Upper Tribunal
(Immigration and Asylum Chamber)

FZ (human rights appeal: death: effect) Afghanistan [2022] UKUT 00071 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 31 January 2022

Decision & Reasons Promulgated

.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE OWENS

Between

FZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: *Ms S Naik QC* and *Ms I Sabic*, instructed by Duncan Lewis Solicitors
For the respondent: Mr S Kovats QC, instructed by the Government Legal Department

Where P has made a human rights appeal and subsequently dies, the appeal no longer exists and should be formally recorded by the Tribunal as having come to an end.

DECISION AND REASONS

A. THE ISSUE

1. What is the effect on a human rights appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 where the appellant dies? In a decision promulgated on 28 April 2021, the First-tier Tribunal (Resident Judge Campbell and Designated Judge Peart) decided that the appeal abates. The right of appeal conferred by the 2002 Act is dependent upon an adverse decision made by the respondent following a claim made by a living person. Family members who have not themselves made human rights claims cannot become additional appellants or be substituted for the appellant, after the latter's death. Since the appeal was no longer extant, the First-tier Tribunal formally dismissed it.

2. Permission to appeal to the Upper Tribunal was granted on 4 June 2021. On 31 January 2022, Ms Naik QC and Ms Sabic appeared on behalf of FZ's widow and children. Mr Kovats QC appeared for the respondent. We are indebted to them for the quality of their written and oral submissions.

B. BACKGROUND

3. The appellant, a citizen of Afghanistan, arrived in the United Kingdom in November 2000 and was granted indefinite leave to remain in December 2009. As a result of committing five criminal offences in the United Kingdom, including actual bodily harm and battery, the respondent decided to deport the appellant as a "persistent offender". The respondent certified the appellant's human rights claim under section 94B of the 2002 Act. This was on the basis that the respondent considered that, despite the appeals process not having been begun, requiring the appellant to leave the United Kingdom pending the outcome of an appeal in relation to his human rights claim, would not be unlawful under section 6 of the Human Rights Act 1998.

4. The appellant was deported from the United Kingdom on 26 April 2016, following an unsuccessful attempt to judicially review the section 94B certificate. The appellant lodged an appeal under section 82 of the 2002 Act with the First-tier Tribunal on 9 May 2016, at a time when he was in Afghanistan.

5. It appears that, at some point, the appellant returned from Kabul to his home area in Afghanistan. On or around 10 September 2018, the appellant was killed by the Taliban.

6. The appellant's widow and children sought to pursue the human rights appeal in the First-tier Tribunal. The hearing in that Tribunal took place over four days in late October 2019 and mid-November 2020. As we have already said, the conclusion of the First-tier Tribunal was that the appeal had abated. Accordingly, it declined to make any findings of fact, as the appellant's widow and children had requested. At paragraph 18(d) of its decision, the First-tier Tribunal recorded the gist of evidence it heard from an expert witness on the availability of a video link from Afghanistan and on the difficulties the appellant faced in Kabul (as a result of which he returned to his home area).

C. LEGISLATION ETC

Human Rights Act 1998

3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

…

6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a)as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b)in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

…

7. Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

…

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

…

8. Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

…

(6) In this section—

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

Nationality, Immigration and Asylum Act 2002

77. No removal while claim for asylum pending

(1) While a person's claim for asylum is pending he may not be—

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section—

(a) "claim for asylum" means a claim by a person that it would be contrary to the United Kingdom's obligations under the Refugee Convention to remove him from or require him to leave the United Kingdom, and

(b) a person's claim is pending until he is given notice of the Secretary of State's decision on it.

(3) In subsection (2) "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol.

…

82. Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where—

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part—

(a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—

(i) would breach the United Kingdom's obligations under the Refugee Convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;

(d) "humanitarian protection" is to be construed in accordance with the immigration rules;

(e) "refugee" has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

84. Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—

(a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;

(b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.

85. Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section [84] against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) ... against a decision [the Tribunal] may consider ... any matter which [it] thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.

