Neutral Citation Number: [2019] EWHC 603(Admin)

Case No: CO/3649/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2019

Before :

MR JUSTICE DINGEMANS

- -

Between :

R(Alliance of Turkish Businesspeople Limited)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

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

Hearing date: 7 March 2019

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dingemans:

Introduction

1. This is a claim for judicial review which raises issues about a substantive legitimate expectation. The claim arises as a result of a change of policy made by the Secretary of State for the Home Department on 16 March 2018 affecting the right of Turkish business people and their dependants to obtain indefinite leave to remain ("ILR").

2. The Alliance of Turkish Businesspeople Limited ("the Alliance") claim that the Secretary of State has acted in breach of a substantive legitimate expectation derived from the published guidance, the relevant Immigration Rules applying in 1973 and individual letters, by imposing the change of policy on 16 March 2018 on all those who had not yet applied for ILR. The change of policy imposed additional requirements to obtain ILR. These were: an additional year of residence, being 5 years as opposed to 4 years; the payment of application fees; and success in an English language test. The Alliance contends that these changes have caused real hardship to Turkish business people and their dependants. The Alliance contends that this change of policy for those who had applied under the old scheme, was so unfair as to amount to an abuse of power.

3. The Secretary of State contends that there was no clear and unambiguous representation on which it was reasonable for the Turkish business people to rely because the only representation made had been that the policy at the time was as set out in the guidance, rules and letters, and that the Turkish business people must be taken to know that the policy might change. In any event any representations which were made were about the legal effect of the European Community Association Agreement ("ECAA") with Turkey, known as the "Ankara Agreement", to which the United Kingdom had become a party on 1 January 1973, and the Turkish business people must be taken to know that if there was a change in the understanding of the legal effect of the Ankara Agreement, the policy would change. Finally, even if there had been a clear and unambiguous representation on which it was reasonable for the Turkish business people to rely, the changes made to the policy were pursuing a legitimate aim and had been carefully calculated to ensure that there was not such unfairness as to amount to an abuse of power. All those who had applied before 16 March 2018 would be considered under the old policy, and the changes were limited and proportionate.

Issues

4. I am very grateful to Ms Sarah Ford QC and Sir James Eadie QC and their respective legal teams for their helpful written and oral submissions. There was some dispute about the relevant legal principles to be applied, but by the conclusion of the hearing those disputes were very minor, and I will address the applicable law below.

5. The following matters are in issue: (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.

The claim

6. In the judicial review claim form the Alliance challenged the change of policy asserting that it was unlawful on two grounds: (1) that the change of policy was contrary to the standstill clause ("the standstill clause") contained within article 41(1) of the Additional Protocol of the Ankara Agreement; (2) that the change of policy infringed the legitimate expectations of Turkish business persons who had come to the United Kingdom under the old policy.

7. Permission to apply was given earlier in the proceedings in respect of the legitimate expectation ground of challenge only. The Alliance has renewed the application for permission to apply to the Court of Appeal in respect of the standstill clause challenge so that issue is not before me, and I have not addressed it.

The evidence

8. There were witness statements on behalf of the Alliance by: Ipek Candan; Gokce Berkkan; Cansu Akbulut; Beyza Nur Ataci; Hatice Aydogu; Cigdem Tulga; Taner Oter; Nesime Olcay; Yakup Elgun; Cagdas Karakoc; and Serdar Coskun which were made on 10 or 11 September 2018. There was a witness statement from Laura Brasnett, a senior policy official at the Home Office, dated 24 January 2019 on behalf of the Secretary of State.

