



Neutral Citation Number: [2021] EWHC 1217 (Admin)

Case Nos: CO/954/2021 (Arman) and CO/957/2021 (GY)

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL
Heard remotely via Microsoft Teams

Date: 13/05/2021

Before :

MR JUSTICE MOSTYN

Between :

R, on the application of Yusuf Arman	Claimant
- and -	
Secretary of State for the Home Department	Defendant

R, on the application of GY	Claimant
(anonymity granted)	
- and -	
Secretary of State for the Home Department	Defendant
- and -	
The First-Tier Tribunal (Immigration and Asylum Chamber)	Interested Party

Ramby de Mello (instructed by **Thompson & Co Solicitors**) for the **Claimant** in **Arman Manjit Gill QC and Priya Solanki** (instructed by **Duncan Lewis Solicitors**) for the **Claimant** in **GY**
Steven Kovats QC (instructed by the **Government Legal Department**) for the **Defendant** in both cases

Hearing date: 5 May 2021

Approved Judgment

I certify pursuant to the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 that in other proceedings this judgment may be cited and/or included in a bundle of authorities.

Mr Justice Mostyn:

1. Before me are the applications for permission to pursue judicial review proceedings by Yusuf Arman (YA) and GY (who has been granted anonymity).
2. YA was born in Turkey in 1971, and came to the UK in 1973 with his family. He is a Turkish citizen but was granted indefinite leave to remain in the UK in 1976. He got married in 1992, but the marriage did not last. He has accumulated no fewer than 33 convictions for 96 offences spanning the period from April 1991 to November 2015. On 6 May 2016, it was decided that he should be deported. YA then made an asylum and protection claim and a human rights claim (after which he continued to commit further criminal offences). On 31 March 2017 the Home Secretary (a) refused YA's asylum and protection claim and certified them under s.94 of the Nationality, Immigration and Asylum Act 2002 as clearly unfounded; (b) refused his human rights claim and certified it under s.94B of that 2002 Act; and (c) made a deportation order. YA was deported to Turkey on 10 June 2017. He has been living in Turkey since that date. Shortly after his arrival in Turkey YA appealed against his deportation. The delay in dealing with this appeal has been extraordinary. It has been derailed by the commencement by YA of two sets of judicial review proceedings and also impacted by the Covid-19 pandemic.
3. YA says he has not been able to find employment in Turkey, and that he has been 'sofa-surfing' with friends and family, or sleeping on the street. He suffers from various conditions, including diabetes and asthma, and he has had suicidal thoughts since his deportation. He says he does not speak Turkish and has difficulty understanding and communicating with others. YA confirms that by his telephone he has regular contact via public Wi-Fi with his family in England.
4. YA commenced judicial review proceedings challenging the s.94B certification in April 2018. Permission was refused on 23 May 2018. On 26 June 2020 this application for judicial review, seeking essentially the same thing, was filed. Permission was refused on the papers by UTJ Pitt on 7 September 2020, and, curiously, for a second time by Swift J on 29 March 2021. YA has exercised his right to an oral renewal of his application and that is the matter before me.
5. GY was born in Turkey in 1987, and moved to the UK in around 1996 with his family. He is a Turkish citizen, but was granted indefinite leave to remain in 2004. He got married in 2008, and has two children with his wife. He too has accumulated numerous convictions, including for grievous bodily harm under s.20 of the Offences against the Person Act 1861. On 22 October 2015, it was decided that he should be deported. He had by then made a human rights claim. On 29 October 2015 the Home Secretary refused the human rights claim and certified it under s.94B. GY was deported to Turkey on 9 March 2017. He appealed against his deportation on 23 May 2017. The delay in dealing with his appeal has been equally extraordinary. However, a two-day hearing fixed for 7 & 8 April 2020 was derailed by these judicial review proceedings.
6. He commenced these judicial review proceedings challenging the s.94B certification on 30 September 2020. On 29 March 2021 Swift J refused permission on the papers. GY has exercised his right to an oral renewal of his application and that matter is also before me.