[5] But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a “new matter” if—

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.

86. Determination of appeal

(1) This section applies on an appeal under section 82(1).

(2) The Tribunal must determine—

(a) any matter raised as a ground of appeal ..., and

(b) any matter which section 85 requires it to consider.

...

94B. Appeal from within the United Kingdom: certification of human rights claims

(1) This section applies where a human rights claim has been made by a person (“P”) ...

(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, refusing P entry to, removing P from or requiring P to leave the United Kingdom, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if refused entry to, removed from or required to leave the United Kingdom.

…

104. Pending appeal

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(3) …

(4) …

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant—

(a) …

(b) gives notice, in accordance with Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.

…

113. Interpretation

(1) In this Part, unless a contrary intention appears—

"asylum claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,

"human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the

United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) …

…

117. Article 8: public interest considerations applicable in all cases

…

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

…

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C. Article 8: additional considerations in cases involving foreign criminals

…

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

…

117D. Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights; "qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

…

Asylum and Immigration Tribunal (Procedure) Rules 2005 (revoked)

17. Withdrawal of appeal

…

(2A) Where an appellant dies before his appeal has been determined by the Tribunal, the Tribunal may direct that—

(a) the appeal shall be treated as withdrawn; or

(b) where the Tribunal considers it necessary, the personal representative of the appellant may continue the proceedings in the place of the appellant.

…

Civil Procedure Rules

Death

19.8—(1) Where a person who had an interest in a claim has died and that person has no personal representative the court may order—

(a) the claim to proceed in the absence of a person representing the estate of the deceased; or

(b) a person to be appointed to represent the estate of the deceased.

(2) Where a defendant against whom a claim could have been brought has died and—

(a) a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;

(b) a grant of probate or administration has not been made—

(i) the claim must be brought against "the estate of" the deceased; and

(ii) the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.

…

Law Reform (Miscellaneous Provisions) Act 1934

1. Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation.

(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include—

(i) any exemplary damages;

(ii) any damages for loss of income in respect of any period after that person's death;

...

D. CASES

Lewisham Mental Health Trust v Andrews [2000] ICR 707

7. **Andrews** concerns an employment claim in the Employment Tribunal for unlawful race discrimination. The complainant died before the complaint was heard. The Court of Appeal held that a claim for compensation for unlawful race discrimination was a cause of action, which survived the death of a complainant, for the benefit of the estate under section 1 of the 1934 Act. There was nothing in the Race Relations Act 1976 or the applicable Tribunal Rules to exclude the personal representative of the complainant from pursuing the complaint in the Employment Tribunal. At paragraph 15 of the judgments, Stuart-Smith LJ said:

> "15. ... The 1934 Act is concerned with causes of action, not actions. 'Cause of action' was defined by Lord Esher MR in *Read v Brown* (1888) 22 Q.B.D. 128, 131 as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court." In Letang v Cooper [1965] 1 Q.B. 232, 242 Diplock LJ said: "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."
>
> ...
>
> 18. The Act of 1934 was passed to abolish the common law rule that actions in tort did not survive for the benefit of or against the estate of a deceased person. The maxim was *actio personalis moritur cum persona*. Actions in contract did survive if they resulted in pecuniary damage, even if they were also torts. But actions for damages for personal injury, even if based in contract as well as tort did not. ... But the Act of 1934 now also governs causes of action in contract which at common law did survive. ...
>
> 19. I have no doubt therefore that a claim for pecuniary compensation for racial discrimination is a cause of action within the meaning of the Act of 1934. The question therefore is not, as the Employment Appeal Tribunal thought, whether there is anything in the discrimination Acts which expressly confers such rights on the personal representative, but whether there is anything which takes them away."

