Immigration cases 2021—July to December review

This analysis was first published on Lexis®PSL on 22 December 2021 and can be found here (subscription required)

Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from July 2021 to December 2021 for immigration advisers, and explains why they are of interest. The review covers long residence settlement applications, section 3C leave, legacy appeals under the EEA regs, evidence from witnesses abroad deprivation of citizenship, Windrush cases, judicial review challenges and Article 8-related cases.

Article 8 and deportation

In *Sanambar v SSHD* [2021] UKSC 30 (16 July 2021), the Supreme Court considered the deportation of an Iranian national who had been lawfully resident in the UK since the age of nine. The appellant had committed a number of serious offences as a minor, including multiple counts of robbery. In 2013 the appellant was sentenced to three years' detention in a Young Offender Institution. The appellant relied on the exception to deportation, as set out in the Immigration Rules, Part 13, para 399A, namely that he had been lawfully resident in the UK for most of his life, he was socially and culturally integrated in the UK and there would be very significant obstacles to his integration into Iran. If the exception did not apply, the public interest required deportation unless there were very compelling circumstances over and above those described in the exceptions. The appellant's appeal was dismissed before the Upper Tribunal and the Court of Appeal. In *Üner v Netherlands* (App No 46410/99) [2006] ECHR 46410/99 the European Court of Human Rights (ECtHR) established that in striking the balance in such cases between a settled migrant's rights under Article 8 and the prevention of crime, the court should consider:

- the nature and seriousness of the offence committed by the applicant
- the length of the applicant's stay in the country from which they are to be expelled
- the time elapsed since the offence was committed and the applicant's conduct during that period, and
- the solidity of social, cultural and family ties with the host country and with the country of destination

Subsequently, in *Maslov v Austria (App no 1638/03)* [2008] ECHR 1638/03, the ECtHR held that where a settled migrant has lawfully spent all or the major part of their childhood and youth in the host country, very serious reasons are required to justify expulsion, particularly where the person committed the offences underlying the decision to deport as a juvenile. Before the Supreme Court it was argued that in a case involving a settled migrant who has lawfully spent all or the major part of their childhood in the host country, the court must separately consider whether there were very serious reasons to justify expulsion, as a separate condition after the examination of the *Üner* criteria. Sir Declan Morgan rejected the appellant's arguments and held that the authorities establish that the court must carry out a delicate and holistic assessment of all the criteria flowing from the ECtHR's caselaw in order to justify the expulsion of a settled migrant, such as the appellant, who has lived almost all of his life in the host country. It must be demonstrated that the interference with his private and family life was supported by relevant and sufficient reasons. In this case the Upper Tribunal had properly carried out its task and reached sustainable conclusions. The Supreme Court therefore dismissed the appeal. Of wider interest is the fact that, in terms of the approach to the assessment of integration, Sir Declan Morgan relied upon the *dicta of* Sales LJ in *Kamara v SSHD* [2016] EWCA Civ 813 (para [14]).

Indefinite leave to remain (ILR) long residence latest

In recent years the long residence rule in the Immigration Rules, Part 7, para 276B, has led to the spilling of much judicial ink which culminated in *Hoque v SSHD* [2020] EWCA Civ 1357 and the introduction of the concepts of 'open-ended' and 'book-ended' overstaying into the immigration lawyer's lexicon. In *R (Mungur) v SSHD* [2021] EWCA Civ 1076 (15 July 2021) the appellant successfully appealed to the Court of Appeal against the refusal to grant them ILR under para 276B.

Their application for judicial review had been dismissed by UTJ Gill, who certified their claim as totally without merit. The Secretary of State for the Home Department (SSHD) had refused his application on the grounds that:

- during the period relied upon by the appellant as continuous residence, he had 'left the UK in circumstances in which he had no reasonable expectation at the time of leaving that he would lawfully be able to return' and therefore could not satisfy the requirements of para 276B(i)(a); and
- he had been in the past an overstayer and therefore could not satisfy the requirements of para 276B(v)

