Neutral Citation Number: [2018] EWCA Civ 2875

Case No: C9/2017/1135

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Holman
[2017] EWHC 297 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before :

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE IRWIN
and
LORD JUSTICE NEWEY

- -

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
CA (TURKEY)	**Respondent**

- -
- -

Miss Deok Joo Rhee QC (instructed by the **Government Legal Department**) for the **Appellant**
Miss Nathalie Lieven QC and Miss Emma Daykin (instructed by **Stuart & Co**) for the **Respondent**

Hearing date: 5 December 2018

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Approved Judgment

Lord Justice Newey:

1. In 2014, Parliament legislated to remove the right to appeal to the First-tier Tribunal that someone in the position of the respondent, CA, would previously have enjoyed. According to the Secretary of State, what is now available to such a person is administrative review pursuant to appendix AR to the Immigration Rules. As can be seen from paragraph AR2.1 of the appendix, "administrative review" involves "the review of an eligible decision to decide whether the decision is wrong due to a case working error". The outcome of an administrative review is, the Secretary of State argues, potentially susceptible to judicial review, but cannot be challenged by way of appeal.

2. The question raised by the present appeal is whether the removal of the right of appeal that the respondent would have had but for the passing of the Immigration Act 2014 (which, by section 14, replaced section 82 of the Nationality, Immigration and Asylum Act 2002) was consistent with EU law. The respondent contends, and Holman J accepted, that it was precluded by article 41 of the Additional Protocol concluded on 23 November 1970 ("the Additional Protocol") to the Agreement establishing an Association between the European Economic Community and Turkey which was signed at Ankara on 12 September 1963 ("the Ankara Agreement") and, hence, that it was ineffective. The Secretary of State disputes that.

3. The issue is of wider importance. We were told that more than 120 cases have been stayed pending the outcome of this appeal.

The framework

4. The Ankara Agreement envisaged the progressive establishment of a customs union between the European Economic Community and Turkey. Articles 12-14 deal respectively with freedom of movement for workers, freedom of establishment and freedom to provide services. They are in these terms:

> "*Article 12*
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> The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.
>
> *Article 13*
>
> The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.
>
> *Article 14*
>
> The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them."

5. Title II of the Additional Protocol contains further provisions relating to the movement of persons and services. Articles 36-40, comprising chapter I of the title, are concerned with "workers", articles 41 and 42, making up chapter II, with "right of establishment, services and transport". Article 41, which is central to what we have to decide, states as follows:

> "1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.
>
> 2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the [Ankara Agreement], determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.
>
> The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade."

6. Article 59 of the Additional Protocol also featured in the argument before us. This reads:

> "In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community."

7. Article 41(1) of the Additional Protocol has been held by the Court of Justice of the European Union ("the CJEU") to have direct effect: see Case C-37/98 *R v Secretary of State for the Home Department ex p Savas* [2000] 1 WLR 1828, where the Court observed (in paragraph 46 of the judgment) that the 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". In this respect, article 41(1) differs from both article 41(2) of the Additional Protocol and article 13 of the Ankara Agreement. In *Savas*, the Court concluded (at paragraph 45 of the judgment) that "article 13 of the [Ankara] Agreement is no more capable than is article 41(2) of the Additional Protocol … of directly governing the legal position of individuals and cannot therefore have direct effect".

8. It is common ground that, when the United Kingdom joined the European Economic Community in 1973, it became bound by the Ankara Agreement and, in particular, the standstill provision found in article 41 of the Additional Protocol. As a result, it has continued to apply the criteria set out in the "Statement of Immigration Rules for Control after Entry" ("HC510") that were in force in 1973 when determining an

application by a Turkish national for leave to remain in the United Kingdom as a business person under the Ankara Agreement.

