He applied for asylum on arrival. Collins J found that the appellant had not told the truth about the claim that he had come straight from Turkey – it was the Secretary of State's position that the appellant had in fact claimed asylum in Italy after his departure from Turkey. After the refusal of his application the appellant had absconded and then he had set up a business and had made an application under the Ankara Agreement. Ms Richards referred us to paragraphs 18 and 19 of the judgment and indeed these paragraphs are relied on by Mr Ali as well. Paragraph 19 reads as follows:

"19. That unlawful presence, whether as an illegal entrant or an overstayer, can justify a refusal to permit an in country application under the Association Agreement is in my view supported by the jurisprudence of the ECJ. Furthermore, if the opportunity to engage in business has been created by working in breach of the terms of any temporary admission or when overstaying and so the unlawfulness of the applicant's conduct goes beyond mere unlawful presence, there is a further justification for refusing the application. The applicant must return to Turkey and make an application from there. That application will be considered in accordance with the standstill clause and so under the Rules applicable on 1 January 1973. I can seen no justification for the approach which I am told is being taken by the Home Office that those who have attempted unsuccessfully to rely on the Association Agreement following the failure of their asylum claims will have to apply under the current Rules. That would be a clear breach of Article 41(1). Incidentally, a requirement to return and to apply from outside the United Kingdom has an

analogy with the marriage cases in which the court has indicated that it will not permit queue jumping and only in exceptional cases would it be proper to overturn the exercise by the Secretary of State of his power to remove: see for example R (Mahmood) v Secretary of State for the Home Department [2001] 1 W.L.R 840."

14. Ms Richards also referred us to paragraphs 23 to 28 of the judgment. In paragraph 24, having referred to Kondova [2001] ECR 1-06427 (where the ECJ spoke of the risk of an applicant building up assets during a period of unlawful stay, opening the way to abuse) Collins J stated:

> "This reasoning seems to me to apply with equal force to cases such as the present. If Turkish nationals can remain illegally in breach of the UK's immigration laws and use that illegal stay to establish the basis for an application which meets the requirement of the Rules, there will be encouragement to do just that. That is precisely what is happening since there are a large number of these applications being made by failed Turkish asylum seekers. Many will properly be rejected for failure to meet the requirements of the Rules, but they could also be rejected on the basis of illegal presence."

15. Ms Richards asked us to take into account paragraphs 34 and 35 of the judgment which reads as follows:

> "34. In the case of one seeking asylum, clandestine entry is not per se to be regarded as fraudulent in the sense identified in Dari & Tum. But if lies are told to an immigration officer in order to persuade him to grant leave, fraud is established. Thus if a dishonest story is given to try to establish an asylum or human rights claim, there is fraud and the fact that on appeal an applicant has been disbelieved suffices to establish that fraud. Equally, a deliberate failure to disclose that an applicant has claimed asylum in another country, particularly if that country is a Member State of the EU, is enough to establish fraud. I have already indicated that the Secretary of State was entitled to decide that the claimant had deliberately concealed that he had claimed asylum in Italy. Unless the claimant can show that that decision by the Secretary of State was wrong in law, which would mean in the context of this case irrational, He cannot succeed in persuading me that it should be set aside. Thus, even if Dari & Tum does have the broad effect for which the claimant contends, the fraud exception applies to defeat the claim.
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> 35. I should add that I entirely agree with the further points made in Yilmaz [2005] 1 W.L.R. 3944 at paragraph 18 that a person who fails to comply with a condition attached to his admission becomes an illegal entrant and so cannot rely on the Association Agreement. That is entirely consistent with what I have indicated I believe to be the position in law."

