



**In the Upper Tribunal  
(Immigration and Asylum Chamber)  
Judicial Review**

In the matter of an application for Judicial Review

The King on the application of  
Muhammad Arsalan Pasha

Applicant

versus

Entry Clearance Officer, Abu Dhabi

Respondent

**ORDER**

**BEFORE Upper Tribunal Judge Blundell**

**UPON** the application for judicial review of the Respondent's decision of 17 January 2023 refusing the Applicant's entry clearance application without a statutory right of appeal.

**AND UPON** hearing Mr Greg Ó Ceallaigh and Taimour Lay, Counsel, instructed by Bindmans LLP, for the Applicant and Mr A Payne KC and Mr C Thomann, Counsel, instructed by the Government Legal Department, for the Respondent at a hearing held at Field House on 26 February 2024.

**IT IS ORDERED** that:-

- (1) The Applicant's application for judicial review is granted.
- (2) The Respondent's decision of 17 January 2023 is quashed.
- (3) The Respondent shall within six weeks (absent special circumstances) consider the Article 8 ECHR claim made by the Applicant on 27 September 2022.
- (4) The Respondent do pay the Applicant's reasonable costs to be assessed if not agreed.
- (5) With respect to the request for a payment on account
  - (i) The Applicant will serve and lodge with the Upper Tribunal a costs schedule within 7 days of receipt of this Order.
  - (ii) The Respondent may file and serve comments on the schedules within 7 days of their receipt.
  - (iii) In default of agreement as to the payment on account of costs, the Upper Tribunal will consider the schedules and comments without a hearing and will direct the amount of the payment on account and the date by which it must be made.
- (6) There shall be a detailed assessment of the Applicant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013.

- (7) The Respondent's application for permission to appeal is refused because the application – which was made on a 'protective' basis only – does not engage with the reasoning in the judgment and does not establish any arguable legal error on the part of the Upper Tribunal.

Signed: M.J.Blundell  
Upper Tribunal Judge Blundell

Dated: 31 May 2024

**The date on which this order was sent is given below**

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**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 31/05/2024

Solicitors:  
Ref No.  
Home Office Ref:

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR-2023-LON-000744

**IN THE UPPER TRIBUNAL**  
**(IMMIGRATION AND ASYLUM CHAMBER)**

Field House,  
Breems Buildings  
London, EC4A 1WR

31 May 2024

**Before:**

**UPPER TRIBUNAL JUDGE BLUNDELL**

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**Between:**

**THE KING**  
**on the application of**  
**MUHAMMAD ARSALAN PASHA**

**Applicant**

**- and -**

**ENTRY CLEARANCE OFFICER, ABU DHABI**

**Respondent**

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**Greg Ó Ceallaigh and Taimour Lay**  
(instructed by Bindmans LLP), for the applicant

**Alan Payne KC and Colin Thomann**  
(instructed by the Government Legal Department) for the respondent

Hearing date: 26 February 2024  
Written submissions on 18, 24 and 25 April 2024

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**J U D G M E N T**

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**JUDGE BLUNDELL:**

1. The applicant is a Pakistani national who was born in 1988. By this application for judicial review, he challenges the refusal of the respondent Entry Clearance Officer to treat his application for entry clearance outside the Immigration Rules as a human rights claim.
2. The case raises a question which might properly be summarised in the following way. Where a person makes an application which is said to be a human rights claim, in what circumstances might the Secretary of State refuse to treat it as such?

### **Background**

3. The applicant entered the United Kingdom as a student on 20 September 2010. He secured a Diploma in Management in 2011 and a Masters in Business Administration in 2012. He made an in-time application for further leave to remain as a student on 22 June 2012. That was refused on 17 April 2013 but an appeal to the First-tier Tribunal was allowed by consent on 12 February 2014, with the consequence that the application remained outstanding before the Secretary of State.
4. The respondent was subsequently notified by Educational Testing Service (“ETS”) that the applicant had used a proxy or proxies to obtain TOEIC English language certificates which were submitted with his application for leave to remain. The respondent refused the application for leave to remain on 11 November 2014 but did not serve the decision on the applicant.
5. On 1 April 2015, the applicant was served with a notice that he was a person liable to removal under section 10 of the Immigration and Asylum Act 1999. That decision was based on the respondent’s conclusion that he had used deception in seeking leave to remain. He was also notified that he was to be removed. He was entitled to appeal against the latter decision, but only after he had left the United Kingdom.
6. The applicant sought judicial review of the section 10 decision but the application was deemed by Upper Tribunal Judge McGeachy to be totally without merit, on the basis that the right of appeal provided by statute was an adequate remedy. On 2 June 2017, Sir Stephen Silber refused permission to appeal against that decision.
7. The applicant’s father fell ill in the second half of 2017 and he departed voluntarily to Pakistan on 2 December 2017.
8. On 15 December 2021, whilst still in Pakistan but with the assistance of his current representatives, the applicant lodged an appeal against the immigration decision which had been issued in 2015. Detailed

submissions were made in support of an application for an extension of time.

9. On 19 April 2022, First-tier Tribunal Judge Swaney considered that application on the papers and refused it. Judge Swaney considered that there was a significant delay. Although she noted what was said about the applicant's father, his ostracism from his family as a result of the TOEIC allegation, and the deterioration in his mental health, she did not accept that there was a good reason for the significant delay. Having considered all the circumstances, she declined to extend time to the extent required.

### **The Application for Entry Clearance**

10. On 27 September 2022, the applicant applied for entry clearance. The form used was for a visit visa but the detailed covering letter from Bindmans LLP made it clear that the applicant sought entry clearance for a purpose not covered by the Immigration Rules. The letter runs to 12½ pages of single spaced type but the thrust of it is helpfully summarised in this way in the applicant's skeleton argument:

"The applicant applied for entry clearance in order to have the opportunity to clear his name. It is his intention on entry to apply for leave to remain to replace that which he lost and permit him to resume his private life in the United Kingdom. If that is granted, all very well. If it is refused on the basis of the TOEIC fraud allegation he will have the opportunity to appeal that decision and have his day in court. Should he succeed in that appeal, or at least prove his innocence, he will be granted a period of leave in accordance with the principles in [Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531]; [R (Khan) v SSHD [2018] EWCA Civ 1648 and the Educational Testing Service: Caseworking instructions v4.0. In any event, his name will be cleared."

11. The penultimate section of the letter was headed "Right of Appeal". It directed the ECO's attention to the relevant published guidance and maintained that the application was a human rights claim which was capable of engaging human rights and which had a prospect of success.

