Neutral Citation Number: [2019] EWHC 3208 (Admin)

Case No: CO/3351/16 AND CO/3079/17 AND CO/1035/2016 AND CO/4208/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2019

Before :

MR JUSTICE SAINI

- -

Between :

THE QUEEN
(on the application of

(1) DERYA KARTAL KARAGUL
(2) AHMET KARAGUL
(3) OKYANUS KARAGUL
(4) ANILCAN AYTEN
(5) HASAN HUSEYIN YILDIZ
(6) UGURCAN IZCI)

Claimants

- and –

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

- -
- -

Gordon Lee and Emma Daykin (instructed by **Stuart & Co.**) for the **Claimants**
Deok Joo Rhee QC and David Mitchell (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 19 and 20 November 2019

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Approved Judgment

MR JUSTICE SAINI:

This judgment is in 12 main parts with an Annexe as follows:

I. Overview

1. These are four consolidated claims for judicial review brought by Turkish nationals, Mrs Karagul, Mr Ayten, Mr Yildiz and Mr Izci ("the Claimants"). The Claimants challenge decisions of the Secretary of State for the Home Department to refuse them leave to remain (LTR) in the United Kingdom as businesspersons.

2. The decisions under challenge were made in relation to rights to apply for such LTR which the Claimants enjoy via the medium of the "Agreement establishing an Association between the European Economic Community and Turkey" signed at Ankara on 12 September 1963 ("the Ankara Agreement") and its Additional Protocol signed in Brussels on 23 November 1970 ("the Additional Protocol") (together, "the ECAA"). The United Kingdom became a signatory to the ECAA upon becoming a member of the European Economic Community on 1 January 1973.

3. The Additional Protocol was itself signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C113, p.17).

4. Although each Claimant pursues distinct conventional public law and case-specific challenges to the refusal of their applications under the ECAA, there are certain common issues of EU law and domestic law pleaded by the Claimants.

5. Those issues are, in outline:

   (i) First, whether the current remedial regime for challenging such refusals (which regime consists of an internal Administrative Review - referred to below as "AR"- supplemented by judicial review) violates the EU law principle of "effectiveness"; and

   (ii) Second, whether the way in which the decisions were made by the Secretary of State was in breach of common law fairness standards. The particular focus in

relation to this second ground is the Secretary of State's conclusion (expressed in the case of each Claimant) that the Claimants had not satisfied her that they had a "genuine intention" or "genuine wish" to set up in the businesses as they claimed in their applications (with the associated implication that they were in fact seeking leave to remain in the UK for a different undisclosed and impermissible purpose). The question which arises concerns the procedures which the Secretary of State is obliged to adopt (in accordance with common law fairness standards) before expressing such conclusions.

6. I will address the specific decisions as regards each Claimant in the Annexe, but I will first summarise the material factual background to each claim, the decisions and the more specific grounds of review relied upon.

II. Outline Facts and Grounds of Review

(a) Karagul

7. On 13 July 2015, the Karagul family were granted limited leave to enter the UK as visitors. This leave was valid until 13 January 2016. They entered the UK on 11 August 2015.

8. Within the period of this original limited leave, on 1 December 2015, Mrs Karagul applied for LTR under the ECAA in order to establish herself in business, working as a mobile beauty therapist and trading as "Ocean Unisex Professional Eyebrow & Beauty". Her application included her spouse and her daughter as dependants. As in the case of each applicant, Mrs Karagul signed the application form warranting that its content was true and accurate and that she therefore had a genuine intention to pursue the business set out in her application.

9. By letters dated 21 January 2016 and 14 March 2016 the Secretary of State requested further documentation and evidence from Mrs Karagul regarding her application. By decisions dated 30 March 2016 the family's applications were refused under paragraph 21 HC 510. Mrs Karagul applied for AR of the refusal decision. By a further decision dated 10 May 2016, the application for AR was also refused.

10. Given its centrality to the arguments before me, I should set out in exact terms what was said in the refusal decision of 30 March 2016 by way of conclusions:

    (a) "The Secretary of State is not satisfied that you genuinely wish to establish in business as proposed" (my emphasis); and

    (b) "Overall, you have failed to demonstrate that you have a genuine intention to establish in business and that you have conducted a significant amount of research in order for your business to be a success" (my emphasis).

11. The 10 May 2019 AR decision recorded (in rejecting the appeal):

    (a) "You claim in your application for Administrative Review that your business plan did not lack significant detail. You believe that you didn't need an intricate business plan because you do not propose to employ anyone and your overheads will be low. However even though your business model is relatively

straightforward we still require a detailed business plan in order to assess the genuineness of your intentions to set up in business." (my emphasis).

(b) "118. Your failure to provide detailed information about customer service undermines the credibility of your intention to set up in business." (my emphasis).

12. By an application for judicial review issued on 1 July 2016, the Karagul Claimants sought to challenge the Secretary of State's decisions dated 30 March 2016 and 10 May 2016. They rely on two grounds: (a) Ground 1: Whether the decision reached was procedurally unfair; and (ii) Ground 2: Whether the current remedial regime of AR (followed by judicial review) as applied to Turkish ECAA cases is an effective one according to the principle of effectiveness in EU law.

(b) Ayten

13. On 17 October 2011, Mr Ayten was granted limited leave to enter the UK as a visitor until 17 April 2012. On 11 September 2012 he was granted LTR in order to establish himself in business under the ECAA. On 18 March 2014 he was refused further leave to remain under the ECAA. On 2 April 2014 Mr Ayten exercised his right to a statutory appeal against the refusal (since replaced by AR). The appeal was heard by the First-tier Tribunal (Immigration and Asylum Chamber) on 2 December 2014 and dismissed in a Decision and Reasons promulgated on 15 December 2014.

14. Whilst at the point of his application Mr Ayten stated that he was a 50% shareholder in a business called Formbay Limited, the FtT found that he "was never involved in any significant way in Formbay, and this was merely a ruse to obtain a residence permit". At the date of the appeal hearing Mr Ayten claimed to be a 50% shareholder in his father's business, Devrim Limited, trading as an off-licence. The FtT found that Devrim Limited was "not even trading" and further rejected his appeal on this basis.

15. By 2 January 2015, Mr Ayten had exhausted his appeal rights. Subsequently, by a further application dated 3 July 2015, acting through his current solicitors, Mr Ayten applied for leave to remain to continue operating in business under the ECAA. According to his application form he had been engaged in operating Devrim Limited since 18 March 2015.

16. By a decision dated 8 December 2015 his application was refused under paragraphs 4 and 21 of HC510. Mr Ayten applied for AR and the refusal decision was upheld in an AR decision dated 15 January 2016.

17. As in the case of the First Claimant, the refusal decision of 8 December 2015 said by way of conclusions:

(a) "The Secretary of State is not satisfied that you have genuinely established a business"; and

(b) "The evidence you have supplied casts serious doubts in respect of your claim to have genuinely engaged in business".

(my emphasis)

18. The AR decision was to the same effect but highlighted a concern about the authenticity of a bank statement that Mr Ayten had submitted.

19. By his application for judicial review issued on 25 February 2016, Mr Ayten challenged the Secretary of State's refusal and AR decisions. His amended pleaded grounds of challenge are: (i) Ground 1: the decision-making process and administrative review is procedurally unfair; (ii) Ground 2: Failure to consider applying discretion and apply policy and principles of Ascioglu [2012] EWCA Civ 1183; and (iii) Ground 3: Unlawful assessment contrary to the standstill clause and irrational conclusions.

(c) Yildiz

20. Mr Yildiz was granted leave to enter the UK on a six-month visitor's visa valid from 30 April 2016. It is not known when he entered the country under that visa but by an application dated 26 August 2016 he applied for LTR in order to establish himself in business. Whilst his application identified his intended business as being a "Gardening Maintenance Service" accompanying his application were projected profit and loss accounts and balance sheets for two businesses, namely, the "Green Gardener" based at 115 Old Wilton Road, Andover, SP10 2DR and "The Olympic Café" at 486 Neasden Lane North, London, NW10 0DG.

21. By a decision dated 8 February 2017, the Secretary of State refused the application under paragraph 21 HC510. This refusal was upheld upon AR in a decision dated 18 April 2017.

22. In similar fashion to the other decisions before me, the refusal decision of 8 February 2017 said by way of conclusions:

    (a) "The Secretary of State is not satisfied that you genuinely wish to establish in business as proposed"; and

    (b) [Having set out the details of the proposed business]: "Therefore based on the information provided I believe this application is an attempt to secure leave rather than a genuine intent to establish in business".

    (my emphasis)

23. The 18 April 2017 AR decision repeated: "We are therefore not satisfied that the you [sic] have a genuine wish to establish a business as proposed".

24. By an appeal lodged with the First-tier Tribunal (Immigration and Asylum Chamber) on 22 February 2017, Mr Yildiz sought to appeal against the original refusal. In a decision dated 8 March 2017 the First-tier Tribunal dismissed the appeal on the basis that no right of appeal existed.

25. The application for judicial review was issued on 29 June 2017 and the amended grounds advance two challenges: (i) Ground 1: Whether the current remedial regime for ECAA applicants is in breach of the principle of effectiveness in EU law; and (ii) Ground 2: Unfair decision making – Failure to apply policy by asking for further information or interviewing the Claimant.

(d) Izci

26. Mr Izci was granted leave to enter the UK on a family visit visa valid from 22 December 2017 to 22 June 2018. The visa prohibited him taking any form of employment in the UK. He entered the country on 30 December 2017. By an application dated 16 April 2018 he applied for LTR in order to establish himself in business under the ECAA providing what he called an "electrical repair and maintenance service".

