EUROPEAN UNION'S VISA APPLICATION FOR TURKEY

Y. Selim SARIİBRAHİMOĞLU*

* Member of Ankara Bar, Doctorate (University of Ankara). The author can be reached at sslawoff@ada.net.tr

Visa requirement for Turkish citizens is not only a political matter being against the spirit of EU integration, but more importantly a legal issue. Apparently, the Association Agreement signed and concluded between Turkey and EEC (Rome Treaty) is an integral part of the Community law making it a primary source of legislation, which will be discussed in depth below, within European Union legal system. Consequently, any regulation as a secondary legislation within the hierarchy of norms should act compatibly with the higher norms being both Foundation Treaties as well as International Agreements signed with EEC. Discriminatory practices of EU towards Turkey violate the enlightment principles upon which Europe itself is founded as well. It can be said that double standards are being applied by EU considering Turkey which is a sign of the limited EU internal capabilities and diminishes EU's credibility.

Visa application for Turkish nationals could be contested legally on various grounds considering the fact that this issue has also been challenged before the European Court of First Instance by Turkish Labor Party on behalf of Republic of Turkey against European Union Commission and Council couple of times but unfortunately the Court choose not to go into the merit regarding the fact that the Commission, as a guardian of the international agreement and EU law, did not fulfill its obligations inspite of the fact that under the light of the Customs Union, the Commisson has an obligation to defence Turkey's rights and therefore due to reasons such as not being compatible with Article 111 of Rules of Procedures of CFI and under the light of the statute of limitation declared the case to be manifestly inadmissible. When as a result of the appeal to the so-called decision, the case reached the European Court of Justice. With reference to the court's decision numbered T-430/09; while requesting the partial annulment of the contested regulation (Regulation No. 539/2001) in favour of Turkey based on the doctrine of *Hierarchy of Norms* despite the fact that the applicant's arguments were all accepted and considered to have legal standings before the court, just as a result of Turkey's omission to act promptly due to the Article 230 EC's time lapse provision; the appeal held to be manifestly inadmissible again stating that *"…except in the exceptional circumstances of the discovery of a fact which is of such a nature as to be a decisive factor, and which, when the decision was given, was unknown to the court and to the party claiming the revision (Article 44 of the Statute of the Court of Justice, applicable to the procedure before this court pursuant to the fisrt paragraph of Article 53 of the Statute), the decisions of this court may only be set aside by the Court of Justice provided that an appeal has been brought before it within prescribed time-limits."* This application is made by the Labour Party for the assertion of acquired rights arising from the Ankara Agreement of 1963 and the Adittional Protocol of 1970 and demanding partial annulment for ignorance of these rights.

Hierarchy of Norms is one of the fundamental doctrines of EU law. Several cases been stipulated towards the end of the article have significantly emphasized the doctrine while referring the member states's attitudes towards putting their

legislation in a hierarchical order and the importance they give to fundamental rights. Since the rights given to Turkish nationals by the Ankara Agreement and its Additional Protocols can be considered as being fundamental, the so-called Council Regulation subject of the said case is not valid. Additionally the direct applicability of the Agreement and the Protocol and the decisions of the Association Council had been argued being supported by several judgements of the court as well. However, since 2001 Council Decision 539/2001 both European Union law and the longstanding principle of hierarchy of norms has been seriously ignored and neglected. Consequently Turkey has been being deprived of its very absolute, legal and acquired rights thereto, therefore being put under a continuous, uninterrupted financial harm being subject to visa applications stipulated by the Schengen Regulation. Having said so, the partial annulment of the so-called regulation concerning Turkey is still highly demanded. Under the light of the very apparent fact that the damages are still persistent on a daily basis, the mere argument of time lapse shouldn't be considered as relevant in this matter.

