Chapter 7: Legitimate expectations

Failure to apply policy: *R (Mohammed) v Secretary of State for the Home Department* [2012] EWHC 3091 (Admin)

The claimant arrived in the UK from Sri Lanka in 2001. She unsuccessfully sought asylum. She then reapplied. When the claimant was subsequently denied leave to remain in the UK, she sought judicial review. She argued, *inter alia*, that official UK Border Agency Guidance had not been taken into account. The effect of the Guidance, according to Stephen Morris QC, sitting as a Deputy High Court Judge, was (at [75]) 'that weight is to be placed on significant periods of residence and that guidance is then given as to what periods of residence are to (or may) be considered to be significant; and in a case such as the Claimant's a period of 6 to 8 years is or may be considered to be significant. Plainly such a significant period of residence is to weigh as a factor operating against removal'. The Judge was not satisfied that the Guidance had been considered by the decision-maker. This, he said (at [76]), amounted to 'a failure to apply relevant policy and a failure to take account of a relevant consideration and would render the decision taken Wednesbury unreasonable or otherwise unfair: see e.g *R (Lumba) v SSHD* [2011] 2 WLR 611 at §35'. The Judge concluded that the decision refusing to grant leave to remain should be quashed.

He then went on to note that the Immigration Rules had changed in a way that was disadvantageous to the claimant. This raised the question whether, when the claimant's case was reconsidered following quashing of the original decision, the Secretary of State should be required to apply the earlier, more generous version of the relevant rule. The Judge noted (at [112]) a tension between the normal rule, according to which decisions should be taken in the light of the contemporary legal and factual context, and the 'potential unfairness arising from the initial unlawfulness [of the original decision]'. The Judge considered that 'a prior unlawful decision and injustice arising from it (arising from the subsequent change of policy or law) are factors which have to be taken into consideration when the decision maker comes to consider the claimant's position on a subsequent occasion'.

The Judge concluded that the Secretary of State should make the fresh decision 'in the light of this judgment'. In principle, the new, less favourable rules would apply to that decision—but, that point notwithstanding, the Secretary of State had a discretion to grant leave to remain. And, said that judge (at [122]) 'in exercising that discretion the [Secretary of State] should seek to correct any injustice that may have arisen as a result of a combination of the [original] unlawful decision ... and subsequent "repeal" of [the relevant provision of the Immigration Rules]'. The Judge reached these conclusions without reliance upon the doctrine of legitimate expectation: rather, the unlawfulness of the initial decision was such as to require that, in her exercising her discretion, the Secretary of State should seek to correct any injustice liable to be caused to the claimant by the subsequent change in the Immigration Rules.