27. On 13 June 2018, Mr Izci was found during an immigration enforcement visit to be working (in alleged breach of conditions) at a restaurant. On 23 July 2018 his ECAA application was refused under both paragraphs 4 and 21 HC510. The refusal was upheld upon AR in a decision dated 1 September 2018.

28. The refusal decision of 23 July 2018 said by way of conclusions: "The Secretary of State is not satisfied that you genuinely wish to establish in business as proposed". The AR decision of 1 September 2018 repeated this language.

29. By an application for judicial review filed on 17 October 2018 the Claimant sought to challenge both refusal decisions. His grounds of challenge are summarised in his Amended Grounds as follows: (i) Ground 1: Whether the current remedial regime of AR (followed by judicial review) as applied to Turkish ECAA cases is an effective one according to the principle of effectiveness in EU law; (ii) Ground 2: Whether the Secretary of State failed to consider and apply [her] policy with respect to the alleged breach of conditions; and (iii) Ground 3: Whether the current decision-making process and AR process is procedurally unfair, also with regard to the duty of sufficient inquiry and the Secretary of State's policy guidance.

30. As will be apparent, each Claimant (with the exception of Mr Ayten) contends that the replacement of a statutory appeal by AR coupled with judicial review breached the EU law principle of 'effectiveness'. No point is taken on whether Mr Ayten can make this argument and I have allowed him to pursue it.

III. The EU Legal Framework

31. As identified by Article 2(1) of the Ankara Agreement, its aim is to promote the continuous and balanced strengthening of trade and economic relations between the contracting parties, which includes the progressive securing of free movement for workers (Article 12), abolition of restrictions on freedom of establishment (Article 13) and on freedom to provide services (Article 14) with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later stage (Article 28 and fourth recital in the Preamble).

32. Article 13 of the Ankara Agreement contains the following general provision on the freedom of establishment between member states and Turkey:

> "The contracting parties agree to be guided by articles 52 to 56 [43EC-46EC] and article 58 [48EC] of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them."
>
> (with my insertion of the renumbered EC Treaty provisions).

33. Article 41 (1) of the Protocol is headed "Rights of establishment, services and transport" and provides for what has been called a “Standstill Clause” in the following terms:

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

34. The European Court of Justice held in C-37/98 Savas [2000] ECR 1-2927 that Article 41 (1) had direct effect and observed as follows:

> “46. As its very wording shows, this provision lays down, clearly, precisely and unconditionally, an unequivocal 'standstill' clause, prohibiting the contracting parties from introducing new restrictions on the freedom of establishment as from the date of entry into force of the Additional Protocol.
>
> 54. It follows from the considerations set forth above that Article 41(1) of the Additional Protocol lays down a precise and unconditional principle that is sufficiently operational to be applied by a national court and therefore capable of governing the legal position of individuals. The direct effect which must therefore be accorded to that provision implies that the individuals to which it applies have the right to rely on it before the courts of Member States.
>
> 69. It should also be noted that the 'standstill' clause in Article 41(1) of the Additional Protocol precludes a Member State from adopting any new measure having the object or effect of making the establishment, and, as a corollary, the residences 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 concerned.
>
> 70. “It is therefore for the national court, which alone has jurisdiction to interpret its own domestic law, to determine whether the domestic rules applied to Mr Savas by the competent authorities have the effect of worsening his position in comparison with the rules which were applicable in the United Kingdom on the date on which the Additional Protocol entered into force in relation to that Member State.”

35. The practical effect of this decision of the Court of Justice was to require the United Kingdom to ‘look back’ in time to the domestic rules which applied to relevant Turkish nationals seeking to establish themselves in business as at 1 January 1973 (when the United Kingdom became a member of the EEC). The rules to be applied to current applications were ‘frozen’ in time as at that date.

36. I should identify at this stage (because it will be relevant to the effectiveness argument below) that the Court of Justice also held in Savas [45] that Article 13 of the Ankara Agreement (cited at [32] above) was not sufficiently precise to have direct effect in the

internal legal order of Member States. In short, it does not govern the position of Turkish nationals in the United Kingdom.

IV. The Domestic Legal Framework

37. By reason of the above case law of the ECJ, the applications of Turkish nationals fall to be considered against HC510, Control after Entry, being the operative Immigration Rules at the material time, 1 January 1973. I will refer to these as "the 1973 Rules".

38. The material provisions within the 1973 Rules are paragraphs 4 and 21 of HC510 which provide as follows:

> "4. The succeeding paragraphs set out the main categories of people who may be given leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their application, or initiating any variation of their leave. In deciding these matters account is to be taken of all relevant facts; the fact that the applicant satisfies the formal requirement of these rules to stay or further stay in the proposed capacity is not conclusive in his favour. It will for example be relevant whether the person observed the time limit and condition subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain, whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country."

> "21. People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required. Where the applicant intends to join an existing business, audited accounts should be produced to establish its financial position, together with a written statement of the terms on which he is to enter into it; evidence should be sought that he will be actively concerned with its running and that there is a genuine need for his services and investment. Where the application is granted the applicant's stay may be extended for a period of up to 12 months, on a condition restricting his freedom to take employment. A person admitted as a businessman in the first instance may be granted an appropriate extension of stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially."

39. As was common ground before me, the 1973 Rules, in contrast to the highly prescriptive version of the current rules, are not to be construed rigidly and involved a broad exercise in discretion by the Secretary of State: see R v IAT (ex parte John Maxwell Clarke Joseph) [1977] Imm. A.R. 70, pages 73-74 and EK (Ankara Agreement – 1972 Rules – construction) Turkey [2010] UKUT 425 (IAC) [23] – [24].

40. Before continuing to outline the domestic law provision, I should pause here to identify the fact that under paragraph 21 of HC510 an applicant can fail to obtain LTR as a businessperson even though they have acted in good faith and put forward a genuine business plan. The Secretary of State may properly take the view that the business proposed is not viable (or for example the applicant cannot show he or she will be able to devote sufficient funds). Equally, the Secretary of State may take the view that although the applicant ticks all the relevant boxes and has indeed put forward a viable business plan, he or she in fact has some ulterior purpose and does not in fact genuinely intend or wish to establish in business as proposed, and in reality just wants to be able to remain in the United Kingdom. Examples may include those who apply with a *prima facie* viable business plan when faced with enforcement action such as deportation where one can readily infer that the likely true intention of the applicant is simply to frustrate or delay removal from the United Kingdom

41. Returning to the statutory framework, of particular relevance to the present cases is the fact that at the material time on 1 January 1973, the Immigration Act 1971, by section 14 (1), provided for the right of appeal to an adjudicator against a decision to refuse to vary leave to remain (such as in each of the Claimants' cases). The powers of an adjudicator on appeal were set out in Section 19 of the Immigration Act 1971, which allowed for a full merits review.

42. This right of appeal to an independent judicial body was removed by Section 15 of the Immigration Act 2014 which amended section 82 of the Nationality, Immigration and Asylum Act 2002 so that the right of appeal to the First-tier Tribunal was restricted to the refusal of a protection claim, refusal of a human rights claim or revocation of protection status.

43. These changes, which came into force on 5 April 2015, removed the right of appeal from Turkish businesspersons who had been refused a grant of leave under HC509 or HC510.

V. Administrative Review

44. The replacement for the appeal system was an internal review of a caseworker's decision by way of administrative review ("AR") under the Immigration Rules. I was taken to the Government's rationale for replacing a statutory appeal with AR. It was set out in the "Immigration Bill Factsheet: Appeals (clauses 11-13)" in which Immigration Minister Mark Harper pledged to,

> "Set up an administrative review system to provide a proportionate and less costly mechanism for resolving case working errors."

45. In the "Impact Assessment of Reforming Immigration Appeal Rights" dated 15 July 2013 it was stated that:

> "An internal Home Office review estimated that approximately 60 per cent of the volume of appeals allowed are due to case working errors. The Administrative Review process when set up is intended to resolve such errors."

46. In terms of the role of new evidence in the AR procedure, as stated in the paper, "IMMIGRATION BILL- STATEMENT OF INTENT Administrative review in lieu of appeals (clause 11)":

> "3. Can new evidence be submitted as part of the administrative review?
>
> New evidence cannot be submitted. This mirrors the current appeal process for in country Points Based System appeals. The only exception to this will be where the new evidence is relied upon to demonstrate that a previously submitted document is genuine or meets the requirements of the Immigration Rules."

47. Paragraphs 34L to 34X of the Immigration Rules include details of "Specified forms and procedures in connection with applications for administrative review" whereas the detail of the AR process is set out at Appendix AR.

48. As to Appendix AR, AR2.1 to AR.2.6 provide as follows:

> "What is administrative review?
>
> AR2.1 Administrative review is the review of an eligible decision to decide whether the decision is wrong due to a case working error.
>
> Outcome of administrative review
>
> AR2.2 The outcome of an administrative review will be:
>
> (a) Administrative review succeeds and the eligible decision is withdrawn; or
>
> (b) Administrative review does not succeed and the eligible decision remains in force and all of the reasons given for the decision are maintained; or
>
> (c) Administrative review does not succeed and the eligible decision remains in force but one or more of the reasons given for the decision are withdrawn; or
>
> (d) Administrative review does not succeed and the eligible decision remains in force but with different or additional reasons to those specified in the decision under review.
>
> What will be considered on administrative review?
>
> AR2.3 The eligible decision will be reviewed to establish whether there is a case working error, either as identified in the application for administrative review, or identified by the Reviewer in the course of conducting the administrative review.