Foundation Treaties and their annexes are primary sources of Community law. Second to foundation Treaties are the international agreements involving the European Union. The secondary legislation is the 3rd major source of Community law which is regulations, directives, decisions, recommendations and opinions. In the hierarchy of norms secondary legislation shall not be in contradiction with international agreements which form an integral part of the *Acquis*; as per to Article 310 of the EC Treaty which allows community and the member states to conclude international agreements therefore EU regulations cannot be contrary to the international agreements. Relevantly, Ankara Agreement establishing an association between EEC and Turkey signed in 1963 and concluded and confirmed on behalf of the Community by Council Decision 64/732/EEC of 1963 brought in certain acquired rights for the Republic of Turkey having the same position within the hierarchy. Thus, the relevant part of the Council Regulation (EC) No 539/2001 regarding Turkey subject to our case is not valid due to the fact that it is contrary to international Agreements, namely the Ankara Agreement and its Additional Protocols.

In this respect, Dr. Klaus Dienett, German Supreme Administrative Court Chamber President, declared that EU regulations cannot be derogative to Turkey-EU partnership Agreement, Additional Protocol and Association Council Decisions. He also emphasized that agreements with 3rd parties and additions are primary sources of legislation so directly applicable. Standstill clause protects previously given and acquired rights. Apparently, EU Commission and Council have failed in their duties arising from the so- called agreements and protocols and furthermore they have imposed regulations contradicting those legal instruments.

In addition to these, here rises the issue of Equal Footing which is again being undermined regarding Turkey. Croatia, which became a candidate in 2004, is enlisted in Annex 2 of the Schengen Rugulation whereas Turkey an associate of

the EU since 1963 and a candidate since 1999 is listed among the countries whose nationals must be in possession of visas for stays of no more than three months. Besides, there is a special arrangement for the citizens of Croatia based on the pre-Schengen bilateral agreements. Croatian citizens are also allowed to cross the border without a visa application. In this respect, even though Croatia is not an EU member the EU honours Croatia's bilateral agreement with member states. Besides, it is respected by EU to Croatia's agreements with third countries as per the standstill principle although he is not a member of EU. However, in Turkey's case although there is an agreement concluded directly by the Community itself, the Union hindered Turkish citizens' rights guaranteed under the Association Agreement which is an unfair application. Thus, besides the Rome Treaty or the agreements concluded by the Community itself, agreements are respected by the Union even as to the bilateral agreements. Croatia will be a member of the EU in 2010, thus the EU finds a solution for Croatia through bilateral agreements. On the other hand, although Turkey has acquired rights regarding visa issues guaranteed under the Ankara Agreement and its Protocols, Turkey is hindered from using its acquired rights. In this respect, as in the Croatia case, the union itself shall come into action directly.

Ankara Agreement and the Additional Protocol of 23rd November 1970 pursue the long term aim of preparing Turkey for accession to the European Union by increasing the coordination of economic policy and creating a customs union since 1 January 1996. Visa requirement is clearly a breach of the principle of free movement which constitutes the basis of the Customs Union established by Association Council Decision 1/95 and also Article 41 of the so-called Additional Protocol. According to the above-mentioned Council Regulation No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the EU's external borders, Turkish nationals require a visa travel to the EU and they encounter cumbersome procedures and grave problems in order to obtain Schengen visas. Its strongly believed that vis-à-vis a country which has an association agreement dating back to 1963, which has been part of the Customs Union since 1995 and has been negotiating since 2005, there is discrimination and unjust treatment with respect to the visa issue. Since the Ankara Agreement envisages certain obligations for both the European Community and the member states, the EU Commission should also act in accordance with its responsibilities through introducing a comprehensive and just solution to this long-lasting problem. As guardian of the EU Treaties should closely monitor and oversee the correct implementation of the EU acquis major responsibility falls on the European Commission. Considering the two requirements namely; Article 308 EC and Article 10 EC, it's obviously the commission's task to identify and bring to an end an infringement. Actually its not just Commission who has obligations although it has the primary obligation, member states are not free of obligation.

Additionally under the light of the provisions of the Association Agreement lies

the very basic and fundamental aims and purposes of European Union law; as per to article 2 the accelerated development of Turkish economy is to be ensured. Article 7 states that the contracting parties shall take all appropriate measures whether general or particular to ensure the fulfillment of the obligations arising from this agreement. They shall refrain from any measures liable to jeopardize the attainment of the objectives of the agreement. Despite these obligations, European Union uses any failure to legitimate its hard policy stance towards Turkey's membership instead of taking precautions.