9. The evidence showed that Turkish business people, some of whom had lived in the UK before applying for the scheme, had applied under the ECAA Business person scheme in the expectation of being able to apply for ILR after 4 years. Some of them had taken a business risk in setting up a business which complied with the scheme and some said that they might have applied to other countries or stayed in Turkey if they had known that the scheme would change. Some had become eligible to apply for ILR before 16 March 2018 but had not submitted the applications before 16 March 2018 because they had not expected an overnight change of policy and were granted only leave to remain for a further 3 years rather than ILR. Some had lost business, business and personal finance and expansion opportunities because parties were not willing to contract with someone whose leave to remain was limited and because of the changes. Some would have come to the UK earlier than they did. Some had lost the right to apply for loans from the Student Loan Company for university fees. Some had delayed plans for a family because of the delay in obtaining ILR. The fees required to apply for ILR were very high because some had a number of dependants. This evidence was relied on to illustrate some of the real and practical difficulties caused by the change of policy.

10. The evidence on behalf of the Secretary of State showed that the understanding of the effect of the standstill clause in the Ankara Agreement was changed as a result of judgments in two cases. The implications of the judgments were considered and there was delay in the processing of applications for ILR by Turkish business people and their dependants between March and July 2017. Applications then continued to be processed as the new policy was formulated. The evidence showed that various options were considered, together with potential discrimination to other non-EU

nationals who were subject to standardised requirements. The evidence showed that the new policy sought to balance the need to manage migration whilst not disadvantaging Turkish nationals who had anticipated being able to settle in the UK under the old policy, and to align more closely the policy for Turkish business people with equivalent routes under the Points Based system.

11. Figures provided at the hearing, which had not been checked and which it was agreed should be used in this judgment for illustrative purposes only, suggest that there have been about 1,500 to 2,300 applications per annum by Turkish business people under the old policy in the 3 years up to March 2018. This suggests that there are about 6,000 Turkish business people, 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.

The Ankara Agreement and its interpretation

12. The Ankara Agreement was made on 12 September 1963 with the general aim of promoting economic relations between Turkey and the European Community and the eventual accession of Turkey to the EEC.

13. The Ankara Agreement includes an Additional Protocol signed at Brussels on 23 November 1970. Article 41(1) of the Additional Protocol provides: "The contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". This is the "standstill clause".

14. The UK became a contracting party to the Ankara Agreement when it joined the European Economic Community in 1973. This explains the significance of the Immigration Rules which were in force on 1 January 1973. This is because the UK was not entitled to introduce "new restrictions on the freedom of establishment and the freedom to provide services".

15. The interpretation of the standstill clause was addressed by the Court of Justice of the European Communities in *R v Secretary of State for the Home ex parte Savas* (Case C-37/98) [2000] 1 WLR 2000. The Court held that the standstill clause was sufficiently precise to have had direct effect in domestic law. It held that the effect of the standstill clause was to preclude "a member state from adopting any new measure having the object or effect of making the establishment, and, as a corollary, the residence of a 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". To understand later developments, it is important to note the difference between "residence" and "settlement".

16. It is apparent that the standstill clause was understood by the Home Office to mean that Turkish business people and their dependants had to have the same rights to obtain settlement by ILR as those business persons did under the Immigration Rules in force as at 1 January 1973.

17. In *BA (Turkey) v Advocate General for Scotland* [2017] CSOH 27; [2017] SLT 1061 Lord Armstrong considered the Ankara Agreement and held 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 … indefinite leave to remain, is necessary for that purpose".

18. In *R(Aydogdu) v Secretary of State for the Home Department* [2017] UKUT 167 (IAC) McCloskey J. also dealt with the Ankara Agreement and held that "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 … settlement is not necessary for this purpose".