> AR2.4 The Reviewer will not consider any evidence that was not before the original decision maker except where:
>
> (a) evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11 (a), (b) or (c) has been made; or
>
> (b) the evidence is submitted to demonstrate that the refusal of an application under paragraph 322(2) of these Rules was a case working error and the applicant has not previously been served with a decision to:
>
> (i) refuse an application for entry clearance, leave to enter or leave to remain;
>
> (ii) revoke entry clearance, leave to enter or leave to remain;
>
> (iii) cancel leave to enter or leave to remain;
>
> (iv) curtail leave to enter or leave to remain; or
>
> (v) remove a person from the UK, with the effect of invalidating leave to enter or leave to remain,
>
> which relied on the same findings of facts.
>
> AR2.5 If the applicant has identified a case working error as defined in paragraph AR2.11 (a), (b) or (c), the Reviewer may contact the applicant or his representative in writing, and request relevant evidence. The requested evidence must be received at the address specified in the request within 7 working days of the date of the request.
>
> AR2.6 The Reviewer will not consider whether the applicant is entitled to leave to remain on some other basis and nothing in these rules shall be taken to mean that the applicant may make an application for leave or vary an existing application for leave, or make a protection or human rights claim, by seeking administrative review."

49. AR2.11 provides as follows:

> "AR2.11 For the purposes of these Rules, a case working error is:
>
> (a) Where the original decision maker's decision to:
>
> (i) refuse an application on the basis of paragraph 320(7A), 320(7B), 322(1A) or 322(2) of these Rules; or
>
> (ii) cancel leave to enter or remain which is in force under paragraph 321A(2) of these Rules; or

> (iii) cancel leave to enter or remain which is in force under paragraph V9.4 of Appendix V of these Rules; or
>
> (iv) refuse an application of the type specified in paragraph AR3.2(d) of these Rules on grounds of deception,
>
> was incorrect;
>
> (b) Where the original decision maker's decision to refuse an application on the basis that the date of application was beyond any time limit in these Rules was incorrect;
>
> (c) Where the original decision maker's decision not to request specified documents under paragraph 245AA of these Rules was incorrect;
>
> (d) Where the original decision maker otherwise applied the Immigration Rules incorrectly; or
>
> (e) Where the original decision maker failed to apply the Secretary of State's relevant published policy and guidance in relation to the application."

50. An "eligible decision" (that is, one capable of being reviewed) is defined at paragraph AR 3.2 as including:

> "(d) A decision made on or after 6th April 2015 on an application for leave to remain made by a Turkish national or their family member pursuant to the UK's obligations under Article 41 of the Additional Protocol to the European Community Association Agreement (ECAA) with Turkey."

51. One of the specific situations where new evidence can be put before the AR decision-maker is when deception has been alleged in relation to an application under the ECAA: see the combination of AR2.11(a)(iv) and AR3.2(d). It was however common ground that this provision had no application to any of the four cases before me where there was in fact a restriction on the ability to submit new evidence for the AR.

52. Further, I understood the Secretary of State to accept that where the complaint in the AR is that paragraph 21 of HC210 or the Guidance has not been followed (for example in relation to the need to ask for additional evidence), the Claimants were not permitted to submit such new evidence to the reviewer. That seems to me to be correct as a matter of construction when one considers the terms of AR2.5 read with AR2.11(a),(b) and (c). In short, on the facts before me the Claimants were in a position where none of the complaints they wished to make in the AR would allow them to seek admission of new evidence.

53. Both parties relied upon certain additional matters in relation to the AR. I can summarise those as follows for completeness but will not, in the interests of brevity, set out all of the material cited to me. The material was essentially put before me to demonstrate that the AR process is not effective and fair.

54. Upon the introduction of AR, oversight of the operation of the new regime by the Independent Chief Inspector of Borders and Immigration ("the Chief Inspector") was incorporated into the Immigration Act 2014:

> "16. Report by Chief Inspector on administrative review
>
> (1) Before the end of the period of 12 months beginning on the day on which section 15 comes into force, the Secretary of State must commission from the Chief Inspector a report that addresses the following matters—
>
> (a) the effectiveness of administrative review in identifying case working errors;
>
> (b) the effectiveness of administrative review in correcting case working errors;
>
> (c) the independence of persons conducting administrative review (in terms of their separation from the original decision-maker)."

55. The Chief Inspector published his first report on Administrative Review entitled "An inspection of the Administrative Review processes introduced following the 2014 Immigration Act September – December 2015", on 26 May 2016. The summary of the findings in the report states:

> "2.4 The inspection found that: the bulk of the AOs redeployed into the AR Team had no experience in Points Based System casework and limited experience of other immigration casework, with permanent staff in the minority; that quality assurance was ineffective; and that there was no evidence of cases being identified as complex and passed to EO caseworkers to review. While staff and managers in the AR Team considered the training they had received to have been adequate, file sampling indicated considerable scope to improve their understanding of relevant Immigration Rules, guidance and practice.
>
> …
>
> 2.7 File sampling indicated that valid applications were being incorrectly rejected and that the quality assurance process was not identifying and rectifying this. In four of the cases sampled the Home Office had conceded it was wrong, either when informed of the applicant's intention to seek a Judicial Review (JR) or in advance of the JR hearing. Better initial decision making, by applying rules and guidelines correctly, and better quality assurance would have avoided the nugatory effort, cost and distress for the applicant of having to resort to a JR."

56. With respect to in-country AR, the inspection revealed that the AR process had missed wrongly refused cases and had not given adequate scrutiny to the issues raised by the applicant:

> "2.9 In addition to the 15 cases where the reviewer had identified caseworking errors, the inspection found a further 10 incorrect refusal decisions, according to the Immigration Rules and Home Office guidance, that the reviewer had missed, and six further cases where the decision was correct but one or more reasons were incorrect or missing.
>
> 2.10 While not always linked to the failure to identify errors, based on the case record and the AR response, in-country AR reviewers had not given adequate scrutiny to the issues raised by the applicant in over half the cases sampled. There was an over-reliance on the initial refusal decision letter, with AR decision notices reiterating the previous grounds for refusal without addressing the applicant's points."

57. As for the success rate for in-country AR, the figure of 8% is considerably lower than compared to success rate on appeal. The report said:

> "2.29 Nonetheless, file sampling suggested that reviews of at the border ARs (which were the smallest in number) were generally less likely to result in the wrong outcome than overseas or in-country ARs. While the latter two were broadly similar in terms of the proportion of caseworking errors that reviewers missed, the success rate for overseas ARs was significantly higher in the file sample and according to Home Office management information. The latter put the rates at 22% and 21% for at the border and overseas ARs respectively, but at only 8% for in-country ARs.
>
> 2.30 Notwithstanding any comparison with the at the border and overseas success rates, in light of the Home Office's own assessment in July 2013 of the extent of caseworking errors in Managed Migration cases that had been lost at appeal, the 8% in-country figure was much lower than might have been predicted based on the Home Office's Impact Assessment. In the circumstances, it would have been reasonable to expect that the Home Office would look closely at the in-country AR process (including the rejection of applications as invalid) and assure itself of the quality of the decision making, as it had committed to doing in its Statement of Intent.
>
> …
>
> 2.33 Overall, there was a clear and pressing requirement for accurate data covering all aspects of the AR processes for in-country, overseas and at the border ARs. Internally, the Home Office needed this to inform its policy and practice, and to

> support learning. Externally, it was a prerequisite for reassuring Parliament and the public about the Home Office's handling of challenges to immigration decisions where the right of appeal has been removed."

58. The Chief Inspector's re-inspection January to March 2017 report, published July 2017 revisited the recommendations made. It was said considerable improvement had been made:

> "However, the Home Office was not yet able to demonstrate that it had delivered an efficient, effective and cost-saving replacement for the previous appeals mechanisms."

59. The report further notes that the overturn rates had dropped further from the 8% in-country overturn rate in the first report to 3.4% in-country overturn rate in the re-inspection. The report does not investigate the reason for this nor recommend that the Home Office explain the drop in positive outcomes. Administrative Review remains under "live inspection" by the Chief Inspector.

60. I have set these materials because they featured in the skeletons and the oral argument before me. I however find them of little assistance in relation to what are ultimately issues of law. Further, at the hearing, Counsel for the Claimant fairly acknowledged that they did not in fact assist in resolution of the issues before me.

61. The low proportion of successful ARs may be related to any number of reasons which may include the fact that first level decisions are, in substantial part, correct. I will accordingly say no more about these matters save that it can be said that in broad terms although the AR system saves time and costs, it does not seem to work as well and as efficiently as one might hope.

VI. The Secretary of State's Guidance

62. The Secretary of State's guidance ("the Guidance") to caseworkers in force at the date of certain of the decisions in these cases, entitled Business applications under the Turkish EC Association Agreement – v 6.0, published 15 October 2015, provides as follows [32]:

> "While the 1973 rules do not specify the types of documents to be submitted in support of a business application, you must assess if not providing relevant and/or requested documents undermines the credibility of the applicant's business proposal."

63. The passage above is repeated at [46] under the heading "Evidence to assess an applicant has met the requirements of the Turkish ECAA" and provides for caseworkers to consider requesting further information, verification checks and interviewing applicants:

> "Requests for further information
>
> You must decide on a case by case basis whether it is appropriate to request further information from the applicant. Where a refusal is based partly or wholly on the applicant failing to

> provide necessary documentation, you must make it clear in the decision letter why and how any missing documents led to a refusal.
>
> Verification
>
> You must verify the documents with the appropriate agency to determine if the documents are genuine, false or inconclusive if you have reasonable doubts that any supporting documents:
> - are genuine, including passports, or
> - do not reflect the claims made in the application.
>
> You can also conduct verification checks on key documents such as references and relevant business documents by contacting the provider in the usual way."

64. The Guidance states at [47]:

> "Interviewing applicants
>
> If you are unable to determine whether an application is genuine solely from the documents provided you must consider if it is necessary to interview the applicant in person.
>
> For example, you may have concerns about:
> - the authenticity of the documents provided
> - inconsistencies in the evidence provided
> - significant omissions in the documents required
> - the involvement of a third party in preparing the application
> - applications which appear to be identical with other applications previously submitted
> - the credibility of the application is in doubt."