Before the Court of Appeal the SSHD abandoned her reliance on the second point above and the appellant's past overstaying in the light of *Hoque*. The appellant had initially entered the UK as a visitor in 2001 but had returned to Mauritius in order to apply for entry clearance as a Student which was granted. The SSHD argued that the appellant could have had no reasonable expectation of being able to return when he left on 1 September 2001 and that the temporary nature of the residence as a visitor means that it falls to be excluded under para 276A(a)(iii). The Court of Appeal disagreed and found that whether the appellant had a reasonable expectation at the time of leaving that he would lawfully be able to return depends not upon the nature of his previous residence but on whether he had a reasonable expectation of being granted leave to return. The fact of the appellant having held a visitor visa is not of itself capable of prejudicing his application for a Student visa. Therefore, the only relevant information before the court was that the appellant was granted his Student visa, from which it may be deduced that he satisfied the criteria for that grant. He had to leave the UK in order to make his application; and there was no suggestion that his circumstances changed such that he would not have qualified for a Student visa on 1 September 2001 but did qualify when he made his application shortly after. The court therefore set aside the SSHD's decision to refuse the appellant ILR.

However the Court of Appeal has cast some doubt on *Hoque* in *R (Afzal) v SSHD* [2021] EWCA Civ 1909 (17 December 2021) which was an appeal against the refusal of permission to apply for judicial review of the SSHD's decision refusing to grant ILR on long residence grounds on the basis that there was a period when the appellant was not lawfully resident in the country with the consequence that the period of continuous lawful residence had been broken. The first issue considered by the court was whether the appellant's leave was extended by section 3C of the Immigration Act 1971 (IA 1971) between the period when the appellant made his application, and also applied for a fee waiver, and when his application was rejected as invalid for failing to pay the immigration health surcharge (IHS). Sir Patrick Elias held that in cases where there is no fee waiver application, then the failure to pay the IHS invalidates the application *ab initio* (para [32]). However where there is a fee waiver application, Sir Patrick found that (para [33]):

> 'the application is conditionally valid, i.e. it is valid unless and until an obligation to pay the fee is imposed, following a refusal to grant relief, and the fee is not thereafter paid within the specified period of ten working days.'

The appellant was therefore entitled to rely upon IA 1971, s 3C until the ten working days had expired after the fee had been requested (para [38]). The appellant's subsequent application was not therefore made within 14 days of his leave being extended by section 3C and he could not rely upon the exception for overstayers in the Immigration Rules, Part 1, para 39E(2)(b)(ii). The appellant further argued that he could rely upon para 39E(2)(b)(i) as his subsequent application was made within 14 days of the SSHD rejecting his application as invalid. Sir Patrick Elias agreed with the appellant and construed the word 'application' in para 39E(2)(b)(i) as including invalid application (para [50]) and fond that the appellant's book ended period of overstaying fell to be disregarded following *Hoque* (para [51]). The court was then left with the question, 'Can disregarded periods of overstaying count towards the ten year requirement?' Sir Patrick disagreed with the majority in *Hoque* (para [70]) and with UTJ Blum in *Muneeb Asif (Paragraph 276B—disregard, previous overstaying)* [2021] UKUT 96 (paras [71–73]) and held that disregarded periods of book ended overstaying do not actively count towards the calculation of ten years continuous lawful residence (paras [70 & 82]). The waters clarified by *Hoque* are once again muddied and this it seems is not the end of the long residence saga.

The ripple effect of Paposhvili

In *AM (Zimbabwe) v SSHD* [2020] UKSC 17, the Supreme Court endorsed the modification of the test in *N v UK* (App no 26565/05) [2008] ECHR 26565/05, introduced by the ECtHR in *Paposhvili v Belgium* (App No. 41738/10) [2017] ECHR 41738/10 in respect of Article 3 health cases. The 'deathbed' scenario was held to set too high a threshold to properly reflect the values that Article 3 is designed to protect. Following *Paposhvili* the correct test is that there must be a real risk of an applicant 'being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'. In the second half of 2021 the Upper Tribunal has applied the test approved in *AM (Zimbabwe)* to two further situations. In *Ainte (material deprivation, Art 3, AM) (Zimbabwe)* [2021] UKUT 203 (IAC) (22 July 2021) the Upper Tribunal found that the test applied to cases of material deprivation which are not intentionally caused, '[t]he question will be whether conditions are such that there is a real risk that the individual concerned will be exposed to intense suffering or a significant reduction in life expectancy.'

