Immigration cases 2021—January to June review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from January 2021 to June 2021 for immigration advisers, and explains why they are of interest. The review covers procedural fairness in PBS cases, Tier 1 (Investors), deprivation of citizenship, Windrush cases, Appendix EU and Zambrano, out-of-country appeals and various Article 8-related cases.

Points-based System (PBS), fairness & rationality

In *R (Taj) v Secretary of State for the Home Department (SSHD)* [2021] EWCA Civ 19, [2021] All ER (D) 77 (Jan) (20 January 2021) the Court of Appeal considered procedural fairness in PBS cases following the Supreme Court's decision in *Pathan v SSHD* [2020] UKSC 41, [2020] All ER (D) 98 (Oct) and gave guidance on the correct approach to irrationality challenges. The Appellant had been refused leave to remain as a Tier 1 Entrepreneur Migrant on the basis that his business was not genuine, in reaching this conclusion the SSHD had conducted a paper review, an interview and a site visit. The refusal was challenged on fairness grounds, that the Appellant should have been given notice of the concerns against him, and that the SSHD's decision was in any event irrational. The Upper Tribunal (UT) dismissed the application for judicial review and the Appellant appealed. Green LJ provides a helpful summary of the application of the *Doody* [1994] 1 AC 531 principles of procedural fairness and their application in PBS cases at para [50]. Principles of procedural fairness apply to the PBS but the manner of their application is fact and context specific; the principle of procedural fairness supports important public interest values such as the promotion of the rule of law; procedural fairness does not involve a materiality test; it applies to both operational and systemic failings; it is a standalone obligation; and administrative convenience and cost do not amount to a justification for procedural unfairness. Green LJ went on to find, para [62]:

> 'that the PBS did not incorporate, as part of its system, a requirement on the decision maker to put the Appellant on notice of general concerns entertained as to the genuineness of the application and the business in question; and nor was it unfair, operationally, on the facts of the case.'

Furthermore he rejected the submission that case law established the right to have concerns about truthfulness communicated to an Applicant in this type of case, para [78]. In distinguishing the authorities Green LJ observed that in an entrepreneur application the proof needed will be largely documentary and the veracity of an applicant's account should not lie at the heart of the process, para [77]. In terms of the rationality challenge the UT Judge had said that the Appellant had to show that the SSHD's decision was 'so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'. Green LJ was critical of this articulation of the test in its unalloyed form, para [80], and sets out how the Court should consider the margin of discretion to accord to the decision maker depending on the context of the decision being made, paras [82-83]. Green LJ concludes that there is no reason in principle why a court should refrain from quashing a decision of this kind which was premised on a material error, para [86], however in the context of a fair PBS, the hurdle to be surmounted in a rationality challenge is likely to be relatively high, para [87]. On the facts of the Appellant's case the court also rejected the rationality challenge.

Tier 1 Investors

In *R (Wang & Anor) v SSHD* [2021] EWCA Civ 679 (11 May 2021) the Court of Appeal grappled with the Tier 1 (Investor) Migrant provisions of the PBS in a case where the Appellant, and over 100 other Investor applicants participated in a scheme whereby £1 million was borrowed from Maxwell Asset Management Limited (MAM) and invested in Eclectic Capital Limited (Eclectic) by way of a convertible loan. The SSHD refused the application on the twin grounds that the loan from MAM did not result in her having the proceeds under her control, and that the investment in Eclectic was not a qualifying investment. The UT dismissed the Appellant's judicial review application. In allowing the appeal

