**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Mehmood (legitimate expectation) [2014] UKUT 00469 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Bennett House, Stoke-on-Trent, on 15 July 2014** | **Determination Promulgated** …… |
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**Before**

**The Hon. Mr Justice McCloskey, President**

**Between**

**ANSAR MEHMOOD**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

**Appellant:** Mr A Hussain (of Counsel), instructed by Trent Centre for Human Rights.
**Respondent**: Mr McVeety, Senior Home Office Presenting Officer.

*The first question in every case concerning an alleged legitimate expectation is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification.*

**DETERMINATION AND REASONS**

**Introduction**

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*") whereby it was determined, on 05 November 2013, to refuse the application of the Appellant, a Pakistani national aged 40 years, for indefinite leave to remain in the United Kingdom in the capacity of Tier 2 Migrant. The ensuing appeal to the First-tier

Tribunal ("*the FtT*") was refused. The grant of permission to appeal to the Upper Tribunal is confined to a single issue, namely whether the impugned decision is unlawful as frustrating a substantive legitimate expectation generated in a written communication on behalf of the Secretary of State.

**Factual Matrix**

2. The factual matrix is uncontroversial. It centres on the Appellant's immigration history, which is as follows:

   (a) On 14 November 2006, having received a 4 year work permit Visa valid until 05 July 2010, the Appellant entered the United Kingdom.

   (b) On 01 July 2010, he applied for further leave to remain as a Tier 2 Migrant.

   (c) On 02 August 2010, the latter application was refused and the Appellant did not exercise his right of appeal.

   (d) On 30 September 2010, he applied for further leave to remain as a Tier 2 Migrant. He withdrew this application on 08 November 2010.

   (e) On 15 July 2011, he applied for further leave to remain as a Tier 2 Migrant.

   (f) On 07 September 2011, he was granted leave to remain in this capacity until 27 April 2013.

3. Lying at the heart of this appeal is an exchange of electronic communications between the Appellant's solicitors and the UK Border Agency ("*UKBA*") in September/October 2011. It is evident that these communications were stimulated by the decision made on 07 September 2011 conferring on the Appellant Tier 2 Migrant status. On 22 September 2011, the Appellant's solicitors addressed the following enquiry to UKBA:

   > "*This migrant was assigned a COS with an expiry date of 26 April 2014. His application for further leave to remain has been approved, but with an expiry date of 27 April 2013. Could you explain why there is a difference of one year?*"

   "COS" denotes "certificate of sponsorship". The possession of such a certificate is a requirement of the Immigration Rules for Tier 2 migrants. On 10 October 2011, a UKBA official replied as follows:

   > "*Your client applied for leave to remain where his previous grant of leave was as a Work Permit Holder applying for an extension in the same job with the same sponsor. In this case, the period of grant given, if* ***[sic]*** *for the period of time needed to take your client's total stay in the United Kingdom to five years in an eligible category or for two years if this is longer (beginning on the start date given on your client's Certificate of Sponsorship). Therefore, in line with published guidance your client was granted to*

***[sic]*** *two years (27/04/2013) as this was longer than five years but shorter than Certificate of Sponsorship plus 14 days.*"

This signalled the conclusion of the exchange of communications.

4. A period of dormancy followed. The next material development occurred on 15 March 2013, when the Appellant applied for indefinite leave to remain in the United Kingdom. This stimulated the impugned decision, giving rise to the appeals which have followed. In the letter of decision, following reference to paragraph 245HF of the Immigration Rules and the Appellant's immigration history, it is stated:

> "*You therefore had no valid leave to remain in the United Kingdom between 02 August 2010 and 07 September 2011, a total of 400 days. You have not spent a continuous period of 5 years lawfully in the United Kingdom. Therefore, your application for indefinite leave to remain cannot satisfy the requirements of paragraph 245HF(c) of the Immigration Rules.*"

This was the sole reason proffered for refusing the application.

5. Based on the dates rehearsed above, the Appellant's immigration history is summarised thus:

(i) Initially, he was lawfully present in the United Kingdom during a continuous period of some three years and eight months.

(ii) Between 02 August 2010 and 07 September 2011, a period of some 400 days, his continuous lawful residence was interrupted.

(iii) On 07 September 2011, his lawful residence recommenced, expiring on 27 April 2013.

(iv) Prior to such expiry, on 15 March 2013, the Appellant made the application for indefinite leave to remain giving rise to the impugned decision, which was made on 05 November 2013, some two years and two months following the preceding grant of leave to remain.