### **The Respondent's Decision**

12. The application was refused on 15 November 2022 but that decision was withdrawn in the face of pre-action correspondence and I need say no more about it. On 17 January 2023, the respondent refused the application for a second time. The letter contains some recitation of the background I have set out above and some consideration of the applicant's ability to meet the requirements for entry clearance as a visitor. Neither of those sections are material for present

purposes. It is the following parts of the letter which are material, and must be set out in full:

“You have stated in your application that Article 8 is engaged in your application, as you were a student and that you had lived in the UK for a number of years. However, I note that you studied from 2010 to 2012, you were then refused leave to remain for submitting false TOEIC document.

I consider that Article 8 is not engaged at all. Your application is not capable of constituting an Article 8 claim. In *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393, at [27], after considering all relevant authorities, the Court of Appeal came to this clear conclusion: “There is no obligation on an ECHR state to allow an alien to enter its territory to pursue a private life. Article 8 was not engaged in the respondent's application for entry clearance for his family to visit the United Kingdom. No question of proportionality arises for consideration.”

This position is not disturbed by the fact that you were previously in the United Kingdom. I am required to focus on your current application for entry clearance. I am satisfied that your desire to enter the United Kingdom is not protected by Article 8.

I note that your solicitors have referred to the judgement of the Court of Appeal in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009. However, there is nothing in *Ahsan* that provide any assistance to you. That was a case where three of the four applicants challenged the removal decisions (attracting out-of-country appeal) by way of (in-country) Judicial Review. The fourth applicant challenged the clearly unfounded certification of his (in-country) Article 8 claim by way Judicial Review. As noted at [84], the Secretary of State in that litigation “did not attempt to rebut the case that Article 8 was engaged”.

The Court of Appeal, accordingly, proceeded on the basis that Article 8 was engaged. That was not surprising as the applicants were present in the United Kingdom and the removal decisions interfered with the private life that they had established. In that context, for the reasons given, the Court of Appeal concluded, at [97], that the out-of-country appeals would not satisfy the right of the applicants to have a fair and effective procedure to challenge the removal decisions. The Court of Appeal, at [157], held that the human rights claim made by the fourth applicant was arguable, and therefore it was not open to the Secretary of State to certify it as clearly founded. However, your situation is entirely different. You are not in the United Kingdom and are seeking entry clearance. Article 8 is not engaged at all. The question of justification does not, therefore, arise.

[...]

I have also considered whether to grant you entry clearance outside the Immigration Rules in the exercise of residual discretion. I am not satisfied that your circumstances are such that they justify departure from the Immigration Rules. Looking at everything in the ground [sic], I decline to exercise discretion outside the Immigration Rules in your favour.

## NEXT STEPS

In relation to this decision, there is no right of appeal or right to administrative review.”

### **The Claim for Judicial Review**

13. Pre-action correspondence having proved unfruitful, this claim was issued on 17 April 2023. Although the submissions made in the grounds are comparatively lengthy, there is a single ground of review, which is that the respondent’s refusal to accept that the applicant had made a human rights claim was unlawful. The relief sought was a mandatory order which required the respondent ‘to reconsider his application and to accept that it amounts to a human rights claim’.
14. Permission was refused on the papers by Judge Macleman, who considered the grounds to be ‘ingenious, but of no arguable merit.’ Judge Norton-Taylor granted permission on renewal after an oral hearing on 12 September 2023. The first two paragraphs of his concise order were in the following terms:

“The narrow scope of the applicant’s challenge is important to bear in mind. The target is the respondent’s refusal to treat the applicant’s application for entry clearance as a “human rights claim” within the meaning of section 113 of the [Nationality, Immigration and Asylum Act 2002].

It is at the very least arguable that the respondent’s decision on this particular point is flawed in light of the relevant case-law and what the impugned decision actually says. It is also arguable that the applicant need not have attempted to lodge an appeal in the First-tier Tribunal as an alternative remedy. Further, the challenge does not seek relief beyond that which would be appropriate: the order sought is only that the respondent treat the entry clearance application as a “human rights claim”, not that there must also be a “refusal” of such a claim, accompanied by a right of appeal.”

15. Detailed grounds of defence were filed following a short extension of time, which was sought and granted on the basis of the ‘unique and far-reaching nature of the applicant’s challenge’ and the need to consult widely. The detailed grounds maintained that the respondent was correct to decide that the application for entry clearance did not engage Article 8 ECHR and did not amount to a human rights claim for the purposes of s113 of the Nationality, Immigration and Asylum Act 2002.
16. The nature of the defence advanced in the detailed grounds shaped the skeleton arguments which were filed by the applicant and the respondent on 4 and 20 February 2024 respectively. There was a broad consensus over the issues for determination, as expressed at

the very start of the applicant's skeleton argument and at [6] of the respondent's. The respondent defined the issues in this way:

“(1) Does the First-tier Tribunal (“FTT”) enjoy jurisdiction over the refusal of the visit visa application made by the applicant on 10 October 2022, by reason of [the applicant] having made a “human rights claim”?”

(2) Does the application made by [the applicant] engage the fundamental human rights protected by Article 8 of the European Convention on Human Rights?”

17. It became clear during oral argument, however, that that helpful summary omitted reference to a submission which had evidently been made before Judge Norton-Taylor and had returned, albeit somewhat obliquely, at [9] and [11] of the respondent's skeleton argument. It was argued in those paragraphs that the question of whether the application was a human rights claim was ‘properly one for the FTT’ and that the applicant was ‘able to place his appeal before the FTT and invite it to rule on jurisdiction’.
18. Mr Payne KC stated on instructions, in response to my question, that the respondent *did* invite me to refuse the application for judicial review on the basis that the applicant had an adequate alternative remedy in the First-tier Tribunal. Mr Ó Ceallaigh took no procedural objection to the point being raised despite its omission from the detailed grounds and was content to make submissions on the point. In the circumstances, it seems to me that the first issue for consideration must be whether the application for judicial review should be refused on the basis that the applicant has an adequate alternative remedy in the First-tier Tribunal.

### **Submissions**

19. There is a fairly sizeable trial bundle in this case. There are also over 1000 pages of authorities, most of which were the subject of written or oral submissions. I do not intend to attempt a comprehensive summary of those submissions; to do so would only serve to lengthen this judgment unnecessarily. What follows is therefore only an outline of the submissions which were made on the three issues I have set out above: (i) alternative remedy; (ii) human rights claim; and (iii) engagement of Article 8 ECHR.
20. For the applicant, Mr Ó Ceallaigh submitted that:
- (i) The FtT could not offer an adequate alternative remedy. Whether or not there had been a human rights claim, it was common ground that there was no refusal of a human rights claim and that there was no right of appeal to the FtT. The proper course in those circumstances was to seek judicial review



of the respondent's refusal to treat the application as a human rights claim: MY (Pakistan) [2020] UKUT 89 (IAC); [2020] Imm AR 906, at [59].