16. Finally Ms Richards drew our attention to paragraph 40 of the judgment where Collins J stated:

> "As will be apparent, I believe that it will only be in exceptional circumstances that a claim by a failed Turkish asylum seeker who has not been given leave to enter or remain and who accordingly is either an illegal entrant or an overstayer could succeed. He cannot obtain the benefit of the Association Agreement if he has created the ability to meet the requirements of the Rules by working or establishing a business in breach of conditions of his admission or while here unlawfully. It is not necessary to establish fraud, but if fraud is shown, there can be no doubt that refusal is proper. All that Dari & Tum decides, in my view correctly, is that the 1973 law applies because of the standstill clause. But the 1973 domestic immigration law fully justifies refusal of leave to enter without any need to consider the Rules, unless, in a given set of circumstances, the Secretary of State decides exceptionally that he can exercise discretion in the claimant's favour. I doubt that he will do that very often and, if he does not, it is difficult to imagine that his refusal would be wrong in law."

17. Ms Richards then took us to LF (Turkey) [2007] EWCA Civ 1441 where the Court of Appeal considered the position in the light of the decision of the ECJ in Tum and Dari.

18. The appellant in that case had made an asylum claim which had been rejected as false in its core aspects by an adjudicator. The appellant was prohibited from entering into employment but he opened a café restaurant notwithstanding. He made an application for leave to remain under the Ankara Agreement. Ms Richards pointed out that while the Court of Appeal had identified two questions as stated in paragraph 13 of the judgment of Laws LJ, argument had concentrated on the first of those questions. The first question was whether the Secretary of State was entitled to disregard the facts of the applicant's establishment of his business on the ground that those facts were the fruit of the applicant's breach of his conditions of temporary admission. The second question was whether the applicant was to be deprived of the benefit of HC 509 because of his attempt to gain entry to the United Kingdom by means of a fraudulent asylum claim. The judgment concludes as follows:

> "14. The argument this morning has concentrated on the first of these questions. Indeed, we have not gone into the second. If the Secretary of State succeeds on the first then he needs no support from the second point. It is convenient at this stage briefly to review the learning which bears on this part of the appeal. The appropriate starting point is Kondova in the European Court of Justice. This decision preceded the material English cases. It concerned antidiscrimination provisions in the Association Agreement between the European Communities and Bulgaria. The European Court of Justice said:
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> > '77. ... if Bulgarian nationals were allowed at any time to apply for establishment in the host Member State, notwithstanding a previous infringement of its national immigration legislation, such nationals might be encouraged to remain illegally within the territory of that State and submit to the national system of control only once the substantive requirements set out in that legislation has been satisfied.
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> > 78. An applicant might then rely on the clientele and business assets which he may have built up during his unlawful stay in the host Member State, or on funds accrued there, perhaps through taking employment, and so present himself as a self employed person now engaged in, or likely to be engaged in, a viable activity whose rights ought to be recognised pursuant to the Association Agreement.
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> > 79. Such an interpretation would risk depriving Article 59(1) of the Association Agreement of its effectiveness and opening the way to abuse through endorsement or infringements of national legislation on admission and residence of foreigners."
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> 15. Kondova was referred to by Woolf LCJ, as he then was, in Dari v Tum [2004) EWCA Civ 788 which was directly concerned with the standstill clause in the Additional Protocol to the Ankara Agreement. There the respondents had unlawfully remained in the United Kingdom after their asylum claims had been rejected although, as the Lord Chief Justice made clear, it was not shown that the claims had been fraudulent. On those facts it was submitted to the Secretary of State that the respondents were not entitled to the benefit of the standstill clause. Lord Woolf disagreed. He said:
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> > '22. There is nothing in article 41(1) of the Additional Protocol itself to support that argument. Furthermore, when the judgment in Savas [I interpolate – that has been relied on] is properly understood as falling into two clear parts, then it seems to me that the judgment strongly supports the contention of the respondent. The fact that the "standstill" provisions are to apply to a person whatever his status so far as his right to remain in this country or his right to enter this country are concerned, is covered by the '"standstill" provisions.

