Neutral Citation Number: [2020] EWCA Civ 553

Case No: C9/2019/0993

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE DINGEMANS
[2019] EWHC 3649 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2020

Before:

LORD JUSTICE FLAUX
LORD JUSTICE NEWEY
and
LADY JUSTICE ROSE

- -

Between:

THE QUEEN (ON THE APPLICATION OF ALLIANCE OF TURKISH BUSINESS PEOPLE LIMITED)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sarah Ford QC and Emma Daykin (instructed by **Redstone Solicitors**) for the **Appellant**
Sir James Eadie QC and David Mitchell (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 26 March 2020

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Covid-19 Protocol:
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Approved Judgment

Lord Justice Flaux:

Introduction

1. This appeal and cross appeal, with the permission of Underhill LJ and Singh LJ respectively, concern the appellant's challenge to changes made by the respondent from 6 July 2018 to the Immigration Rules and guidance affecting the right of Turkish self-employed businesspeople and their dependants to obtain indefinite leave to remain ("ILR") in the United Kingdom.

Relevant Factual background

2. On accession to the European Economic Community on 1 January 1973, the United Kingdom became bound by the Agreement establishing an Association between the European Economic Community and Turkey signed at Ankara on 1 September 1963 (the "ECAA" or "Ankara Agreement"). Article 41(1) of the Additional Protocol to the Ankara Agreement (the so-called "standstill clause") provides that:

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

3. As confirmed by the Court of Justice of the European Union in *R v Secretary of State for the Home Department ex parte Savas* [2000] ECR 1-2927, the standstill clause precludes any member state from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of the Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the member state concerned.

4. As a consequence, Turkish nationals exercising their rights under the Ankara Agreement for the purposes of setting up a business in the United Kingdom were considered by reference to the Immigration Rules which were in force in 1973. Specifically, the requirements for settlement of Turkish businesspeople were those set out in the Statement of Immigration Rules for Control after Entry dated 23 October 1972 (HC510), paragraph 28 of which, so far as material, provided: "A person who is admitted in the first instance and who has remained here for 4 years in approved employment or as a businessman or a self-employed person or a person of independent means, may have the time limit on his stay removed unless there are grounds for maintaining it". The rules extended the same benefits for dependants by paragraph 41.

5. The Home Office issued Guidance from time to time in relation to applications under the Ankara Agreement, most recently before the changes which are the subject of the claim, on 15 October 2015. The judge summarised the relevant sections of this at [21]-[22] of the judgment:

> "21… [This] stated on the front page "this guidance is based on the business provisions in force in 1973". On page 2 of 117 it stated "Turkish nationals who have completed at least four years lawfully in the UK as a businessperson are entitled to

> apply for indefinite leave to remain to settle in the UK." On page 3 of 117 next to the question "How long is leave to remain normally granted for?", the statement was made "applicants may be granted indefinite leave to remain on completion of 4 years in the category …". Next to the question "Are dependants allowed?" the answer was "Yes …". At the bottom of the page going onto page 4 of 117 the question was "Does this category lead to settlement (indefinite leave to remain)" and the answer given was "yes". On page 6 of 117 it was stated "Turkish nationals intending to come to the UK to establish in business generally have the right to have their application considered against the businessperson requirements in force in 1973. This date reflects when the UK became a signatory of the agreement with Turkey. Since then, Turkish ECAA applications have to be assessed against the Immigration Rules in force at that date. This `standstill clause' means applications for entry in this category are judged against HC509, while applications for leave to remain are decided by HC510 …".
>
> 22. Page 13 of 117 dealt with eligibility for leave to remain. This set out the 4 year scheme. Page 60 of 117 set out how paragraph 28 of the 1972 Control after Entry Rules was to be applied. Page 63 of 117 set out how to consider applications from dependant family members. There was an explanation of the background to the Ankara Agreement on page 114 of 117. Having rehearsed the background and the terms of the standstill clause it was stated "in respect of Turkish nationals seeking to enter or reside in the UK to establish themselves in business or provide a service, the UK must apply the domestic business provisions as they were within the Immigration Rules in force in 1973. These are HC509 (on entry rules) and HC510 (after entry rules). The Immigration Rules as they were in 1973 are far less stringent than the corresponding requirements in the current rules and must be applied in the context of the objectives of the ECAA".”