8. Mummery LJ, agreeing with Stuart-Smith LJ, held at paragraph 33:

> "... The appeal tribunal ... characterised rights under the Act of 1976 as "of a largely personal nature which Parliament has not deemed fit to provide should devolve on the estate." That approach is wrong because it disregards the fundamental change in the law made by the Act of 1934. The point is not whether the action is "personal" or whether it is assignable, but whether

> the person who has died had a "cause of action." If he had a cause of action, the benefit of it passed to his estate. The correct question is whether the complaint by the complainant under the Act of 1976 was a "cause of action" within the meaning of the Act of 1934. If it was, the benefit of it passed to her estate whether it was a "personal action" or not. This does not mean that all benefits conferred by or recoverable under all statutes survive death: See, for example, *D'Este v D'Este* [1983] Fam.55 at 59 (Application for financial provision under the matrimonial causes legislation not a "cause of action"). It is necessary to decide in each case whether the person who has died had a "cause of action" within the meaning of the Act of 1934."

9. In Barder v Caluori [1987] 2 WLR 1350, the House of Lords held that the question of whether further proceedings, including an appeal in a matrimonial matter, could be taken after the death of a party depended on the nature of the further proceedings sought to be taken, the true construction of the relevant statutory provisions and the applicability of section 1(1) of the 1934 Act. In that case, the House of Lords held that a husband could appeal against a consent order in divorce proceedings, even though the widow had then killed herself.

10. In Campbell v Secretary of State for Northern Ireland [2019] 1 WLR 2337, the Upper Tribunal Administrative Appeals Chamber held that a subject access request pursuant to section 7 of the Data Protection Act 1998, seeking access to official records relating to the requesting data subject's internment without trial in Northern Ireland established a purely personal right for the data subject to have access to his own personal data.

11. Accordingly, where a person who had made such a request died after initiating an appeal against the refusal of the request, that appeal did not survive the appellant's death. Neither the section 7 request nor the appeal could be regarded as a "cause of action" within the meaning of the Northern Ireland counterpart of the 1934 Act.

12. At paragraph 16, the Upper Tribunal held that, if the appellant's widow had made the request in respect of his data after his death, the request could not have been granted because it was not a request for "data which relate to a *living* individual" within section 1(1) of the 1998 Act.

13. The Upper Tribunal continued:

> "17. The central question for us is whether that analysis is also applicable to the actual situation that has arisen in this case. As Ms Doherty reminded us, the present appeal is factually not the same as our hypothetical in several respects. Mr Campbell was undoubtedly alive at the time he made his section 7 request – he was also alive when the Secretary of State issued her section 28 certificate and indeed when the section 28(4) appeal to the Tribunal was lodged. Does the fact that his appeal was already on foot enable us to distinguish the hypothetical case and lead to a different result? As Ms Doherty correctly notes, neither the DPA itself nor the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) specifically deals with these

circumstances, although rule 9(3) of the 2008 Rules does provide that "a person who is not a party may apply to the Upper Tribunal to be added or substituted as a party". However, that discretionary power as to procedure provides no answer to the jurisdictional question as to whether in the first place the right of appeal under section 28 survives the appellant's death. In the absence of a bespoke statutory answer to that question, it follows that we are thrown back onto consideration of first principles. In that context, and in support of her contention that Mr Campbell's appeal survived his death, Ms Doherty's submissions focussed first specifically on the terms of section 28 of the DPA and then more generally on the wider picture as regard the survival of causes of action.

18. So far as section 28 is concerned, Ms Doherty reminded us of the terms of subsections (4) and (5):

> '(4) Any person directly affected by the issuing of a certificate under subsection (2) may appeal to the Tribunal against the certificate.
>
> (5) If on an appeal under subsection (4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate.'

19. Ms Doherty's argument ran as follows. Mr Campbell, when alive, had exercised his right of appeal under section 28(4) as "any person directly affected by the issuing of a certificate" under section 28(2). There was no reference within section 28(4) to the notion of "personal data". The Tribunal is now bound to apply the test in section 28(5), which again makes no mention of "personal data". Rather, section 28(5) requires the Tribunal to focus on the circumstances as they were at the date when the section 28(2) certificate was issued. Accordingly, the test is whether at that time (when Mr Campbell was alive) "the Minister *did not have* reasonable grounds for issuing the certificate". For all those reasons the section 28 appeal survived the death of Mr Campbell.