23. The one exception that I would make to that clear position is with regard to a person who achieves entry to this country by the use of fraud. It has long been the situation that those who enter by fraud cannot benefit from the point of view of immigration status by so doing. The case of Kondova (Case C-235/99, 27 September 2001) which was not referred to in the court below, confirms that that is the position. The provisions which are being considered by the Court in that case are not the same as here, but for present purposes paragraph 80 can be applied. It says: ".... a Bulgarian national who intends to take up an activity in a Member State as an employed or self-employed person but who gets round the relevant national controls by falsely declaring that he is entering that member Sate for the purpose of seasonal work places him outside the sphere of protection afforded to him under the Association Agreement." The sentiments expressed in that paragraph would be equally applicable to a situation where a person otherwise in the position of the respondents sought to gain access to this country as an asylum seeker by fraudulent means.'

16. In the same case, Dari v Tum, their Lordships' House made a reference to the European Court of Justice. The European Court of Justice handed down its judgment as recently as 20 September 2007. At paragraph 64 of the judgment this is said:

> 'Lastly, as regards the alternative argument of the United Kingdom Government that failed asylum seekers such as the applicants in the main proceedings should not be allowed to rely on Article 41(1) of the Additional Protocol, since any other interpretation would be tantamount to endorsing fraud or abuse, it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends [authority then cited] and that the national courts may, case by case, take account on the basis of objective evidence of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely [and a further case is cited].'

17. This, if I may say so with great respect, is an application of the abuse of rights principle which is well established in the jurisprudence of the Court of Justice. There is plain affinity with the common law rule (if I may express it very broadly) that a man may not profit from his own wrong and the linked principle expressed in the Latin phrase *ex turpi causa non oritur actio*. There is in the present context no reasonable distinction, I think, between abuse of rights and fraud. Such a distinction if it were asserted could not in my judgment survive the reasoning of the Court of Justice in Kondova and Dari v Tum. This conclusion is, I apprehend, in line with first instance decisions in the Administrative Court, notably Yilmaz and Temiz to which I have made reference. I will not, with respect, cite those judgments.

18. What then is the position here? I have concluded that the Secretary of State was entitled to deny the applicant the benefit of paragraphs 30 to 32 of HC 509 because his reliance on those provisions was in truth only viable by virtue of his own wrongdoing – the establishment of a business in 2004 in plain contravention of a then extant prohibition against his doing so. It is true been [sic] the focus of the argument this morning has been the fact that from October 2005 onwards, successive forms IF96 did not repeat this restriction on their face. However, the applicant had made his application to enter as a businessman in January 2005 and he relied on the business he had established from June 2004 onwards. That essentially remained the case. The Secretary of State in paragraph 7 of the decision letter, which I have already set out, is plainly addressing his attention to the basis on which or the circumstances in which the business of the applicant had historically been established. Even if (which I am bound to say I doubt) in October 2006 the applicant was entitled to think that the restriction was not then being insisted on, the basis on which his application had been put forward on which indeed it depended remained the historic establishment of a business in violation of his conditions.

19. In these circumstances it seems to me that the Secretary of State's decision was lawfully arrived at, and for my part I do not find it necessary to decide whether the Secretary of State was also entitled to rely on the applicant's fraudulent asylum claim. It may be said that that claim was in effect what allowed the applicant to remain in the United Kingdom albeit on temporary admission from 2000 onwards while the appeal process took its course. But the circumstances relating to the fraudulent asylum claim may well be thought more remote from the claim to enter as a businessman than is his actual establishment of the business in question.

> 20. For these reasons I conclude that there is nothing in the first and principal ground of appeal. There is a suggestion that it is in some way enforced by a legitimate expectation. I perceive no such expectation. None, I think, is generated by the Secretary of State's guidance discussed by Lloyd Jones J and to which I have referred. As regards the point under the European Convention on Human Rights, Mr Zahed has this morning very candidly accepted that in truth the Article 8 claim falls away, as it is now to be understood that the applicant could launch a fresh claim to enter the United Kingdom from Turkey. It is not in those circumstances necessary to say any more about Article 8. Nor in truth can Article 1 of the First Protocol provide any self-standing justification for overturning the Secretary of State's decision. That being so, it is not necessary to go into the question whether the Article 8 claim might be thought to be a fresh claim theoretically generating fresh appeal rights."