6. There are examples in the material before the Court of letters sent by the Home Office to Turkish businesspeople who had entered the UK and applied for leave to remain under this scheme. The terms of the letters were essentially identical:

> “you have applied for leave to remain in the United Kingdom (UK) as a business person under HC510, the Immigration Rules in force in 1973, by virtue of the terms of the European Community Turkey Association Agreement. I am writing to confirm that you have been granted 3 years leave to remain in the UK as a self-employed person under these provisions. One month before the expiry of your existing leave on 5th June 2018, you will be eligible to apply for indefinite leave to remain. You will need to complete an application form. To use this, go to the Home Office website … On the website you will

> find further information about the Turkish European Community Association Agreement …"

7. It is clear from the Guidance and letters that the Home Office understood the standstill clause to mean that Turkish businesspeople who had applied for leave to remain and their dependants would have the same rights to obtain settlement by ILR as those businesspeople did under the Immigration Rules in force as at 1 January 1973. However, that understanding was demonstrated to be incorrect by two cases decided in 2017. On 21 February 2017, in *BA (Turkey) v Advocate General for Scotland* [2017] CSOH 27; [2017] SLT 1061, Lord Armstrong in the Outer House of the Court of Session concluded at [50] in relation to the standstill clause:

> "I am persuaded that settlement is not a corollary of the freedom of establishment, but that, rather, the nature of the residence which is a corollary of that freedom is that necessary to render the freedom effective in the sense of allowing the setting up of a business and thereafter the maintaining of it. I do not accept that longer-term residence, of the nature of settlement or indefinite leave to remain, is necessary for that purpose. All that is necessary is residence of a character which subsists so long as the freedom of establishment is exercised, and is sufficient to allow the pursuit of that economic goal."

8. Only weeks later, on 8 March 2017, the decision of McCloskey J, President of the Upper Tribunal (Immigration and Asylum Chamber), was promulgated in *R (Aydogdu) v Secretary of State for the Home Department* [2017] UKUT 167 (IAC). At [34], he held that a refusal to grant ILR to the spouse of a Turkish businessperson did not extinguish or frustrate his ability to exercise his freedom to establish a business in the UK:

> "The grant of limited leave to enter and remain to the family members of a Turkish national exercising rights will, in all cases bar the most exceptional, suffice to ensure the efficacious exercise and enjoyment of the economic right in play. The higher, optimum status of settlement is not necessary for this purpose. In the language of the governing jurisprudence, the grant of settlement status is neither a prerequisite to nor a corollary of the exercise of the primary rights engaged. There is *no* evidence warranting the assessment that only settlement will suffice to ensure that the rights in question can be efficaciously exercised. Nor is there any basis upon which judicial notice of this detriment is justifiable."

9. The reasoning in both those cases was influenced by the earlier decision of this Court in *R (Buer) v Secretary of State for Home Department* [2014] EWCA Civ 1109, which concerned an equivalent provision to the Article 41(1) standstill clause, in Article 13 of Association Council Decision 1/80, although that decision had not led to any reconsideration by the respondent of whether the 1973 Immigration Rules still applied in relation to ILR for Turkish businesspeople within the scheme. However, following the decisions in *BA (Turkey)* and *Aydogdu*, the respondent paused the processing of ECAA applications for ILR between March and July 2017 before

resuming the processing and grant of such applications under the terms of the 1973 Rules and the 2015 Guidance.

10. On 16 March 2018, the respondent changed the policy. As appears from the Guidance issued on that day, anyone who had applied on or before 15 March 2018 who was eligible for ILR was dealt with under the old policy, whereas after that date, anyone applying for ILR would be granted 3 years leave to remain. Although that was renewable, in the sense that, at the end of the 3 year period, a further 3 years leave to remain would have been granted, at that stage at least, ILR was not granted.

11. However, on 15 June 2018 a Statement of Changes in Immigration Rules was published and laid before Parliament. The changes came into force on 6 July 2018. Their effect was: (i) 5 years residence rather than 4 was required before an application for ILR could be made; (ii) an applicant for ILR had to demonstrate sufficient knowledge of the English language and of life in the UK and (iii) the waiver of fees on an application for ILR by a Turkish businessperson was removed, so that a fee of £2,389 per applicant was payable. Revised Guidance was published on 6 July 2018 which set out the new policy.

The judgment below

12. As the judge identified at [5] of his judgment, there are two issues in the case: (1) whether there was a clear and unambiguous representation on which it was reasonable for the Turkish business people to rely; (2) if so, whether the immediate change of policy on 16 March 2018 amounted to such unfairness as to be an abuse of power, in the sense that frustrating the substantive legitimate expectation could not be objectively justified as a proportionate response, having regard to a legitimate aim pursued by the Secretary of State in the public interest.

13. At [9] the judge summarised the evidence adduced by the appellant from various individuals affected by the change of policy. As he said later in the judgment at [46], although the evidence showed that the effects of the change in policy varied, plans had been affected and expectations for businesses, individuals and their dependants had been frustrated. That finding of detrimental reliance was not challenged on appeal.

14. The judge noted at [11] that on the basis of figures provided which it was agreed he should use in the judgment, there were about 6,000 Turkish businesspeople and their dependants who were on the path to ILR or had qualified for ILR under the old policy before it was changed on 16 March 2018.