7. Since his deportation GY has been living in a small village named Karatavuk, in the north-west of Turkey, with his grandmother. The nearest town to Karatavuk is Akcakoca, which is about 20km away. His wife and children remain living in the UK.
8. In the period since GY's arrival in Karatavuk, the village has gone from having just one landline to having mobile phone coverage, which would appear to be mainly a 3G data network, but in places 4G, provided by Turk Telecom. Now, GY is able to communicate with his solicitor and presumably would be able to tether a laptop to his telephone to enable him to participate in his appeal reasonably.
9. The grounds relied on by both claimants are the same, to all intents and purposes. It is for this reason that the two renewal applications have been linked and heard together. The grounds are as follows:
 - i) The s.94B certifications, with the consequence that any appeal must be heard out-of-country, were a clear breach of Article 8 of the European Convention on Human Rights ("the ECHR ground");
 - ii) The 1963 EEC-Turkey Association Agreement, as supplemented by the Additional Protocol of 23 November 1970 and Decision 1/80 of its supervisory Association Council, together with EU law principles of proportionality, have the legal effect of overriding these statutory provisions and of granting the claimants a deportation-suspensory in-country right of appeal ("the Ankara Agreement ground"). These EU provisions are applicable in this case because both the relevant events, and the making of the claims, occurred before the completion of Brexit on 31 December 2020.
10. Both grounds are strongly disputed by Mr Kovats QC on behalf of the Home Secretary. In addition, he says that quite apart from the lack of merits of the two grounds, the applications for judicial review are grossly out of time and for that reason, if none other, permission should be refused in both cases.
11. GY has advanced a further ground under the GDPR which in my judgment is wholly misconceived, and which I deal with shortly below.

The ECHR ground

12. In her speech to the Conservative party conference on 30 September 2013 the then Home Secretary, the Rt. Hon. Theresa May, said:

“Where there is no risk of serious and irreversible harm, we should deport foreign criminals first and hear their appeals later.”
13. In *R (on the applications of) Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42 at [31] Lord Wilson quoted this pledge and went on to explain with his customary clarity the statutory arrangements which were put in place to give effect to it. First, at [10] – [14], he explained the features of the statutory regime as it was prior to 28 July 2014:

- i) Section 3(5)(a) of the Immigration Act 1971 states that a person who is not a British citizen is liable to deportation from the UK if the Home Secretary deems his deportation to be conducive to the public good: [10].
 - ii) Section 32(4) of the UK Borders Act 2007 states that, for the purpose of s.3(5)(a) of the 1971 Act, the deportation of a foreign criminal is conducive to the public good. Section 32(1) and (2) defines a foreign criminal as a person who is not a British citizen and who is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months: [11].
 - iii) Section 32(5) of that 2007 Act states that, unless an exception specified in s.33 applies, and unless his removal would breach his rights under the ECHR, the Home Secretary must make a deportation order in respect of a foreign criminal: [12].
 - iv) Section 82(1) and (3A) of the Nationality, Immigration and Asylum Act 2002 at that time provided that, where a deportation order in respect of a person was stated to have been made in accordance with s.32(5) of the 2007 Act, he might appeal to the First-tier Tribunal (“FTT”). By s.82(4), however, the right of appeal was subject to limitations: [13].
 - v) Section 92(1) of the 2002 Act stated that an appeal under s.82 could not be brought while the appellant was in the UK unless it fell within one of the specified exceptions. Section 92(4)(a) gave an exception where the appellant had made a human rights claim while in the UK. But s.94(1) and (2) gave an exception to that exception by providing that an appellant could not rely on s.92(4)(a) to bring his appeal from within the UK if the Home Secretary certified that his human rights claim was clearly unfounded: [14].
14. To give effect to the conference pledge, s.17(3) of the Immigration Act 2014 was swiftly passed. This introduced s.94B into the 2002 Act, and rewrote s.92. It came into force on 28 July 2014. The new s.92(3)(a) stated that where pursuant to s.94B the Home Secretary had certified a human rights claim made by a person liable to deportation (“P”), his appeal could be brought only from outside the UK.
 15. To certify a human rights claim under s.94B the Home Secretary must have concluded that despite the appeals process not having even started or, if begun, not having been exhausted, the removal of P to the proposed overseas place, pending the outcome of P’s appeal, would not be unlawful under the ECHR (s.94B(2)). Section 94B(3) stated, by way of example, that the grounds upon which the Home Secretary 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 removed to that place.
 16. Whatever one may think of the features of this process, it is highly important, in my opinion, that the court dutifully accepts that Parliament has spoken. It has decreed the deportation of foreign criminals to be conducive to the public good. It has set up clear machinery that provides for deportation first, appeals afterwards for those cases where the Home Secretary, acting objectively and impartially, has concluded that a deportation would not lead to a breach of P’s Convention rights. In my opinion, the court should not be straining to find obscure loopholes, the exploitation of which would render this process nugatory.