19. Ms Richards submitted that the observations of the Court of Appeal in relation to the fraudulent asylum claim were obiter. The case did establish that the appellant could not rely on the fact that he had established the business in the face of an expressed prohibition. It was wholly illogical to submit that the abusive behaviour which could be relied on in country by the Secretary of State could not be relied on out of country by the Entry Clearance Officer. There might be circumstances where an applicant could make an application from overseas relying on a fresh business which was in no way tainted by his previous behaviour. That was not the circumstances of this case. Fraud had not been alleged in the case of Dari & Tum. Savas was not a case about fraud or abuse. The cases of Aksoy and Taskale and Temiz established that the Secretary of State was entitled to rely on the false asylum claim. In the light of the authorities the decision of the Entry Clearance Officer was lawful and abuse had been established.

20. Mr Ali submitted that it had to be borne in mind that the case law relied upon arose in connection with judicial review proceedings. The Secretary of State's decision would stand absent irrationality and it was no light thing to establish irrationality. While it was not conceded that the case law in relation to in country applications was correct, it was quite clear from the decision of Collins J in Temiz that the proper course was to do what the appellant had done in this case and make the application from overseas. The case of Taskale referred at paragraph 29 to those who were in this country. It was a public law challenge. The court had been dealing with the issue of fraud in the context of judicial review being a discretionary remedy – see paragraph 33 of the judgment. The case of Kondova had been concerned with a different Association Agreement. The case of Temiz turned on the issue of the justification of a refusal to permit an application made in country under the Association Agreement – see paragraph 19. The Secretary of State was cherry picking the parts of the judgment that were useful to her. The last sentence of paragraph 19 had to be read in the light of recent jurisprudence from the House of Lords.

21. In paragraph 27 of the judgment reference had been made to people not being permitted to circumvent national legislation – the appellant was not seeking to do this. He was applying from overseas. In paragraph 34 it was clear that the court was concerned with an irrationality challenge – it was necessary for the claimant to demonstrate that the decision of the Secretary of State was wrong in law and it was difficult to establish irrationality. The Secretary of State's own guidance referred to in paragraph 12 of LF indicated that a negative history including previous unlawful presence in the United Kingdom did not prevent the application of the standstill clause. The court had referred to paragraph 78 of the decision in Kondova but it must be recalled that that decision had been taken in the context of a different Association

Agreement. In paragraph 17 the Court of Appeal had referred to the abuse of rights principle but that did not apply in the circumstances of the instant case where the appellant had set up a business on which he was paying taxes and there was nothing fraudulent about it. The issue of the false asylum claim was too remote a matter – see paragraph 19 of the judgment.

22. The Secretary of State's conduct was also in issue. He had demonstrated no will to consider the case properly or at all until compelled to do so. The Secretary of State was in effect compelling Turkish nationals to comply with the current Rules. The issue of fraud had not been raised in Tum and Dari but the facts in those cases were important. The Secretary of State's argument had no application to a properly submitted application in Turkey. The cases concerned public law challenges to applicants seeking leave to remain having been present improperly. Was it suggested that the alleged abuses only applied to the old Rules and not the current Rules? That would be absurd. In paragraph 61 of the decision in Savas reference was made to periods in which a Turkish national was employed under a residence permit which was issued to him only "as a result of fraudulent conduct which has led to a conviction" were not based on a stable situation. There was no conviction in the instant case. The circumstances were different. Mr Ali referred to the case of A v Secretary of State [2002] EWCA Civ 1008 where the Court of Appeal set aside a reference to the ECJ on the basis that the law was acte clair.