9. As yet, no further steps have been taken pursuant to article 41(2) of the Additional Protocol (under which the timetable and rules for the progressive abolition of restrictions on freedom of establishment and freedom to provide services are to be determined). More progress has, however, been made in relation to workers and their families. Thus, Decision 1/80 of the Council of Association provides, for example, for a "Turkish worker duly registered as belonging to the labour force of a Member State" and members of his family to have certain rights as regards employment (see articles 6 and 7). The same section of Decision 1/80 also contains these provisions:

> "*Article 13*
>
> The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.
>
> *Article 14*
>
> 1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.
>
> 2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals."

10. Article 6(1) of Decision 1/80 has been recognised as having direct effect. For instance, in Case C-188/00 *Kurz v Land Baden-Württemberg* [2002] ECR I-10691, the CJEU said this:

> "26 The first point to be noted … is that, since the judgment in Case C-192/89 *Sevince* [1990] ECR I-3461, at paragraph 26, the Court has consistently held that Article 6(1) of Decision No 1/80 has direct effect in the Member States and that Turkish nationals who satisfy its conditions may therefore rely directly on the rights which the three indents of that provision confer on them progressively, according to the duration of their employment in the host Member State (see, in particular, Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 19).
>
> 27 Second, it is also settled case-law that the rights which that provision confers on Turkish workers in regard to employment necessarily imply the existence of a corresponding right of residence for the person concerned, since otherwise the right of access to the labour market and the right to work as an

> employed person would be deprived of all effect (see, inter alia, *Birden*, paragraph 20)."

The present case

11. The respondent, a Turkish citizen who was born in 1996, entered the United Kingdom as a visitor in December 2014. On 28 April 2015, shortly before his existing leave to remain would expire, he applied to extend his stay pursuant to the Ankara Agreement in order to establish a business providing window-cleaning services. On 27 October 2015, the respondent was informed that his application had been refused, but also that he could apply for administrative review of the decision, and he did so. He was not, however, successful. On 23 November 2015, he was told that the original decision had been maintained.

12. The respondent sought judicial review, and his claim was upheld by Holman J. In a judgment dated 8 February 2017, Holman J concluded that the decisions of 27 October 2015 and 23 November 2015 should both be quashed and that the Secretary of State must reconsider the respondent's application for leave to establish himself in business in the United Kingdom. With regard to the earlier of the decisions, the judge said (in paragraph 25 of his judgment):

> "the reasoning of the decision letter and the approach of the decision-maker was, in my view, so defective or unfair on a range of points that the overall conclusion that this was not a genuine or viable application simply cannot stand".

As for the administrative review decision of 23 November, the judge commented (in paragraph 47 of his judgment):

> "merely to repeat the passage under challenge is not to perform a review of the first decision-maker's decision and reasons. The reviewer had to consider the passage and the reasons, subject it to some scrutiny, and consider whether it is sound. If he had done so, he should have been driven to conclude that it is not for the reasons I have given above".

13. More importantly for present purposes, Holman J arrived at this conclusion (in paragraph 87 of his judgment):

> "I hold that the absence, since its abolition, of a right of appeal for Turkish citizens seeking to exercise their freedom of establishment under the [Ankara Agreement] is incompatible with the [Ankara Agreement] in that it breaches the requirements of article 41(1) of the Additional Protocol to the [Ankara Agreement]; and that that incompatibility has not been avoided or removed by the introduction of administrative review in such cases".

In that connection, the judge had said this in paragraph 83 of his judgment:

> "In my view, the effect of article 41 [of the Additional Protocol] is to require, subject to article 59, that the appeal or review procedure available to the claimant should not be less favourable now than it was in 1973. For the reasons already given, it is in my view markedly less favourable. The limitations and shortcomings of administrative review, relative to a judicial appeal, are very obvious and were indeed well illustrated by the history of this case. Although the claimant has ultimately succeeded by way of judicial review, judicial review is no substitute for an appeal. It is a more limited remedy in which there is the procedural hurdle of permission; oral evidence is rarely heard; and the court, unlike on an immigration appeal, can normally at best only quash the decision and order a reconsideration, as I have done. Unlike on an appeal, it would be a highly exceptional case in which the court on judicial review could substitute its own decision."