65. Under the heading "experience and qualifications" the Guidance provides [53]:

> "Insufficient evidence
>
> In cases where the applicant does not provide sufficient evidence of their previous experience and/or qualifications relevant to the application, you must ask them to provide further written evidence. This may take the form of employer references and certificates.
>
> In cases where previous experience and/or qualifications are particularly relevant you may wish to consider interviewing the applicant."

66. As to proficiency in English, the Guidance recognises that this is not a requirement of the 1973 rules but where evidence is not provided and it is considered relevant to the application the Guidance provides [54]:

> "In cases where the applicant does not provide sufficient evidence of proficiency in English and this is relevant to the application, you must ask the applicant to provide further written evidence of their fluency. This may take the form of an appropriate qualification in English or a certificate of attendance from a college where they are studying English.
>
> You must check that the evidence is correct and genuine.
>
> In cases where proficiency in English is particularly relevant you may consider interviewing the applicant."

67. As to reasons for refusal, I need to set out the instructions given to case workers in the Guidance. Specifically, the language they are directed to use when refusing an application for LTR under the Ankara Agreement is as follows (in material part):

Reason	Suggested wordings
You do not genuinely wish to establish in business as proposed/you have not genuinely established in business as proposed	• The documentation you have submitted does not reflect a business proposal with a realistic chance of success because [state reasons] • You are not named on the partnership agreement • The partnership agreement does not satisfactorily outline what your level of involvement in the business will be • The documentation which you have submitted does not include [state documents]. This documentation is considered to be essential evidence to show that you can run a business of this nature because [state reasons] • You claim to be establishing in business as [state facts] but you have not shown that you have the relevant [qualifications] [experience] which are considered essential to running such a business

	• Your level of English is not sufficient to allow you to run your business with a realistic chance of success because [state reasons].

68. As to breach of conditions of leave, the Guidance says:

> "Breach of conditions
>
> This page tells you about breach of conditions when a person is applying as a self-employed Turkish businessperson under the Turkish ECAA.
>
> Case law such as that of C-186/10 Oguz and Ascioglu v SSHD [2012] EWCA Civ 1183 established that applicants who have breached immigration law must still be assessed under the 1973 rules and not the more restrictive current Immigration Rules. Under the 1973 rules breaches of immigration law in business cases are covered by paragraph 4 of HC510.
>
> Just because an applicant has worked in breach of their conditions does not mean you must automatically refuse the case under paragraph 4 of HC510. Instead you must consider an applicant's breach of immigration law on an individual basis. This is because a breach of conditions can vary in different ways and so have a different impact on a case.
>
> You must consider all the relevant circumstances of an application, but applicants must not normally be allowed to benefit from breaches in immigration law. This includes first time or repeat applications based on previously established businesses, or where there are only superficial changes such as a change in name, or change in the status of a business from sole trader to limited company.
>
> The following factors are relevant when you decide if an application, where a breach of immigration law has occurred, should be refused. An applicant:
>
> - Has overstayed a previous period of leave
> - Has entered or sought to enter the UK illegally
> - Has sought or obtained leave by deception such as making false representations or failing to disclose fact sin the application (fraudulent and abusive conduct)
> - Has breached their conditions of leave to enter or remain (for example, where the applicant started trading before the initial grant of leave and this put the applicant in a position to meet the requirements of paragraph 21, in circumstances where they should not have been able to do so otherwise) if an applicant has breached their

> conditions of temporary admission or has absconded from temporary admission
> - Has made an asylum claim that has been refused
> - Has previously used fraudulent or abusive conduct
> - Has demonstrated there is a material link between the current business proposal and previous fraudulent and/or abusive conduct
> - Whose conduct makes it undesirable to grant them leave for example where there is evidence of criminality
> - Is liable to deportation"

69. I should add there are a number of specific versions of the Guidance (and a single version was not applied to all Claimants) but the parties are agreed that the provisions I have set out above appear in all relevant versions.

VII. The Akturk Case

70. A judicial review challenge to the change in available remedies (on the basis that the new regime was incompatible with Article 41(1) of the Additional Protocol to the Ankara Agreement - the standstill clause) was considered in the case of Akturk v Secretary of State [2017] 4 W.L.R. 62; [2017] EWHC 297 (Admin). The complaint was essentially about the removal of the right of appeal.

71. Holman J held that the absence of a right of appeal for this category of claimant was incompatible with article 41(1) and the incompatibility was not avoided by the introduction of administrative review. Judicial review was also granted on traditional public law grounds of procedural unfairness.

72. As regards procedural fairness, particular emphasis is placed by the Claimants on the judgment of Holman J at [25] to [41] and the specific observation:

> "42. I have adverted several times above to the possibility of a face-to-face interview with the claimant, reflecting passages which I have quoted from the Secretary of State's own guidance document. When an applicant has a right of appeal to a judicial tribunal at which he can give evidence himself directly to the tribunal, the need for, and proportionality of, an interview at the earlier, administrative decision making stage may be less; but if and in so far as appeal rights have been removed, the need for an administrative interview may have increased. Save where there is powerful documentary evidence of a lack of genuineness, it is a strong thing, and likely to be unfair; for any decision maker to reach adverse conclusions as to integrity, credibility or legitimacy without, at some point in the process, the person concerned having the opportunity to answer questions and explain himself."

73. By a judgment dated 21 December 2018, the Court of Appeal allowed the Secretary of State's appeal against Holman J's judgment: Secretary of State for the Home Department v CA (Turkey) [2018] EWCA Civ 2875; [2019] 1 W.L.R. 2689. In short, the Court of Appeal held that the standstill clause does not apply to remedies. Therefore,

the replacement of a statutory appeal by AR did not amount to a new restriction on the right of Turkish businesspersons freely to establish in the UK.

74. The decision of Holman J in respect of the public law procedural unfairness in that case was not the subject of the appeal to the Court of Appeal (which was restricted to the issue of the removal of the right of appeal, permission having been refused to challenge the procedural fairness ruling).

VIII. The Effectiveness Challenge

75. Before the principle of effectiveness can be invoked, one needs to identify with precision *which* directly effective right arising under EU law is said to be issue. At the risk of stating the obvious, the principle of full and effective protection only "bites" once a directly effective right is invoked: *Lewis, Remedies and The Enforcement of European Community Law*, page 57. The position of the Claimants as to which right is said to be relied upon has not been clear or consistent.

76. As has been noted above in relation to the Court of Justice's decision in Savas, Article 13 of the Ankara Agreement is not sufficiently precise to establish any right which has direct effect in the internal legal order of Member States. It follows that insofar as Article 13 of the Ankara Agreement is the claimed right invoked, the effectiveness argument cannot be deployed (that is, whether as a means of challenging AR (as supplemented by judicial review) or in support of the other procedural protections contended for).

77. In oral argument, the position of the Claimants appeared to have been modified somewhat and seemed to be that it is not Article 13 of the Ankara Agreement that is the relevant provision for the purposes of their case but, rather, Article 41(1) of the Additional Protocol – a provision which is directly effective.

78. As I recorded it, the Claimants' submission was that "Article 41(1) is a quasi-procedural right. Pre-remedy, it accompanies everything up to Administrative Review so unfairness does bite on the direct effect of Article 41(1)".

79. This submission is not altogether easy to follow, but I reject it for a number of reasons. First, the argument fails to acknowledge that the right sought to be enforced in these cases is the right to establish in business under Article 13 of the Ankara Agreement. There has rightly been no suggestion that the directly effective right under Article 41(1) of the Additional Protocol is breached by the procedural unfairness alleged. Second, the submission contradicts the fact that the effectiveness argument was (as originally formulated) directed to the process of AR as supplemented by the availability of judicial review (and not to any alleged unfairness in the decision-making process prior to AR). Thirdly, the argument ignores the fact that in substance Article 41(1) operates to prevent new "restrictions" (on the freedom of establishment). That is, it cannot be invoked to argue for *additional* procedural protections in the decision-making process; there are no new "restrictions" that have been identified by the Claimants and which they challenge and seek to disapply.

80. The principle of effectiveness is simply not in play. However (and since it has been fully argued) I will go on to consider whether (assuming it to be in play) there is any substance to the effectiveness challenge. I take the argument to be that there is some

form of unfairness in the process governing ECAA applications which domestic law cannot remedy (and that there is therefore some form of violation of EU law).

81. The EU law principles of equivalence and effectiveness – the latter being relied on in the present case – were summarised by the Grand Chamber of the CJEU in Impact v Minister for Agriculture and Food C-268/06; [2008] 2 C.M.L.R. 47:

> "44. The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, in particular, *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (33/76) [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533 at [5]; *Comet BV v Produktschap Voor Siergewassen* (45/76) [1976] E.C.R. 2043 at [13]; *Peterbroeck Van Campenhout & Cie SCS v Belgium* (C-312/93) [1995] E.C.R. I-4599; [1996] 1 C.M.L.R. 793 at [12]; *Unibet* at [39]; and *Van der Weerd v Minister van Landbouw* (C-222/05, C-223/05, C-224/05 & C-225/05) [2007] 3 C.M.L.R. 7 at [28]).
>
> 45. The Member States, however, are responsible for ensuring that those rights are effectively protected in each case (see, in particular, *Bozzetti v Invernizzi SpA* (179/84) [1985] E.C.R. 2301; [1986] 2 C.M.L.R. 246 at [17]; *Seim v Subdirector-Geral das Alfandegas* (C-446/93) [1996] E.C.R. I-73 at [32]; and *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (C-54/96) [1997] E.C.R. I-4961; [1998] 2 C.M.L.R. 237 at [40]).
>
> 46. On that basis, as is apparent from well-established case law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, *Rewe-Zentralfinanz* at [5]; *Comet* at [13]–[16]; *Peterbroeck* at [12]; *Unibet* at [43]; and *Van der Weerd* at [28]).
>
> 47. Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law."