15. The judge then set out the history of the Ankara Agreement and its interpretation, the Immigration Rules and Guidance and the change in policy which I have summarised above. At [29] he turned to the relevant legal principles relating to legitimate expectation, stating the relevant principle accurately at [32]:

> "In order to rely on the doctrine of legitimate expectation there must be a promise or representation, which representation may arise from habitual practice, which is clear and unambiguous and on which it is reasonable for the applicant to rely. This may require a detailed examination of the precise terms of the

> promise or representation made, the circumstances in which the promise or representation was made, and the nature of the statutory or other discretion to be exercised by the policy maker."

16. At [33] the judge noted that part of the factual matrix as to whether it was reasonable for the appellant to have relied on any promise or representation was that the respondent may change immigration policy and for that reason, generally, the publication of a policy is only a statement of the policy that applies at the time. This is so even when the policy speaks to the future, for example by setting out a route by which a particular status may be acquired. The judge cited in that context *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 and *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230. He noted that in the latter case, the applicant doctor had made an application for leave to remain which was rejected because the previous policy had changed before her application was determined. It was held that she had no "vested right". As the judge also noted, it was not argued in that case that she could rely upon the doctrine of legitimate expectation.

17. At [34] the judge held that, just because the respondent could change his policy, it was not correct that it was not possible to find a promise or representation as to the future application of the policy, because whether there was a promise or representation was ascertained by looking at how, on a fair reading, the representation would reasonably have been understood by those to whom it was made. The judge gave the example of a statement by the respondent that in the event of a future change of policy, he will continue to apply the previous policy to the applicant, in which case a clear and unambiguous representation will have been made. *R (HSMP Forum Limited) v Secretary of State for the Home Department* [2008] EWHC 664 (Admin) was an example of such a case.

18. At [35] to [38] the judge said that, once a clear and unambiguous representation on which it was reasonable to rely has been identified, legitimate expectations have been analysed in three categories, although these were not hermetically sealed: (i) if there is such a promise or representation, the public authority will at least be required to bear in mind the previous policy and the promise or representation, giving it such weight as it thinks right before deciding to change policy; (ii) the promise or representation may give rise to a legitimate expectation of a procedural advantage to those to whom it has been made, for example consultation or a right to be heard; (iii) the promise or representation may provide a substantive benefit where to frustrate the expectation "is so unfair that to take a new and different course will amount to an abuse of power", it being illogical or immoral or both to act with such conspicuous unfairness. The judge said that this third category was the relevant one in this case.

19. At [39] he said that what fairness requires is always fact specific, continuing:

> "The question will be whether the frustration of the substantive legitimate expectation can be objectively justified as a proportionate response having regard to a legitimate aim pursued by the public body in the public interest, see paragraph 68 of *Nadarajah.* The Court is the judge of what is unfair or abusive because this is not a back-stop review of the primary

> decision maker's position, see *R (Bhatt Murphy)* at paragraph 28."

20. At [40] he noted that an abuse of power was more likely to be found where the promise or representation was made to one person or a few people, giving it the character of a contract. The broader the class, the more likely change will be justifiable, citing Laws LJ in *R v Education Secretary Ex parte Begbie* [2000] 1 WLR 1115 at 1130G-1131B. He went on to say that, if a mistake has been made, a Court will be slow to fix the public authority permanently with the consequences of its mistake, but a mistaken representation on which there had been reliance might still give rise to an abuse of power, referring to 1127C of *Ex parte Begbie*.

21. The judge then held at [41] that what applicants were told in the Guidance which he had analysed at [21] and [22] (quoted at [5] above) gave rise to a clear and unequivocal representation that future applications from those applicants and their dependants for ILR would be decided by HC510 of the Rules in 1973. At [42] he decided that it was reasonable for the applicants to rely on that representation because, although applicants for ILR are generally to be taken to know immigration policy can change, these applicants were expressly told that the UK had no choice in the matter and that the policy as at 1 January 1973 would prevail.

22. The judge rejected the proposition that the applicants should be taken to understand that, if the interpretation of the Ankara Agreement changed, the policy might change, because he did not accept that it would be in the reasonable expectation of the applicants that the interpretation would change after 45 years. The judge said the change in interpretation apparently came as something of a surprise to the Home Office.

23. At [44] he noted that neither party placed particular reliance on the letters, which he agreed with because the clearest statement and representation was in the Guidance and the letters were consistent with the Guidance.

24. The judge then turned to the question whether frustrating the substantive legitimate expectation could be objectively justified as a proportionate response having regard to a legitimate aim pursued by the respondent in the public interest. As I have already said, at [46] the judge recognised that there had been detrimental reliance.