Popplewell LJ found that the purpose of the control requirement in row 1 of Table 8B is that it is intended by the SSHD to ensure the personal availability to the applicant of the UK assets or loan entitlement respectively, para [51], some restriction on use is not sufficient to prevent money being wholly under the control of the applicant, para [56] and that the SSHD and UT erred in the construction of 'control' as a matter of law in treating it as directed to restrictions on use, rather than personal availability, and therefore treating the (correct and lawful) conclusion that the MAM loan had to be used for investment in Eclectic as fatal to the Appellant's application, para [58]. Popplewell LJ went on to consider qualifying investment ground and the four excluded entitles in paragraph 65(b) of Appendix A of the Immigration Rules ((i) open-ended investment companies; (ii) investment trust companies; (iii) investment syndicate companies; and (iv) pooled investment vehicles). He indicated that he would have been attracted by the argument that this was a pooled investment vehicle, para [60], but this had never been part of the SSHD's case who had sought to uphold the reasoning of the SSHD and the UT that Eclectic was excluded because it shared the objectionable characteristics which were exemplified by each of the four entities, para [61]. Popplewell LJ rejected the SSHD's argument on the basis that this is not what paragraph 65(b) says as a matter of ordinary language, para [62], and that the construction adopted by the SSHD and the UT is not consistent with the proper approach to the interpretation of rules in a points based system, para [63]. A hard-edged rules approach operates for the benefit of applicants as well as the SSHD, para [64], and the approach of the SSHD and UT is the antithesis of the approach identified in *R (Mudiyanselage) v SSHD* [2018] EWCA Civ 65 and *EK (Ivory Coast) v SSHD* [2014] EWCA Civ 1517, para [65]. The appeal was therefore allowed albeit without any enthusiasm [69] and with some reluctance [71].

Article 8 and adult relatives

In *Mobeen v SSHD* [2021] EWCA Civ 886 (14 June 2021), the Court of Appeal considered Article 8 ECHR family life and Adult Dependent Relatives in the context of a aged, widowed mother who had resided with her family in the United Kingdom since 2014. The First-tier Tribunal (FTT) had dismissed the appeal finding that family life was not established, relying on what provision could be made for the Appellant if she returned to Pakistan, and that the decision was in any event proportionate. The UT found no error of law in the decision of the FTT. The Court of Appeal reviewed the Adult Dependent Relative entry clearance rules which have applied since July 2012, the interplay between Article 8 and the Rules and the consideration of Article 8 outside of the Rules. As to family life with adult relatives the Court confirmed that it is fact sensitive enquiry requiring an assessment of all of the relevant facts, para [45]. Whilst something more than the normal ties of love and affection is required ultimately the question is whether there is 'effective, real or committed support', para [47]. Cohabitation is a strong indicator of the existence of family life, para [46]. In this case the Judge had erred in finding that family life had not been established, para [55], and had put the cart before the horse in focussing on what arrangements could be put in place in Pakistan, para [56]. The Judge had also failed to consider key additional factors which demonstrated the existence of family life, para [57]. However the Court dismissed the appeal as they found the Judge's alternative finding on proportionality sustainable.

Article 8, entry clearance & meeting the rules

In *Begum (employment income, Rules/Article 8) Bangladesh* [2021] UKUT 115 (IAC), [2021] All ER (D) 54 (14 April 2021), a Presidential panel of the UT found that the financial requirement for entry clearance in Appendix FM related to the period of six months (or in certain situations the 12 months prior to the date of application). The UT overturned the finding of the FTT who had dismissed the appeal on the basis that, despite meeting the financial requirement in the specified period prior to the application, the sponsor could not now meet the financial requirement at the date of the hearing. Permission to appeal was refused by both the FTT and the UT was granted following a successful Cart judicial review. Given that Article 8 was engaged and the rules were met the Article 8 appeal was allowed following the approach set out in *OA and Others (human rights; 'new matter'; s 120) Nigeria* [2019] UKUT 65 (IAC) and *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109. The UT pointed out that there may be situations where the requirements of the rules are met but entry can be denied such as where another rule in invoked for example where there has been deception.

Human rights claims and serious harm

In *JA (human rights claim, serious harm) Nigeria* [2021] UKUT 97 (IAC) (30 March 2021), which is another example of a case where permission to appeal was refused by the FTT and UT only to be quashed on judicial review (this was a Scottish case so a petition to the Outer House of the Court of Session for reduction of the UT's decision to refuse permission to appeal), the UT confirmed that where a human rights claim raises protection issues there is no obligation to make a protection claim and the risk of harm can be considered under Article 8 with reference to Immigration Rules, Part 7, para 276ADE(1)(vi). However the refusal to make a protection claim will be relevant to the assessment of the claim. Furthermore a refusal of a protection claim cannot be appealed on protection grounds.