82. As held by the Grand Chamber of the CJEU in Case C-327/02 Panayotova and Others v Minister Voor Vreemdelingenzaken en Integratie [2005] 1 C.M.L.R. 24 (a case concerning residence permits and the right of establishment):

> "26. It should also be pointed out that the procedural rules governing issue of such a temporary residence permit must themselves be such as to ensure that exercise of the right of establishment conferred by the Association Agreements is not made impossible or excessively difficult.
>
> 27. It follows in particular that the scheme applicable to such temporary residence permits must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings."

83. In Case C-89/17 Banger v Secretary of State for the Home Department [2019] 1 C.M.L.R. 6 a question was referred to the CJEU as to whether judicial review compared to a full merits appeal complied with the requirement under Article 3(2) of Directive 2004/38 (the Citizens' Directive) requiring that "[t]he host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

84. In delivering his Opinion, Advocate General Bobek explained that:

> "102. In the context of the principle of effectiveness as a limit to the procedural autonomy of the member states, the court has held that it is not required that, in all circumstances, courts be able to substitute the decision on the merits and facts (Case C-120/97 *Upjohn Ltd v The Licensing Authority Established by the Medicines Act 1968 and Others* [1999] 1 C.M.L.R. 825 at §§34 & 35)
>
> …
>
> 107. Two (interrelated) points are worth highlighting in lieu of a conclusion: first, the best possible generalisation as to the scope and depth of the review emerging from the case law is rather laconic: it depends on several factors. It depends on the particular nature of the EU law based rights and entitlements as set by the applicable EU law rules, analysed in a given context related to the subject matter of the dispute. Second, the more harmonised the (procedural) standards in EU law itself, the more thorough the review likely to be required at the national level. Conversely, as in many other areas of EU law, the less explicit the provisions of EU law on the matter, the greater the leeway given to the member states in shaping the way judicial protection is provided."
>
> (my emphasis)

85. Addressing the specific question in Banger regarding effective judicial protection and Article 3(2) of Directive 2004/38 the Advocate General stated that Article 3(2) required

three elements of judicial scrutiny, namely the decision reviewed must be the result of an extensive examination, which must be reflected in the reasons for the decision and that the examination must be on the basis of the individual's personal circumstances (§111).

86. Further:

> "113… as long as all those elements can be reviewed and any administrative decision breaching those requirements can be annulled, an effective remedy under article 47 of the Charter does not require, in my opinion, the reviewing court or tribunal to have the competence to examine new evidence. Nor does it require it to establish facts not presented before the administrative authority, or to have the power to immediately substitute the administrative decision with its own judgment."

87. In its judgment the CJEU in Banger concluded as follows:

> "52… article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence."

88. It will be noted that the Advocate General in Banger made specific reference in his Opinion to Case C-120/97 Upjohn Ltd v The Licensing Authority Established by the Medicines Act 1968 and Others [1999] 1 C.M.L.R. 825 at §§34 & 35. In my judgment, that is an important authority in the context of the matters which have been argued before me.

89. In Upjohn, the UK Licensing Authority revoked the marketing authorization relating to medicine. Upjohn Ltd sought judicial review of the decision revoking the authorisation and argued that the material directives and, more generally, Community law required national courts to exercise full review of the merits of the decisions of national competent authorities, i.e. to verify on the basis of a fresh, comprehensive examination of the issues of fact and law, whether the decision taken was correct. That submission was roundly rejected and the Court of Justice referred to the established case law to the effect that, in the absence of Community rules, it was for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, subject to the principles of effectiveness and equivalence. It held that the effective protection of Community rights did not require a procedure empowering the national courts to substitute their assessment of the facts for that made by the national authority revoking authorisation. The Court proceeded to draw a parallel between judicial review of Community measures and review of national measures. It

recalled its case law according to which, where a Community authority is called upon to make assessments in the exercise of broad discretionary powers, judicial review is limited to ascertaining the accuracy of facts, manifest error, misuse of powers, and clear excess of discretion (essentially mirroring the scope of domestic law judicial review).

90. In the result, the Court of Justice held that Community law does not require the Member State to establish a procedure for judicial review of national decisions revoking marketing authorisations which involves a more extensive review than that carried out by the Court of Justice itself in similar cases.

91. The Claimants' broad overall submission is that because the Secretary of State fails to correctly apply the staged procedural features of her Guidance (as set out above) to decision making, the system, as a whole, fails, to provide an effective remedy.

92. The Claimants also relied on the fact that the Chief Inspector still has AR under inspection and the re-inspection demonstrates a further decline in the numbers of successful AR. It is accordingly argued that this formidable barrier of obstacles is intimidating to any would-be businessperson seeking to establish in the UK but onwards from that position to pursue judicial review, which is almost inevitably necessary in order to obtain a remedy has its own particular features that make its pursuit in the totality of the system impossible or excessively difficult, to exercise.

93. In my judgment there is no breach of the principle of effectiveness for the following reasons:

(a) Neither the Ankara Agreement, its Additional Protocol, nor any other instrument of EU Law, prescribes the internal procedural rules of Member States by which the rights contained at Article 13 of the Ankara Agreement and the 'standstill clause' are to be protected. This is a matter for the UK's domestic legal system as a matter of its procedural autonomy.

(b) It is wrong in principle to consider AR separate from judicial review because they both form crucial parts of the UK's relevant internal legal order. The Claimants have to show that these twin processes make it "practically impossible or excessively difficult" to exercise the relevant rights

(c) As to judicial review (as distinct from AR), whilst the Claimants highlight Holman J's brief observations concerning the differences between it compared to a statutory appeal (Akturk [83]), the mere fact of such differences cannot render the Claimants' exercise of their right of establishment "practically impossible or excessively difficult". This is not least because Mr Akturk's claim *succeeded* on conventional judicial review grounds (§48, undisturbed by the Court of Appeal) notwithstanding that his application for AR had failed. My judgment below also shows that the domestic courts are able to entertain the procedural complaints made by the Claimants.

(d) As to the nature of domestic judicial review the observations of the Court of Appeal in T-Mobile (UK) Ltd and another v Office of Communications [2008] EWCA Civ 1373; [2009] 1 W.L.R. 1565 are material. Article 4 of Directive 2002/21/EC (the Framework Directive) provided for a "right of appeal"

ensuring that "the merits of the case are duly taken into account and that there is an effective appeal mechanism". The Court of Appeal explained:

> "the common law in the area of judicial review is adaptable so that the rules as to judicial review jurisdiction are flexible enough to accommodate whatever standard is required by article 4."
>
> (per Jacob LJ at §19).

(e) Jacob LJ also referred to series of cases where the width and range of judicial review has been emphasised. One can add to this TN (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 1609; [2014] 1 W.L.R. 2095 at [16] as to the effectiveness of judicial review as a remedy for the purposes of Article 39 of the Procedures Directive and Article 47 of the Charter of Fundamental Rights. See also Regina (Q) and others v Secretary of State for the Home Department [2003] EWCA Civ 364; [2004] Q.B. 36 (CA)[114]-117] as to the effectiveness of judicial review.

(f) It is the remedy of AR combined with judicial review which gives effect to the Claimants' rights under Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and fair trial).

(g) Ultimately, Counsel for the Claimants was not able to point to any gap in judicial review in terms of its scope which would render it incapable of providing effective protection for the protection of the procedural rights claimed in these cases. He accepted that the lack of a merits jurisdiction in judicial review was not his complaint.

94. I reject the effectiveness challenge.

IX. Procedural Fairness: Legal Principles

95. Although there were a large number of authorities placed before me on the issue of procedural fairness (both from the immigration field and other contexts) in my judgment one now needs to go no further than Singh LJ's judgment in R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812, [2018] 4 W.L.R. 123, for a comprehensive summary of the requirements of procedural fairness in modern public law. The main judgment was given by Singh LJ (with whom Hickinbottom and Asplin LJJ agreed).

96. Singh LJ collected and summarised the material principles as follows [68]-[71]:

> "68. That the common law will 'supply the omission of the legislature' has not been in doubt since *Cooper v Wandsworth Board of Works* (1863) 4 CB (NS) 180 (Byles J); see also the more recent decision of the House of Lords in *Lloyd v McMahon* [1987] AC 625. Accordingly, the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a

statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed.

69. The requirements of procedural fairness were summarised in the following well known passage in the opinion of Lord Mustill in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560 in which he summarised the effect of earlier authorities:

> 'From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

70. *In R v Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108, 113, Laws J said, in the context of a housing decision but by reference to immigration law as well:

> 'In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the

> applicant, it has to give the applicant an opportunity to deal with it.'
>
> 71. The origins of the duty to act fairly in the context of an immigration decision can be traced back to the decision of the Divisional Court in *In re HK (An Infant)* [1967] 2 QB 617, 630 (Lord Parker CJ)."

97. The question of whether there has been procedural fairness or not is an objective question for the court to decide for itself. The question is not whether the decision-maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned: see R (Balajigari) v Secretary of State for the Home Department [2019] EWCA Civ 673; [2019] 1 W.L.R. 4647 (CA) (hereafter, "Balajigari").

98. The judgment of the Court of Appeal in Balajigari is important in a number of additional respects which are relevant to the present claims. It was the subject of detailed submissions before me and I accordingly need to set out the issues and reasoning in some detail. The Secretary of State argues that the decision is of limited effect and is relevant only in the context of the specific facts of the several cases before the court. The Claimants draw principles of general application from the judgment.