**Relevant Immigration Rules and Policies**

6. The governing provision of the Immigration Rules in the present context is paragraph 245HF. This regulates the grant of indefinite leave to remain in the United Kingdom to various categories of migrant, including Tier 2 (General) Migrants. The version of paragraph 245HF in force at the time of the impugned decision belongs to Part 6A of the Immigration Rules, which regulates the points based system. Within this discrete regime there are 4 "routes", one whereof is Tier 2. The introductory words of paragraph 245HF are the following:

"*To qualify for indefinite leave to remain as a Tier 2 (General) Migrant ….. an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.*"

Paragraph 245HF continues, under the rubric "Requirements":

"*(b) The applicant must not fall for refusal under the general grounds for refusal and must not be an illegal entrant.*

*(c) The applicant must have spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 2 Migrant, in any combination of the following categories …*

*(d) The Sponsor that issued the Certificate of Sponsorship that led to the applicant's grant of leave must …….*"

There follows a series of requirements pertaining to the Sponsor, of no moment for present purposes. In the context of this appeal, the second of the specified requirements is the critical one. It engages the following definition, contained in paragraph 245 AAA(a):

"'*Continuous period of 5 years lawfully in the UK' means, subject to paragraphs 245CD, 245GF and 245HF, residence in the United Kingdom for an unbroken period with valid leave and for these purposes a period shall not be considered to have been broken where:*

*(i) The applicant has been absent from the UK for a period of 180 days or less in any of the 5 consecutive 12 month periods preceding the date of the application for leave to remain;*

*(ii) The applicant has existing limited leave to enter or remain upon their departure and return except that where that leave expired no more than 28 days prior to a further application for entry clearance, that period and any period pending the determination of an application made within that 28 day period shall be disregarded; and*

*(iii) the applicant has any period of over staying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of over staying pending the determination of an application made within that 28 day period disregarded.*"

The remaining provisions of paragraph 245AAA are immaterial for present purposes.

7. It is of note that the relevant communication from UKBA (*supra*) states that the decision made on 07 September 2011, whereby the Appellant was granted further

leave to remain until 27 April 2013, was "*in line with published guidance*". The preparation of this judgment was deferred pending compliance with directions given at the conclusion of the hearing conducted on 15 July 2014. Following some delay on the part of the Respondent, bilateral compliance with the Tribunal's directions was achieved on 05 September 2014.

8. This resulted in the Respondent providing the text of the relevant provisions of the Immigration Rules in force when the UKBA communication of 10 October 2011 (*supra*) was made, namely paragraph 245HE. This provides, in material part:

> "*(a) In the cases set out in paragraphs (b) and (c) below, leave to remain will be granted for:*
>
> *(i) subject to paragraph (ii), a period equal to 5 years less X, where X is the period of time that the applicant has already spent in the UK with entry clearance, leave to enter or remain in any combination of the categories set out in paragraph (b) and where X commences on the date on which the applicant was granted entry clearance, leave to enter or leave to remain at the start of the continuous period;*
>
> *(ii) Where the calculation in paragraph (i) would lead to a period of leave of less than 2 years or a period of leave longer than the length of the period of engagement plus 14 days, a period equal to:*
>
> *(1) the length of period of engagement plus 14 days, or*
>
> *(2) two years,*
>
> *whichever is the shorter.*"

The "*cases set out in paragraphs (b) and (c)*" follow. These consist of a list of various capacities – for example, Ministers of Religion or sportsperson migrants – in which a person was previously granted entry clearance, leave to enter or leave to remain. Throughout these detailed provisions, the words "*cases*" and "*categories*" are employed interchangeably.

9. The case management directions mentioned above also elicited the production of the UKBA Guidance in vogue when the impugned decision was made. This explains the broader context in the following terms:

> "*Tier 2 is the route which enables United Kingdom employers to employ nationals from outside the resident workforce to fill particular jobs which cannot be filled by settled workers. A skilled worker in any Tier 2 category must not displace a suitable settled worker.*"

The guidance further helpfully explains that within Tier 2 there are four categories: general, intra-multinational company transfer, sports person and Minister of

Religion. Fundamental requirements are an offer of employment and a Certificate of Sponsorship from a United Kingdom licensed sponsor.

**The Appellant's Arguments**

10. The main focus of the argument of Mr Hussain (of Counsel), on behalf of the Appellant, was the UKBA communication of 10 October 2011. He submitted that the phrase "*eligible category*" is to be construed as a category eligible for settlement and/or indefinite leave to remain upon the conclusion of 5 years residence in the United Kingdom, as was consistent with the rules then in force. He also drew attention to a subsequent (mid-2012) version of paragraph 245HF which, he submitted, mirrored the 5 years residency provision in the 2011 version. Mr Hussain submitted that the purpose of the decision made on 07 September 2011, as explained in the UKBA communication of 10 October 2011, was to extend his client's residency to a total period of five years, thereby attaining the threshold for the grant of indefinite leave to remain. The core of his submission was that the relevant communication generated in the Appellant a legitimate expectation that he would later, at the appropriate time, secure indefinite leave to remain.