23. In relation to the ground of appeal concerning the 1971 Act Mr Ali accepted that no difficulties arose in the context of this case but in another case reliance might be sought to be placed on the former appeal provisions. We should point out that the respondent initially contended that the appellant only had a qualified right of appeal against the decision of 7 January 2008 but by letter sent to the Tribunal 18 September 2008 it was accepted that the appellant enjoyed a full right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act, 2002.

24. In reply Ms Richards submitted that in the context of the judicial review proceedings the Secretary of State had agreed to accept and process the appellant's application in Turkey but that there had been no acceptance that the fraud and abuse principle would be disapplied. There was no waiver. This was abundantly clear when one looked at the e-mails in the respondent's bundle. No guarantee had been given as to the outcome. There was no estoppel.

25. Ms Richards accepted that there was no issue in the instant appeal concerning advantages to be derived by former appeal and procedural rights. Such a question was not relevant to the instant appeal.

26. Ms Richards responded to the submission that it was nonsense to rely on fraud in respect of the old Rules and not the new ones. Ms Richards submitted that the appellant was relying on a principle of Community law. The Secretary of State was contending that the appellant was not entitled to rely on that Community law principle because of fraud and abuse. The current Rules had nothing to do with Community law.

27. On the question of the evidential burden, the appellant had put forward nothing to counter what the Secretary of State said. The respondent had discharged the burden.

28. The ECJ was not concerned with the factual issues appertaining to fraud and it was for the national courts to apply the jurisprudence on a case-by-case basis.

29. Reliance by the appellant had been placed on the case of A but the Court of Appeal in Tum & Dari had referred at paragraph 27 to an apparent inaccuracy in A as reported insofar as it was suggested that the court had made any form of declaration as to the legal position. A had in any event considered a very limited issue.

30. In Savas fraud and abuse had not been raised and the same position arose in Tum and Dari.

31. While it was accepted that the case law concerned public law challenges that was irrelevant. The cases set out parameters as to what amounted to fraud and abuse for community law purposes.

32. While all the authorities concerned in country cases the principle applied more widely. One could not rely on abuse or fraud to establish a community right as held in Tum and Dari. There was no logical reason to confine the principle to in country applications. The cases of Aksoy, Temiz and Teskale established that making a false asylum claim was an aspect of fraud or abuse as was establishing a business in breach of conditions – see LF and the decision of the Tribunal in FS (Breach of conditions: Ankara Agreement) Turkey [2008] UKAIT 00066.

33. An applicant should be denied the benefit of the old Rules in an out of country application just as much as in an in country application. What Collins J had said in paragraph 19 of Temiz was obiter and did not have the significance contended for by the applicant. The circumstances in which the fraud or abuse principle could be engaged had not been addressed. What had been said in paragraph 5 of Aksoy did not undermine the submission. It was not said that an out of country application would be dealt with any differently.

34. Although Kondova was concerned with a different Association Agreement what was said was relevant to the fraud and abuse principle. It was recognised by the courts that fraud would be encouraged if applicants could seek to obtain an advantage on the basis of illegal entry, maintaining a false claim and building up a business in breach of conditions. It would be nonsense if what was relevant to an in country application could not be relevant to an out of country application. If the appellant relied upon a completely new business when making his out of country application it might be argued that the fraud principle did not apply. However in the instant case the appellant was seeking entry clearance on the basis of a business which he had set up when he was prohibited from doing so. For the reasons given in the Entry Clearance Officer's decision, the appeal should be dismissed.

35. At the conclusion of the submissions we reserved our determination. We have had the benefit of written and oral submissions and we have carefully taken these into account.

36. We did not hear oral evidence from the appellant. He has submitted a statement dated 10 July 2008 in which he denies that his immigration history amounts to abusive conduct and he contends that he started work with the permission of the Home Office. Once his domestic remedies were exhausted he left the country

voluntarily in order to make an application from abroad. He had never been told that he could not place reliance on the successful business that he had established in the United Kingdom. He had left the country "so that a fresh application could be made and my previous immigration history ignored for the purposes of the Ankara Agreement". In paragraph 12 of the statement the appellant said this:

> "In the refusal letter the officer refers to fraud or abuse. I think that he is entirely wrong to take this into account when considering an out of country application for first admission."