25. He said at [47]-[48] that, once there was proper appreciation following the decisions in *BA (Turkey)* and *R (Aydogdu)*, that the Ankara Agreement protected establishment and not settlement, the Home Office was entitled to respond to the correct understanding of the interpretation of the standstill clause and attempt to introduce some uniformity with nationals of other states. It was common ground that the aims behind the change of policy, the balance of the need to manage migration whilst not disadvantaging Turkish nationals who had envisaged being able to settle under the old policy, and to align the policy for Turkish businesspeople with equivalent routes under the points-based system were legitimate aims. It followed that the critical issue was whether the changes to the policy could be justified as a proportionate response in the public interest.

26. The judge's conclusion at [49] was that they could be so justified, because the Home Office was entitled to attempt to introduce some uniformity with nationals of other

states and because changes to the requirements had been restricted so as to reduce the impact on applicants for ILR. The judge said:

> "The requirement to take an English language test might affect some applicants even though the evidence did not illustrate those particular problems, but fluency in the English language will assist integration in the UK. The cost of making the application for ILR will be a burden for all and very difficult for some, but it is a payment towards the operation of the system which will benefit the applicants. Finally the increase of 1 year before ILR can be obtained is important, but the extra time is not excessive when compared to some other routes of settlements, even for those who had already satisfied the requirements to obtain ILR but had not yet applied for ILR before the policy changed. Different considerations might have applied if more extensive and more onerous requirements had been imposed on the applicants by the change of policy."

The grounds of appeal and cross appeal

27. The grounds of appeal are as follows:

(1) The judge erred in law in applying the test of proportionality and concluding that it was justifiable to frustrate what he had found was a substantive legitimate expectation as a proportionate response having regard to the respondent's aim to achieve a measure of uniformity with the nationals of other states;

(2) The judge's findings that there had been an unambiguous promise, that there had been detrimental reliance and that the promise had been made to a specific group should have led him to conclude that the respondent's aim to achieve a measure of uniformity did not justify the imposition of the detrimental consequences of the policy changes on those already within the route to settlement.

28. The ground of cross-appeal raised by the Respondent's Notice is that it was an error of law for the judge to find that there was a legitimate expectation that immigration policy will not be changed.

The cross appeal: submissions of the parties

29. Since the question whether the judge was right to conclude that the appellant had a substantive legitimate expectation is logically prior to the issues raised by the grounds of appeal, it is appropriate to consider the cross-appeal first.

30. It was common ground that, before a statement or representation can be relied upon as giving rise to a legitimate expectation, it must be "clear, unambiguous and devoid of relevant qualification": see *R. v. Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545 at 1569G-H per Bingham LJ; *R (Patel) v General Medical Council* [2013] EWCA Civ 327; [2013] 1 WLR 2801 at [40] per Lloyd-Jones LJ. As Lloyd-Jones LJ went on to say at [44]: "The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made."

31. On behalf of the respondent, Sir James Eadie QC submitted that in order for a promise or representation to be of that kind, it had to have a particular nature, to be a promise or representation that the present policy will continue in the circumstances which have arisen. This point was expressed by Laws LJ in *R (Bhatt-Murphy) v Independent Assessor* [2008] EWCA Civ 755 in these terms at [43]:

> "Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured."

32. Sir James Eadie QC submitted that this sort of promise, which had to be forward-looking, was extraordinarily difficult to establish in the context of government policy. The government was always entitled to reformulate policy, a point made by Laws LJ at [41] in *Bhatt-Murphy*. Before a promise could be relied upon as giving rise to a substantive legitimate expectation, it had to be what Laws LJ described in that case as "pressing and focused", by which he presumably meant directed at a particular person or group of people rather than generalised.

33. Sir James Eadie QC submitted that various cases, admittedly in the context of taxation, had demonstrated that it was extremely difficult to build a legitimate expectation on a wrong view of the law. He relied upon the *MFK Underwriting* case, where Bingham LJ sated the principle at 1569:

> "Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law…"

34. The same principle emerged from *R (Hely Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075; [2018] 1 WLR 1682 at [40] and [63] per Arden LJ. He submitted that those authorities showed that the key underlying feature was that a reasonable person would expect a policy to change if the law on which it was premised had been mistakenly appreciated by the public authority.

35. Sir James Eadie QC submitted that a legitimate expectation that the old policy would continue was not implicit in the previous 1973 Immigration Rules, which simply referred to the fact that someone who had remained here for 4 years as a businessman may have the time limit on his stay removed. This was no different from any other Immigration Rule in that it was susceptible to change. The House of Lords in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230 had been very clear about the nature of Immigration Rules and the fact that it was inherent that they can or may be changed, in the exercise of the prerogative power to control immigration. Section 3(2) of the Immigration Act 1971 gives the respondent an express power to change the Rules. As Lord Brown said at [35]:

> "The immigration rules are statements of administrative policy: an indication of how at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain".