In *MY (Suicide risk after Paposhvili)* [2021] UKUT 232 (IAC) (23 August 2021) the Upper Tribunal applied the test in suicide risk cases at para [118], '[t]here is nothing in European or domestic case law to support any contention that *Paposhvili* does not apply to suicide cases.' However 'when undertaking an assessment the six principles identified at [26]–[31] of *J v Secretary of State for the Home Department* [2005] EWCA Civ 629; [2005] Imm AR 409 (as reformulated in *Y (Sri Lanka) v SSHD* [2009] EWCA Civ 362) apply' but do not impose a separate test.

Section 3C and the revival of leave

In R (*Akinola) v Upper Tribunal* [2021] EWCA Civ 1308 (26 August 2021), the Court of Appeal navigated the deep waters of section 3C of the Immigration Act 1971 and the revival of leave in particular where an application has been made for variation of existing leave, the application has been refused by a decision of the SSHD, and subsequently:

- there is an out-of-time appeal for which an extension of time is granted, or
- the SSHD withdraws and/or reconsiders the decision

Where an extension of time is granted for an appeal out of time, the date when the appeal is instituted and becomes a pending appeal within IA 1971, s 3C(2)(c) is the date when the notice of appeal was filed, not the date when the extension of time was granted (para [64]). Where a decision by the SSHD refusing an application for variation of leave is subsequently quashed by the court in proceedings for judicial review, the quashed decision has no legal effect for the purposes of section 3C, so that the application for variation will not have been 'decided' until a fresh decision is taken on the application, and leave will continue to be extended under IA 1971, s 3C(2)(a) in the meantime (para [65]). The court went on to consider the position where the SSHD withdraws a decision and found that the withdrawal does not reverse the previous legal position but can cause leave to revive under section 3C(2)(a) for the future because, from the date of withdrawal and until a fresh decision is taken, the application for variation can no longer be said to have been decided (para [68]). This would leave a gap in the persons leave from the point of the original decision until the withdrawal, however the SSHD's policy (para [67]) indicates that the person should not be disadvantaged by this gap and should be treated as lawfully present during this time. In regard to where the SSHD agrees to reconsider a decision the court found that if there is no withdrawal of the original decision, the making of a new decision on a reconsideration does not change the status of the original decision or its effect on section 3C leave (para [69]). Practitioners should keep the guidance in *Akinola* in mind when settling judicial review applications and drafting consent orders.

Deprivation of citizenship post-Begum

In R (*Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 (26 February 2021) the Supreme Court held that SIAC should approach a section 40(2) of the British Nationality Act 1981 (BNA 1981) deprivation appeal 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. In *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) (8 September 2021*)* the Upper Tribunal President applies *Begum* to section 40(3) BNA 1981 deprivation cases and seeks synthesise the recent jurisprudence. The President states (para [29]):

> 'Before returning to the present case, we shall attempt to reformulate the principles articulated by Leggatt LJ in *KV (Sri Lanka)* in a way which takes account of *Aziz, R (Begum)*, *Hysaj (deprivation of citizenship: delay)* and

> *Laci*. In the light of Lord Reed's judgment in *Begum*, the reformulation needs to highlight the fact that, in practice, where there is no issue regarding the conditions precedent mentioned in Leggatt LJ's original principle (3), the Tribunal's starting point is highly likely to be the ECHR and the compatibility of the Secretary of State's deprivation decision with her obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with a Convention right. If that issue is determined in favour of the appellant, then the appeal must be allowed. Otherwise, the Tribunal will consider whether to allow the appeal, according to the principles set out in paragraphs 68 to 71 of the judgment of Lord Reed in *Begum*.'

The President sets out a seven-step reformulation (para [30]) which sets out the correct steps that a tribunal should take in a deprivation appeal.

The Detained Fast Track, unfairness and nullity

In R (*TN (Vietnam)) v SSHD [2021] UKSC 41 (22 September 2021)* the Supreme Court rejected the argument that Detained Fast Track appeals under structurally unfair procedure rules were automatically a nullity. Lady Arden rejected the appellant's principal submission that the First-tier Tribunal's (FTT) determination was automatically a nullity and without effect. The fact that the system was structurally unfair did not mean that it operated unfairly in every case (para [53]). Agreeing with Sales LJ, she accepted Singh LJ's jurisdictional reason (para [55]). Lady Arden rejected the submission that the determination was 'inextricably linked' to the systemic unfairness (para [56]), and affirmed the principle that a court order is valid until set aside (para [57]). Sales LJ agreed with Singh LJ's jurisdictional reason and amplified the 'conceptual distinction' between ultra vires and procedural unfairness in an individual case (paras [80]–[85]).