99. The judgment of the Court of Appeal was given by Underhill LJ (Underhill, Hickinbottom and Singh LJJ each having made substantial contributions). In summary, a number of foreign nationals who had had leave to enter or remain as Tier 1 (General) Migrants appealed against decisions upholding the Secretary of State's refusal to grant them indefinite leave to remain. Tier 1 migrants had been entitled to apply for indefinite leave after five years. Their applications had to demonstrate a minimum level of earnings. The Secretary of State discovered discrepancies between the earnings the appellants had stated and the earnings declared in their tax returns. He refused the applications, relying on the Immigration Rules para.322(5), which stated that leave to remain would normally be refused on the ground of "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct ... character or associations". The Secretary of State's policy was only to rely on para.322(5) where he believed that a discrepancy was the result of deliberate misrepresentation either to HMRC or to the Home Office. The appellants claimed that careless errors had been treated as dishonest without adequate evidence or a fair procedure.

100. The Court of Appeal allowed the appeals. It held that where the Secretary of State was minded to refuse indefinite leave to remain under paragraph 322(5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he was required as a matter of procedural fairness: (i) to indicate clearly to the applicant that he had that suspicion, (ii) to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and (iii) to take that response into account before drawing the conclusion that there had been such conduct.

101. The Court of Appeal also held, however, that the duty to act fairly did not in every case require that an interview be conducted, and a written procedure might well suffice in most cases. It concluded that the availability of a procedure for administrative review

following an initial refusal of indefinite leave to remain did not satisfy the requirements of procedural fairness since it was precisely because the applicant had no notice of the Secretary of State's concerns that he had no opportunity to put evidence before the original decision-maker. Particular reliance was placed by the Court of Appeal on R. v Secretary of State for the Home Department Ex p. Al-Fayed (No.1) [1998] 1 W.L.R. 763 (CA) at [55]-[56] of Balajigari.

102. In my judgment, the Balajigari judgment is an application of well-established general principles and is not to be regarded (as the Secretary of State submits) as a decision simply about unfairness in a specific set of circumstances. Based on that decision, and also the decision of Martin Spencer J in Shahbaz Khan [2018] UKUT 384 (IAC) (which I respectfully record I have found to be of considerable assistance) there is in my judgment a general public law principle in operation in the cases.

103. I summarise that general principle as follows but with the caveat that its application will of necessity be modified depending on the terms of the statutory regime:

(1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision.

(2) Further, a process of internal administrative review of an original negative decision which bars the applicant from submitting new evidence to rebut the finding of wrongdoing is highly likely to be unfair.

(3) The need for these common law protections is particularly acute where there has been a decision by the legislature to remove an appeal on the merits to an independent and impartial tribunal.

X. Procedural Fairness: General Conclusions as regards ECAA Applications

104. Having regard both to the principles set out above and the specific statutory context, my general conclusions in relation to the nature of an application under the ECAA, the associated procedural requirements, and the role of the Court are summarised below.

105. I have addressed a wide range of matters in this summary because they will be relevant to some of the specific complaints in the individual cases which I before me (Section XI below).

106. My conclusions are as follows:

(i) The assessment of an application under paragraph 21 of HC510 is a merits based evaluative assessment for the Secretary of State's judgment. Notably, it is an assessment involving a predictive analysis of the viability in the future of a proposed business, and such an assessment will be by its very nature difficult to challenge.

(ii) As long as the Secretary of State has followed a fair procedure, directed herself according to relevant considerations (and not taken into account irrelevant considerations), and arrived at a rational conclusion with reasons (directed at the terms of HC510 and the Guidance), a public law court will not interfere with the decision.

(iii) The context in which the evaluative assessments are to be undertaken by the Secretary of State gives her a wide margin of appreciation as to the merits and feasibility of proposed businesses and whether they meet the paragraph 21 requirements. Specifically, it would be in a rare and extreme case that a court on judicial review would second-guess an overall assessment by the Secretary of State that an application failed on the merits.

(iv) In this regard, one needs to guard against a rationality challenge to an ECCA decision being 'dressed' in the clothes of a procedural fairness challenge. The observations of Singh LJ in Talpada v Secretary of State for the Home Department [2018] EWCA Civ 841 at [58]-[65] are particularly relevant in this context. As I identify below, certain of the individual challenges by the Claimants before me fall into this category.

(v) The factors which the Secretary of State will take into account in considering an application are fairly and fully set out in the terms of paragraph 21 of HC510 and the Guidance. No further elaboration is required. The applicant knows of the requirements he or she needs to satisfy in the application.

(vi) It is for an applicant to make his or her application addressing the publicised factors and supplying evidence including business plans and the additional material set out in the Guidance. Although the 1973 Rules did not specify any particular materials had to be provided, the nature and type of information which the Secretary of State requires in her Guidance is justified and rationally related to the fair consideration of an application. It is lawful for the Secretary of State to require an applicant to supply such information.

(vii) Subject to what is said in the Guidance, if an applicant fails to provide compliant information there is no obligation on the Secretary of State to contact the applicant to alert him or her that certain material is missing. They have had fair warning of what was required.

(viii) In general, if an applicant is asked questions (or for information) in the processing of an application, that does not imply that the remainder of their application is necessarily in order and is compliant. As recognised by the Guidance, the caseworker might in certain circumstances exercise a discretion to interview or ask for more information but whether that should have been done in any case is fact-specific. If a court can identify a rational reason why a decision not to interview or seek additional material was made, it will not interfere.

(ix) However, in cases where there are concerns that the applicant has not shown he or she has a "genuine intention or wish" to run the proposed business, the Secretary of State is highly likely to be obliged to consider interviewing an

applicant under the Guidance. That is a sensible provision and reflects what fair decision-making at common law would require.

(x) That is because the terms "genuine intention or wish" are in context referring to a potential conclusion that the application is made in bad faith. That is, in circumstances where the applicant has no true intention to start and run the claimed business but is using the application as false basis to obtain LTR. Not only is that the general English language meaning in this context of "genuine intention or wish" but it also appears to be the understanding of the draftsman of the Guidance who specifically identified the following indicators of a lack of genuineness (when an interview might be required):

> "If you are unable to determine whether an application is genuine solely from the documents provided you must consider if it is necessary to interview the applicant in person.
>
> For example, you may have concerns about:
>
> - the authenticity of the documents provided
> - inconsistencies in the evidence provided
> - significant omissions in the documents required
> - the involvement of a third party in preparing the application
> - applications which appear to be identical with other applications previously submitted
> - the credibility of the application is in doubt."

(xi) Although there is no obligation to undertake an interview under the Guidance in such circumstances, it would be rare that it would be fair and lawful at common law *not* to interview an applicant if his or her application was to be rejected on the basis that the applicant had not shown a "genuine intention or wish" to run the proposed business. That is an application of the general principle I have identified at para. [103] above.

(xii) In cases where the application is potentially to be rejected on a lack of genuineness basis, fairness standards may equally be satisfied be a "minded to refuse" process on the terms identified in Balajigari at [55]. That is by (i) indicating a suspicion of bad faith and particulars; (ii) giving an opportunity to respond and (iii) taking that response into account.

107. I would respectfully adopt the observations of Holman J in Akturk which I have set out in full above at para. [72]. In particular, I agree with him that (save where there is powerful documentary evidence of a lack of genuineness) it is a strong thing, and likely to be unfair for any decision maker to reach adverse conclusions as to integrity, credibility or legitimacy without, at some point in the process, the person concerned having the opportunity to answer questions and explain himself.

108. One can add to Holman J's observations, the summary provided by Singh LJ in Citizens UK at [82] as to why fairness is important. As he observed, procedurally fair decision-making is liable to result in better decisions (ensuring that the decision-maker receives all relevant information and that it is properly tested) as well including the avoidance

of the sense of injustice which the person who is the subject of the decision will otherwise feel when they have been accused, at least implicitly, of a lack of integrity in not having their professed intention.

109. Overall, these principles require that (where a finding that the applicant has not satisfied the Secretary of State as to their genuine intentions is to be made) the caseworker acts fairly before coming to a conclusion, and not just an ability for the applicant to challenge the original decision on AR. Further, a bar on new evidence being put before the reviewer on AR to rebut the allegation of a lack of genuine intention is also unfair at common law. Such a bar seeks to deprive the accused applicant of one of his or her best tools in seeking to establish that they do indeed have a genuine intention to run a business and are not simply using the application as a ruse to remain in the country.

110. However, in cases where the application is not being rejected on genuineness grounds but on the basis that the business proposal is flawed or otherwise defective (such as for example where the financial projections or business plan suggest the proposed business would not succeed or is wildly optimistic), there is no need for an interview or "minded to process". That is because there is no suggestion of bad faith and the applicant is well aware of the factors which the Secretary of State will address in considering the application.

111. In this regard, I reject the Claimants' submissions that the statutory context and the width of paragraph 21 HC210 discretion demand an interview or "minded-to" process in the run of the mill cases where an application is to be refused on the merits. I also do not consider that an inability to submit new evidence to the AR in such cases is unfair. Such process standards go substantially beyond any principle to be found in the authorities.

XI. Procedural Fairness: Application to the Facts

112. In my judgment, in each of the four cases the Claimants were in substance accused by the Secretary of State of having effectively made an application with a claimed intention which they did not in fact hold - that is effectively a conclusion of bad faith or some form of disreputable conduct.

113. I refer to the extracts from the original and AR decisions which I set out at in Section II above. It was being said that despite the Claimants having signed an application which stated an intention to run a business and to obtain LTR on that basis, the Secretary of State did not believe them. This was not because they were naïve or misguided in their business plans but because the Secretary of State did not believe they had their claimed intention to run the proposed businesses.

114. The common form of words used was: "The Secretary of State is not satisfied that you genuinely wish to establish in business as proposed". In one case (Yildiz), the Secretary of State used not only these words but spelt out in terms what they in any event implied by adding: "Therefore based on the information provided I believe this application is an attempt to secure leave rather than a genuine intent to establish in business". In my judgment, that was also in effect being said to each of the other Claimants.