20. However, we do not consider the absence of any reference to "personal data" within section 28(4) and (5) leads to the conclusion that Ms Doherty invites us to reach. Nor does the backward-looking nature of the test in section 28(5) assist, as that is no more than being entirely consistent with the judicial review approach mandated by that provision. The fundamental difficulty with Ms Doherty's submissions is that they do not address the true nature of the section 28 procedure. Mr Campbell, as with the other data subjects, had no freestanding right to lodge an appeal under section 28(4). He could only do so because the Secretary of State had issued him with a national security certificate under section 28(2) in response to his section 7 request. The effect of that certificate was to restrict the scope of his section 7 subject access rights. As Mr McLaughlin put it, the section 28(4) appeal procedure does not have an independent existence separate from the underlying section 7 subject access rights. The section 28(4) appeal

procedure is wholly ancillary to, and parasitic upon, the data subject's rights under section 7."

14. So far as concerned the Northern Ireland equivalent of section 1 of the 1934 Act, the Upper Tribunal at paragraph 27 said the proposition that "all causes of action by or against a person's survival in death to or against his estate" merely begged the question as to what is "cause of action" was, in the first place. Having examined the judgment in Andrews and the definition provided by Diplock in LJ in Letang v Cooper, the Upper Tribunal held, at paragraph 29, that the right of appeal conferred by the 1998 Act was "no more than the statutory appeal route, a procedural mechanism, for challenging the issue of a national security certificate in the substantive section 7 access request proceedings". There was "no freestanding right to bring a section 28(4) appeal; it presupposes that a section 7 request has been made and a section 28(2) certificate has been issued".

15. At paragraph 30, the Upper Tribunal explained why the section 7 request itself could not be regarded as a "cause of action". At paragraph 32, the Upper Tribunal concluded that the deceased's "rights under section 7 of the DPA were purely personal rights which did not survive his death as a cause of action". They were more akin to rights under the matrimonial causes legislation than to other statutory rights, which may pass to the estate. The Upper Tribunal reasoned as follows:

> "32. … Section 7(1) is pre-eminently an individual and personal right. This much is plain from the terms of section 7 itself. In particular, section 7(1)(c) provides that the individual has the right "to have communicated to him in an intelligible form— (i) the information constituting any *personal data of which that individual is the data subject"* (emphasis added). As Mr McLaughlin submitted, the section 7 right is a right the individual data subject has as against the data controller. Thus, the data controller is entitled to be satisfied of the identity of the particular data subject making the subject access request (see section 7(3)). Section 7(4) likewise reinforces the bilateral and personal relationship between data controller and data subject. The very premise of section 7 is that it establishes a personal right for the data subject to have access to his or her own personal data. It is not a right for a third party, however close to the deceased, to be granted such access."

16. Recently, in Hasan v Ul-Hasan, Decd & Anor [2021] 3 WLR 989, Mostyn J held that where the claimant's husband died before her application for financial relief in matrimonial proceedings was adjudicated at first instance, the claimant could not pursue her application against the late husband's estate. Mostyn J considered that he was bound by authority, including D'Este v D'Este, to reach that conclusion.

17. In the absence of such authority, however, Mostyn J said that he would have concluded otherwise. At paragraph 42, he expressed the view that a "cause of action" for the purposes of section 1 of the 1934 Act "plainly

encompasses processes which are speculative, personal and discretionary". At paragraph 44, he concluded that "if there is a right which gives rise to a remedy from the court then there is a cause of action". This led him to conclude, at paragraph 45, that "it is very difficult to see why a claim for post-divorce relief is not a 'cause of action'. It is a right, at the very minimum, to apply to the court, which will award a remedy if the necessary facts are approved."