37. The High Court application had, in the appellant's view, been refused "on the basis that the defendant will consider the claimant's application pursuant to the 1973 Rules within 28 days of it being received at the British Embassy." The appellant's case was that the High Court Judge was wrongly led to believe that the application will be considered under the 1973 Rules and the Treasury Solicitors were well aware of the facts of the appellant's case and the basis on which the application would be made from Turkey. Nowhere in the 1973 Rules were Entry Clearance Officers allowed to take into account past immigration history and accordingly the appellant could not be accused of fraud or abuse. The appellant felt he had been subjected to an abuse of process.

38. While the appellant did not admit that he had engaged in business without permission, he was now making an application to rejoin the business which he had established. He could have taken the money out and applied to start a fresh business but he could not see why this would make a difference. Had he taken this course the Entry Clearance Officer might possibly have refused the application by arguing that the appellant had circumvented the procedures.

39. It appears from the authorities that the fact that an appellant entered the country in a clandestine fashion and made an application for asylum which failed does not in itself render the appellant guilty of abusive or fraudulent conduct for the purposes of making an application under the Ankara Agreement. This much is clear from paragraph 67 of the case of Tum and Dari which reads as follows:

> "In those circumstances, the fact that Mr Tum and Mr Dari had, prior to their applications for clearance to enter the UK for the purpose of exercising freedom of establishment, made applications for asylum which had, however, been refused by the competent authorities of that member state, cannot be regarded, in itself, as constituting abuse or fraud."

40. However, it is in our view equally plain that an appellant's immigration history and conduct may not be irrelevant when considering an application under the Ankara Agreement – see Tum and Dari at paragraph 64 – Community law cannot be relied on for abusive or fraudulent ends. The ECJ held that the national courts may "case by case take account – on the basis of objective evidence of abuse or fraudulent conduct on the part of persons concerned in order, where appropriate, to deny them the benefit of the provisions of community law on which they seek to rely...".

41. Mr Ali submitted that it was absurd to say that the appellant could not rely on the old Rules because of his fraud and then refer him to the new Rules. This is a submission based on a misunderstanding of the position. The appellant is seeking to rely on the provisions of Community law. He argues that he is entitled by virtue of Community

law to rely on the old Rules. But the respondent contends he is not entitled to rely on those old Rules because of his behaviour.

42. In this case the appellant entered the United Kingdom in a clandestine fashion and applied for asylum. His application was refused and his appeal was heard by an adjudicator. His appeal failed. As we have said, none of these factors would, by themselves, have given rise to the obstacle that is said to face the appellant in this case. However, the facts on which the appellant founded his asylum claim were false. This was the clear finding of the adjudicator and there has been no challenge to that finding. Indeed in the appellant's latest statement he makes no protest about the decision at all and does not complain that the adjudication was wrong.

43. It follows in our view that the appellant was not a bona fide asylum seeker. He came to this country to put forward a false claim. He put that false claim forward to the authorities and then to an adjudicator. What was said by Sullivan J at paragraph 4 of Aksoy is of relevance:

> "Of course much will turn on the particular facts of each case and the particular conclusions reached by the Immigration Judge. It does not follow that simply because a claim for asylum is rejected entry was sought to be obtained by means of a fraudulent story. But there is no doubt on the facts of this case that that is precisely what was attempted and the short point that is made in Yilmaz and Taskale is that it cannot make any difference whether the appellant is someone whose false representations enabled him to gain leave of entry, or someone whose false representations were not believed, who was based on temporary admission, and who then sought to gain entry by repeating those false assertions in front of an Immigration Judge who rejected them."