To the same effect was Lord Neuberger at [59]:

> "The immigration rules would have been expected to be amended from time to time, as needs and perceptions change..."

Accordingly, Sir James Eadie QC submitted that the fact that the particular Rule had been in force for a long time did not matter, as its fundamental nature did not change.

36. He submitted that the Guidance and letters were merely premised on the Immigration Rules being in a particular state and thus essentially parasitic. The Guidance was giving assistance and information about a state of affairs under the existing Rules from time to time. It was not making a promise or representation that the Rules in question would never change. The difference between this case and *R (HSMP Forum Limited)* was that, unlike in that case, there was no promise as to the future.

37. On behalf of the appellant, Ms Sarah Ford QC submitted that at the time of the change of policy on 16 March 2018, there was a legitimate expectation on the part of those Turkish businesspeople already en route to settlement that they would be dealt with under the existing policy.

38. The applicable legal principles were essentially common ground, save in one respect. Ms Ford QC took issue with the suggestion on behalf of the respondent that it was extremely difficult to build a legitimate expectation on a wrong view of the law. She relied upon the decision of this Court in *Ex parte Begbie*. In that case, the alleged representation was in the so-called Teed letter which mistakenly misstated the policy of the Secretary of State; see 1127A. However, Laws LJ went on to make it clear at 1127C that the mere fact that the public authority had made a mistake would not prevent a legitimate expectation arising where a clear and unequivocal representation had been made.

39. Ms Ford QC submitted that neither of the tax cases relied upon by the respondent said anything to the contrary. In every case, the question was what would be reasonably understood by the statement or representation, looking at it in its context. Although the respondent relied upon *MFK Underwriting*, in the passage from the judgment of Bingham LJ immediately after that cited by Sir James Eadie QC, Bingham LJ went on to say: "No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them." This indicated that, in an appropriate case, the doctrine of legitimate expectation could apply to statements or representations by HMRC.

40. As for *Hely Hutchinson*, Ms Ford QC pointed out, by reference to [35] of Arden LJ's judgment, that it was a case in which it was accepted that particular guidance issued by HMRC gave rise to a legitimate expectation as to how certain losses would be treated, as she said, not a promising start for the respondent's argument. [45] of the judgment set out a general statement of principle:

> "I now turn to the situation where HMRC issues a policy or guidance but later comes to the view that its policy or guidance was wrong in law. Legitimate expectations are not unqualified: see, for example, *United Policyholders*, above. If HMRC finds that they need to resile from guidance, a taxpayer can only rely on the legitimate expectation that the guidance created where, having regard to the legitimate expectation, it would be so unfair as to amount to an abuse of power."

That was no support for the respondent's proposition that it was extremely difficult to have a legitimate expectation based on an error of law.

41. Ms Ford QC accepted that in principle the respondent was entitled to change his policy, but submitted that this could be defeated, so far as the applicants for ILR already in the system were concerned, by their legitimate expectation that their applications would be dealt with under the old policy. She accepted that what was required for a public authority to be held to previous policy was as set out by Laws LJ in *Bhatt-Murphy* at [43], which I cited at [31] above.

42. Ms Ford QC submitted that the present case had considerable similarities to *HSMP Forum* where legitimate expectation did defeat a change in policy. That case also involved a scheme with interlocking provisions and an assurance that once an applicant was within the scheme, he or she was entitled to be treated within it. She drew attention to the assurance that was given in the Guidance in that case as set out in [13] of the judgment of Sir George Newman:

> "It is important to note that once you have entered under the programme you are in a category that has an avenue to settlement. Those who have already entered under HSMP will be allowed to stay and apply for settlement after four years' qualifying residence regardless of revisions to HSMP."

43. Contrary to what was said in the respondent's skeleton argument, the Court in that case had not wrongly proceeded on the basis that the respondent could not change her immigration policy. The judge expressly recognised at [48]-[49] the respondent's discretionary power to make changes to immigration policy, but said that had to be weighed against the fact that there was an express assurance that those in the scheme would continue to be treated under it even if it were suspended or changed, which was a clear representation which gave rise to a legitimate expectation.

44. As Ms Ford QC pointed out, the respondent did not appeal that decision, but following the judgment, a policy document purporting to give effect to it was issued, which extended the qualification period even for those already in the scheme from 4 years to 5 years. That was subject to a further challenge by way of judicial review which was heard by Cox J: *R (HSMP Forum (UK) Limited) v Secretary of State for the Home Department (No. 2)* [2009] EWHC 711 (Admin). As appears from [67] of that judgment, one of the legitimate aims of this change was to achieve consistency with relevant EU provisions. Ms Ford QC pointed out that the judge was unpersuaded by this in relation to those already in the scheme, finding at [70] that there had been the clearest of representations to them that they would qualify for ILR after a period of continuous residence of 4 years. Cox J concluded that there had been detrimental

reliance by those in the scheme and concluded at [77] that, like Sir George Newman in the first case, she was

> "unable to identify a sufficient public interest which justifies a departure from the requirement of good administration and straight forward dealing with the public, or which outweighs the unfairness that the increase in the qualifying period visits upon those already admitted under the scheme".