E. DISCUSSION

18. As the majority of the case law on section 1 of the 1934 Act (and its Northern Ireland equivalent) demonstrates, the question of whether a particular statutory provision creates a "cause of action" within the ambit of section 1 requires the court or tribunal to construe the effect of that particular provision. Unless this is done, there is a danger that section 1 will assume a form that Parliament did not intend it to have. With respect to Mostyn J, merely to hold that a right which gives rise to a remedy is a "cause of action" for the purposes of section 1 would result in that expression having no real meaning. Every situation that is being analysed under section 1 will involve a right, in this broad sense. The deceased requester in Campbell had a right to the information relating to his request, subject to the restrictions etc. contained in the legislation. He would have been able to demand a remedy in vindication of that right, had he not died. The key question, therefore, is not whether a right has come into being but the nature of that right. The answer must depend on construing the relevant statutory provision.

19. The categorisation of a right as "personal" to the individual concerned is not necessarily helpful; at least unless deployed with care. A paradigm case where section 1 preserves a right on death is where an individual suffers a tortious act. Yet, in a real sense the tort is "personal" to the person who suffers it. So too is the right to damages that vests in the person at that point. Section 1 nevertheless enables the person's estate to receive the damages the individual would have obtained, whether or not proceedings in respect of the tort had commenced before the person's death.

20. In the present case, we must closely examine the provisions of the 2002 Act, in order to determine whether a "cause of action" exists.

21. It is evident from the language of section 82 of the 2002 Act that the right of appeal to the First-tier Tribunal is conferred only on the person ("P") in respect of whom the respondent has decided to refuse a human rights claim made by P. In this sense, the right of appeal is firmly "personal" to P.

22. The definition of "human rights claim" in section 113 of the 2002 Act puts it beyond doubt that we are here concerned not with what has happened, or may have happened, but with a hypothetical future situation; namely,

whether removal of P, requiring P to leave or refusing P entry would be unlawful under section 6 of the 1998 Act. The task of the First-Tier Tribunal, in a human rights appeal, is to determine, on the basis of matters as they stand at the date of hearing, whether P's removal etc would be unlawful under section 6. The sole ground of appeal specified in section 84(2) is precisely to this effect. The determination of the appeal does not, accordingly, turn on whether P has suffered a breach of P's protected human rights, or whether anyone connected with P has suffered such a breach.

23. As a result, if P dies, then whether or not P has initiated a human rights appeal to the First-tier Tribunal, there is no longer any possibility of P being removed, required to leave or refused entry. An appeal under section 82 therefore ceases to have any meaning or purpose.

24. This conclusion is reinforced when one examines the question of what the First-tier Tribunal can do in a section 82 appeal. Section 86(2) states that the Tribunal must determine any matter raised as a ground of appeal; that is to say, any matter raised as going to the issue of whether the decision to refuse the human rights claim is unlawful under section 6 of the 1998 Act because the removal etc of P would involve the respondent acting contrary to the ECHR. Section 86(2)(b) also requires the First-tier Tribunal to determine any matter which section 85 requires it to consider. Section 85 is concerned with statements made under section 120 of the 2002 Act. A section 120 statement can involve only matters that constitute "a ground of appeal of a kind listed in section 84 against the decision appealed against" (section 85(2)). Section 85 does not, therefore, enable the First-tier Tribunal to go beyond the sole ground of appeal in section 84(2).

25. Until its amendment by the Immigration Act 2014, the 2002 Act enabled the First-tier Tribunal, if it allowed an appeal under section 82, to make a direction for the purpose of giving effect to its decision. That power was, however, removed by the 2014 Act, consequent upon the re-casting of section 82, so as to confer a right of appeal only in the limited situations described in that section, as it currently stands.

26. The fact that a section 82 appeal is concerned only with a living individual is further underscored by section 78. This provides that while a person's appeal under section 82(1) is pending, he may not be removed or required to leave the United Kingdom in accordance with the provision of the Immigration Acts. Section 78 can have no application where the person concerned has died.

27. Mention of a pending appeal takes us to section 104 of the 2002 Act. This provides that an appeal under section 82(1) is pending during the period beginning when it is instituted and ending when it is finally determined, withdrawn or abandoned; or when it lapses under section 99.