In our view there is a world of difference between the bona fide asylum applicant who tells a truthful story but whose case fails for reasons which do not reflect on his credibility and the circumstances of the present case. For example an appellant may fail because of positive developments in the objective situation. Defeat may not impinge on his integrity at all.

44. Mr Ali places reliance on LF where the Court of Appeal considered that the circumstances relating to the fraudulent asylum claim "may well be thought more remote from the claim to enter as a businessman than is his actual establishment of the business in question."

45. It is quite clear from paragraph 14 of the judgement of the Court of Appeal that it had not gone into the argument on the question of the impact of fraudulent asylum claims in cases of this type. Even if it could be said that a fraudulent asylum claim was more remote, the Court of Appeal was not saying that it was an irrelevant factor. Indeed in Tum and Dari in the Court of Appeal the Lord Chief Justice stated, in relation to the fraud exception, that it had long been the situation that those who entered by fraud could not benefit from the point of view of immigration status by so doing. The Court of Appeal referred to Kondova and found that the circumstances in that case "would be equally applicable to a situation where a person otherwise in the position of the respondent sought to gain access to this country as any asylum seeker by fraudulent means." In Taskale Wilkie J stated at paragraph 34:

> "In my judgment and consistent with the approach taken by the Court of Appeal in Dari v Tum and having regard to the judgment of Beatson J in Yilmaz, the Secretary of State would be entitled to have regard to the findings of the adjudicator (apparently unappealed) of fraud on

> the part of the claimant, not so much in the way in which he gained entry by being hidden in the back of a lorry, but subsequently by giving a false and fraudulent account to Immigration Officers and therefore to the adjudicator. In those circumstances it would be open to the Secretary of State to have rejected this application at the outset by saying that this claimant was not entitled to the benefit of the Agreement scheme on account of his having attempted, albeit unsuccessfully, to gain entry by the use of fraud."

46. In our view the appellant was guilty of fraudulent and abusive conduct in the circumstances of this case. His circumstances are similar to the circumstances of the appellant in Taskale.

47. It is submitted that the appellant should not benefit from the Ankara Agreement because the businesses that he established in the United Kingdom were established without authorisation. From an early stage the appellant was an illegal entrant and notification was given to him to that effect. Any doubts that he might have had would have been dispelled by the notice that was served on him on 8 June 2004 stating that "you may not enter employment, paid or unpaid, or engage in any business or profession."

48. The appellant went on to establish the two businesses on which he places reliance in this case. The case of LF makes it clear that in such a case the Secretary of State was entitled to deny the appellant the benefit of the old Rules because – see paragraph 18 of the judgment – "his reliance on those provisions was in truth only viable by virtue of his own wrongdoing" – in that case the establishment of a business in 2004 in plain contravention of a then extant prohibition against his doing so. The Tribunal reached a similar conclusion in FS. Mr Ali makes the point that the cases we have been referred to are all public law cases and it was necessary for the applicant to displace the Secretary of State's position. In the appeal before us the boot is on the other foot. It is for the Secretary of State to prove her case – Ms Richards accepts that the burden lies on her. Nevertheless the facts are in the main undisputed. It is quite clear that the appellant was a failed asylum seeker who based his case on a fraudulent story. He maintained this story before the Secretary of State and an adjudicator. He was prohibited from working. He established the businesses he relies upon in face of a plain prohibition. In our view the respondent could make good her case on either limb – the fact that the appellant was a bogus asylum seeker who put forward a false claim or the fact that the appellant set up his businesses in breach of a requirement imposed by the Secretary of State. We find that the respondent has amply discharged the burden on her to establish fraud and abuse in this case.