45. Ms Ford QC contested the submission on behalf of the respondent that the *HSMP Forum* decisions, which preceded the decision of the House of Lords in *Odelola,* could not stand after that decision. Contrary to the suggestion in the respondent's skeleton argument, neither *HSMP Forum* judgment proceeded on the incorrect basis that the respondent could not change immigration policy. Furthermore, it was important to note that the appellant in *Odelola* had expressly accepted that she could not rely on the doctrine of legitimate expectation: see per Lord Brown at [29]. This was made even clearer by Buxton LJ in the Court of Appeal in that case, [2008] EWCA Civ 308; [2009] 1 WLR 126 at [2]:

> "The applicant asserts that the Secretary of State had no option in law other than to decide her case according to the immigration rules as they stood on the date of her application. She did not put that claim on the basis of any legitimate expectation…"

46. Ms Ford QC submitted that nothing in *Odelola* suggested that, in an appropriate case in relation to Immigration Rules, the doctrine of legitimate expectation could not apply. That much had been conceded by the respondent in *Granovski v Secretary of State for the Home Department* [2015] EWHC 1478 (Admin), another HSMP case, at [40]. The judge in that case, HHJ Coe QC, accepted that the *Odelola* principle did not apply in all immigration cases, saying at [69]:

> "The Defendant cannot rely on the principle in *Odelola*. It does not necessarily apply in all cases and where, as here, the Claimant has an extant application or a vested right or a legitimate expectation then it would not apply. In any event applying *Odelola* to an HSMP application would make a nonsense/nullity of the decisions in *HSMP 1* and *2*. The rule changes clearly do disadvantage the Claimant in respect of whom there is no evidence of any change in the nature and pattern of his work since his acceptance on the programme."

47. Ms Ford QC submitted that the Guidance in the present case contained a similar representation as in the *HSMP Forum* litigation that people who were already in the scheme would continue to be dealt with under the Immigration Rules in force in 1973, even if the Rules changed for the future.

The cross appeal: discussion

48. I agree with Ms Ford QC that there is nothing in *Odelola* which supports the argument that the doctrine of legitimate expectation cannot apply in an immigration

case because the nature of the Immigration Rules is such that they are no more than a statement of current policy which can always change. In an appropriate case, those already in a particular scheme, such as the HSMP scheme, may rely upon the doctrine of legitimate expectation. To that extent, I consider that the two *HSMP Forum* cases were correctly decided.

49. Equally, I do not consider that there is any force in the submission by Sir James Eadie QC that it is extremely difficult to build a legitimate expectation on a wrong view of the law. The authorities on which he relied all recognise in terms that, even where a statement or representation has been made by a public authority on a mistaken view as to what the law is, if the requirements of the doctrine of legitimate expectation are satisfied, it will apply and its application will not be rendered impossible or more difficult because the statement or representation was made on a mistaken view of the law. As in so many areas of public law, the applicable legal principle is stated with characteristic clarity by Laws LJ, who sadly died whilst this judgment was being written. In *R v Education Secretary ex parte Begbie* [2000] 1 WLR 1115 at 1127C, he said:

> "Where the court is satisfied that a mistake was made by the minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake. That is not to say that a promise made by mistake will never have legal consequences. It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it, for example where there has been detrimental reliance on the statement before it was corrected."

50. Nonetheless, as I have already said, it is common ground that before a statement or representation can be relied upon as giving rise to a legitimate expectation, it must be clear, unambiguous and devoid of relevant qualification and Ms Ford QC accepted that what was required was also a promise or representation that the present policy will continue. In the present case, there is nothing in the Immigration Rules in force in January 1973 which indicated that they would continue in force so far as Turkish businesspeople who were in the scheme are concerned. Indeed, by definition, those Rules have long been superseded.

51. Accordingly, if any representation or statement of the kind required to give rise to a legitimate expectation was made by the respondent it must be found in the Guidance. I do not accept that Sir James Eadie QC is necessarily right that the Guidance is merely parasitic on the Rules. It is possible for Guidance issued by the respondent to contain such a representation or statement, as is demonstrated by the assurance given in the Guidance in the *HSMP Forum* cases as quoted at [42] above.

52. The critical question is whether there was any such statement or representation that, so far as Turkish businesspeople who were already eligible under the scheme were concerned, they would continue to be treated in accordance with the Immigration Rules in force in 1973, even if the respondent's policy changed for the future. As appears from [41] of the judgment, the judge considered that the statement at page 6 of 117 of the Guidance was a statement that Turkish businesspeople already in the

scheme would continue to be treated in accordance with the Immigration Rules in force in 1973, even if the respondent's policy changed for the future. Ms Ford QC also particularly relied upon this passage in the Guidance as stating that the UK government has no choice and must apply the Rules in force in January 1973 and that this was a statement for the future as well as the present, at least so far as concerned those already in the scheme.