- (ii) The respondent's published policy and the decision under challenge impermissibly conflated what were, in law, two distinct issues. The first was whether there had been an Article 8 ECHR claim. The second was whether that claim engaged Article 8 ECHR. In considering the first question, there was no 'merits threshold', and the respondent had erred in concluding otherwise. Correctly understood, the authorities provided no support for the respondent's approach, the correctness of which was in any event doubted in Baihinga [2018] UKUT 90 (IAC); [2018] Imm AR 930. In the present case, there could be no doubt that the application presented to the ECO was exactly what it purported to be: a claim that it would be unlawful under section 6 of the Human Rights Act 1998 to refuse entry to the UK.
- (iii) The question of whether Article 8 was engaged did not in truth arise because the merits of that claim were for the FtT. If the respondent concluded that Article 8 ECHR was not even engaged, the proper course was to certify under section 94 of the 2002 Act. The respondent set great store in SSHD v Abbas [2017] EWCA Civ 1393; [2018] 1 WLR 533 but the applicant's case was readily distinguishable. The applicant evidently had a private life when he was in the UK and that had not been extinguished by his departure or by the passage of time. The authorities showed that there could be a private life claim for admission in certain circumstances. Mr Ó Ceallaigh added in a short note which was filed on 18 April 2024 that his submissions in this regard were supported by the recent decision in Ali v UTIAC and SSHD [2024] EWCA Civ 372.

21. For the respondent, Mr Payne submitted that:

- (i) The FtT was the proper forum for considering whether the application was a human rights claim. That issue could be considered by a judge and if it was resolved in the applicant's favour, the respondent would have to engage with the human rights claim.
- (ii) The Secretary of State's guidance was correct in its approach to deciding whether or not a human rights claim had been made. It was correct, in particular, in requiring decision makers to take into account whether the matters raised were 'capable of engaging human rights'. The guidance had been endorsed in MY (Pakistan). The 'label' given by the applicant was not determinative. The question was one of substance, not form.

The exercise of an appeal right under s82 of the 2002 Act was contingent upon engagement, at least, of a Convention Article. Nothing turned on the respondent's power to certify under s94; that power could not restrict an out of country appeal in a human rights claim until 28 June 2022 (when the Nationality and Borders Act 2022 amended Part 5 of the 2002 Act).

- (iii) It was clear that Article 8 ECHR was not engaged on the facts of this case. It was a private life claim for admission to which SSHD v Abbas applied. Nothing said in subsequent authorities cast any doubt on the ratio of that case and neither the applicant's previous residence in the UK nor his desire to contest the TOEIC allegation sufficed to distinguish his case from that decision. Any private life the applicant might have had in the UK was extinguished upon voluntary departure. His real motivation was to circumvent Judge Swaney's refusal to extend time to bring his out-of-country appeal. The respondent maintained these submissions in the note which was filed on 24 April 2024, stating Ali v UTIAC & SSHD did not alter the position at law.

22. Here and below, I have attributed the submissions to Mr Payne and Mr Ó Ceallaigh because they made oral submissions before me. The pleadings and the skeleton arguments also bear the names of Mr Thomann and Mr Lay, however, and I am grateful to all four counsel for the comprehensive submissions which were made orally and in writing.

### **Statutory Framework**

23. Section 82(1)(b) of the 2002 Act has, since its amendment by the Immigration Act 2014 on 20 October 2014, enabled a person to appeal to the First-tier Tribunal where the Secretary of State has decided to refuse his human rights claim. By section 84(2) of the 2002 Act, as amended, such an appeal must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

24. Section 113 of the 2002 Act has, since amendment on the same date, defined a "human rights claim" in this way:

"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)

25. By section 94(1) of the 2002 Act, the Secretary of State may certify a protection or human rights claim as clearly unfounded. Since 28 June

2022 (on which date it was inserted by the Nationality and Borders Act 2022) section 94(3A) has prevented a person from bringing an appeal under section 82 if the claim to which the decision relates has been certified under section 94(1).

## **Analysis**

### Issue One – Is there an adequate alternative remedy in the First-tier Tribunal?

26. It is common ground in this case that the applicant does not have a right of appeal to the First-tier Tribunal even if the application which he made on 27 September 2022 constituted a human rights claim. That is because the 2002 Act only provides a right of appeal where there has been a *refusal* of a human rights claim. Whether or not the applicant made a human rights claim, it is quite clear that the Entry Clearance Officer did not *refuse* any such claim. The Entry Clearance Officer refused the application for a visit visa; he refused to accept that there was a human rights claim. The refusal of the former does not imply or entail the refusal of the latter: Yerokun (Refusal of claim; Mujahid) [2020] UKUT 377 (IAC).
27. This is not, therefore, one of those cases in which the respondent can assert that the applicant should not have pursued an application for judicial review because there is a right of appeal provided by statute. In such cases, the ordinary course is quite clear: the applicant should pursue the right of appeal provided by statute and judicial review should be refused because to do otherwise would be to subvert the will of Parliament: R v Birmingham City Council ex parte Ferrero [1993] 1 All ER 530, at 536-541; R v SSHD ex parte Swati [1986] 1 WLR 477, at 485.
28. It is nevertheless submitted by Mr Payne that the applicant has an adequate alternative remedy in the FtT, not in the form of an appeal but in the availability of a judicial decision on the question of whether his claim was a human rights claim. Mr Ó Ceallaigh acknowledged when confronted belatedly with that submission that lodging an appeal to the FtT ‘would not have been an insane thing to do’ but submitted that the preferable and proper course was that which had been taken.
29. I consider first the mechanism by which the respondent submits that an applicant in this position would be able to obtain a conclusion from the First-tier Tribunal on the question of whether or not he had made a human rights claim. I do so because it is necessary to look carefully at the suitability of the alternative remedy proposed: ex parte Ferrero refers, at p537, per Taylor LJ.