In the immediately preceding paragraphs, the judge had explained as follows:

> "81 The observations of the ECJ at paragraph 69 of *Tum and Dari* and paragraph 67 of *Dorr and Unal* seem to me to make clear that the standstill in article 41 applies no less to procedural rights and guarantees than to substantive ones, being 'inseparable from the rights to which they relate.' It is true that those authorities are distinguishable on their facts and in their context, but the reasoning of the court must apply no less to the standstill effect of article 41.
>
> 82 Further, the observations of Sullivan J in *Parmak* at paragraph 27, although obiter, powerfully describe and illustrate the practical importance of appeal rights. I can see no rational basis, nor any imperative, for drawing the line, as [counsel for the Secretary of State] does, immediately after the first decision, but before any review or appeal process."

The judge's order accordingly included this (at paragraph (3)):

> "The absence, since its abolition, of the right of appeal for Turkish citizens under the [Ankara Agreement] is incompatible with the [Ankara Agreement] in that it breaches the requirements of Article 41(1) of the Additional Protocol to the [Ankara Agreement] and that incompatibility is not avoided or removed by the introduction of Administrative Review in such cases".

14. The Secretary of State applied for permission to appeal, but was granted it only as regards the point reflected in paragraph (3) of Holman J's order: the conclusion that the substitution of administrative review for a right of appeal breached article 41(1) of the Additional Protocol. It is therefore that aspect of the judge's decision that we have to consider.

Was the removal of the right of appeal contrary to article 41(1) of the Additional Protocol?

15. The Secretary of State's position is that article 41(1) of the Additional Protocol does not bite on remedies. Miss Deok Joo Rhee QC, who appeared for the Secretary of State, submitted that a distinction is to be drawn between, on the one hand, matters that affect a Turkish national's rights of establishment (and, with it, residence) and, on the other, means of redress. According to Miss Rhee, article 41(1) bars a Member State from "introducing … any new restriction", whether substantive or procedural, on the former, but is not directed at the latter. If a Turkish national wishes to maintain that the remedies available to him for a breach of his rights as regards establishment are inadequate, he must look to EU law's principle of effectiveness (requiring that national remedies and procedural rules should not render the exercise of EU rights virtually impossible or excessively difficult). In the present case, however, the respondent has never complained of breach of the principle of effectiveness. He has nailed his colours to the mast of article 41(1), which (so Miss Rhee said) is not in fact in point.

16. In contrast, Miss Nathalie Lieven QC, who appeared with Miss Emma Daykin for the respondent, supported Holman J's decision. She stressed that it is common ground that article 41(1) of the Additional Protocol encompasses procedural as well as substantive conditions and contended that it could not be right to draw an arbitrary line between the moment a decision is made and any procedural consideration thereafter. Moreover, support for the judge's conclusion is, Miss Lieven contended, to be found in the authorities on which he particularly relied, namely, the decision of the CJEU in Case C-136/03 *Dörr and Ünal v Sicherheitsdirection für das Bundesland Vorarlberg* [2005] 3 CMLR 11 and that of Sullivan J in *R (Parmak) v Secretary of State for the Home Department* [2006] EWHC 244 (Admin), [2006] 2 CMLR 56.

17. We were referred to a number of cases which confirm that (as Miss Lieven emphasised and Miss Rhee agreed) article 41(1) of the Additional Protocol can apply to procedural requirements. As Miss Rhee noted, article 41(1) has been held to cover the need for an administrative authorisation such as a work permit (Joined Cases C-317/01 and 369/01 *Abatay and Sahin* [2005] 1 CMLR 50), a rule requiring pre-arrival entry clearance (Case C-16/05 *R (Tum) v Secretary of State for the Home Department* [2008] 1 WLR 94), a visa requirement (Case C-228/06 *Soysal v Germany* [2009] 2 CMLR 47) and charges for residence permits (Case C-242/06 *Minister voor Vreemdelingenzaken en Integratie v Sahin* [2010] 1 CMLR 215). In this connection, Miss Lieven took us to the *Tum* case. It was there held (at 125) that article 41(1):

> "is to be interpreted as prohibiting the introduction … of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that state, of Turkish nationals intending to establish themselves in business there on their own account".