A similar approach was adopted by the Upper Tribunal in *EP (Albania) (rule 34 decisions, setting aside)* [2021] UKUT 233 (IAC) (15 September 2021) which concerned error of law decisions made without a hearing under the Presidential Guidance Note dated 23 March 2020 which was found to be unlawful in *R (JCWI) v President of UT (IAC)* [2020] EWHC 3103 (Admin). The Upper Tribunal rejected the submission that the consequence of the *JCWI* judgment was that every rule 34 decision to proceed without a hearing taken following the issue of the Presidential Guidance Note amounted to a procedural irregularity. A decision made under rule 34 to determine an error of law appeal without a hearing would amount to a procedural irregularity for the purposes of rule 43 if the rule 34 decision rested on an error of law. Whether or not a relevant procedural irregularity occurred must depend on scrutiny of each rule 34 decision, and the reasons given for it. The question is whether the decision that it would be fair to determine the appeal in issue without a hearing was wrong in law.

Human rights decisions and appeals

In *MY (Pakistan) v SSHD* [2021] EWCA Civ 1500 (15 October 2021) the Court of Appeal considered the circumstances in which the refusal of an application for indefinite leave to remain (ILR) by a victim of domestic violence may attract a right of appeal. Underhill LJ dismissed the appeal observing that the starting point must be that under the statutory scheme as structured an application for leave to remain and a 'human rights claim' are conceptually different kinds of thing, serving different purposes (para [39]). It is of course nevertheless the case that an application for leave to remain may constitute a human rights claim (para [40]) but it does not, however, follow that every application for leave to remain necessarily involves a claim that removal would be a breach of the applicant's Convention rights (para [41]). At para [42] he said:

> 'That analysis informs the question of whether it is possible for the Secretary of State, in a case where an applicant for leave to remain has made a human rights claim, to decide to refuse the application without also refusing the claim. Where the application necessarily involves a human rights claim, in the sense discussed above, a refusal of the one must necessarily entail a refusal of the other. But where that is not the case there is nothing illogical in the Secretary of State choosing to refuse the application but to defer a decision on the human rights claim. That choice may in principle be challengeable on public law grounds, but that is another matter.'

Underhill LJ therefore concluded that the appellant's application under section DVILR of the Immigration Rules, Appendix FM did not inherently involve a human rights claim within the meaning of section 113 (1), and accordingly the refusal of that application did not necessarily involve a refusal of the human rights claim which he in fact made. In a separate judgment, MY (Pakistan) v SSHD [2021] EWCA Civ 1615 (4 November 2021), the court refused to reconstitute itself as a Divisional Court and entertain a challenge to the SSHD's 'one-application-at-a-time policy' which could not be determined in the context of a statutory appeal. The main reason for this was that the court was not in a position

to determine the lawfulness of the policy, either generally or as applied to the appellant, on the basis of the pleadings or the evidence before it (para [5]).

Modern slavery leave (MSL) policy unlawful

In *R* (*KTT) v SSHD* [2021] EWHC 2722 (Admin) (12 October 2021), Mr Justice Linden held that the SSHD's 'Discretionary Leave for Victims of Modern Slavery' policy (the MSL Policy), which stated that any consideration of MSL would not be considered until after the determination of an applicant's asylum claim was contrary to Article 14 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (ECAT) because it fails to permit the grant of MSL to a victim on the ground that she has to remain in the UK to advance an asylum/protection claim based on the fear of being retrafficked if she is returned to her country of origin. The refusal of leave in the claimant's case was therefore inconsistent with Article 14(1)(a) ECAT and unlawful. A great deal of the judgment is taken up with the issue of justiciability as the SSHD had argued, on the basis of *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 that the claim was not justiciable because it was essentially a complaint that the UK had failed to comply with obligations under an international treaty, ECAT, which has not been incorporated into our law. However Linden J followed the *R (PK (Ghana)) v SSHD* [2018] EWCA Civ 98 line of cases and that that the source of the public law obligation contended for was the declared policy of the defendant, which was intended to give effect to ECAT, rather than ECAT itself.