Qualifying children & the reasonableness test

The Court of Appeal once again revisited the question reasonableness and qualifying children in *NA (Bangladesh) v SSHD* [2021] EWCA Civ 953 (24 June 2021). This case concerned a Bangladeshi family with two children one of who had resided in the UK for over seven years and was thus a qualifying child (by the time the case reached the Court of Appeal he had been registered as a British citizen). In *KO (Nigeria) v SSHD* [2018] UKSC 53, [2018] All ER (D) 95 (Oct) the Supreme Court had found that the 'reasonableness' test in Nationality, Immigration and Asylum Act 2002 (NIAA 2002), s 117B(6) and Immigration Rules, Part 7, para 276ADE(1)(vi) was focused solely on the child and did not involve the behaviour as a balancing factor. However the Supreme Court also found that the position of the parents was indirectly relevant as if the parents had no right to remain than the starting position would be that it would normally be reasonable for the child to remain with their parents. In *NA* the Appellants relied upon the approach in *R (MA (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] All ER (D) 52 (Jul) that it would not be reasonable for a seven-year child to be expected to leave the United Kingdom unless there were 'powerful reasons to the contrary'. The UT found that this approach was inconsistent with *KO (Nigeria)*. Giving the judgment of the Court of Appeal Underhill LJ agreed, paras [28]-[29]. Whilst the seven-year provisions are benevolent and operate in favour of an applicant (if they are met this is definitive of the public interest question but if they are not met a proportionality assessment is still required), paras [12] and [31], they do not create a presumption in favour of a seven-year child, and thus their parents, being granted leave to remain. However they also do not create a presumption in the opposite direction, para [30] and the approach of Lord Carnwath in *KO (Nigeria)* represents no more than a common sense starting point. Interestingly this judgment does not reference the SSHD's extant policy which states:

> 'The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.' ('Family life (as a partner or parent), private life and exceptional circumstances', Version 14.0 24 June 2021)

Deportation, very significant obstacles and exile

In *Lowe v SSHD* [2021] EWCA Civ 62, [2021] All ER (D) 84 (25 January 2021) the Court of Appeal considered the 'very significant obstacles' to integration test in NIAA 2002, s 117C and Immigration Rules, Part 11, para 399A. In 2002 the Appellant, aged three, had moved to the United Kingdom with his mother in order to join his father who had previously moved here. Just before the Appellant's 18th birthday he committed offences of possession of a controlled drug of Class A, with intent to supply, and to possession of a bladed article in a public place. The Appellant pleaded guilty and was sentenced to two years and four months imprisonment. The SSHD made a deportation order against him and refused his human rights claim. The Appellant appealed and the FTT found that the SSHD's decision was based on the erroneous assumption that the Appellant's father and extended family still lived in Jamaica, para [13]. The FTT found the evidence of the Appellant and his mother credible, para [15], and found, para [17], that the Appellant was dependent upon his parents who would not be able to meaningfully support him in Jamaica. The FTT concluded that there would be significant obstacles to the Appellant's integration into Jamaica and allowed the appeal, paras [18-19]. The

SSHD appealed to the UT who overturned the decision. The majority of the Court of Appeal (Phillips LJ dissenting) found that UT impermissibly made his own decision taking into account matters which had not featured before the FTT at all, paras [20-26]. The UT Judge also prayed in aid the reasoning of the SSHD which was based upon an erroneous view of the facts, para [25]. The decision of the FTT was not irrational and should stand. Of note is the consideration that this was a case of exile rather than deportation (this was one of the reasons the second appeals test was said to be met, para [2]). Previously the Court of Appeal have deprecated notions such as the 'home grown criminal' (*Binbuga (Turkey) v SSHD* [2019] EWCA Civ 551 (04 April 2019)). At para [32] of *Lowe* McCombe LJ concluded:

> 'It was, in my view, quite open to the FTT judge to find that there were the necessary very significant obstacles based on the impression made upon him as to the effect of the "exile" of this young man, with all his characteristics, attributes, qualities and defects that were disclosed by the evidence. Not every healthy young man, in a case such as this, would make the same impression. However, this was a 19 year old with a conviction, when he appeared before the FTT. He had lived for all but the first three years of his life in the UK and had no connection to Jamaica whatsoever other than a residual nationality. The judge found that he had a specific dependency on his parents. The judge was entitled to form his own impression of the obstacles he would face on being dumped in Jamaica at the end of the prison term. He was not an adult foreign criminal, like some whose cases come before the courts, with a significant foundation of knowledge of the country of his birth from an earlier time in life, and who is being returned to a country with which he has some acquaintance. It is not surprising to me that a judge (if not all judges) would find, as this judge did, that there were very significant obstacles to integration. Others might have made a different decision, but this was very much a case on its own facts to be assessed on the evidence.'