The Court explained in paragraph 61 of the judgment:

> "It must be added that article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive

> establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the member states and the Republic of Turkey. That provision of the Additional Protocol thus appears to be the necessary corollary to article 13 of the [Ankara] Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment: *Abatay v Bundesanstalt für Arbeit* (Joined Cases C-317 and C-369/01) [2003] ECR I-12301, paras 68 and 72. Even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained (see, by analogy, *Peskeloglou v Bundesanstalt für Arbeit* (Case 77/82) [1983] ECR 1085, para 13, and the *Abatay* case [2003] ECR I-12301, para 81), it is important to ensure that no new obstacle is introduced in order not further to obstruct the gradual implementation of such freedom of establishment."

18. Such cases are unsurprising. It is readily comprehensible that the imposition of, say, a requirement for pre-arrival entry clearance should be seen as falling within the prohibition on "introducing … any new restrictions on the freedom of establishment". It makes obvious sense that article 41(1) of the Additional Protocol should prevent Member States from putting procedural obstacles, as much as substantive ones, in the path of someone wishing to exercise the rights that the State in question recognised at the time it became bound by the Ankara Agreement.

19. While, however, these authorities are consistent with the respondent's case, I agree with Miss Rhee that they are distinguishable. They related, essentially, to restrictions on a person becoming entitled to exercise freedom of establishment. None of them concerned a change in the legal remedies available to someone alleging breach of his rights.

20. Miss Lieven submitted that the *Dörr and Ünal* case indicates that there is no relevant distinction between these types of situation. There, Mr Ünal, a Turkish national, was appealing against an order for his expulsion from Austria which had been made because he had been the subject of three convictions. One of the questions referred to the CJEU was whether the guarantees of judicial protection provided by articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health ("Directive 64/221") applied to Turkish nationals whose legal status was defined by article 6 or article 7 of Decision 1/80. The relevant articles of Directive 64/221 provided as follows:

> "*Article 8*
>
> The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue

> or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.
>
> *Article 9*
>
> 1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.
>
> This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.
>
> 2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security."

21. The CJEU held that the procedural guarantees set out in articles 8 and 9 of Directive 64/221 were applicable. Having referred to article 12 of the Ankara Agreement, to article 36 of the Additional Protocol and to Decision 1/80, the Court said this:

> "62 The Court has inferred from the wording of those provisions that the principles laid down in the context of Art.48 of the Treaty must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by Decision 1/80.
>
> 63 The Court has also held, when determining the scope of the public policy exception provided for in Art.14(1) of Decision 1/80, that reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a Member State of the Community. Such an approach is all the more justified because Art.14(1) is formulated in terms that are almost identical to those of Art.48(3) of the Treaty.
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> 64 On the basis of these elements, the Court held, in paras [46] and [47] of *Cetinkaya*, that Art.14(1) of Decision 1/80 imposes on the competent national authorities limits analogous to those

> which apply to a measure expelling a national of a Member State and that the principles established on the basis of Art.3 of Directive 64/221 can be extended to Turkish workers who enjoy the rights recognised by Decision 1/80. National courts must, therefore, take these principles into consideration in reviewing the lawfulness of the expulsion of such a Turkish worker.
>
> 65 The same considerations require that the principles enshrined in Arts 8 and 9 of Directive 64/221 be regarded as capable of extension to Turkish workers who enjoy the rights recognised by Decision 1/80 .
>
> 66 Such an interpretation is justified by the objective of progressively securing freedom of movement for Turkish workers, as set out in Art.12 of the Association Agreement. The social provisions of Decision 1/80 constitute a further stage in securing that freedom. In particular, Art.6(1) of Decision 1/80 grants to migrant Turkish workers who fulfil its conditions precise rights with regard to the exercise of employment. It is established case law that Art.6(1) of Decision 1/80, which has been recognised as having direct effect, creates an individual right as regards employment and a correlated right of residence.
>
> 67 In order for those individual rights to be effective, Turkish workers must be able to rely on them before national courts. To ensure the effectiveness of that judicial protection, it is essential to grant those workers the same procedural guarantees as those granted by Community law to nationals of Member States and, therefore, to permit those workers to take advantage of the guarantees laid down in Arts 8 and 9 of Directive 64/221. As the Advocate General states in point AG59 of his Opinion, such guarantees are inseparable from the rights to which they relate."