Permission to work policy also unlawful

Linden J found another of the SSHD's policies unlawful in *R (Cardona) v SSHD* [2021] EWHC 2656 (Admin) (4 October 2021), on this occasion it was the 'Permission to work and volunteering for asylum seekers' policy. The claimant was granted permission to work while his asylum claim was pending but in accordance with the Immigration Rules, Part 11B, para 360A (that employment was limited to jobs on the Shortage Occupation List (SOL)). The claimant wrote to the SSHD arguing that the SOL condition should not apply to him but the SSHD refused to exercise her discretion and depart from the Immigration Rules. Linden J found that the work policy did not comply with the SSHD's duties in section 55 of the Borders Citizenship and Immigration Act 2009 in respect of the best interests of children. After circulating his draft judgment the Supreme Court handed down judgment in *R (A) v SSHD* [2021] UKSC 37 and *R (BF (Eritrea)) v SSHD* [2021] UKSC (see below) but found that they did not affect the outcome of the claim. Linden J refused to rule on a later version of the work policy, which had been amended following *R (IJ Kosovo) v SSHD* [2020] EWHC 3487.

Legacy appeals under the EEA Regulations 2016 post-Brexit

In *Geci (EEA Regs: transitional provisions, appeal rights)* [2021] UKUT 285 (IAC) (29 September 2021), UTJ Rintoul gives guidance on the law as it now exists in respect of the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (the EEA Regulations 2016) and the right of appeal following their revocation on 31 December 2020. As the judge notes, and practitioners will be aware, the 'position is unfortunately complex and requires the consideration of several different pieces of legislation'. The EEA Regulations 2016 were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. However, many of the provisions of the EEA Regulations 2016 are preserved (although subject to amendment) for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations, SI 2020/1309, (the EEA Transitional Regulations). The preserved provisions and amendments made are set out in paras 5 and 6 of Schedule 3 to the EEA Transitional Regulations. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the UK prior to 31 December 2020. The issue of a residence card is an administrative matter. Although the SSHD does have power under the EEA Regulations 2016 to refuse to issue a residence card on grounds of public policy, public security or public health, she does not have the right to do so under Directive 2004/38/EC or the EU Treaties. The facts of *Geci* were unusual, the appellant had twice entered the UK in breach of a deportation order, the SSHD failed to take steps to remove the appellant under the EEA Regulations 2016 but instead chose simply not to issue a residence card and expressly stated that the appellant's rights of free movement as a family member of an EEA national were not being restricted. It was not in dispute before the Upper Tribunal that the appellant had a right of residence and as the Directive does not permit a refusal to issue a residence card on public policy, public security or public health grounds, the judge allowed the appeal.

Court of Appeal overturns Upper Tribunal on 'unduly harsh' test again

In *MI (Pakistan) v SSHD* [2021] EWCA Civ 1711 (18 November 2021) the Court of Appeal once again revisited the question of the 'unduly harsh' test in section 117C of the Nationality, Immigration and Asylum Act 2002 and overturned the Upper Tribunal reported decision of *Imran (Section 117C(5); children, unduly harsh : Pakistan)* [2020] UKUT 83 (IAC) (11 February 2020) restoring the decision of the FTT. Simler LJ found that there was no error of law or perversity in the FTT's application of the 'unduly harsh' test to the facts found in this case, and that the Upper Tribunal was not entitled to substitute its own decision for that of the FTT. Simler LJ found that the Upper Tribunal had erred in two ways, firstly the legal proposition derived by the Upper Tribunal from *PG (Jamaica) v SSHD* [2019] EWCA Civ 1213 ('that the 'unduly harsh' test will not be satisfied in a case where a child has two parents by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and (therefore) of the emotional harm that would be likely to flow from separation') was inconsistent both with the detailed and authoritative analysis in *HA (Iraq) v SSHD* [2020] EWCA Civ 117, and perhaps more significantly, with the statutory test (para [48]). Secondly the Upper Tribunal took the factual situation in *PG (Jamaica)* together with the holding that that factual situation did not justify the 'unduly harsh' conclusion reached, and elevated it to a legal proposition based on the apparent similarity of the facts of *PG (Jamaica)* when compared with this case (para [50]).