Appendix EU and Zambrano applications

The definition of a 'person with a *Zambrano* right to reside' in Annex 1 of Appendix EU includes the following, '(b) without leave to enter or remain in the UK, unless this was granted under this Appendix'. The Claimant in *R (Akinsaya) v SSHD (Rev 3)* [2021] EWHC 1535 (Admin) (09 June 2021) challenged the SSHD's understanding of the *Zambrano* jurisprudence and reg 16 of the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 arguing that limited leave to remain was not a Zambrano extinguishing factor. In a significant judgment, which will impact a large number of individuals para [71], Mostyn J agreed with the Claimant and found that, para [51]:

> 'nothing decided in the CJEU or domestically since the decision in Zambrano supports the theory that the existence of a concurrent limited leave to remain of itself automatically extinguishes a claim for Zambrano residence'

Mostyn J found that the SSHD therefore erred in formulating paragraph (b) of the definition of a person with a *Zambrano* right to reside, para [54]. The SSHD's guidance had applied *Patel v SSHD* [2017] EWCA Civ 2028, [2017] All ER (D) 93 (Dec) in a misleading way, para [50] and SI 2016/1052, reg 16 cannot be construed in a way that excludes an individual with limited leave to remain, para [73]. On 17 June 2021 a consent order in relation to the Claimant's application to quashing relief was appended to the judgment. The consent order is very important for practitioners to consider as it provides, inter alia, for the SSHD to reconsider Appendix EU, for applications affected by the judgment to be stayed whilst the SSHD reconsiders Appendix EU, for a grace period for late applications and for the Immigration Rules, Part 1, para 34BB (preventing simultaneous applications) to be disapplied. It is understood that the SSHD is appealing the judgment.

Deprivation of citizenship appeals

Over recent months practitioners will have noticed the increase in decisions by the SSHD to deprive individuals of their British citizenship pursuant to section 40 of the British Nationality Act 1981 (BNA 1981) on the basis that they had obtained it by fraud (section 40(3)). In *Laci v SSHD* [2021] EWCA Civ 769, [2021] All ER (D) 82 (20 May 2021) the Court of Appeal considered the case where the Appellant had applied for naturalisation on the basis that he was a Yugoslav national from Kosovo

whereas he was in fact Albanian. The SSHD had written to the Appellant in February 2009 indicating that she had information suggesting the Appellant had obtained his citizenship by fraud, was considering deprivation action and invited the Appellant to make representations. The Appellant replied in March 2009 admitting the fraud but advancing mitigating circumstances as to why he should not be deprived of his citizenship. The SSHD then did nothing until February 2018 when she again wrote to the Appellant indicating that she was considering deprivation and inviting representations. A decision to deprive was made in June 2018. The Appellant appealed and his appeal was allowed by the FTT but this was overturned by the UT. The Court of Appeal review the jurisprudence of the UT and Court of Appeal in respect of deprivation appeals against decisions under BNA 1981, s 40(3), paras [21-40], as a postscript to this the Court makes reference to the decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 WLR 556, [2021] All ER (D) 116 (Feb). *Begum* concerned a deprivation decision under BNA 1981, s 40(2) and in his judgment Lord Reed discusses the nature of an appeal to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997 (SIAC 1997), which is the equivalent of BNA 1981, s 40A. Lord Reed's conclusion is that while SIAC 1997, s 2B provides for an appeal rather than a review SIAC should approach its task on essentially *Wednesbury* principles, save that it was obliged to determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998 (HRA 1998). Underhill LJ at para [40] of *Laci* says:

> 'It may be that that reasoning is not confined to section 2B or to cases falling under section 40(2), in which case some of statements quoted above about the correct approach to appeals under section 40A in the case of decisions under section 40(3) will require qualification. But I do not think that that is something on which I should express a view here.'