30. The FtT is primarily an appellate body. Whilst it has other associated functions (bail, for example), its primary task is to consider appeals against decisions made by the Secretary of State, Entry Clearance Officers or Immigration Officers. It is a creature of statute, which only has jurisdiction to consider appeals against specified types of decisions.
31. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 make provision the Tribunal to scrutinise and make a decision upon the question of jurisdiction at an early stage. It may not accept a notice of appeal where there is no appealable decision: rules 22(1) and 22(2)(a) refer. Where the Tribunal does not accept a notice of appeal it must notify the parties and take no further action on that notice of appeal: rule 22(3).
32. Decisions under rule 22 may be taken by a judge or by a Legal Officer of the First-tier Tribunal, pursuant to the [Senior President of Tribunals' Practice Statement of 6 April 2022](#). Where the decision is made by a Legal Officer, a party may apply within 14 days for the decision to be considered afresh by a judge: rule 3(4) refers.
33. What Mr Payne's submission envisages, therefore, is that a person in the applicant's situation (who asserts that he has made a human rights claim which the respondent wrongly refused to accept as such) should lodge an appeal to the FtT, despite it being clear that the FtT has no jurisdiction. The person should presumably make written submissions to the FtT, alerting it to the issue between the parties, and should ask for a ruling on the question of jurisdiction.
34. As I have already explained, there can only be one answer to that question; the FtT does not have jurisdiction because there has been no refusal of a human rights claim. But, submits Mr Payne, the FtT might - as part of its assessment of that question - decide whether the applicant made a human rights claim. In the event that it decides that the applicant did make a human rights claim, the parties would receive a copy of a reasoned decision from the Tribunal (either a Legal Officer or a judge) and the respondent would be obliged to act in accordance with that decision by making a decision on the outstanding claim.
35. There are powerful considerations which militate in favour of Mr Payne's submission. The first is the heavy obligation to resort to judicial review only if it is really unavoidable: [R \(Cowl & Ors\) v Plymouth County Council](#) [2001] EWCA Civ 1935; [2002] 1 WLR 803.
36. Then there is the possibility of avoiding future costs akin to those which have already accrued in this case. The Secretary of State's costs already exceed £30,000. I expect that the applicant's legally aided costs are rather more. It would evidently be preferable for an

applicant in this position to be able to access a judicial decision on whether he has made a human rights claim somewhat more economically.

37. The final consideration is time. It would be preferable for a person in the applicant's position to be able to achieve a swift decision on whether he had made a human rights claim, rather than waiting months for the wheels of judicial review to turn.
38. Whilst these are powerful considerations, I do not consider them to compel the conclusion that an applicant in these circumstances must resort to the rule 22 procedure rather than pursuing an application for judicial review. Whilst there is nothing to prevent an applicant from doing so, I do not consider that it is an adequate alternative remedy which requires me to refuse relief. Recourse to the FtT in the way that I have outlined above provides, at best, an ill-fitting substitute for judicial review. I say that for the following reasons.
39. As we have seen, the FtT cannot be said to have jurisdiction in a case such as the present. Although it would not be professionally improper for a representative to lodge a notice of appeal with the express purpose of securing a ruling of the type described above, it would create a class of case which is not envisaged by statute. People in the applicant's position would not be asking the FtT to accept jurisdiction and make a decision on the lawfulness of the respondent's conduct under section 6 of the Human Rights Act 1998; they would be asking the FtT to decline jurisdiction but, in doing so, to make a favourable observation which might then be used to their advantage. That is not one of the FtT's statutory functions. However much one recalls that judicial review is a remedy of last resort, the route suggested by Mr Payne simply does not feel like an alternative remedy of the type recognised in the authorities.
40. I also doubt whether such a decision would be binding on the Secretary of State. It is trite that a final and unappealed decision of the FtT is binding on the parties, subject to the limited exceptions considered in R (Al-Siri) v SSHD [2021] EWCA Civ 113; [2021] 1 WLR 2137. I doubt whether observations made during the course of a rule 22 decision would be binding on the parties, however, and it would be open to the Secretary of State to refuse to recognise that the claim made by the applicant was a human rights claim, at which point the matter would have to be subject to the very litigation which the applicant had sought to avoid.
41. Mr Payne suggested at one point that the FtT would be able to enforce its decision by making a direction that the Secretary of State should consider the human rights claim which it had found to exist but there are three difficulties with that submission.

42. Firstly, the direction could not be a case management direction because there would be no case for the FtT to manage, it having ruled (inevitably) that it had no jurisdiction. The Rules expressly provide that the FtT shall take no further action in that event, which must necessarily include making case management directions. Secondly, the FtT's power to make a direction to give effect to a decision was removed when section 87 of the 2002 Act was repealed by the Immigration Act 2014 on 20 October 2014. Thirdly, and in any event, that repealed power was contingent upon the Tribunal having allowed an appeal; it conferred no power on the FtT to give a direction where it had declined jurisdiction.
43. In summary, my conclusion on the first issue is as follows. Where a person seeks to make a human rights claim and the Secretary of State refuses to recognise it as such, that person has no right of appeal to the First-tier Tribunal because there has been no refusal of a human rights claim. The possibility of the First-tier Tribunal considering, within the context of a jurisdictional ruling under rule 22, whether or not a human rights claim was made by that person, does not amount to an adequate alternative remedy which justifies the refusal of judicial review.
44. For all of these reasons, I do not accept the Secretary of State's submission that judicial review should be refused because the applicant had an adequate alternative remedy.
45. In any event, it is clear that a court (or tribunal) has a discretion to proceed with a judicial review challenge despite the existence of an alternative remedy: Falmouth & Truro Port Health Authority v South West Water Ltd [2000] EWCA Civ 96; [2001] QB 445. Where, as in this case, the case has progressed to a full hearing and there has been detailed argument over the course of a day, I would have proceeded to consider the next issue in the case even if I had held that the rule 22 procedure on which Mr Payne relied amounted to an adequate alternative remedy.

*Issue Two – Did the Applicant Make a Human Rights Claim?*

46. The statutory definition of a human rights claim is at s113 of the 2002 Act, which I have reproduced in full at [24] above. That definition was amended by the Immigration Act 2014 so as to include the words "or to refuse him entry into the United Kingdom", thereby recognising explicitly that a human rights claim might be made by a person outside the United Kingdom.
47. R (Alighanbari) v SSHD & FtT(IAC) [2013] EWHC 1818 (Admin) was decided before that amendment. It was a case in which an Iranian claimant sought to avoid removal to Slovenia under the Dublin Convention. The second of the five issues considered was whether

the applicant had made a human rights claim before the Secretary of State reached the decision under challenge. That issue was considered at [66]-[86]. At [70] of his judgment, Stephen Morris QC (as he then was) said that the following elements must be present in order to constitute a human rights claim (under Article 8 ECHR):

“(a) a claim not to be removed from the UK; (b) an assertion of facts that could constitute an existing or prospective private and/or family life, the interference with which Article 8 ECHR protects; (c) an assertion that removal will interfere with that private and/or family life (i.e. that the, or a, basis upon which the claimant wishes to remain in the UK is the desire to maintain or build a private and/or family life).”