19. It was the decisions in *BA (Turkey)* and *R(Aydogdu)* which led the Home Office to reformulate the policy. It might be noted that in *R(Kotuk) v Entry Clearance Officer, Warsaw* [2018] EWCA Civ 2850; [2019] 4 WLR 10 the Court of Appeal also held that restrictions on the settlement in the UK of Turkish business people or their dependants did not fall within the scope of the standstill clause. This was because a restriction on settlement would not interfere with the economic freedom to establish a business or provide services provided that Turkish business people were entitled to reside in the UK. The UK was not under a positive obligation to provide Turkish business people with greater rights, such as the right to obtain ILR. Ms Ford reserves her position in respect of the correctness of the decisions in *BA (Turkey)*, *R(Aydogdu)* and *R(Kotuk)*, but it is common ground that the decision in *R(Kotuk)* is binding on me. However *R(Kotuk)* does not answer the question about whether the UK did, before the change of policy on 16 March 2018, make promises or representations about settlement rights to Turkish business people and if so, what is the legal effect of those promises or representations. It is therefore necessary to turn to consider what promises or representations were made to the Turkish business people and their dependants before 16 March 2018.

The Immigration Rules, Guidance and letters

20. It is common ground that, as at 1 January 1973, the relevant rules relating to entry were set out in the Rules for Control on Entry HC509, and relevant rules relating to ILR were set out in the Rules for Control after Entry HC510. Both were dated 23 October 1972. So far as material the rules in HC510 provided at paragraph 28 "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.

21. The Home Office published guidance titled "Business applications under the Turkish EC Association Agreement" which 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".

23. There were examples of letters sent to Turkish business people who had entered the UK and who applied for leave to remain under the old policy in the bundle before me. The letters were from the UK Visas and Immigration section of the Home Office. The material parts of the letters were in identical terms save for dates. One particular letter stated "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 …".

24. It became apparent during the course of the hearing that the letters were sent to the Turkish business people at some stage during their first year of residence and on receipt of the application for an extension. The dates given in the letters was the relevant anniversary date of their entry into the UK or onto the scheme.

The change of policy on 16 March 2018

25. The change of policy was set out in: (1) the Secretary of State's ECAA business guidance, version 7.0 published on 16 March 2018; (2) Appendix ECAA to the Immigration Rules introduced by a Statement of Changes in the Immigration Rules (HC 1154) laid before Parliament on 15 June 2018 and taking effect from 6 July 2018; and (3) the Secretary of State's ECAA Indefinite Leave to remain ("ILR") and Further leave to remain ("FLR") guidance, version 1.0, published on 6 July 2018.

26. The effect of the business guidance published on 16 March 2018 was that anyone who had applied on or before 15 March 2018 who was eligible for ILR was dealt with under the old policy, as appears from page 25 of 29. As from 16 March 2018 a person

applying for ILR would be granted 3 years leave to remain, as appears from page 26 of 29.

27. The Statement of Changes in Immigration Rules was published on 15 June 2018. The changes came into effect on 6 July 2018. The effect of the changes was that: (1) 5 years and not 4 years residence was required before an application for ILR could be made; (2) an applicant for ILR had to demonstrate sufficient knowledge of the English language and life in the UK; and (3) the waiver of fees on an application for ILR which had applied to Turkish business persons was removed, the fee was £2,389 per applicant for ILR.

28. Revised guidance was published on 6 July 2018 which set out the changed policy.

Relevant legal principles relating to legitimate expectation

29. There was, by the end of the hearing, more common ground between the parties about the applicable legal principles than at the start. In the course of the submissions there was a wide ranging and interesting review of the development of the law of legitimate expectation, and some time was spent in the course of the submissions analysing the judgments in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, *R v Education Secretary, ex parte Begbie* [2000] 1 WLR 1115, *R(Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, *R(Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755; (2008) 152(29) SJLB 29 and *United Kingdom Association of Fish Producer Organisations v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin). However, given the common ground, it is not necessary for me to set out a review of the development of the principles of legitimate expectation. My task is to attempt to set out as accurately, fairly and shortly as I can the relevant law, explaining where necessary my reasons for finding that to be the applicable law.

30. The UK has the right to control access to its borders. Immigration control is the responsibility of the Secretary of State pursuant to the Immigration Act 1971 ("the 1971 Act"). The Secretary of State sets out statements of practice to be followed in the administration of the 1971 Act through Immigration Rules laid before Parliament pursuant to section 3(2) of the 1971 Act. The Secretary of State may, as may any public authority, change policies, and may sometimes be required to change policies.