22. Point AG59 of Advocate General Maduro's opinion, to which the Court made reference in paragraph 67 of the judgment, included this:

> "Let us remember that Art.6 of Decision 1/80, which has been acknowledged to have direct effect, creates an individual right of access to the employment market and a correlative right of residence. It must be possible, if that individual right is to be effective, to invoke it before a competent authority which will protect it. The procedural safeguards laid down in Art.9 of Directive 64/221 must not be regarded merely as technical rules unconnected with the substantial rights conferred on individuals. On the contrary, they safeguard and protect those rights. They are therefore fundamental guarantees required to ensure the effectiveness of those rights and of the principle of the free movement of workers. In that sense, they are inseparable from that principle and those rights. To the extent to which the substantive rights conferred on nationals of the

> Member States have been extended to Turkish nationals under Decision 1/80, the procedural protection granted by Community law for the assertion of those rights must also be afforded to such nationals. There is no justification for establishing a separate, lower level of protection for the rights conferred by Decision 1/80."

23. Miss Lieven made the point that article 41(1) of the Additional Protocol corresponds to article 13 of Decision 1/80. This, she said, is critical. While, however, (a) article 41(1) of the Additional Protocol has been said to be "of the same kind" as article 13 of Decision 1/80 (see *Savas*, at paragraphs 49 and 50 of the judgment, and also e.g. *Minister voor Vreemdelingenzaken en Integratie v Sahin*, at paragraphs 62-65 of the judgment) and (b) *Dörr and Ünal* concerned Decision 1/80, article 13 of Decision 1/80 played no part in the Court's decision. In fact, the provision is not mentioned at all in either the judgment or the Advocate General's opinion.

24. As I understand it, the Court's reasoning in *Dörr and Ünal* depended on the fact that freedom of movement for Turkish workers had been taken a "further stage" by Decision 1/80. The Court noted, for example, that "Art.14(1) [of Decision 1/80] is formulated in terms that are almost identical to those of Art.48(3) of the [EC] Treaty". More importantly, it observed that article 6(1) of Decision 1/80 had been "recognised as having direct effect" and, hence, had created "individual rights". Workers, the Court considered, had to be able to take advantage of the guarantees laid down in articles 8 and 9 of Directive 64/221 "[i]n order for those individual rights to be effective", such guarantees being "inseparable from the rights to which they relate".

25. None of this has any parallel in the context of freedom of establishment. There is no provision "constitut[ing] a further stage in securing" freedom of establishment, let alone one having direct effect and so creating individual rights. In any case, nothing was said in *Dörr and Ünal* about either article 41 of the Additional Protocol or its Decision 1/80 equivalent, article 13. In the circumstances, I do not think *Dörr and Ünal* casts any light on how article 41 of the Additional Protocol should be construed.

26. Sullivan J was inclined to attach somewhat more significance to *Dörr and Ünal* in the other case on which Holman J principally relied, *R (Parmak) v Secretary of State for the Home Department*. The issue there was whether a Turkish national who had unsuccessfully claimed asylum had an in-country right of appeal. Sullivan J concluded that he did not on the basis that, as a failed asylum seeker, he would not have had such a right even in 1973, when the United Kingdom became bound by the Ankara Agreement. Sullivan J said in paragraph 22 of his judgment:

> "If [the claimant] would not have been entitled to an in-country right of appeal under the immigration legislation then in force, there is no reason why he should be entitled to such a right in 2006."