48. I will return to Alighanbari in due course. For the present, however, I note that it was a case in which no *express* human rights claim had been made before the decision under challenge. As is clear from [68] of the Deputy Judge’s decision, the first point at which it was submitted that the claimant had made a human rights claim before the decision under challenge was in the skeleton argument for the substantive judicial review hearing. What the court was considering, therefore, was whether the matters described by the claimant at various stages before the decision under challenge amounted to a human rights claim even though they had not at that stage been described as such.
49. The Secretary of State has for some years issued guidance to staff concerning the rights of appeal which might be available against decisions taken by caseworkers and entry clearance officers. The *Rights of Appeal* guidance is currently in its fifteenth iteration, which was issued on 11 December 2023. It is materially identical, however, to the guidance which was in force at the time that the decision under challenge was reached.
50. The guidance deals with human rights claims at pages 10-19. Under the sub-heading ‘How to identify a human rights claim’, the guidance considers various situations in which such a claim might be made. The first four pages of the guidance concern ‘in country’ claims. Overseas claims are considered at pages 14-16, which provide materially as follows:

#### **“Decision making process**

When a visitor application is received in which Part 9 has been completed, you must first consider whether a human rights claim has been made. Guidance on identifying whether such a claim has been made is set out in this section.

If a human rights claim has been made, you must go on to consider it substantively and decide whether it is to be refused or granted. The answer to this question will determine whether the application can be dealt with at

the visa application centre or whether it must be referred to the Referred Cases Unit (RCU).

Where the application obviously falls for refusal, it can be dealt with at the visa application centre. An Entry Clearance Officer (ECO) can refuse an application outside the Immigration Rules. The refusal of a human rights claim will attract a right of appeal.

Where the application has merit and may be granted, the ECO must refer the application to the RCU. This is because an ECO cannot grant an application outside the Immigration Rules.

### **Determining if a human rights claim has been made**

The visitor form does not ask the applicant to indicate whether the claim being made is a human rights claim. Therefore, the ECO will need to identify whether a human rights claim has been made.

It is important that the ECO gives careful consideration to whether a human rights claim has been made. If no human rights claim has been made, the refusal of the application does not attract a right of appeal.

ECOs should consider the following questions:

- does the application say that it is a human rights claim?
- does the application raise issues that may amount to a human rights claim even though it does not expressly refer to human rights or a human rights claim?
- are the matters raised capable of engaging human rights?
- what are the claim's prospects of success?

Guidance on each stage is set out in the Considering human rights claims in visit applications guidance."

51. In MY (refusal of human rights claim) Pakistan [2020] UKUT 89 (IAC); [2020] Imm AR 906, the Upper Tribunal (Lane P and UT) Norton-Taylor) held that similarly worded guidance was 'broadly compatible' with the decision in Alighanbari. The Upper Tribunal echoed a concern that it had expressed in Baihinga (r22; human rights appeals; requirements) [2018] UKUT 90; [2018] Imm AR 930, however. The guidance which was in force in 2018 and 2020 suggested, as it still does, that a bare and unparticularised statement such as "I am making a human rights claim" was not to be treated as a human rights claim.
52. In Baihinga and MY (Pakistan), the Upper Tribunal doubted the correctness of that guidance. It noted in the latter case that the same view had been expressed by Kerr J in R (AT) v SSHD [2017] EWHC 2589 (Admin); [2018] Imm AR 483. What Kerr J said at [58]-59] was this:



“[58] Reference was also made in argument to the threshold of ‘certifiability’, i.e. the possibility that a purported human rights claim might not qualify as one if its merits were hopeless, such that it would fall to be certified as clearly unfounded by the Secretary of State under what is now section 94(1) of the 2002 Act.

[59] That threshold does not happily work as a test of what a human rights claim is. Section 94(1) is drafted on the premise that a clearly unfounded human rights claim is still a human rights claim, albeit one without foundation. I therefore prefer to ask myself whether all domestic violence claims necessarily pass the three tests set by Mr Morris QC, as he then was in *Alighanbari*. If they do, they may on their facts be well-founded, ill-founded or clearly unfounded.”

53. The dispute in this case necessarily touches upon the correctness of the bullet points in the published guidance which I have reproduced above. By that guidance, decision makers are instructed to consider whether an application raises issues which may amount to a human rights claim, whether the claim is capable of engaging human rights and whether the claim has prospects of success as part of their decision as to whether the claim is a human rights claim at all. Mr Ó Ceallaigh submits, however, that the existence of a claim and the assessment of its merits are separate matters, logically and in law.
54. I cannot for my part see any proper basis for concluding that a human rights claim is only made where the claim has some semblance of arguable merit. To accept the Secretary of State’s submission in that respect would, in my judgment, be to overlook the ordinary meaning of the word ‘claim’. A claim (derived from the Latin ‘*clamare*’: to call out) is a contention or an assertion, a demand or a request. There is no context of which I am aware in which only a claim which is not devoid of merit can qualify as being a claim. A claim may be fanciful or even illogical but it is still a claim. A claim that the present king of France is bald is evidently wrong, but it is still a claim.
55. As Kerr J noted in AT, the Secretary of State’s approach to a human rights claim also gives rise to difficulty when it comes to the certification of ‘clearly unfounded’ claims under section 94 of the 2002 Act. Such a certificate might be applied when a human rights claim is bound to fail: ZT (Kosovo) v SSHD [2009] UKHL 6; [2009] 1 WLR 348. If the Secretary of State’s approach is correct, however, a claim would only be accepted to amount to a human rights claim where it was capable of engaging human rights and had some prospects of success. A human rights claim which is certified under section 94 would therefore have some intrinsic merit whilst also being bound to fail, which simply makes no sense.
56. Properly understood, the authorities to which the Secretary of State refers do not support the contrary conclusion. The high point of the

Secretary of State's case in this regard is to be found at [70](b) of the judgment in R (Alighanbari) v SSHD: "an assertion of facts that could constitute an existing or prospective private and/or family life, the interference with which Article 8 ECHR protects". Neither those words nor the careful assessment which the Deputy Judge undertook at [71]-[83] suggests that he intended an analysis of the type suggested in the Secretary of State's guidance, however. The passage is, with respect, very carefully articulated; the search is not for facts which do engage Article 8 ECHR, or even for facts which are capable of doing so, but for an *assertion* of facts which *could* do so.