28. Ms Naik draws attention to the fact that section 104 makes no mention of an appeal coming to an end because P has died. The absence of such a reference cannot, however, in our view serve to re-write sections 82, 84 and 113 in the way that would be needed in order for a human rights appeal to subsist in any meaningful sense, following the death of P. The most that section 104 can do in this regard is require the First-tier Tribunal to take some formal action, in the light of P's death, such as by dismissing the appeal, as the First-tier Tribunal did in the present case.

29. Ms Naik also sought to rely upon the former rule 17(2A) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, as amended. As we have seen, this provided that where an appellant died before his appeal had been determined by the Tribunal, the latter had power to direct that the appeal should be treated as withdrawn or, where necessary, that the personal representative of the appellant could continue the proceedings in the place of the appellant.

30. Subordinate legislation should not, however, be relied upon in order to construe primary legislation, which is itself free from ambiguity. In any event, as we have already seen, former rule 17(2A) belonged to a very different appellate regime.

31. Ms Naik placed heavy emphasis upon the position of the appellant's widow and children which, she said, shows that there was a "cause of action" which survived the appellant's death and enables those members of his family to pursue the section 82 human rights appeal. In this regard, she relied on the opinions of the House of Lords in Beoku-Betts v SSHD [2009] 1 AC 115; [2008] Imm AR 688. In that case, the House held that, in considering whether the appellant's proposed removal would be disproportionate in the context of Article 8 of the ECHR, that question was to be considered with reference to the family unit as a whole. If removal would be disproportionate, then each affected family member was to be regarded as a victim.

32. Lord Brown said as follows:

> "43. The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 appeal), other family members' rights in another (a separate claim under section 7 of the Human Rights Act 1998)? Is it not somewhat unlikely that the very legislation which introduced "One-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65? Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's* case (para 31 above),

> "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction."

33. We do not consider that Beoku-Betts assists the appellant's family. On the contrary, the emphasis placed by Lord Brown on convenience points in favour of the respondent's position. It plainly makes sense for the potential impact of P's removal on P's family members to be taken into account in deciding whether P's removal would be contrary to section 6 of the 1998 Act, as being a disproportionate interference with the Article 8 rights of P and/or P's family. Where, however, P has died, there is no question of P being removed and, consequently, no question of the respondent acting contrary to the Article 8 rights of any family member by removing P. In short, Beoku-Betts provides no justification for approaching the statutory provisions in a different way from that set out above.

34. Ms Naik urged us to consider the position of the appellant's widow and children as victims, within the meaning of section 7 of the 1998 Act, when construing the provisions of the 2002 Act compatibly with the requirement in section 3 of the 1998 Act. As we have seen, section 3 requires legislation to be read and given effect in a way that is compatible with Convention rights, so far as it is possible to do so.

35. The reason why there is no need to invoke section 3 in interpreting the provisions of the 2002 Act is because sections 7 and 8 of the 1998 Act provide the means whereby family members of a deceased individual can obtain relief from a court, if and insofar as a public authority has acted, vis-à-vis the deceased, in a way made unlawful by section 6 of the 1998 Act. By reason of section 8, such a court could order declaratory relief and damages.

36. Against this background, there is no justification for the radical re-writing of section 82 etc of the 2002 Act, which would be necessary so as to enable the appellant's widow and children to pursue the appellant's appeal before the First-tier Tribunal. There would, in any event, be issues under section 8 of the 1998 Act, such as whether it is "within its powers" for the First-tier Tribunal to grant any meaningful "relief or remedy", as well as the fact that section 8(2) means the First-tier Tribunal could not, in any event, award damages, if it found a historic breach of Article 8 in the treatment of the appellant and/or his family.

