EU Countries and Visa Exemption for Turkish Nationals*

■ by *Hamdi PINAR***

The Turkish Ministry of Foreign Affairs has commented on the judgement of the European Court of Justice that *"it does not enable nationals of the Turkish Republic to travel to the EU countries without a visa and to freely move among the member countries of the Union."* However, such comment is inappropriate …

The partnership between Turkey and the European Union, which commenced with the Association Agreement signed in 1963, has been adding a new dimension with each and every new ruling of the Court of Justice of the European Communities (ECJ). The latest one of these rulings is the *'Tüm and Darı'* decision that was delivered on the 20th of September, 2007. Regarding these discussions, the Turkish Foreign Ministry, in its announcement on 29 September, unlike the media frenzy, took a position on the judgement that *'it does not enable nationals of the Turkish Republic to travel to EU countries without a visa and to freely move among the member countries of the Union."*

Improvement on the rulings

In retrospect, the ECJ, from its first ruling in 1987 in the *"Demirel"* case, together with the last one, which was delivered in 2007, has heard and adjudicated thirty seven (37) cases related to Turkish nationals.

After *'Demirel,'* which was the first ruling of the ECJ in 1987, it was acknowledged that the provisions of the Additional Protocol could have direct effects. With the *'Abatay'* judgement of October 2003, the ECJ settled some doubts in favor of Turkish nationals by widely interpreting Article 41 of Additional Protocol and Article 13 of the decision of the Association Council, No. 1/80.

With the *'Tum and Dari'* decision, dated 27 September 2007, the

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ECJ delivered a judgement which runs parallel to the aforementioned decisions. Following the *'Savas'* and *'Abatay'* cases, the novelty of such a decision is that it became crystal clear that a member country has the authority over the issuance of a visa for the first entry.

Freedom of settlement and free movement of services

One can say that there is a freedom of settlement under circumstances where a commercial venture can been started by a commercial entity or a professional activity can been performed by a national of a member state on equal terms with the nationals or commercial entities of the state to which he/she has relocated.

In one of its judgements, the ECJ stated that the freedom of settlement would also include the performance of a profession, establishment and management of commercial entities, formation of a subsidiary or agent company and a branch.

Free movement of services completes the concept of free movement and settlement of persons (workers).

Concerning the free movement of workers, labor relations are there between worker and employer, whereas in case of free movement of services, the service is provided by the provider independently.

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As for the free movement of services, the service itself freely circulates abroad/overseas in a temporary fashion, whereas the service providers are absorbed into the economies of the relocated state within the context of freedom of settlement.

Article 50 of the Treaty establishing the European Community (ECC) points out four types of services: activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions.

Main services, touched upon in the ECJ judgements, are as follows: television broadcasting, legal counselling, insurance, negotiable instruments services, recruitment services, legal consultancy, construction, tourist guidance, games, advertisement, private security services, domestic services, travels for touristic, medical treatment or educational purposes or business travelling, etc.

Analyzing the subject from the perspective of the EU and Turkey

The ECJ's *'Savaş'* judgement, dated 11 May 2000, primarily concerns the fields of freedom of settlement and free movement of services between the EU and Turkey. On 22 December 1984, the Savaş couple went to the United Kingdom on a one-month tourist visa. The couple was later involved in different commercial activities without the necessary permits. In 1994, the authorities decided to deport the couple since, according to English law, an alien can obtain permanent

residence permit provided that alien has stayed in the country for ten (10) consecutive years on a legal basis or fourteen (14) consecutive years on an illegal basis.

Having been seised of the matter, the ECJ set some significant ground rules for the relationship between the EU and Turkey in terms of free movement of services and freedom of settlement. **For the first time ever, it has been openly acknowledged that Article 41 of Additional Protocol, signed between the EU and Turkey and coming into force on 1 January 1973, has direct effect.** According to the aforesaid Article, both sides shall not bring new restrictions on the freedom of settlement and free movement of services.

As a result of this, member countries, with regards to freedom of settlement and free movement of services, shall not introduce or apply national measures (for Turkish nationals) that are more stringent and restrictive than those which were applicable prior to the date on which Additional Protocol came into force; therefore the national measures that are more favorable shall be applicable for Turkish nationals. (the so-called *"Stillhalteklausel/Standstill clause"*).

***"Tüm and Darı"* Judgement**

With its judgement on 20 September 2007, the ECJ adopted a more favorable approach of vital importance, in addition to the ground rules that were set in *"Savaş"* judgement. The case revolves around two Turkish nationals, both entering into United Kingdom and seeking refuge -- Mr. Veli Tüm, from Germany in 2001 and Mr. Mehmet Darı from France in 1998.

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Subsequent to long court battles and unsuccessfully arguments before English courts, these two Turkish nationals invoked the application of Article 41 of the Additional Protocol, whereupon, the British House of Lords, as the highest court of appeals, turned to the ECJ for a preliminary ruling. After the *'Savaş'* judgement, there was only one possible line of argument left for the British government to hold onto – the British government, by invoking ECJ case law, argued that regardless of the actual reason/purpose, the alien's first entrance into the country is entirely at the country's discretion. In other words, a Turkish national, who illegally entered into United Kingdom (without a duly issued visa) cannot invoke application of Article 41 of the Additional Protocol at all.

Having rejected this line of argument, the ECJ shed a clear and definitive light on the matter: in accordance with Article 41/1, application of the more favourable conditions should also be taken account for the first entry *(Stillhalteklausel/Standstill clause)*.

To put it differently, if a member country did not used to require visas for Turkish nationals at the time the Additional Protocol came into effect, but did so later on, that particular member country can no

longer apply such stringent and restrictive rules to Turkish nationals regarding their freedom of settlement and free movement of services.

It is therefore not only necessary that each and every member country should be taken to account individually, in the light of ECJ's *'Savaş'* and *'Tüm and Darı'* judgements, but also required to compare their legislation prior to, and subsequent to, 1 January 1973, when the Additional Protocol came into force, in order to ascertain whether they have introduced more restrictive measures into their national legal order.

The Additional Protocol was signed by Germany, France, Belgium, Italy, the Netherlands and Luxembourg on 23 November 1970; Denmark, United Kingdom and Ireland in 1973; Greece in 1981; Portugal and Spain in 1986; and Finland, Austria and Sweden in 1995 also signed when they acceded to the Union. For the big bang enlargement, the accession date of the Eastern European countries should be taken into account as they implement their national immigration policies.