57. I agree with Mr Ó Ceallaigh that the respondent's reliance on something said at [82] of MY (Pakistan) is misconceived. The passage in question is this:

"In deciding whether to refuse any human rights claim, whether made by reference to provisions of the Rules listed in the Guidance or otherwise, the caseworker is required to consider whether, even though the person in question fails to satisfy the requirements of the Rules, there may be "exceptional circumstances" that nevertheless mean removing them or requiring them to leave the United Kingdom would be contrary to section 6 of the 1998 Act: Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; paragraphs 51-53 (Lord Reed) . It seems to us that the hallmark of a decision by the respondent to refuse a human rights claim will be a consideration outside the Immigration Rules, by reference to Article 8 or such other article of the ECHR as may be engaged."[emphasis added]

58. That passage assists with the question of when a human rights claim is refused, and not with the separate and anterior question of when such a claim is made. The Upper Tribunal was not suggesting that a human rights claim might only be made where the article in question was accepted by the respondent to be engaged.

59. The Secretary of State's reliance on something said by Upper Tribunal Judge Southern (as he then was) in ECO (Accra) v Adjei [2015] UKUT 261 (IAC) is misconceived for a similar reason. Judge Southern held that:

"The first question to be addressed in an appeal against a refusal to grant an entry clearance as a visitor when only human rights grounds are available is whether Article 8 ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the Rules and should not do so."

60. Judge Southern did not purport, there or elsewhere in that decision, to say anything about the making of a human rights claim. His analysis was concerned with the circumstances in which human rights grounds were invoked against the refusal of entry clearance as

a visitor and the proper approach of the First-tier Tribunal to the consideration of that ground of appeal. It is for the FtT to decide the strength or weakness of any Article 8 ECHR case and, in doing so, to analyse that case with reference to Lord Bingham's five stage analysis in R R v SSHD ex parte Razgar [2004] UKHL 27; [2004] 2 AC 368. If the appellate Tribunal decides that the human rights claim which was made does not engage Article 8(1), then its analysis ends there; the judge need not consider whether the decision is in accordance with the law or whether it is proportionate. But these are questions which concern the merits of the human rights claim, not the question of whether a human rights claim was made in the first place.

61. Mr Payne submitted that the Secretary of State's approach was not actually one which required consideration of the substantive merits of the claim. The first question, he submitted, was whether human rights were even 'in play' or, in his alternative formulation, whether the claim asserted even 'fell within' the parameters of the ECHR. This approach is easy to formulate but rather more difficult to apply. It is simple enough in the example given by Mr Payne, in which a visitor claims that the refusal of admission would be a breach of his Article 5 ECHR rights. Were such a claim to be made, an ECO might well conclude that human rights were not 'in play'; the individual is not deprived of his liberty and the refusal of entry clearance has no bearing on the right in issue. To borrow from another context, it might properly be said in such a context that the claim does not even fall within the ambit of Article 5 ECHR.
62. The difficulty with the submission in the present context, however is that the protection afforded by Article 8 ECHR is famously elusive and does not lend itself to exhaustive definition: R (Countryside Alliance) v AG & Ors [2007] UKHL 52; [2008] 1 AC 719, at [10], per Lord Bingham. As Mr Ó Ceallaigh submitted, therefore, analysis of whether human rights are 'in play' tends necessarily to bring with it an analysis of the merits of the claim. The decision in this case illustrates the point, given that it considers not only whether the claim is 'capable of constituting an Article 8 claim' but also whether Article 8 is 'engaged at all'. Whilst the former mode of expression suggests a categorisation decision of the type envisaged by Mr Payne's submission, the latter is a decision on the merits, of how the first of the five Razgar questions should be decided.
63. The respondent's skeleton argument for these proceedings also tends to illustrate Mr Ó Ceallaigh's point that the line easily blurs between categorisation and assessment of the merits. At [36], the respondent cites the policy guidance to which I have already referred, in which the question posed is whether 'the claim made is capable of engaging the human right relied upon'. At [46], however, the respondent submits that "the exercise of an appeal right under s82 is

contingent upon engagement, at least, of a Convention Article". Insofar as that replicates what was said by Judge Southern in *Adjei*, it is unobjectionable. Insofar as it tends to suggest that the respondent must decide – as part of the assessment of whether a human rights claim has been made – whether Article 8 ECHR is actually engaged, it is distinctly problematic, since that question necessarily trespasses into the merits of the claim, and not whether it is a human rights claim at all.

64. The *Alighanbari* formulation of what amounts to a human rights claim has stood the test of time. It has been cited in decisions of the Upper Tribunal and the High Court and no doubt has been cast on it in the eleven years since it was handed down. Nothing I have said in this judgment is intended to cast doubt upon that formulation but I do consider the context of the case to be important. As I have already explained, and is clear from the Deputy Judge's careful analysis, that was a case in which nothing was said about the existence of a pre-decision human rights claim until the skeleton argument was filed for the substantive hearing. It was therefore for the Deputy Judge to consider whether what had been said by the applicant and his solicitors amounted to a human rights claim despite the failure to describe it as such. It was in that context that the Deputy Judge said that the question was one of substance, not form. He meant by that that the failure to label a claim as a human rights claim was not determinative of whether it was; one had to look to the substance of what was alleged.
65. Where, as here, a claim *is* said to be a human rights claim, it is rather more difficult to see how the respondent might legitimately say that it is not. The individual has, after all, expressed in terms a claim that to remove him from or refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. There might be cases such as that postulated by Mr Payne, in which a visitor relies on Article 5 ECHR, in which such a conclusion might be justified. But in the ordinary run of events, a person who states in terms that removing them from, or refusing them entry to, the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 should be taken to have made a human rights claim which satisfies the definition in s113 of the 2002 Act. Any analysis of that question which enters into consideration of the five *Razgar* questions should be avoided, since such an analysis blurs the line between the existence of the claim and its merits.
66. In this case, the expertly drafted letter which accompanied the application said at the very start that it was an application for leave outside the Rules. It was replete with reference to Article 8 ECHR and to a raft of authority on such cases. It stated at [24] that it was 'an application for leave to enter the UK outside the Immigration Rules based on Article 8 of the European Convention on Human Rights, our

client's compelling and compassionate circumstances, and the historic injustice he has suffered.' There were detailed representations at [28]-[30] and [53]-[54] about why the claim was a human rights claim, the refusal of which should attract a right of appeal. The answer to the question posed by statute (did the applicant claim that refusal of entry would be unlawful under section 6 HRA 1998?) is, in my judgment, quite clear. That is certainly what he asserted, through his expert solicitors, and he did so with formidable clarity and particularity.