37. Ms Naik relied on paragraph 22.20 of the *Law of Human Rights* (second edition) by Richard Clayton QC and Hugh Tomlinson QC. This states that where an applicant before the Strasbourg Court dies during the course of proceedings, his family (such as his spouse or parents) are entitled to be regarded as victims for the purpose of maintaining his claim. An heir may not, however, seek to enforce rights which are personal to the deceased, such as claims under Articles 5, 6 or 10. There is said to be a discretion as

regards the granting of victim status when an applicant has died; and the Court may allow an application to proceed when it raises an issue of general interest. It also appears from some of the cases (eg Silver v UK (1983) 5 EHRR 347), that the Strasbourg Court has allowed next of kin to continue Article 8 claims, whether or not the next of kin fell to be treated as victims.

38. We do not consider that this passage or the cases cited in its support (helpfully summarised in a note produced by Ms Naik and Mr Bandegani), serve to advance the case being made on behalf of the widow and family of the appellant. The cases concern alleged breaches of human rights that occurred prior to the death of the person concerned. In any event, they have no material bearing on the particular nature of the right of appeal to the First-tier Tribunal conferred by section 82 of the 2002 Act.

39. The overall scheme of the 1998 Act is such as to ensure that victims have a fair and effective means of redress through the domestic courts. In particular, Mr Kovats was keen to emphasise that in judicial review proceedings concerning a Convention right, the proceedings would not necessarily come to an end. This does not, however, support the submission that the right of appeal to the Tribunal under section 82, following the refusal of a human rights claim, survives the death of a person whose claim is refused.

40. At several points in her oral submissions, Ms Naik appeared to accept that the appellant's widow and children could not have commenced a human rights appeal, whether on behalf of his estate or in respect of their status as victims, following the appellant's death. For the purposes of section 1 of the 1934 Act, however, a "cause of action" does not depend upon whether proceedings to vindicate the right in question have begun before the death of the individual concerned. In our view, Ms Naik's justifiable caution in this regard emphasises the fact that the right of appeal under section 82 has the character we have described.

41. Ms Naik submitted that the First-tier Tribunal is a specialist body, so far as concerns the ascertainment of the human rights of those subject to immigration control. Whilst this is not in doubt, we do not consider that the submission addresses the fundamental difficulties that would arise from construing the legislation in the way for which the appellants contend. Furthermore, there are suitable fora in which breaches of human rights can be declared and damages awarded. Since the coming into force of the 1998 Act, the High Court and the County Court have regularly been called upon to adjudicate in human rights matters. This includes cases involving persons who are subject to immigration control.

42. So far as CPR 19.8 is concerned, we agree with Mr Kovats that this does no more than to make provision, in certain circumstances, for a claim to proceed, "[w]here a person who had an interest in a claim has died". CPR 19.8 has nothing to say about whether, in any particular context, the claim survives death.

43. Accordingly, we conclude that, as matter of statutory construction, the right under section 82 of the 2002 Act of appeal to the First-tier Tribunal against the refusal of a human rights claim comes to an end on the death of the person whose human rights claim has been refused.

44. We should add that, given the forward-looking nature of a "protection claim", as defined by section 82, we can see no reason why the right of appeal against the refusal of a protection claim should survive the death of the individual concerned.

45. These findings do not dispose of the totality of the case advanced by Ms Naik. She says it possesses a key feature, in that the appellant's human rights claim was certified by the respondent under section 94B of the 2002 Act. As a result of that certification, the appellant was removed by the respondent to Afghanistan, where he met his death.

46. That removal, which followed an unsuccessful attempt by the appellant to challenge the certification by means of judicial review, preceded the judgments of the Supreme Court in Kiarie v SSHD/R (Byndloss) v SSHD [2017] 1 WLR 2380; [2017] Imm AR 1299.

47. In Kiarie, the Supreme Court held that, if a section 94B certificate was lawful, the appellant would already have been deported before the appeal challenging the lawfulness of the deportation was heard. His integration into United Kingdom society and his relationships with family there would already have been damaged by the removal, with the result that the observance of his Convention rights would be less likely to require his re-entry to the United Kingdom. Any such significant weakening of an arguable appeal before it could be heard therefore called for considerable justification.