53. Although I have already quoted the relevant passage in the Guidance as set out in the judgment at [5] above, it is perhaps worth repeating it here:

> "Turkish nationals intending to come to the UK to establish in business generally have the right to have their application considered against the businessperson requirements in force in 1973. The 1973 date reflects when the UK became a signatory of the agreement with Turkey. Since then, Turkish ECAA applications have to be assessed against the Immigration Rules in force at that date. This `standstill clause' means applications for entry in this category are judged against HC509, while applications for leave to remain are decided by HC510 …"

The other passages in the Guidance and the letters on which Ms Ford relied do no more, as I see it, than repeat the same advice as in that passage.

54. Despite Ms Ford QC's eloquent submissions to the effect that this was a representation that, so far as people already eligible under the scheme are concerned, they would continue to be treated under the 1973 Rules even if the respondent's policy changed, I cannot see it as such. I agree with Sir James Eadie QC that this and the other passages in the Guidance were only giving advice as to the state of affairs as it existed at the time of the Guidance. Unlike the statement made in the Guidance in the *HSMP Forum* cases, no promise or representation was being made as to the future and, specifically, no promise was being made that, if the policy did change, those already in the scheme would continue to be treated under the 1973 Rules. In my judgment, that is the critical difference between the present case and the *HSMP Forum* cases. Nor do I consider that there is anything in the point that the application of the 1973 Immigration Rules under the scheme had remained unchanged for 45 years. As Sir James Eadie QC submitted, the fact that the Immigration Rule in question has been in force for a very long time does not change its fundamental nature or mean that, unlike any other Immigration Rule, it may not change if the government policy changes.

55. It follows that, in my judgment, there was no statement or representation capable of giving rise to a legitimate expectation and the judge was wrong in the conclusion he reached on this issue at [41] to [43] of the judgment. Accordingly, I would allow the cross-appeal. In those circumstances, the appeal must also fail, but since it was fully argued, I will consider it in the usual way.

The appeal: the parties' submissions

56. On behalf of the appellant, Ms Ford QC submitted that a substantive legitimate expectation can only be frustrated if it is proportionate to do so, relying on what Laws LJ said to that effect at [68] of *Nadarajah v Secretary of State for the Home*

Department [2005] EWCA Civ 1363. She noted that at [69] he had identified factors bearing on the issue of proportionality as including whether there was an unambiguous promise, whether there was detrimental reliance and whether the promise had been made to an individual or specific group. Where those factors were present, denial of the expectation was likely to be harder to justify as a proportionate measure.

57. She also submitted that consideration of what was proportionate should also involve consideration of the necessity of the changes of policy that were being made (relying on [54] of Lord Mance JSC's judgment in *Kennedy v Charity Commission* [2015] AC 455) and of what measures could be taken to assuage disappointed expectations, relying on [49] of the judgment of Schiemann LJ in *R (Bibi) v Newham LBC* [2002] 1 WLR 237.

58. Ms Ford QC submitted that unlawful frustration of a legitimate expectation could also arise not from the policy change itself but from the absence of transitional arrangements or prior warning. She relied upon what was said by Sedley LJ in *Bhatt Murphy* at [70] and a passage in the judgment of Lloyd-Jones LJ in *R (Patel) v General Medical Council* [2013] EWCA Civ 327; [2013] 1 WLR 2801 at [83], emphasising that there was no evidence of urgency necessitating an immediate change of policy and criticising the failure to consider what steps could be taken to mitigate the effect of the change of policy.

59. Ms Ford QC emphasised the findings made by the judge: (i) at [40]–[41] of the judgment that there was an unambiguous promise; (ii) at [8]-[9] of the judgment about the various matters which it was accepted amounted to detrimental reliance and (iii) at [11] of the judgment about the number of Turkish businesspeople adversely affected by the change in policy, about 6,000, so that, as she submitted, this was a promise made to a specific group. These were exactly the factors identified by Laws LJ at [69] of *Nadarajah* as making it harder to justify changes in policy as proportionate.

60. However, Ms Ford QC submitted that the judge had failed properly to address this issue of proportionality. He had only alluded to it briefly in one paragraph of the judgment, [49]. The conclusions he reached there, about the requirements of an English language test assisting in integration in the UK and the fee for an application being payment towards the operation of the system which would benefit all applicants, were not points made in the evidence for the respondent from Ms Brasnett of the Home Office. What emerged from that evidence was that the change in policy was motivated by the desire to modernise the route to settlement and make it consistent with other routes to settlement.