115. Despite the use of the common wording, Leading Counsel for the Secretary of State forcefully argued that in fact the applications were not dismissed for any claimed bad

faith or belief of dishonesty but simply on the merits under paragraph 21 of HC210. She contended that there was no need for this wording and drew a contrast between applications refused under paragraph 4 (where some form of disreputable conduct would be necessary) and those refused under paragraph 21.

116. I cannot accept this. I consider the wording to be highly significant. The approach of the caseworker to the evidence in an application which he or she considers is in reality an attempt to obtain LTR for a different purpose to that claimed will be different to that applied by a caseworker who concludes that, for innocent reasons, the application does not put forward a realistic business plan. It was not being said to these Claimants that they were simply naïve or deluded in their views as to the potential for their businesses.

117. Leading Counsel for the Secretary of State candidly accepted that the wording I have identified was in her language "unfortunate" and might imply wrongdoing but she argued that it was the result of the Guidance which specified that such language was to be used in simple rejection cases where the requirements of paragraph 21 were not satisfied.

118. I will return to that point in due course (para. [121] below), but for present purposes it is in my judgment not possible to understand words which say that an applicant has not shown he or she has a "genuine wish or intention" to run a business as suggesting anything other than that in this context it effectively means a knowingly false basis for obtaining LTR.

119. The first notice that the Claimants received that such a decision was being made against them was on receipt of the final decision of the caseworker. Further, before me, it was common ground that in each of the four cases, the Claimants were precluded by the relevant AR rules from putting any new evidence before the reviewer to challenge these conclusions of the caseworker. So, they have been found to have effectively been dishonest and then face an appeal process to be conducted without any chance to rebut that allegation that they did not have the relevant genuine intention with new evidence. As to the seriousness of such findings by the Secretary of State, I refer to Balajigari at [51]-[53]).

120. Applying the established principles of procedural fairness I have summarised above, this was procedurally unfair at common law.

121. As indicated above, Leading Counsel for the Secretary of State submitted that the unfortunate use of language (which she properly and fairly accepted implied wrongdoing) was due to the instructions to caseworkers in the Guidance. Those instructions do, as she correctly submitted, direct caseworkers to use this language when in fact the reasons for refusal may be based on innocent failure to put forward a plan with a realistic chance of success. I have set those directions out above at para. [67] and will not repeat them again.

122. It does seem to be the case that (as Leading Counsel for the Secretary of State submitted) inappropriate labels are directed to be attached when applications are rejected without any suggestion of fault or bad faith on the part of the applicant. This is however not an answer to the complaint.

123. The Secretary of State has made an implicit finding of some form of bad faith (in the form of applications falsely claiming a certain genuine intention) and it is no comfort to a claimant that he can hunt down the Guidance and will appreciate that when the Secretary of State says X she in fact means Y according to some special dictionary of terms used in the Home Office. I refer in this regard to the observations of the Court of Appeal in Balajigari at [211]-[212] about the importance of accurate use by public officers of language which implies dishonesty.

124. There are discrete public law complaints made by each Claimant (which I will also briefly address in the Annexe for completeness). I must underline however that it is very difficult as a matter of common sense to divorce the common conclusion of the Secretary of State in respect of each Claimant (as to the lack of her satisfaction in relation as their genuine intentions) from the factual findings on the merits of the applications. The comments I make in the Annexe proceed on the artificial and unrealistic basis that such a divorcing is possible.

XII. Conclusion and Relief

125. In each of the four cases, the Secretary of State said the Claimant had not satisfied her that the applications were made with "the genuine intention or wish" to establish the proposed businesses. The Claimants in making their applications were representing that they had precisely this intention and wish. The Secretary of State's rejection using this language was a conclusion which implicitly suggests the applications were made for a different purpose and effectively in bad faith or dishonestly. That is, with the intention of obtaining LTR on a false basis. Indeed, in one of the claims (Yildiz), the Secretary of State made an explicit statement to this effect, but it was not disputed before me by the Secretary of State that each of the decisions carries this message, as a matter of ordinary English. It is not hard to imagine how rejection of an application on this basis would have implications for an immigrant who in future seeks leave to enter the United Kingdom.

126. The rejection of the applications on this basis was reached without affording the Claimants a fair process at common law in that: (a) the original decision of the Secretary of State was made without giving the Claimants the opportunity to address such a serious allegation; and (b) as was common ground before me, the system of AR expressly prevented the Claimants from submitting any additional evidence to the reviewer in answering this allegation.

127. As to relief, the Secretary of State invited me to consider the issue of materiality. I have considered whether one might contend the above unfairness had no material effect on the outcome of the applications and I have paid particular regard to the helpful summary of the principles at [131]-[136] of Balajigari.

128. It seems to me that two points might be made by the Secretary of State. First, that the applications would have been refused on the merits even if the comments about intention were not made; and second, that a process of interview or "minded to" decision would not have made any difference to the Secretary of State's conclusion on the substance of the applications.

129. I reject both of these arguments. In my judgment, it is not possible with confidence to say that the Secretary of State's conclusion as to the true intentions of the applicants

would have had no impact upon their rejection on the merits. Equally, I also cannot say with confidence that allowing the Claimants to make submissions (and to submit additional evidence) would have made no difference to the outcome. The errors were material.

130. It follows that each of the decisions under challenge must be quashed and the applications are to be remitted for a fresh consideration.

131. If the Secretary of State on reconsideration decides to maintain her position that she does not accept the Claimants' statements and implicit positions as to their true and genuine intentions, she is obliged to follow a fair process in which the Claimants have the opportunity to address this allegation before a final decision by a caseworker and also without being subject to an absolute prohibition on evidence being submitted in the AR in a challenge to the caseworker's decision. The way to meet fairness standards in such cases can be either by way of interview or a "minded to decide" written process.

132. If the Secretary of State merely decides to reject the applications on the merits under paragraph 21 of HC501, the current procedural regime as specified in the Guidance and AR system satisfies public law standards of fairness. As indicated above, there is and was no need for the Secretary of State to enter into speculation as to the true intentions of applicants. If, however, she decides to do so, public law requires her to act fairly.

133. The EU law challenge is dismissed. The principle of effectiveness is not engaged and even if it were, the domestic system of remedies, including judicial review, comfortably meets the requisite EU law standards.

ANNEXE
Specific Individual Complaints

(a) Karagul

1A. Mrs Karagul was provided with reasons as to why her application was refused under paragraph 21 of HC510 (paragraph 4 was not in issue). The claimed inadequacy of her business plan was the focus of the decision.

2A. The business plan was said to "lack significant detail" for the following reasons:

(a) It failed to discuss customer service whether within the Turkish community or otherwise and failed to provide an English translation to the documentation at Appendix VII of the application.
(b) Whilst a basic pricing structure had been provided as part of the cash flow prediction, there was a failure to provide a menu of products or price list.
(c) There was a failure to show "best value for money" by comparison with competitors.
(d) The projected annual turnover of £34,200.00 was not supported by a pricing structure. Letters of intent did not refer to prices or regularity of work.
(e) There was no reference to local competitors (the Secretary of State's own research had revealed 65 "mobile beauty therapists" within a 3.8 mile radius of Mrs Karagul's postcode).

3A. In addition, in rejecting the application, it was noted that there was no evidence of English language proficiency and there was no evidence of a UK or Turkish driving licence.

4A. Mrs Karagul identifies four specific matters in her judicial review complaint:

> "(a) The Defendant seems to allege that the business proposal lacks viability because the Claimant and her dependants entered the United Kingdom as visitors.
>
> (b) The business plan "lacks significant detail" with respect to customer service and marketing.
>
> (c) The lack of fluency in English.
>
> (d) The lack of a driver's licence."

5A. In oral submissions the focus was on items (c) and (d) and in her Amended Grounds for Judicial Review she raised the further complaint of "Failure to apply policy by asking for further information or interviewing the Claimant". It also does seem to me that item (a) was not pursued. I will address those complaints which I believe were pursued.

Error in finding the business plan "lacks significant detail" with respect to customer service and marketing.

6A. I would have rejected this complaint. Whilst the Claimant takes issue with the Secretary of State's finding concerning the lack of significant detail in the business plan she neither refers to nor disputes any of the detailed reasoning set out by the decision-maker in both the original and AR decisions in support of the conclusion. The Secretary of State having raised detailed concerns regarding the defects in the business plan in the

original decision, Mrs Karagul sought to meet these in her application for AR. Having considered her submissions, the Secretary of State nonetheless upheld her decision.

7A. In particular, and as I have identified above, before submitting her application the First Claimant was on general notice of the Secretary of State's requirements from the terms of paragraph 21 combined with the Guidance. Further, after her application was refused, she was on specific notice of the Secretary of State's concerns which she had an opportunity to addressed under the AR process.

8A. As in Talpada, Mrs Karagul's real dispute is not with the procedure which was applied but the actual substance of the decision. Subject to the points I make concerning the apparent conclusion of bad faith, the Secretary of State's conclusion that the business plan lacked significant detail was an intrinsically evaluative and subjective judgement. Mrs Karagul has not shown any proper grounds for interfering with this judgement.

9A. Mrs Karagul advances a new complaint, which is not included in her Grounds or Amended Grounds, at §69 of her skeleton argument. This concerns the statement in the refusal decision that the business plan failed to include a menu detailing products and items. I would have rejected this complaint. Whilst limited information was included in the separate projected cashflow document at Appendix II, as explained in the AR decision, this "broad overview of your services (along with basic pricing structure)" included in the cash flow prediction was not "a menu which clearly shows the products / items (e.g. hair dyes) which you intend to offer to your customers with the prices you are intending to charge". I would have held there was no public law error.

The lack of fluency in English.