48. In the light of Kiarie, the Upper Tribunal in AJ (s.94B: Kiarie and Byndloss Questions) Nigeria [2018] UKUT 115 (IAC); [2018] Imm AR 976 held that, where an appeal has been certified under section 94B, the First-tier Tribunal should adopt a step-by-step approach to determine whether the appeal could be determined fairly (that is to say, in accordance with ECHR Article 8 procedural rights), without the appellant being physically present in the United Kingdom. The Upper Tribunal distilled four questions, deriving from the judgment of Lord Wilson, that are of potential relevance in determining this overarching "fairness" issue. If the First-tier Tribunal concludes that the appeal cannot proceed, compatibly with Article 8 in its procedural aspect, whilst the appellant remains outside the United Kingdom, then the First-tier Tribunal should give a direction to that effect and adjourn the proceedings.

49. Ms Naik submitted that, given we are concerned with section 94B certification, the First-tier Tribunal should have proceeded with the appeal, rather than holding that the appellant's death meant the appeal was abated. The First-tier Tribunal should have considered the "AJ" questions

and decided whether the appellant could have received a fair hearing, without being in the United Kingdom.

50. More generally, Ms Naik contended that because the appellant was actually removed pursuant to the certificate, the section 82 appeal in this case is, in reality, concerned with deciding the lawfulness of what actually happened, as supposed to merely what might happen if the appellant were to be removed.

51. We do not consider that the section 94B certification has any material bearing on the way in which the language of sections 82, 84, 86 and 113 of the 2002 Act falls to be construed.

52. Whether or not a claim has been certified under section 94B does not change the legal nature of the human rights appeal. Leaving aside the procedural "AJ" questions which must be answered by the First-tier Tribunal before it reaches a decision in the substantive appeal, the fact that, as a result of the certificate, an actual or prospective appellant has been removed from the United Kingdom is no more than an evidential matter, so far as the section 82 human rights appeal is concerned.

53. The effect of actual removal on an appellant and their family can, of course, constitute evidence that is relevant to the determination of the appeal, in that it can show, for example, that there has been a profoundly negative effect on children, thereby supporting the submission that hypothetical removal at the date of the hearing would violate Article 8. Conversely, as Lord Wilson observed in Kiarie, the fact of removal may have weakened the appellant's case. This does not, however, alter the statutory ground of appeal in section 84(2), read with section 113. Regardless of certification, the First-tier Tribunal's task is to consider the position at the date of hearing.

54. We said at paragraph 48 above that the First-tier Tribunal should adjourn a human rights appeal, if it is satisfied that the fact the appellant is outside the United Kingdom as a result of a section 94B certificate means the appeal cannot justly be decided. This does not, however, assist the widow and children of a deceased appellant. On the contrary, the obligation to adjourn in those circumstances only makes sense if the appellant is still alive. Where the appellant has died, the First-tier Tribunal has no power to issue a declaration as to whether - to take the present case - the appellant could have engaged meaningfully in a video link hearing from Kabul.

55. For these reasons, certification of the appellant's human rights claim under section 94B had no bearing on the nature of the statutory question to be decided by the First-tier Tribunal.

56. If the appellant had not died, the First-tier Tribunal would, following AJ, have had to decide whether the appeal could proceed compatibly with Article 8 procedural rights. We agree with Ms Naik that this would have been so, notwithstanding the appellant's earlier unsuccessful judicial

review. The Tribunal's duty to ensure fairness is ambulatory in nature. However, it does not follow that the First-tier Tribunal was wrong to find that the appellant's appeal had abated on his death.

57. Since the appeal had abated, the First-tier Tribunal was under no obligation to make findings of fact, as it was asked to do by the appellant's widow and family. On the contrary, given that it lacked power to do anything meaningful in the light of any such findings, it would have been pointless and wrong for the First-tier Tribunal to embark on that exercise.

F. DECISION

58. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal is, accordingly, dismissed.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

22 February 2022