67. The only way in which such an express claim might conceivably be said not to constitute a human rights claim is if it fell foul of a bright line rule established by authority. Let us suppose, for example, that it had been held that Article 8 ECHR was of no application in entry clearance cases. Were that the law, one could perhaps understand how an ECO might legitimately say that no human rights claim could be made by an application for entry clearance. But that is not the law, and it is readily accepted by the Secretary of State in entry clearance cases which raise family life considerations that Article 8 ECHR might properly be invoked. Indeed, appeals against refusals of such cases are routinely encountered in the Immigration and Asylum Chamber. The 'Gurkha dependant' class of case considered in cases such as R (Gurung & Ors) v SSHD [2013] EWCA Civ 8; [2013] 1 WLR 2546 is an example of an entry clearance case in which Article 8 ECHR is invoked, often successfully.
68. Mr Payne submits, however, that a clear distinction exists, in the entry clearance context, between family life cases such as those and private life cases such as the present. Whilst applicants in the former category might successfully invoke Article 8 ECHR (as a result of the presence of a family member in the UK proving a 'jurisdictional peg'), the authorities establish that there is "no obligation on an ECHR state to allow an alien to enter its territory to pursue a private life": SSHD v Abbas [2018] 1 WLR 533, at [27], per Burnett LJ (as he then was), with whom Ryder and Gloster LJ agreed. It is, in summary, as a result of that purportedly bright line that it is submitted in the instant case that the refusal of entry to a person such as the applicant could never amount to a human rights claim, whether or not it was described as such.
69. I was taken to a great deal of authority on this point but I do not propose to mention every case. I have reproduced the ratio of SSHD v Abbas, by which I am obviously bound. There was reference in Mr Ó Ceallaigh submissions to the fact that SSHD v Abbas was decided without reference to Sargsyan v Azerbaijan (App No 40167/01); (2017) 64 EHRR 4 but I did not understand him to repeat the *per incuriam* submission which necessarily failed at [47]-[59] of SSHD v Onuorah [2017] EWCA Civ 1757.

70. Mr Ó Ceallaigh's aim, instead, was to explore the application of the Al-Skeini v United Kingdom (App No 55721/07); (2011) 53 EHRR 18 extra-territoriality principle on which SSHD v Abbas was founded in cases such as the present. In that regard, he drew attention to the uncontested facts of this case, including the applicant's residence in the UK for seven years, the curtailment of that residence for reasons which are yet to be judicially considered on their merits, and the personal and reputational damage which the applicant has suffered as a result of those allegations. He submitted, in summary, that this was not aptly viewed simply as a case in which the applicant sought to enter the UK in order to 'pursue' or to 'develop' a private life. In a case such as that, it is clear from [18] and [27] of SSHD v Abbas that Article 8 ECHR offers no protection. In a case such as the present, however, Mr Ó Ceallaigh submitted that the applicant had a private life in the UK before his departure and that it would be wrong, in all the circumstances, to regard it as having been extinguished by either the passage of time or the applicant's departure from the UK in 2017 to see his father before he died.
71. For the Secretary of State, Mr Payne submitted that there was nothing in this case which distinguished it from the paradigm situation considered in SSHD v Abbas and that the applicant fell foul of the bright line principle recorded in that decision.
72. I consider it unnecessary to descend into the detail of the domestic and European authorities to which I was taken at the hearing, because that task was undertaken after this hearing by the Court of Appeal (King, Coulson and Andrews LJ) in Ali v UTIAC & SSHD [2024] EWCA Civ 372. I am grateful to Mr Ó Ceallaigh for drawing that decision to my attention shortly after it was handed down, and to counsel on both sides for the written submissions made about it. Those submissions were comprehensive. I was not asked to reconvene the hearing and I did not consider it necessary to do so.
73. Unlike the claimant in SSHD v Abbas, the appellant in Ali had settled in the UK with his family. He had come to the UK at the age of 10, with his mother and siblings, and he was granted Indefinite Leave to Remain in 2004, at which point he was 14. He was issued with a Home Office travel document in 2008 and he left the UK later that year, hoping that the warmer climate in Africa would assist his recovery from tuberculosis. He intended only a temporary spell outside the UK but he then lost his travel document and was unable to obtain a replacement and his ILR lapsed, by operation of law, in early December 2010.
74. Due in large part to the impecuniosity of his family, it was only in May 2015 that an application for entry clearance as a returning resident was lodged, by which stage Mr Ali had been outside the UK for about 6½ years. That application was refused but no appeal was brought.

Another application was made in January 2019. That application was also refused, not rejected. The respondent concluded that it was proportionate to refuse entry clearance. On appeal, the judge in the FtT did not consider the proportionality of the ECO's decision; he held that he was bound by SSHD v Abbas to conclude that Article 8 ECHR was not engaged. It was that point of principle – concerning the scope and ratio of the decision in SSHD v Abbas – which found its way to the Court of Appeal, following refusals of permission to appeal by the FtT and the Upper Tribunal and the refusal of an application under CPR 54.7A (a 'Cart JR') by Lang J.

75. The only full judgment on the appeal was given by Andrews LJ. Coulson LJ gave a short concurring judgment and King LJ agreed with Andrews LJ. At [40], Andrews LJ held that the ratio of SSHD v Abbas is that 'Article 8 does not oblige a state to allow a non-national to enter its territory in order to develop a private life there', which formulation echoed that of Laing LJ in a SIAC case: R3 v SSHD [2023] EWCA Civ 169. The ratio was not as summarised by the Upper Tribunal in SD (Sri Lanka) v ECO [2020] UKUT 43 (IAC); [2020] Imm AR 706: that "the right to respect for private life was not engaged in entry clearance cases". Having analysed the language used by Burnett LJ in SSHD v Abbas and another case (Singh v SSHD [2015] EWCA Civ 630), Andrews LJ held at [41] that the principle in the former case:

"applies to a situation in which a foreign national with no, or no sufficient ties to the UK, is seeking to enter in order to develop a private life in the UK in the future, which was the situation which this Court was there specifically addressing. Otherwise, anybody could turn up at the border and demand entry to the UK, and as Burnett LJ rightly pointed out, that is completely antithetical to the right of immigration control."

76. Andrews LJ noted that the court in SSHD v Abbas was not considering what she described as the "markedly different" situation in which:

"... a settled migrant (indeed, an accepted refugee) has been denied re-entry after a period of temporary absence that the Immigration Rules both envisaged and permitted, because, through no fault of his own, he is no longer in possession of the travel document which proved his immigration status (and the Secretary of State wrongly (as is now accepted) refused to accept that he had that status)."