27. Sullivan J went on to make some observations on the propriety of removing any right of appeal. He said this:

> "26 Given the importance of procedural rules in the immigration field (as shown by Parliament's repeated

> amendments to the legislation over recent years) and the extent to which matters of procedure and matters of substance may well be inextricably interlinked in such cases, I would not be prepared to accept, in the absence of further and more detailed argument, that there is necessarily a clear-cut distinction to be drawn between procedural and substantive rules in this field.
>
> 27 As *Dörr and Ünal* shows, substantive rights may well be ineffective or less effective if they are not backed up by appropriate procedural guarantees in relation to matters such as rights of appeal. It will be recalled that in para.[67] of its judgment the ECJ agreed with the point made by the Advocate General that such procedural guarantees 'are inseparable from the rights to which they relate'. There is nothing in *Savas* or in *Tum and Dari* to suggest that making procedural rights less favourable for an applicant who relies on the standstill agreement is acceptable in terms of Community law. Community law is concerned with practicality rather than procedural formality. Much, for example, may depend upon the extent to which it is necessary in practice for applicants to appeal in order to succeed in establishing their claims. For example, if there is a very high rate of initial refusals and, correspondingly, a high rate of success on appeal, then removing the right of appeal might well have the practical effect of worsening the position for applicants, even though the substantive rules, applied both at first instance and on appeal, remain unchanged."

28. These comments undoubtedly merit serious consideration. However, they were plainly obiter (Sullivan J himself noted in paragraph 25 of his judgment that it was unnecessary for him to resolve the issue) and expressed in somewhat tentative terms. My own view, as I have already indicated, is that *Dörr and Ünal* is of no real help in the context of the present appeal.

29. Miss Lieven also took us to Case C-327/02 *Panayotova v Minister voor Vreemdelingenzaken en Integratie* [2005] 1 CMLR 24. This concerned not the Ankara Agreement, but agreements with Bulgaria, Poland and Slovakia which obliged each Member State to grant "a treatment no less favourable than that accorded to its own companies and nationals" for the establishment and operation of Bulgarian, Polish and Slovakian companies and nationals. The questions referred to the CJEU related to the propriety of Dutch legislation to the effect that an application for a full residence permit was to be considered only if the person had a valid temporary residence permit, The Court ruled that such legislation was not in principle precluded, but:

> "The scheme applicable to such residence permits issued in advance must, however, 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."

30. The Court explained in the judgment:

> "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. It should be remembered, in this last respect, that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law, and that this principle of effective judicial protection constitutes a general principle which stems from the constitutional traditions common to the Member States and is enshrined by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950, in Arts 6 and 13 of the Convention."

31. It seems to me, however, that this case does not assist in the resolution of the present appeal. The Court's decision was not based on any standstill provision, but rather on the principle of effectiveness. As can be seen from, for example, Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* [2014] 2 CMLR 33 (at paragraph 32 of the judgment), the principle of effectiveness means that procedural rules "must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law". This is the very language that the CJEU used in the *Panayotova* case.

32. In the end, of course, the question we have to decide is whether the bar on "introducing … any new restrictions on the freedom of establishment" imposed by article 41(1) of the Additional Protocol extends to the removal of a right of appeal. In considering that issue, consideration should be given both to the wording of article 41(1) and to "the context in which it occurs and the objects of the rules of which it is part" (to quote from the judgment of the CJEU in Case C-199/08 *Eschig v Uniqa Sachversicherung AG* [2010] 1 CMLR 5, at paragraph 38).

33. Taking first the terms of article 41(1) itself, they seem to me to favour Miss Rhee's interpretation of the provision. A change in legal remedies would not naturally, in my view, be referred to as the introduction of a new restriction on the freedom of establishment.

34. So far as context is concerned, Miss Rhee pointed out that the word "restrictions" also appears in article 41(2) of the Additional Protocol, the other sub-article of the provision whose interpretation is in dispute. Article 41(2) speaks of "the progressive abolition … of restrictions on freedom of establishment and on freedom to provide

services". Plainly, the sub-article is not contemplating the abolition of means of redress. "Restrictions" is here being used to refer to bars to freedom of establishment, not legal remedies.