31. The decision to adopt one policy, and then to adopt another subsequent and different policy, will involve two lawful exercises of power by the relevant public authority. However, if there was a promise in the first policy on which persons reasonably relied, those persons may become trapped between the first policy and the second policy and may be entitled to rely on the doctrine of legitimate expectation, see *ex parte Coughlan* at paragraph 66.

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.

33. In this case part of the relevant factual matrix for examining the promise or representation and determining whether it is reasonable for the applicants to rely on the promise or representation, will include the fact that the Secretary of State may change his immigration policy. For this reason, generally speaking, the publication of a policy is only a statement that this is the policy that applies at the time, compare *ex parte Hargreaves* [1997] 1 WLR 906 as explained in *ex parte Coughlan* at paragraphs 74 to 76. This applies even if the policy speaks to the future, for example by setting out a route by which a particular status may be acquired, see *R(Bhatt Murphy)* at paragraphs 33 and 44. In this respect *Odelola v Home Secretary* [2009] UKHL 25; [2009] 1 WLR 1230 made it plain that the applicant doctor who had completed clinical attachments and made an application for leave to remain in accordance with the then policy relating to medical practitioners, had her application rejected because the previous policy was changed before her application was determined. It was held that she had no "vested right" or legitimate expectation under the previous policy (and legitimate expectation was not the subject of submissions), see paragraph 29 of *Odelola*.

34. However, although this was disputed in the written submissions on behalf of the Secretary of State, in my judgment it is not correct to say that just because the Secretary of State can change his policy it is not possible to find a promise or representation as to the future application of the policy in any policy. This is because the promise or representation is to be ascertained by asking how, on a fair reading, the representation would reasonably have been understood by those to whom it was made, see *United Kingdom Association of Fish Producer Organisations* at paragraph 92(3). Everything will depend on the relevant factual circumstances. If, for example, the Secretary of State states that in the event of a future change of policy, he will continue to apply the previous policy to the applicant, then a clear and unambiguous promise or representation will have been made. In my judgment the judgment in *R(HSMP Forum Limited) v Secretary of State for the Home Department* [2008] EWHC 664 (Admin) at paragraphs 3 and 61 is an example of that proposition.

35. Once a clear and unambiguous promise or representation on which it is reasonable to rely has been identified, legitimate expectations have been analysed in three categories, although the categories are not hermetically sealed, see *ex parte Begbie* at 1130G.

36. First, and in all cases, if there is such a promise or representation the public authority will at the least be required to bear in mind its previous policy and the promise or representation, giving it such weight as it thinks right, before deciding to change policy, see *ex parte Coughlan* at paragraph 57.

37. Secondly the promise or representation may give rise to a legitimate expectation of a procedural advantage to those to whom the promise or representation has been made such as, for example, consultation or a right to be heard. This has sometimes been termed a procedural legitimate expectation, see *ex parte Coughlan* at paragraph 57.

38. Thirdly 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", see *ex parte Coughlan* at paragraph 57. This is because it is illogical or immoral or both for a public authority to act with such

conspicuous unfairness, see *Ex parte Unilever* [1996] STC 681 at 695. This is the relevant category in this case.

39. What fairness requires in such a case will always be fact specific. 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.

40. An abuse of power is more likely to be found where the promise or representation is made to one person or a few people, giving the promise or representation the character of a contract, see *ex parte Coughlan* at paragraph 59. The broader the class the more likely change will be justifiable, see *ex parte Begbie* at 1130G-1131B.Detrimental reliance may be relevant. The character of the decision will be relevant, see *Nadarajah* at paragraph 69. 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 has been reliance might still give rise to an abuse of power, see *ex parte Begbie* at 1127C.