77. At [43], Andrews LJ noted that the appellant was not seeking to 'develop' a private life in the UK in the sense that that verb was used in SSHD v Abbas. He was instead seeking to 'resume or continue' his long-established private life which had been curtailed for reasons beyond his control.

78. For reasons she gave at [44], Andrews LJ did not consider the principle in SSHD v Abbas to be as wide as the Secretary of State contended. At [45], Andrews LJ stated that she could find no principled justification for the proposition that a settled migrant could complain about the interference with his private life within the UK if his leave is curtailed whilst he is physically in the UK, but not if it is curtailed when he goes abroad on holiday or to visit relatives.
79. For reasons given at [46]-[53], Andrews LJ considered that analysis to be supported by two decisions of the ECtHR to which Mr Payne and Mr Ó Ceallaigh both referred: Abdul Wahab Khan v The United Kingdom (App No 11987/11); (2014) 58 EHRR SE15 and Sargsyan v Azerbaijan. At [54], Andrews LJ highlighted what she considered to be the illogicality of the Secretary of State's position and, at [55]-[57], she explained why the Immigration Rules concerning the position of returning residents fortified her yet further in her conclusions. At [59] Andrews LJ expressed her conclusion on the law in this way:

"In my judgment, depending on the facts, the refusal of entry clearance could interfere with a person's private life developed in the UK sufficiently to engage Article 8, and Abbas does not decide the contrary. It is unnecessary for the purposes of this appeal to decide anything more than that it was open to this appellant, as a settled migrant, to contend that the refusal of re-entry to resume his private life within the UK was disproportionate in all the circumstances. There is no need for the Court to consider the position of an individual whose private life within the UK is of a more tenuous nature."

80. In his written submissions for this case, the respondent reserves his position on the correctness of Ali, noting that an application for permission to appeal to the Supreme Court might yet be made. The remainder of the submissions invite me to note what is said to be the 'narrow compass of the judgment', with particular reference to the unusual circumstances which were noted by Andrews LJ, including the fact that Mr Ali was a settled migrant when he left the UK and when he attempted to return. The respondent's submissions invite me to conclude that the decision is of no assistance to this particular applicant, who has not enjoyed settled status at any point; did not reside in the UK long-term; and did not have to absent himself from the UK temporarily.
81. It is important to recall that the Court of Appeal in Ali was not considering the same question as is before me. The Entry Clearance Officer had accepted in that case that a human rights claim had been made and the judge in the FtT had (of his own volition) decided that the claim did not engage Article 8 ECHR. The importance of Ali in a case such as the present – in which the central question is whether a human rights claim has even been made – is to show that the bright



line which Mr Payne initially sought to draw in reliance on SSHD v Abbas is not quite so clear.

82. Whilst I accept that Ali might be distinguished on the facts – not least because the applicant before me was never settled – the importance of Andrews LJ’s judgment lies in what she says about the way in SSHD v Abbas should be confined to cases in which an individual seeks to enter the UK to ‘develop’ a private life in the future. As Mr Ó Ceallaigh submitted, a person who has previously enjoyed a private life in the UK, and who seeks to resume it following events such as those summarised at [70] above, might properly be able to contend that Article 8 ECHR is engaged. Insofar as the Secretary of State submits that such a person cannot even be taken to have made a human rights claim which warrants consideration as such by the Entry Clearance Officer, Ali shows that such a submission cannot be correct.
83. I therefore conclude that there is no bright line rule which prevents a person in the applicant’s position from making a human rights claim for admission to the UK. The Entry Clearance Officer was wrong to conclude otherwise and that decision must be quashed, with the result that the ECO must consider the human rights claim on its merits.

*Issue Three - Does the application made by the applicant engage Article 8?*

84. I agree with Mr Ó Ceallaigh that I should not proceed any further. It suffices for me to conclude that the applicant made a human rights claim which should have been considered by the respondent. The respondent failed to consider that claim because he misunderstood the effect of SSHD v Abbas and because he strayed impermissibly into the consideration of the merits.
85. Whether that claim suffices to engage Article 8, or whether the refusal of that claim would be disproportionate, are matters which fall to the Entry Clearance Officer to decide, and a negative conclusion in either respect would (subject to my final observation below) attract a right of appeal to the First-tier Tribunal, which is the proper alternative remedy prescribed by statute.
86. A number of the submissions made before me belong in the analysis of the merits, and not in the consideration of whether the claim made was a human rights claim. In assessing the claim, the ECO will wish to consider, for example, the significance of the fact that the applicant was not settled, the significance of his ‘voluntary’ departure from the UK, and the significance of the fact that he was outside the UK for many years. But those matters are not relevant to the question of whether a human rights claim was made.

*Certification Under Section 94*

87. My final observation concerns the possibility of certifying such a claim under section 94 of the 2002 Act. When I first read the papers in this case, it seemed to me that the Secretary of State was fighting yesterday's war. Prior to 28 June 2022, there was no possibility of certifying a claim such as this so as to remove a right of appeal. Certification under that provision always left open the possibility of an out-of-country appeal. Prior to the statutory change, therefore, it is understandable that the Secretary of State would wish to 'hold the line' and to submit that many entry clearance cases could not amount to human rights claims, whether or not they were labelled as such and whether or not detailed submissions were made about why that label was appropriate. Now, however, there is no need to maintain the blurred line between categorisation (whether a human rights claim or not) and the engagement of Article 8 ECHR. If the respondent believes that a claim is bound to fail because Article 8 ECHR is simply not engaged, there is a statutory mechanism by which she can express that conclusion and prevent any right of appeal to the First-tier Tribunal.
88. There was only a brief reference to that point in Mr Payne's skeleton. When I asked him about it at the hearing, he had a twofold response. The first was that certification could only take place when there was accepted to be a claim. The second was that the power to certify an entry clearance claim has only existed since June 2022. In my judgment, neither of those submissions represents any real answer to the point. The first runs into the problem considered by Kerr J in AT, to which I have referred above. The second takes the Secretary of State nowhere; if there was a statutory lacuna, it has now been filled.

**Conclusion**

89. It follows from the above that the respondent's refusal to treat the application as a human rights claim must be quashed and the Entry Clearance Officer must be ordered to consider the human rights claim which was made. I note that no other relief was sought in the claim form. I invite counsel to agree the form of the order, failing which I will resolve that and any other consequential matters on the basis of written submissions.

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