Article 9 stipulates the non-discrimination regarding Turkey-EU relation. One of the striking examples of discrimination towards Turkey is the example of the EU's stance towards Croatia. Although it became a candidate in 2004 as well as Bulgaria, Romania whose accession took place in 2007 are enlisted in Annex II of the Council Decision Regulation 539/2001 which entered in to effect in 2001. However Turkey an associate of EU since 1963 and candidate since 1999 is in Annex I. Croatian citizens are also allowed to cross the border without a visa application. In this respect, even though Croatia is not an EU member, the EU honours Croatia's bilateral agreement with member states. Besides, it is respected by EU to Croatia's agreements with the third countries as per to the stand still principle although he is not a member of EU. However, in Turkey's case, although there is an agreement concluded directly by the Community itself, the Union hindered Turkish citizens' rights guaranteed under the Association Agreement which is an unfair application.

Also accordingly, while Cyprus problem has been linked to the accession of Turkey to the EU, Croatia's continuing border problems with Slovenia and the returnee problems with the Serbia and Montenegro did not constitute problem and Commission explicitly stated its positive opinion for Croatia. inner-contradiction with the assumed principles of EU is clearly being pointed out here.

In European Commission the issue of visa facilitation is brought up as a way to improve the current situation in return for signing a readmission agreement with the Community. However Turkey has resumed negotiations for a readmission agreement since the signature of a readmission agreement which envisages to return all illegal Turkish migrants residing in the EU and all those irregular migrants who have transited through Turkey is likely to bring a significant financial and administrative burden onto Turkey.

Articles 12, 13 and 14 of the Association Agreement explain and secure the freedom of movement between parties. Also Preamble of Ankara Agreement and its resemblance to the preamble of Rome Treaty as well as sharing the same cornerstone and preamble with Greece-EEC Agreement. *However the progress of Greece to full membership is in contrast to the lack of progress in respect of Turkish membership*. There are two main common objectives between Rome Treaty and Ankara Agreement namely; *common market and closer unification which shall be achieved by exercising the freedom of movement, common policies and legislation for*

fundamental matters. The pertinency of the preamble of Ankara Agreement is further exemplified by European Court of Justice to the similar paragraph of Rome Treaty has been concluded in the case of C-92/92 Collins. Moreover, the goal of EU is freedom from visa requirement for citizens of European Union so it has started negotiations with 3rd parties about visa application abolishment. But what about the principle of mutuality considering Turkey? For Mexico and New Zealand the mutuality has been achieved already.

Furthermore regarding the Additional Protocol Article 41/1 as well as Article 53 of Treaty establishing the Community; *Standstill clause forbids a party from changing conditions to the detriment of the other party from how they stand at the time of entry into force of the Agreement. At the time of entry, signatory parties were not required visas for entry. However from 1980 beginning with Germany they began to implement visa requirement to Turkish citizens. Not surprisingly Neither Council nor Commission did nothing about it*.

It is no secret that immigration policies of many EU member states have become stricter in the early 1980s and that visa requirements were introduced where they did not exist previously. However, the judgement of *Savaş* does not only have implications for the national immigration policies and measures of member states, but also for measures introduced at EU level that constitute a new obstacle or a new restriction for Turkish nationals wishing to exercise freedom of establishment or the freedom to provide services in member state of the Union. One example of such measure is Council Regulation (EC) No. 539/2001 which lists Turkey as one of the countries whose nationals need to obtain a visa when crossing the EU external borders. Since the Schengen acquis and this Regulation in particular were introduced after 1 January 1973 the date when the Additional Protocol entered into force via-a-vis the European Economic Community, these measures will also fall under the prohibition of the standstill clause.