A clear and unambiguous representation on which it was reasonable to rely

41. There was in this case a statement to those granted leave to remain under the Ankara Agreement that future applications for ILR would be "decided by HC510 …". This is what the applicants were told in the Home Office guidance set out in paragraphs 21 and 22 above, and the applicable rules were then set out. The reason that this approach had to apply was explained. In my judgment this gives 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.

42. In my judgment it was reasonable for the applicants to rely on that representation. This is because even though applicants for leave to remain are generally to be taken to know that an immigration policy can change, which affects whether it is reasonable to rely on a statement in such a policy, the applicants in this case were expressly told that the UK had no choice in the matter and that the policy prevailing at 1 January 1973 would prevail. This meant that the applicants could apply for ILR after 4 years residence under the scheme.

43. Further I do not accept the proposition that the applicants, having been told that this state of affairs existed because of the Ankara Agreement, should be taken to understand that if the interpretation of the Ankara Agreement changed the policy might change. This is because I do not accept that it would be in the reasonable expectation of applicants that the interpretation of the Ankara Agreement would change after some 45 years. Indeed it appears that the change in interpretation of the Ankara Agreement came as something of a surprise to the Home Office, who then formulated a change of policy.

44. It should be noted that neither party placed particular reliance on the letters sent to the applicants. I agree with this approach, because the clearest statement and representation is contained in the guidance, and the letters are consistent with that guidance. It is also apparent that some Turkish business people who were in the first

year under the scheme would not have received such letters, and in my judgment they are not excluded from reasonable reliance on the clear and unambiguous statement set out in the guidance because of that.

The change of policy was justifiable so that there was not such unfairness as to amount to an abuse of power

45. The changes in policy made in breach of the substantive legitimate expectation were: the increase of a year before ILR could be obtained; the need to take the English language test; and the payment of fee. The question for me is whether frustrating the substantive legitimate expectation can be objectively justified as a proportionate response having regard to a legitimate aim pursued by the Secretary of State in the public interest.

46. The evidence did illustrate the practical effects of the change of policy on individuals. These changes, some of which were referred to in paragraph 9 above and which were summarised in a very helpful table produced on behalf of the Alliance, showed that the effects varied but that plans had been affected and expectations for businesses, individuals and their dependants had been frustrated. Although the old policy was more advantageous to the applicants than comparable Home Office policies for business people from non-European Union countries, the evidence showed that there was detrimental reliance. This was because some of the business people had come to the UK because of the old policy when they could have gone to other countries or stayed in Turkey.

47. It is relevant to note that the policy changed because after the decisions in *BA (Turkey)* and *R(Aydogdu)* the Home Office appreciated that there had been a mistaken interpretation of the Ankara Agreement, as appears above. In my judgment once there was a proper appreciation that the Ankara Agreement protected (exceptional situations apart) 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 the nationals of other states.

48. It was common ground that the aims behind the change of policy, namely the balance of the need to manage migration whilst not disadvantaging Turkish nationals who had anticipated being able to settle in the UK under the old policy, and to align more closely the policy for Turkish business people with equivalent routes under the Points Based system, were legitimate aims. This means that the critical issue is whether the changes to the policy can be justified as a proportionate response in the public interest.

49. In my judgment the changes to the policy can be objectively justified as a proportionate response in the public interest. This is because the Home Office was entitled to attempt to introduce some uniformity with the nationals of other states, and because changes to the requirements have been restricted so as to reduce the impact on the applicants for ILR. 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.

Conclusion

50. For the detailed reasons given above I find that: (1) there was a clear and unambiguous representation on which it was reasonable to rely to those granted leave to remain under the Ankara Agreement that future applications for ILR would be decided by HC510 of the Rules in 1973; (2) it was justifiable to frustrate the substantive legitimate expectation by making the changes to the policy as a proportionate response having regard to legitimate aims pursued by the Secretary of State in the public interest. I therefore dismiss the claim for judicial review.