11. As this resumé of the argument demonstrates, the Appellant does not make the case that he is eligible for the grant of indefinite leave to remain under the Immigration Rules. Indeed, the unexpressed premise of his case is that he does not satisfy the requirements of the Rules. Rather, he is driven to rely on a principle, or doctrine, of public law in order to make good his case.

12. At this juncture, it is appropriate to reflect on the terms of the refusal decision. Having rehearsed paragraph 245HF of the Rules, together with the Appellant's immigration history, the letter states:

> "*You therefore had no valid leave to remain in the United Kingdom between 02 August 2010 and 07 September 2011, a total of 400 days. You have not spent a continuous period of 5 years lawfully in the United Kingdom. Therefore, your application for indefinite leave to remain cannot satisfy the requirements of paragraph 245HF(c) of the Immigration Rules.*"

This was the sole refusal reason.

**Substantive Legitimate Expectation**

13. The doctrine of substantive legitimate expectations is now firmly embedded in the public law compartment of the common law of the United Kingdom. The *locus classicus* continues to be the decision of the English Court of Appeal in R v North and East Devon Health Authority, ex parte Coughlan, [2001] QB 213. Other recent contributions to the developing jurisprudence include the decision of the Privy Council in Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1 and two notable judgments, in the same case, emanating from Northern Ireland, Re Loreto Grammar School's Application [2011] NIQB 36 (at first instance) and [2012]

NICA 1 [Court of Appeal]. For present purposes, two discrete elements of this doctrine fall to be considered. The first concerns the nature and quality of the promise or representation required. The second relates to the interaction of substantive legitimate expectations with the public interest.

14. This doctrine is the response of the common law to failures by public authorities to honour promises and assurances made to citizens. Its central tenets are fairness and abuse of power. In appropriate cases, it is incumbent on the Court to conduct:

> "….. *a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*"
>
> (Coughlan, paragraph [56]).

In the typical case, the conduct of the public authority under scrutiny will normally take the form of something said verbally or in writing. The cases belonging to this field are replete with the word "*promise*". In Coughlan, for example, the judgment speaks of "*a current policy or an extant promise*": paragraph [65]. In that particular case, there was "*an express promise or representation made on a number of occasions in precise terms*", such that a failure to honour it "*… would be equivalent to a breach of contract in private law*": paragraph [86].

15. Fairness to the citizen and the misuse of public power are two of the themes which course through the veins of Coughlan and subsequent decisions. They are also reflected in the following passage in Administrative Law (Wade and Forsyth, 10th Edition), page 447:

> "*Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and the Government becomes a choice between chaos and coercion.*"

The two basic ingredients of what the law has come to recognise as a substantive legitimate expectation are satisfied where there is an unambiguous promise or assurance by a public official in which the affected citizen reposes trust. The decided cases have established with reasonable clarity the boundaries of the doctrine. In Coughlan, for example, the Court recognised, tacitly, that a public authority would not be acting unlawfully in circumstances where to adhere to the relevant promise would be tantamount to "*acting inconsistently with its statutory or other public law duties*": paragraph [86]. In an earlier passage, the Court coined the test of "*a sufficient overriding interest to justify a departure from what has been previously promised*": paragraph [58]. In the immediately preceding paragraph, the standard formulated was that of "*any overriding interest relied upon for the change of policy*". In R v Secretary of State for Education, ex parte Begbie [2000] 1 WLR 1115, the Court held that an election promise made by a shadow Minister did not bind the appointed Minister following a change of Government. In a different context, in R (Bloggs 61) v Secretary of State for the Home Department [2003] 1 WLR 2724, it was

decided that the public agency concerned, the Prison Service, was not bound by a promise made by the police to a prisoner about future conditions, as this lay outwith their ostensible authority. Further guidance is found in the following passage in R (Bhatt Murphy and Others) v The Independent Assessor and Others [2008] EWCA Civ 755:

> "*[41] ……. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest ….*
>
> *This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation…..*
>
> *[42] But the Court will (subject to the overriding public interest) insist on such a requirement and enforce such an obligation where the decision maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself ….*
>
> ***What is fair or unfair is of course notoriously sensitive to factual nuance***."

[Emphasis added]

Finally, turning to the nature of the promise or representation required to engage the doctrine, Laws LJ adverted to "*a specific undertaking, directed at a particular individual or group*" and "*the pressing and focused nature of the kind of assurance required*": paragraphs [45] and [46].