61. Ms Ford QC submitted that in [49] the judge had considered the impact of the changes to the scheme on applicants as a whole. He had simply failed to focus on the particular circumstances of the applicants already in the scheme who had the legitimate expectation of continuing to be eligible under the 1973 Rules, or to ask himself the critical question whether it was necessary, in order to achieve the aim of the respondent to make the changes of policy, that those changes should take immediate effect without some transitional provisions to protect those already in the scheme. If he had carried out the proportionality assessment correctly, he would have concluded that the change in policy could be given effect prospectively, so that those already inside the existing scheme would still receive its benefit, thereby alleviating

any detrimental reliance. There was simply no evidence that there was such a problem with the existing policy after the decisions in *BA (Turkey) and R (Aydogdu)* that the changes had to be introduced immediately and, in any event, it took the respondent a year from March 2017, when *R (Aydogdu)* was promulgated, to March 2018 when the first change in policy was introduced. This was not a case where there was some wide-ranging or macro-political policy necessitating the change: it affected a limited number of people.

62. On behalf of the respondent, Sir James Eadie QC submitted that the judge had been right to conclude that the change in policy was not so unfair for it to amount to an abuse of power to resile from the original policy. The judge had correctly stated at [38]-[39] of the judgment the legal principles and test as to when frustration of a legitimate expectation was so unfair as to amount to an abuse of power and it was then for the judge to evaluate the question of unfairness on the facts.

63. He submitted that there were rational policy reasons for making the changes, including the aim, after the decisions in *BA (Turkey)* and *R (Aydogdu)*, of aligning the policy for Turkish businesspeople with equivalent routes to settlement under the points-based system. The changes were limited: another year's residence to qualify for settlement and the introduction of an English language test and a fee requirement which were standardised requirements under the points-based system. There was a concern that Turkish businesspeople should not be treated more favourably than other migrants and, as Sir James Eadie QC put it, lurking in the shadows was an issue about discrimination.

64. So far as those who were already within the scheme before March 2018, but had not yet accrued the original four year residence requirement enabling them to make an application, the change introduced in March 2018 gave them a three year rolling residence entitlement which would enable them to continue to build up their overall entitlement until they reached the new five year residence requirement. It was not accepted that the changes caused any significant hardship or irredeemable prejudice. It was not unfair that the new policy also applied to those who were already within the scheme as how to align Turkish businesspeople with other migrants was a policy judgment for the respondent. This was a macro-political policy judgment: the 6,000 people said to have been affected was a significant number of people.

65. Overall, Sir James Eadie QC submitted that there was no error in the judge's evaluation of the issues of fairness and proportionality and that this Court should not interfere with his conclusion.

The appeal: discussion

66. In my judgment, the judge did correctly state the legal principles and test at [38]-[39] of his judgment and to that extent, there was no error of law. As I see it however, the problem with his analysis is how he then dealt with the issue of proportionality. I agree with Ms Ford QC that, at [49] of his judgment, the judge has only addressed whether the respondent had shown good reasons for the change of policy so far as the future is concerned. In relation to those who were already in the scheme, the judge has not considered at all whether there was any necessity for an immediate change of policy which affected them adversely, as opposed to a change for the future which affected only those yet to enter the scheme. He has not considered at all whether a

more proportionate approach by the respondent would have been to effect the change of policy only in relation to those who were not yet in the scheme and/or to introduce transitional provisions which preserved the original policy so far as concerned those who were already in the scheme. Nothing in the evidence put forward by the respondent suggests that, in either March or July 2018, it was necessary to make a change of policy which also affected those already in the scheme, nor has the respondent put forward any evidence suggesting that transitional provisions protecting those already in the scheme would have been impractical.

67. Where the judge has failed to deal at all with the position of the individuals already in the scheme in considering the issue of proportionality and fairness, then, contrary to Sir James Eadie QC's submission, I consider that Ms Ford QC is right that this Court is entitled to review and interfere with the judge's assessment, even though it involved an evaluation of facts: see [55]-[59] of the judgment of the Privy Council given by Lord Neuberger in *The United Policyholders Group v The Attorney-General of Trinidad and Tobago* [2016] UKPC 17; [2016] 1 WLR 3383.

Conclusion

68. Accordingly, if I had considered that the judge was correct in his conclusion as to whether there was legitimate expectation, I would have concluded that he had erred in his evaluation that it was justifiable to frustrate that legitimate expectation by making the immediate changes in policy and I would have allowed the appeal. However, since I have concluded that there was no statement or representation capable of giving rise to a legitimate expectation, so that the cross-appeal must be allowed, it necessarily follows that the appeal must be dismissed and the judge's judgment upheld, albeit on different grounds.

Lord Justice Newey

69. I agree.

Lady Justice Rose

70. I also agree.