Evidence from witnesses abroad

In *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC), the Upper Tribunal gave long awaited guidance on witnesses giving evidence from abroad updating the previous decision in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC) to the following extent:

- there is an understanding among Nation States that one state should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other state to do so. Any breach of that understanding by a court or tribunal in the UK risks damaging this country's relationship with other states with which it has diplomatic relations and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice
- the position of the Secretary of State for Foreign, Commonwealth and Development Affairs is that it is accordingly necessary for there to be permission from such a foreign state (whether on an individual or general basis) before oral evidence can be taken from that state by a court or tribunal in the UK. Such permission is not considered necessary in the case of written evidence or oral submissions
- henceforth, it will be for the party to proceedings before the FTT who is seeking to have oral evidence given from abroad to make the necessary enquiries with the Taking of Evidence Unit of the Foreign, Commonwealth and Development Office (FCDO), in order to ascertain whether the government of the foreign state has any objection to the giving of evidence to the Tribunal from its territory
- the FTT will need to be informed at an early stage of the wish to give evidence from abroad. The party concerned will need to give the Tribunal an indication of the nature of the proposed evidence (which need not, at this stage, be in the form of a witness statement).
- the tribunal's duty to seek to give effect to the overriding objective may require it, in particular, to consider alternatives to the giving of oral evidence where eg there are delays in the FCDO obtaining an answer from the foreign state. Each case will need to be considered on its merits, and
- the experience gained by the FTT in hearing oral evidence given in the UK by remote means during the coronavirus (COVID-19) pandemic is such that there should no longer be a general requirement for such evidence to be given from another court or tribunal hearing centre.

Challenging Home Office policies by way of judicial review

R (BF (Eritrea)) V SSHD [2021] UKSC 38 (30 July 2021) concerned a challenge to the SSHD's policies in cases of doubt as to the age of an asylum seeker presenting as a child. However the case has wider implications in terms of the standards to be applied by a court on judicial review of the

contents of a policy document or statement of practice issued by a public authority. *BF (Eritrea)* was heard by the same panel and handed down at the same time as *R (A) v SSHD* [2021] UKSC 37, which sets out the principles governing this area. The Supreme Court rejected the Court of Appeal's assessment of the lawfulness of the policy by reference to whether it creates a real risk of more than a minimal number of children being detained and/or creates a risk which could be avoided if the terms of the policy were better formulated. The Supreme Court set out the principles governing the test that should be applied when considering the lawfulness of policies in *A* (paras [1],[48]). The standard of judicial review of a policy issued by a public authority derived from *Gillick v West Norfolk and Wisbech Area Health Authority* *[1986] AC 112* is that the policy must not direct officials act in a way which is contrary to their legal obligations (see *A* at paras [29]–[47] for the court's discussion) (para [49]). Guidance in a policy should not sanction, positively approve or encourage unlawful conduct. The Court of Appeal erred by applying a different and more demanding standard of review, contrary to the guidance in *Gillick*. The Court of Appeal's approach would turn the limited test of unlawfulness set out in *Gillick* into a requirement to issue a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty (paras [50]–[51]). But it is in the nature of law that a person subject to a legal duty might misunderstand or breach it, and the remedy is to have access to the courts to compel that person to act in accordance with their duty (para [52]). The judgments in *A* and *BF (Eritrea)* have significant implications and will no doubt make challenges to the SSHD's policies more difficult.

Windrush and citizenship

In *R (Vanriel) v SSHD* [2021] EWHC 3415 (Admin) (16 December 2021), Mr Justice Bourne found for two Windrush victims who had been refused citizenship under the five-year rule. The context is set out at para [5]:

> 'Both Claimants claim to be victims of the type of injustice which gave rise to the Windrush Scheme, in that they were wrongfully prevented from entering the UK at a time when they had or were entitled to indefinite leave to remain in the UK ("ILR"). Both Claimants successfully applied under the Windrush Scheme and were granted ILR. Both subsequently applied for British citizenship. In both cases the Defendant refused the citizenship applications, considering that she was bound to do so by a provision of primary legislation (Sch 1, para 1(2)(a) of the British Nationality Act 1981, "BNA") which requires that a citizenship applicant has been physically present in the UK five years prior to the application ("the 5 year rule").'

The claimants challenged the decision on human rights grounds under Article 14 and/or Article 8. Bourne J found that:

> 'The application of paragraphs 1 and 2 of schedule 1 to the BNA in their unmodified form infringed his rights under Article 14 and/or Article 8, and therefore infringed section 6(1) of the HRA 1998. Section 3 of the HRA enabled, and therefore required, the legislation to be read and interpreted as if it conferred the necessary discretion to avoid that infringement. There is therefore no defence under section 6(2), and the Defendant erred in law when deciding that she had no discretion.'