10A. Mrs Karagul was on notice that her proficiency in English was to be taken into account in the assessment of her application. In the guidance at page 54, under the heading, "Evidence of proficiency in English" it was explained that:

> "Fluency in English is not a requirement of the 1973 business provisions but should be taken into account as part of the overall assessment of the evidence provided."

11A. In my view, she can be taken to have understood this as included in her application was the statement:

> "I have basic English and planning to take extra lessons to improve it very quickly to be able to serve English speaking clients, leading for increase of sales (sic)."

12A. In her application for AR, Mrs Karagul contended that the "decision maker's comments upon the applicant's lack of English fluency were purely speculative". However, she did not seek to contradict the decision, and as noted in the AR decision, "you have not provided any certificates to prove the level of your English language abilities".

13A. The application for AR further contended that proficiency in English was "irrelevant to her ability to succeed in her proposed business" because "she is intending to operate within the Turkish community". The same point is made in her Grounds for Judicial Review where it is stated that her "business… had been specifically tailored to serve

the Turkish community" (§42 c.). The difficulty with these assertions is that they are contradicted by the contents of her original application.

14A. A further argument was made in reliance on the submission that the Secretary of State has breached her own Guidance in which it is stated that, "In cases where the applicant does not provide sufficient evidence of proficiency in English and this is relevant to the application, you must ask the applicant to provide further written evidence of their fluency". She argues that the Secretary of State was required to ask for written evidence of Mrs Karagul's fluency, and the failure to do so was procedurally unfair. This contention ignores Mrs Karagul's statement in her application that she was not fluent in English, as reiterated in her application for AR and Grounds for Judicial Review. No issue of procedural unfairness would in my view have arisen.

The lack of a driver's licence.

15A. The refusal decision noted that Mrs Karagul had not provided any evidence that she held either a valid UK or Turkish driving licence or that she had researched into purchasing a vehicle: "In your line of work, a driving licence would be essential in order for you to be a mobile beauty therapist, travel to customers with speed and efficiency and to transport your equipment".

16A. Whilst the application for AR complained that the decision-maker had erred by remarking on the absence of a driving licence ("The applicant has a Turkish driving licence and is a competent driver"), I agree with the Secretary of State that this was to overlook the point that the omission of this important detail in her application counted against her in circumstances where she was purporting to be establishing in business as a mobile beauty therapist.

17A. In circumstances where Mrs Karagul had not explained that she was only proposing to use public transport and taxis, there was no error, procedural or otherwise, in the Secretary of State's view that in order for her to establish in her stated business she would require private transport.

(b) Ayten

18A. Mr Ayten's application was refused under both paragraphs 4 and 21 of HC510.

19A. In terms of the former, the decision-maker noted that Mr Ayten had remained in the UK following the expiry of his leave after he became appeal rights exhausted on 2 January 2015. He failed to make any attempt to regularise his immigration status until his further ECAA application on 6 July 2015. The Claimant was an overstayer.

20A. I find the reasons for the refusal of the application under paragraph 4 incomprehensible. The reasons given were as follow (in their totality):

> "You have overstayed previous leave:
>
> You submitted an application on 6th July 2015, however your previous leave to remain expired on 11th September 2013. This was extended by virtue of 3C and 3D leave until 2nd January 2015.

> You therefore overstayed your previous leave by approximately six months.
>
> You therefore did not have leave to enter or remain at the time of your application.
>
> Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here.
>
> There is a material link between the current business proposal and previous fraudulent or abusive conduct:
>
> - You have used relevant experience while establishing as an illegal entrant in developing your current business proposal.
>
> The Secretary of State, having taken into account all the circumstances of your case, is therefore not prepared to exercise discretion in your favour in light of your conduct and character."

21A. With respect to the caseworker these reasons seem to be a poor "cut and paste" job from parts of the Guidance with no real consideration of how the overstaying is said to be fatal. Specifically, there is no elaboration on what the claimed "material link" was between the current business proposal and earlier claimed "fraudulent and abusive conduct" (it also not being clear what this fraud and abuse was said to be).

22A. The Guidance correctly identifies that any breach of conditions is to be considered on an individual basis and cannot lead to automatic refusal of an application. Leading Counsel for the Secretary of State valiantly sought to explain what the reasons set out above were intended to refer to and how the Guidance was properly applied. I was unpersuaded. In short, this Claimant was not an illegal entrant and no link was identified in the decision letter between the overstaying and use of experience gained at that time to assist in developing the business proposal. The paragraph 4 decision would not have stood had the matter arisen for final decision.

23A. As to the paragraph 21 decision, Mr Ayten was said to be unable to show that he had genuinely established in business as claimed. The following reasons were provided:

(a) Lack of evidence showing control over the business.
(b) Provision of a single stamped page of a bank statement the dates of which (29 January 2015 to 27 February 2015) did not extend to the date he claimed to have started trading (18 March 2015).
(c) The bank statement did not show any incoming transactions to demonstrate the financial position of the business.
(d) Otherwise, failure to provide stamped bank statements verifiable as authentic.
(e) Lack of evidence showing he was a signatory to the business bank account.
(f) Lack of business accounts for 2015. Mr Ayten only provided a projected cash forecast for 2016.
(g) Lack of evidence showing control over, or any input into, running the business.
(h) Lack of evidence showing day-to-day responsibilities in running the business.
(i) Lack of evidence showing that the invoices provided were genuine documents.

24A. As stated in the refusal letter,

> "Given your previous appeal this Department would have expected at a minimum that the concerns raised in the determination of 15th December 2014 would have been addressed in any subsequent application - which you have not."

25A. Further, it was concluded that "The Secretary of State is not satisfied that you have shown that you are actively concerned in the running of the business". This assessment was based on Mr Ayten's failure to provide a partnership agreement with his father. As explained by the decision-maker, "This Department cannot confirm you are actively concerned in the running of the business without the knowledge of what day to day responsibilities you claim to have accepted". I do not consider there to be any public law error with this approach. The reasons for refusal are rational.

26A. I do not agree that any point of procedural unfairness arises (nor is any particularised by this Claimant). Mr Ayten's failings were substantive in that he was unable to comply with the requirements of the rules and Guidance (I refer here again to Talpada). Nor is Mr Ayten correct to submit that there were "no explicit evidential requirements or even exhaustive specifying factors" against which his application was judged. As I have identified above, paragraph 21 and the Guidance are clear. He was wrong to contend that an application could be refused on any number of points that are unforeseen and unpredictable. The relevant points (or requirements for an application to succeed) are both foreseeable and predictable: see paragraph 21 of HC110 and the Guidance.

(c) Yildiz

27A. Mr. Yildiz had applied to establish in two different types of business: first, as a gardener and secondly, as a café owner. It was noted that he had not provided a business plan in relation to either. However, the decision-maker proceeded to decide the application based on the documentation submitted.

28A. In terms of the gardening business it was noted that: there was no evidence corroborating the claim that market research had been carried out; there was no evidence corroborating the claim that Mr Yildiz had experience working as a gardener; that it was unclear how he proposed to start up and run two separate businesses, both of which would require his full attention; and that there was no explanation as to how he proposed achieving his intended sales in the gardening business nor had he provided any price list identifying how much he planned to charge for his services.

29A. The decision-maker continued, "The Secretary of State is not satisfied that you will be bringing into the country money of your own to establish in business":

> "The budgeted statements you have provided for Green Gardener and the Olympic Café show that you intend to introduce capital of £4,000.00 to your Green Gardener business and £4,000.00 into The Olympic Café business. However your Turkish bank statements show that on 04 July 2016 your available funds were £2,500.00. Therefore your application is refused as you do not have the required funds to invest in either or both businesses."

30A. In his application for AR, Mr Yildiz sought to excuse the errors in his application as follows:

> "If I had been asked for further information I would have explained that I had investigated two business opportunities, Olympic Café and Green Gardener which is why two business plans were prepared… I only intended to pursue the Green Gardener business, unfortunately my previous representatives included all my research for both businesses which has led to the confusion but the application form makes clear it is the gardening business that is my intended business."

31A. In my judgment, no issue of procedural unfairness would have arisen. The Secretary of State was not responsible for the admitted "confusion" caused by submitting documentation for two separate businesses.

32A. However, I would have agreed with this Claimant that under the Guidance (main judgment, para. [65] above) if the application did not provide sufficient evidence of experience (as was the case here) he should have been asked for it.

33A. The failure to give this opportunity to him was not in accordance with the Guidance. However, had this been the only point in issue, there might have been a serious question as to whether the decision under paragraph 21 of HC210 could stand despite this failure.

(d) Izci

34A. The principal argument was that the Secretary of State failed to apply her Guidance on the basis that Mr Izci's breach of the conditions of his leave as a visitor was treated as an automatic reason for refusal. Mr Izci was said by the Secretary of State to have been working in breach of the conditions of his visitor's visa which provided, "no work or recourse to public funds".

35A. I agree with the Claimant that decision under paragraph 4 of HC210 seems to have been made simply on the basis of this breach of conditions. There is nothing on the face of the very short decision to suggest any other facts were taken into account in accordance with the Guidance which I have set out above at para. [68] of the main judgment. The paragraph 4 decision would not have withstood this challenge.

36A. As to the paragraph 21 decision, Mr Izci's complaint was that, "The decision maker has failed to apply his policy by failing to ask for further information and / or interview the applicant prior to making a decision".

37A. In my judgment, there is no substance to this complaint. Subject to the bad faith/genuineness point (which is particularly important in this claim), the reasons for the refusal were a failure by him to produce essential evidence which it would have been obvious was necessary. His real complaint does not raise any matter of procedural unfairness but instead concerns his failure to comply with the substantive requirements of the relevant immigration rules and guidance. I detect no error of law or failure to apply the Guidance in deciding not to interview or to request further information.