49. It is submitted that there was some waiver and that the appellant was led to believe that he could leave the country and make his application from overseas and this would be considered under the old Rules and his past would not be held against him. We find no basis whatsoever for such a belief. The e-mails sent from the respondent to the appellant's representatives are inconsistent with any such expectation in the mind of the appellant. Ms Richards referred us to an e-mail dated 19 October 2007 which refers to the arrangements in place in Turkey to accept entry clearance applications under the Ankara Agreement and added "There is no dispute that such applications can now be made from Turkey (subject to the fraud and abuse exceptions), as I previously indicated to you." There is an earlier e-mail to similar affect dated 8 October 2007 which states: "The guidance for ECOs is in the process of

being amended. It is accepted that in principle business applications under the 1973 Rules can be made from Turkey (subject to the fraud/abuse exceptions, of course.).

50. We see nothing in the order of the High Court or indeed elsewhere to warrant any expectation in the mind of the appellant, legitimate or otherwise, that his past would somehow be forgotten.

51. Mr Ali submits that the behaviour of the respondent could only be interpreted as a way of frustrating Turkish applicants from relying on the old Rules and forcing them to comply with the new ones. This is in some respect inconsistent with the recently lodged evidence which shows that the respondent does consider matters on a case-by-case basis and does grant in country applications. However we find the submission is completely without merit. The appellant was not compelled to rely on the businesses established in breach of his conditions of stay. He could have indicated a wish to start a fresh business and that application would have to have been considered under the old Rules. Indeed any further application made by the appellant would still fall for consideration under the old Rules. The appellant gives an example in his statement of withdrawing the funds from the business and starting a fresh business. Such a device might well cause the appellant problems, as he recognises. The appellant would still be arguably relying on funds gained in a manner tainted by his unlawful conduct.

52. The appellant is faced with a conundrum. He has to rely on the old Rules as it does not appear to be in dispute that he cannot comply with the minimum investment provisions of the current Rules. In order to rely on the old Rules he has to rely on community law. In relying on Community law, he faces the hurdle of his own fraudulent and abusive conduct.

53. Mr Ali submits that the cases concern in country applications and are irrelevant overseas. We see no merit in this submission. It would be completely illogical if the fraud and abuse which stood in the way of an in country application were suddenly forgotten and forgiven overseas. The same policy arguments remain valid. We do not read paragraph 19 of the judgment of Temiz as indicating more than that an application in circumstances such as apply in the instant case must be made from overseas and that such an application will be considered in accordance with the standstill clause. This is exactly what happened in this case. Mr Ali also referred us to the case of A v Secretary of State, a case in which the Court of Appeal declined to refer a point to the ECJ as the decision in Savas dealt with the issue. The Court of Appeal in Tum and Dari drew attention to an inaccuracy in the report – no form of declaration had been made. The circumstances of the appellant in that case were different to the circumstances in the instant case and the points taken by the Secretary of State were different too. We do not find that that the case assists Mr Ali. We prefer the submissions made by Ms Richards on the cases put before us.

54. The new evidence concerning applicants who have successfully applied in country for leave to remain was served too late in the day for the respondent to deal with it. There can be no doubt that the Secretary of State considers many applications made by Turkish asylum seekers under the Ankara Agreement and she deals with them on a case-by-case basis. We can only determine the instant appeal on the facts of this case.

55. It may be that a combination of fresh circumstances and the passage of time would create conditions where it would no longer be appropriate to deny the appellant the benefit of Community law. As is established in Tum and Dari at paragraph 64, the "national courts may, case by case, take account on the basis of objective evidence of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely…". However, we do not consider that such conditions have yet been made out. While the appellant has built up businesses, he has not done so lawfully, while he has no criminal record, he had been guilty of fraud and abuse. It is to his credit that he left the country voluntarily, and we take that into account, but the application overseas was founded very much on the fruits of unlawful enterprise.

56. Bearing in mind all the matters relied upon in favour of the appellant, we nevertheless find it established that his fraudulent and abusive conduct does indeed deny him the benefit of Community law. In the premises it is not necessary for us to go into the substance of the appellant's application under the 1973 Rules.

55. We heard no arguments on other issues such as human rights. The appeal accordingly fails on all grounds.

Signed Date 17 October 2008

Senior Immigration Judge