35. The same picture emerges from Directives in which the word "restrictions" has featured. Council Directive 64/220/EEC of 25 February 1964 on "the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services", having spoken in its recitals of "the General Programmes for the abolition of restrictions on freedom of establishment and on freedom to provide services", provided for Member States to "abolish restrictions on … movement and residence" (article 1) and for each Member State to grant permanent residence "to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty" (article 3). Almost identical wording was found in Council Directive 73/148/EEC of 21 May 1973 on "the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services", and similar usage of the word "restrictions" can be seen in other Directives as well. In none of these contexts can there be any question of "restrictions" denoting means of legal redress. To my mind, that lends support to Miss Rhee's contentions.

36. Turning to the object of article 41(1), the provision was clearly designed to prohibit restrictions on a person becoming entitled to exercise freedom of establishment, but it is not evident that it was intended to have any application to legal remedies. As Miss Rhee noted, procedural matters were considered to be within the province of Member States when the Additional Protocol was signed in 1970. The principle of judicial effectiveness emerged in 1976 in Case 33/76 *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* [1977] 1 CMLR 533, but in that very case Advocate General Warner had observed in his opinion that it was "for the national law of each Member State to determine the nature and extent of the remedies available in the Courts of that State to give effect to those rights". The extent to which national procedural autonomy had previously been understood to prevail makes it the less likely that article 41(1) was meant to encompass remedies.

37. In all the circumstances, I respectfully take a different view from Holman J. I agree with Miss Rhee that article 41(1) of the Additional Protocol does not bite on remedies and, hence, that the substitution of administrative review for a right of appeal did not infringe the provision.

Conclusion

38. I would allow the appeal.

Lord Justice Irwin:

39. I agree with the judgment of Newey LJ, and I too would allow this appeal.

40. In my view, the starting point is the language of Article 41(1). The phrase "new restrictions on the freedom of establishment and the freedom to provide services"

does not easily imply the grant of any specific form of procedural rights, nor imply a brake on alteration of procedural rights or remedies.

41. From the time of accession by the United Kingdom to the Common Market, adequate procedural rights and remedies were required by the principle of effectiveness. However, the principle of effectiveness cannot be taken to demand any particular form of remedy. As Newey LJ has pointed out, it has long been established that, subject to the principle of effectiveness, or other principle of European law, it is for member states generally to "determine the nature and extent" of legal remedies, see *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland*. The Respondent has not suggested that the altered remedy complained of here breaches the principle of effectiveness.

42. The question therefore turns on whether a particular form of procedural remedy, once granted to an individual in the position of the Respondent, cannot be altered so as to be less advantageous. Put another way, in the absence of a positive step in a decision or directive importing "individual rights" for the benefit of the Respondent, such as was found to be the consequence of Article 6(1) of Decision 1/80 in *Dörr and Unäl* in respect of workers, can the prohibition of "new restrictions on the freedom of establishment and the freedom to provide services" extend to the form of remedy?

43. For the reasons given by Newey LJ, I consider that cannot be the result. There never were rights to a particular form of remedy here, arising from European law. Nor has there been promulgated any provision, such as that in *Dörr and Unäl*, specifying that the rights for those in the Respondent's position must be the same as those for nationals of member states.

44. Moreover, if the Respondent's analysis were accepted, considerable anomalies would develop between the position in different member states. In a state where no remedy more favourable than a "review" procedure had ever been available, the prohibition in Article 41(1) would not bite. In a member state like the United Kingdom, where by domestic law an appeal by way of re-hearing had once come into being, there would be no going back. In effect, a procedural "ratchet" would arise, derived from European law but specifying a particular form of domestic remedy, all this in an area where there has been no advance or convergence in substantive rights. In my view that cannot be the law.

The Senior President of Tribunals:

45. I agree with both of my Lords' judgments.