Finally it would be of utmost important as well to consider the Common Council Decision NO. 1/95 which as a result of it the Customs Union was effectuated from 1 January 1996 in which the significance of Ankara Agreement was reaffirmed. Its the most advanced type of relationship that the Union has in the area of free movement of goods with a third country. After Customs Union Decision of 1/95 the visa application caused Turkish businessmen not to be able to have the right of free movement and as a result their goods wont be circulated freely as well. There is a crystal clear violation of the principle of Equal Footing which had been accepted reciprocally by the contracting parties under the Association Council Decision No 3/80. In such an atmosphere that there is no fair competition under the light of Article 85 of Treaty establishing the Community then there will not be mutuality in the rights of contracting parties. In brief, visa application simply undermines the ideologies of common market and fair competition as being two of the basic tenets of European Union objectives.

Under Article 310 EC Community may conclude bilateral agreements with third

party states establishing an association involving reciprocal rights and obligations, common actions and special procedure. These international agreements would form an integral part of the *acquis communitaire*. Regarding Turkey obviously this agreement is rather unilateral and one-sided and reciprocity has totally lost its meaning. As per the principle of "*pacta sunt servanda*", in a contractual arrangement obligations and rights are reciprocal and each party has to fulfil its obligations.

Relevantly under the light of case law the followings are of much importance to be considered;

In Commission v. Germany (C-61/94) it was held that Commission has a role in ensuring compliance with Community agreements as an obligation. The case concerns an action for non-compliance with international agreement. This case forms a basis for future decisions of court on interpretation and enforcement of agreements. Based on Article 300(7) EC and cases such as *Haegeman*, Belli *Filli (C–286/02)* Court of Justice held that such agreements are binding on community institutions and member states prevailing over secondary legislation.

In *Sürül* v. *Bundesanstalt Für Arbeit (1999) Case C–262/96* court stipulated that "This court has consistently held that a provision in an agreement concluded by the community with non-member countries must be regarded as being directly applicable having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject in its implementation or effects to the adoption of any subsequent measure". It has also been reiterated in *Demirel v. Stadt Schwabisch Gmünd (1987) C–12/86*. With this decision Ankara Agreement and Additional Protocol are registered as an integral part of Acquis Communitaire.

Additionally in the case of Soysal, court by referring to an earlier judgment as precedent where it had already ruled that international agreements concluded by the Community have primacy over provisions of secondary community legislation meaning regulations and directives, which in practice means that the provisions of the latter must be interpreted in as far as possible in a manner consistent with the former. Therefore the primacy of international agreements would imply an obligation on the part of the Union to adjust the secondary legislation so as to make it compatible with its international obligations. As long as such amendments have not been made the relevant provisions of secondary law have to be set aside, otherwise it will be grossly against the deeply rooted principle of EU law which is hierarchy of norms.

In case of *Spain v. European Commission Case (T–219/04) para 66* of it stated it must be recalled that in accordance with the principle of the hierarchy of norms an implementing regulation may not derogate from the rules contained in the Act to which it gives effect which is also confirmed and reiterated in *Case 38/70 Deutsche Tradax [1971] ECR 145, para 10, Spain v. Commission, para. 61 & para 20, Case T–64792 Chavane de Dalmasy and Others v. Commission [1994] ECR II–723, para 52*

Some Opinions of various Advocate Generals would be well-fitted to be mentioned;

C-413/06 Bertelsmann AG and Sony Corporation of America v. Impala para.100 the Opinion of Advocate General Kokot 13th Dec. 2007; regarding the principle of hierarchy of norms the provisions of secondary law cannot restrict the scope of primary law.

C-582/08 EU Commission v. UK & Northen Ireland the opinion of Advocate General Jaaskinen 20th May 2010; that the view that any step should be consistent with case law according to which any provision is to be interpreted in the light of higher norms and the interpretation that is compatible with those higher legal norms is to be preferred.

It would be well-fitted to reiterate the fact that as a result of the unlawful implementation of visa requirements for Turkish nationals, Republic of Turkey has been suffering significant losses on the daily basis which is ongoing. Under the Article 235 EC Turkey should have the absolute right to ask for the awarding of the damages. Considering the fact that the monetary damages has been continuing and has never stopped then the issue of time lapse for such a damage shouldn't be a subject matter as it was also concluded in the case of *Yedaş v. EU Commission & Council*. Therefore the time lapse of one year for the cancellation of regulations can not be acceptable for this matter.