16. Given the intrinsic dynamism of the common law, it seems unlikely that the ingredients and boundaries of the doctrine of substantive legitimate expectations have been finally settled. In an immigration context, the doctrine has been described as "*much in vogue*": EB (Kosovo) v Secretary of State for the Home Department [2008] 3 WLR 178, at [31], per Lord Scott. Since the landmark decision in Coughlan, the doctrine has been considered, and developed, by the Court of Appeal in around a dozen cases. In addition, there is much scholarly writing, including dedicated text books. Dr Christopher Forsyth has offered the following sombre reflection:

> "*… Notwithstanding those many judgments and the acres of scholarly writing, we have made little progress. There is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention. It sounds so benign – who could be against the protection of legitimate expectations? – but, it seems to me, as sometimes interpreted, the concept often gives little guidance and plays at best a rhetorical role.*"

[Legitimate Expectations Revisited (2011) 16 JR 429]

Similar reservations resonate in the following comment:

> "*A legitimate expectation in its current state, as a patchwork of possible elements to consider rather than an organised system of rules, is little more than a mechanism to dispense palm tree justice.*"

This somewhat withering dismissal is contained in "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Expectations" [Watson, Legal Studies, Volume 30, No 4 2010]. Notwithstanding, the doctrine now has deep roots and, in a substantial number of cases, the main question for the Court is whether the promise or assurance under scrutiny is sufficiently clear and unconditional.

**Conclusions**

17. The enquiry which prompted the relevant communication from UKBA was simplicity itself. The solicitor simply wished to know why, in circumstances where the relevant COS was valid until 26 April 2014, the Appellant's grant of further leave to remain had a scheduled expiry date of 27 April 2013. The response confirmed, in substance, that this was intentional and no error had been committed. In the response, the correspondent attempted to explain the underlying reason. The key sentence is the second one (beginning "*In this case …*"): [3] supra. Considered literally, the sentence is not the most intelligible. However, it seems likely that the word "*if*" was written in error and should have been "*is*". With this minor adjustment, the sentence becomes coherent. The final sentence, particularly the words "*granted to two years*", is difficult to construe in any intelligible way. This is so for the further reason that on the date when the decision was made, 07 September 2011, the Appellant was not granted leave to remain for a further two years: rather, the period was confined to approximately twenty months. Moreover, these words are not rendered intelligible by the exercise of subtracting two years from 27 April 2013, since the date 27 April 2011 has no particular significance.

18. The first question in every case of this *genre* is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification. In this case, the application of this test raises the question of whether the Secretary of State represented, or promised, that upon the expiry of the authorised period of leave, on 27 April 2013, the Appellant would be granted indefinite leave to remain. I consider that the UKBA communication falls measurably short of satisfying this requirement. Fairly, reasonably and objectively construed, it simply stated that the rationale underlying the grant of leave to remain to the Appellant was "*….. to take* [his] *total stay in the United Kingdom to five years in an eligible category*". There is no suggestion that this was other than a correct exposition of the Rules and related policy guidance operative when the statement was made. Crucially, the statement said nothing about continuous residence, explicitly. Furthermore, I am satisfied that, implicitly, it was also silent on this discrete issue.

19. In addition, the UKBA communication was not made in a vacuum. Rather, the context included the relevant provisions of the Immigration Rules, rehearsed above. I consider that the communication cannot be construed as conveying that the

continuous residence requirement of the Rules would, in the Appellant's particular case, be waived or relaxed. It contains no unambiguous and unqualified promise or assurance to this effect. I am further satisfied that it could not reasonably have been understood in this way. Moreover, I consider that the Appellant's argument founders on the formidable rock of three of the pillars of the United Kingdom's legal system, namely equality before the law, the consistent application of the law to all citizens and legal certainty. For these reasons, I conclude that the expectation asserted by the Appellant was not generated by the UKBA communication. It has no basis, in fact or in law. There is, therefore, no substantive legitimate expectation to which the Court will give effect.

20. I add the following. If, hypothetically, the SoS official had stated unambiguously and without qualification that, upon expiry of the relevant period, the Appellant would be granted indefinite leave to remain in the United Kingdom, I consider that no Court would give effect to such assurance, for two reasons. First, in the language of Coughlan [58], the official would have been "*acting inconsistently with its statutory or other public law duties*" which, fundamentally, were to adhere and give effect to the Immigration Rules. Second, as in Begbie, the expectation invoked would have been defeated by the relevant legal rule – in this instance, paragraph 245HF (d), in tandem with paragraph 245AAA of the Immigration Rules

21. By analogy, the Appellant is in no better position than the immigrant in Odelola v Secretary of State for the Home Department [2009] UKHL 25, who argued unsuccessfully, in a kindred though not identical juridical context, that her application for leave to remain as a postgraduate doctor should be determined according to the operative provisions of the Immigration Rules in force when the application was made, rather than those in existence at the later date of its determination.

**Decision**

22. For the reasons elaborated above, I dismiss the appeal.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Dated: 17 September 2014