Underhill LJ goes on to consider the decisions of the FTT and UT in *Laci* and finds that the grounds upon which the UT found an error of law were not made out, paras [63-71], and the decision of the FTT was not perverse, paras [72-81]. For the Appellant it was argued that what was exceptional about this case was the SSHD's unexplained delay of almost a decade, para [74]. Underhill LJ considers the relevance of delay in paras [74-80] applying Lord Bingham's speech in *EB (Kosovo) v SSHD* [2008] UKHL 41, [2008] 3 WLR 178 and at para [81] concludes:

> 'On balance, and not without hesitation, I would accept that the FTT was entitled to regard the Secretary of State's inaction, wholly unexplained at the time and for so extraordinarily long a period, as sufficiently compelling, when taken with all the other circumstances of the case, to justify a decision that the Appellant should not be deprived of his citizenship.'

As a final postscript in para [85] the Court of Appeal laments the fact that there have been repeated instances of courts and tribunals not being referred to authorities which were relevant to their decisions and

> 'Although it is the responsibility of representatives on both sides to apprise judges of the relevant law, those representing the Secretary of State are inherently better placed than even the most diligent practitioner to know of the most recent case-law in the immigration and asylum field because the Home Office is involved in every case. It is important, both in its own interests and in order to assist the tribunals and courts, that it has a robust system for ensuring that its Presenting Officers, and its solicitors and counsel when instructed, are aware of the latest developments in the case-law; and the same goes for the Government Legal Department as regards cases in the courts.'

Windrush cases

In the case of *R (Howard) v SSHD* [2021] EWHC 1023 (Admin) (23 April 2021) the focus of the proceedings was the SSHD's decision in November 2018 to refuse the Claimant's application for naturalisation as a British citizen. That application post-dated a statement by the SSHD in the House of Commons on 23 April 2018 (the Windrush statement). In that statement the SSHD accepted that some of the ways in which the Home Office had applied immigration rules aimed at combating illegal immigration had disadvantaged the 'Windrush generation', the generation of Commonwealth immigrants who had come to the United Kingdom from the late 1940's to the early 1970's, many of whom had not thought it necessary to obtain formal documentation to record the right to remain in the UK they had under section 1(2) of the Immigration Act 1971 (IA 1971). However in early May 2018 the

new SSHD had decided that the existing good character guidance should continue to be applied to all applicants, including those from the Windrush generation. The Claimant's application for naturalisation was therefore refused on the basis of his criminal record: three convictions between 1974 and 1977 each of which had resulted in a Probation Order; three convictions relating to Class B drugs between 1984 and 1988 each of which had resulted in a fine; a conviction in 2000 for an offence under the Public Order Act which had been addressed by imposition of a further Probation Order; and the June 2018 offence which had resulted in the 12-month suspended sentence. Swift J rejected the discrimination ground but accepted that the SSHD's decision that the existing good character guidance should continue to apply without modification to Windrush generation applications, fell outside the range of options available to him acting reasonably, para [35], and was thus irrational. Sadly, by the time this application for judicial review was heard, the Claimant had died of leukaemia, underscoring the historic injustice suffered by the Windrush generation. In October 2019, shortly before the Claimant died, the SSHD granted naturalisation on compassionate grounds, para [39].