Besides, when examining the pertinent section of the Rome Treaty, to form the EEC in the means of an economical unification, the creation of the Common Market is one of the main goals. To achieve the stated aim, firstly the conditions of trade and manufacture within the territory of the Community has to be transformed. Second, since the Rome Treaty also considers EEC as a contribution towards the functional construction of a political Europe and a step towards the closer unification of Europe politically, it is important to conclude mutual international agreements (such as the Ankara Agreement). Thus, in the pertinent section it is admitted that the Common Market and the EEC are accepted to have the same structure as they both serve for the ultimate aim of having a unified Europe of economy and politics. Therefore, the relevant part of the cited Council Regulation regarding the EU maintaining restrictions to the freedom of establishment and freedom to provide services by employing visa requirements affecting Turkish nationals is contrary to the Foundation Treaties itself and therefore invalid. Accordingly, there can be no time limit for a valid submission on the issue since it is rooted in the Foundation Treaties itself.

In Soysal ruling it was expressly stated that a visa requirement as such constitutes a new restriction and if the member state in question did not require such a visa at the time of the entry into force of the Additional Protocol of 23 November 1970 then Turkish nationals travelling to that member state do not require a visa. The reference date for each member state is the time of the entry into force with regard to that member state of the Additional Protocol. For instance, for Germany in the

Soysal case this date is 1 January 1973, for Spain 1986 and for Romania 2007. In other words the accession date to the Union.

In the case of Soysal, the ECJ said that this decision and ruling constitutes a reference decision for other EU member states.

European Court of Justice for the first time in the case of Savaş confirmed that Article 41 of Additional Protocol has direct effect and therefore directly applicable since it provides clearly, precisely and unconditionally an unequivocal standstill clause that envisages certain obligations on contracting parties not to act.

In the case of *Sevince* ECJ stipulated that decisions adopted by Association Council can be directly effective in the Community if they comply with the same requirements as apply to Association Agreement.

In the case of *Costa v. Enel Case 6/64 [1964]ECR* court held that Art. 53 of Treaty establishing the Community is legally complete and capable of producing direct effects on the relations between member states and individuals. The Art is about prohibiting member states from introducing new restrictions on the rights of the nationals of other member states (a duty not to act).

Furthermore as well as relevant to be stipulated within this text; concerning the article published by Mr. Metin Can in Sabah newspaper dated 20.01.2011, basically not only the European Union acts unlawfully by applying visa requirements for Turkish Nationals, but also the mere fact of earning large amounts of income by such unlawful application, is an issue of utmost weight and significance which should be considered seriously by the European Union Commission under the light of their terms of reference & consequently be declared as invalid and lacking any legal ground. Otherwise, the perennial paid amounts of money alongside with its interest would be demanded from European Union Commision.

Under the mentioned legal instruments and the most importantly the long-lived principle of hierardchy of norms Turkey should not simply be deprived of its already acquired certain rights preventing its nationals from using their absolute rights arising from primary legislation leading to a gross violation of EU law. Schengen Regulation is obviously against the so-called principle and should be rendered null and void partially regarding Turkey, unless Turkey is removed from Annex I of the contested regulation & be included instead in Annex II thereto, since it contradicts with the integral part of Community law forming the Acquis Communitaire. Considering the terms of reference of the European Commission as mentioned above as well; since its primarily the duty of the Commission to take this matter seriously and put an end to the longlasting unlawfullness, under the light of the stipulated legal grounds the removal of Turkey from Annex I and being placed in Annex II alonside with the countries not requiring the visa application within the context of Sechngen Agreement as well as the retrieving of the unlawfully acquired ocnsiderable amounts of money from Turkey is to be highly demanded. The constructive response of the EU Commission accordingly, both concerning the European Union law and Human Rights would be of utmost significance.