Asylum claims, child dependents and the Hague Convention

The Supreme Court considered the relationship of the 1980 Hague Convention to asylum law in *G v G* [2021] UKSC 9, [2021] 2 WLR 705 (19 March 2021). The parties were the parents of an eight-year-old girl 'G'. G was born in South Africa, where she has been habitually resident all her life. In March 2020, G's mother, the appellant, wrongfully removed G from South Africa to England, in breach of G's father's rights of custody. G's father, the respondent, applied for an order under the 1980 Hague Convention for G's return to South Africa. The mother opposed his application on the ground, in particular, that there is a grave risk that return would expose G to physical or psychological harm or otherwise place her in an intolerable situation. The central question in the appeal was whether G is protected from refoulement as a result of being listed as a dependant on her mother's asylum application, such that she cannot be returned to South Africa pursuant to the 1980 Hague Convention proceedings until the asylum application is determined. The Court of Appeal held that a child listed as a dependant on an asylum application has no protection from refoulement, but that if G had made an application in her own right, she could not be returned prior to the determination of her application. The Court of Appeal concluded that there was no bar to ordering G's return to South Africa. The Supreme Court allowed the mother's appeal and held that a child who can objectively be understood to be an applicant for asylum cannot be returned to the country from which he or she has sought refuge before the final determination of the asylum claim. UK asylum law is derived from a patchwork of international, EU and domestic law sources, para [77], which provide that an individual who is a refugee has a right not to be refouled, subject to limited exceptions. That right does not depend on whether they have been granted status as a refugee, paras [79]-[81]. An individual who can be understood to be seeking refugee status is therefore protected from refoulement. An asylum application which lists a child as a dependant is also an asylum claim by that child if objectively it can be understood as such, paras [117]-[121]. The protection from refoulement of a child who can objectively be understood to be an applicant for asylum applies during the determination of their application. The effect of implementing a return order in 1980 Hague Convention proceedings in respect of a child asylum applicant is to return the child to the country from which they seek refuge. While the High Court can decide whether to make a return order, the return order cannot be implemented until the asylum claim has been determined, paras [124]-[134]. All those involved in the 1980 Hague Convention proceedings must act promptly if the UK is to fulfil its obligations under the 1980 Hague Convention, paras [68]-[72]. At the end of his judgment Lord Stephens sets out various practical steps to coordinate related 1980 Hague Convention and asylum proceedings with a view to their prompt determination, paras [163]-[177].

Legal limbo & Article 8

In the case of *R (AM) v SSHD (legal 'limbo')* [2021] UKUT 62 (IAC) (1 February 2021), the UT President considered individuals in legal 'limbo' and human rights challenges . The term 'limbo' is a shorthand for describing the position of a person whom the SSHD wishes to deport or remove, but there is a limited prospect of ever effecting their deportation or removal. The President held that a person whose removal from the UK has become an impossibility in the sense identified by the House of Lords in *R (Khadir) v SSHD* [2005] UKHL 39, [2005] 4 All ER 114, [2005] All ER (D) 149 (Jun) cannot be subject to immigration bail. Such 'Khadir' I impossibility is, however, a high threshold to

surmount. However applying the four-stage analysis of Haddon Cave LJ in *RA (Iraq) v SSHD* [2019] EWCA Civ 850, [2019] 4 WLR 132, an individual who is subject to immigration bail may still succeed in a human rights challenge, based on ending his state of legal 'limbo' in the UK, where the case is of a truly exceptional nature. In the Applicant's case the Tribunal held that he had not shown that the Respondent cannot lawfully keep him on immigration bail, para [118], primarily because of the Applicant's own failure to disclose his true identity, paras [113-118]. However applying the analysis in *RA*, paras [120-150], the Tribunal find that continuing to refuse to grant leave would be a disproportionate interference with the Applicant's Article 8 rights, para [150]. The Tribunal note that the Applicant's case is exceptional and '[a]nyone reading the applicant's history cannot reasonably regard our conclusion as any "green light" for others to attempt to withhold material relevant to the establishment of their true identity.' para [149].

Human rights claims

Where an individual, who is in the UK, makes an application for indefinite leave to remain (ILR) which is to be treated as a human rights claim within the meaning of NIAA 2003, s 113 and the SSHD decides not to grant ILR but grants the individual limited leave to remain, does the Secretary of State 'refuse a human rights claim' within the meaning of NIAA 2003, s 82(1)(b), with the result that the individual has a right of appeal to the FTT? In *R (Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and SSHD (refusal of human rights claim)* [2020] UKUT 85 (IAC), [2020] All ER (D) 116 (Mar) the UT President concluded that the answer to this question is no and dismissed the judicial review of the decision of the FTT that no right of appeal to the FTT existed in the specified circumstances. The Appellant appealed to the Court of Appeal on various grounds in *R (Mujahid) v First Tier Tribunal (Immigration and Asylum Chamber)* [2021] EWCA Civ 449, [2021] All ER (D) 12 (31 March 2021) but Stuart-Smith LJ dismissed the appeal and stated, para [25]:

> 'In my judgment, the interpretation adopted by the UT is consistent with the general structure and scheme of Part 5 of the Act. This emerges most clearly once s. 104(4A) is brought into play. It provides that an appeal under s. 82(1)(b) brought by a person while they are in the United Kingdom shall be treated as abandoned if they are granted leave to enter or remain in the United Kingdom. It would be incoherent to hold that, on the one hand, the applicant has a right to appeal to the FTT if the Secretary of State grants limited leave in response to an application for indefinite leave to remain but that, on the other, an appeal to the FTT that is brought in any other circumstances involving refusal of a human rights claim is to be treated as abandoned if limited leave is subsequently granted.'

UT overturning allowed appeals and errors of law

AE (Iraq) v SSHD [2021] EWCA Civ 948 (22 June 2021) is the latest example of the Court of Appeal rebuking the UT for overturning a decision of the FTT allowing an appeal without properly identifying an error of law in the decision. The case concerns an Appellant who the SSHD had found was excluded from the protection of the Refugee Convention due to her posting online statements encouraging jihad. A panel of the FTT had allowed the Appellant's appeal finding on the facts of the case that she was not excluded. The UT disagreed with the decision of the FTT and overturned it. The Court of Appeal allow the appeal holding that the UT did not make any finding that the FTT erred in law and therefore had no jurisdiction to interfere with it, para [52]. Furthermore the UT were wrong to in law to find that the decision of the FTT was irrational, para [53]. Warby LJ provides some helpful guidance in respect of the role of the UT and warns against mis-characterising disagreement as an error of law. At para[32] Warby LJ says,

> 'Commonly, the suggestion on appeal is that the FTT has misdirected itself in law. But it is not an error of law to make a finding of fact which the appellate tribunal might not make, or to draw an inference or reach a conclusion with which the UT disagrees. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted.'

Section 94B certificates and out-of-country appeals

In linked judicial review proceedings *R (Arman) v SSHD* [2021] EWHC 1217 (Admin) (13 May 2021) two Turkish nationals challenged decisions to certify their human rights claims pursuant to NIAA 2002, s 94B with the consequence that any appeal must be heard out-of-country. The decisions were challenged on the basis that the section 94B certifications breached the Appellants' human rights and that the Ankara Agreement afforded the Claimants a suspensory in-country right of appeal. In relation to the human rights ground Mostyn J. considered the judgment of the Supreme Court in *R (Kiarie and Byndloss) v SSHD* [2017] UKSC 42, [2017] All ER (D) 70 (Jun). Mostyn J acknowledged that the decision in *Kiarie and Byndloss* was correct at the time due to the prevailing technological situation, para [21], but as a result of the Coronavirus (COVID-19) pandemic most civil and family hearings are conducted remotely and now, para [22]:

> 'almost all witnesses give their evidence without a hitch from their homes (which may be here or overseas) or their lawyers' offices; and the widely held misconceptions that this is unsatisfactory, or in some way renders the task of the judge in sifting truth from untruth more difficult, are being gradually displaced through wide experience

Mostyn J observes that most of the concerns of Lord Wilson in *Kiarie and Byndloss* have now been overcome or shown to be unfounded, para [24]. At para [31] Mostyn J states that he does not believe *Kiarie and Byndloss* would be decided in the same way today and in 2021 he is confident that in most cases an overseas appellant can reasonably prepare for and participate in their appeal, paras [34-35]. At para [41] Mostyn J. concludes that 'it is not arguable that these claimants cannot be enabled, realistically and reasonably, to prepare for, and participate in, their appeals to the FTT from Turkey.' Of note is that the judgment does not refer to the difficulties thrown up by *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC) (22 November 2011) which is relied upon by the FTT when an individual is seeking to give evidence from abroad in an appeal. Mostyn J also rejected the Ankara Agreement ground, paras [42-51], and the GDPR ground which was relied upon by one of the Claimants, paras [52-56]. In any event Mostyn J found that the delay in bringing the claims must lead to the applications being dismissed, paras [57-61].