17. It is important to recognise that the Home Secretary cannot lawfully certify under s.94B if she considers that the removal of P to the overseas place would lead to a breach of his Convention rights.
18. In *Kiarie and Byndloss* the s.94B certifications were claimed to have been made unlawfully because they obstructed those appellants' abilities to present their appeals, and that this obstruction amounted to a breach of the appellants' Convention rights. At [39] Lord Wilson stated:

“...a specific focus on the risk of serious harm *to the prospects of his appeal* might very well ground a conclusion that his removal in advance of it would breach his Convention rights.”
(original emphasis).

19. He went on to hold that the obstructions did indeed amount to a breach of Convention rights. In reaching that conclusion (writing, I remind myself, four years ago in 2017) he referred to the following matters:
- i) Even if an appellant abroad secured legal representation from one source or another, he and his lawyer could face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular during the hearing: [60].
 - ii) The FTT would want to hear how the appellant explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to the issue of whether he is a reformed character. The FTT will usually be unable properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or point up perceived errors which he would need to correct: [61].
 - iii) There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box: [67]. Thus, in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) the Upper Tribunal stated:

“(90) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an

out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process.”

- iv) The ability of a witness on screen to navigate his way around bundles is often problematic, as is his ability to address cross-examination delivered to him remotely, perhaps by someone whom he cannot properly see. But, although the giving of evidence on screen is not optimum, it might well be enough to render the appeal effective for the purposes of Article 8, provided that the appellant’s opportunity to give evidence in that way was realistically available to him: [67].
- v) A 2016 survey disclosed that 66% of FTT judges rated as poor the standard of IT equipment used in the FTT: [68].
- vi) In 2016 FTT guidance required an appellant to pay for all necessary equipment and a Skype link, including projection equipment, audio equipment and a Wi-Fi link. He had to do so for both ends: both for the FTT end and for the hearing centre from which he was expected to give his evidence in the foreign place: [71]. In one of the cases before the Supreme Court the anticipated cost to the appellant was for a new computer, a projector and a 3G mobile telephone contract, as well as rental of a videoconference room at £240 an hour for about seven hours: [72].
- vii) Further, there may be compatibility issues requiring a bridging service to be engaged and funded; there may be problems about time differences; and, not uncommonly, links can fail during the hearing and cannot be immediately restored: [73].
- viii) Further still, an appellant already deported will probably face insurmountable difficulties in obtaining the supporting professional evidence that he needs to adduce. For example, his probation officer may well have closed his file and may regard himself as no longer obliged to write a report. He may wish to adduce evidence from a consultant forensic psychiatrist, but a remote assessment would be extremely unusual and would have to be treated with considerable caution. A report from an independent social worker may be very necessary but one compiled in the absence of the social worker’s direct observation of the appellant and the family together was likely to be of negligible value: [74].

20. Lord Wilson concluded at [78]:

“The appellants undoubtedly establish that the certificates represent a potential interference with their rights under Article 8. Deportation pursuant to them would interfere with their rights to respect for their private or family lives established in the UK and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective. The burden then falls on the Home Secretary to establish that the interference is justified and, in particular, that it is proportionate: specifically, that deportation in advance of an

appeal has a sufficiently important objective; that it is rationally connected to that objective; that nothing less intrusive than deportation at that stage could accomplish it; and that such deportation strikes a fair balance between the rights of the appellants and the interests of the community ... I therefore turn straight to address the fair balance required by Article 8 and I conclude for the reasons given above that, while the appellants have in fact established that the requisite balance is unfair, the proper analysis is that the Home Secretary has failed to establish that it is fair.”

The s.94B certificates were therefore quashed.

21. I want to make it absolutely clear that I fully accept the correctness of this decision at the time it was rendered. The IT equipment used by HMCTS in 2017 was prone to malfunction repeatedly and the level of technological skill of most practitioners was not high. In common with the 66% of the FTT judges in the 2016 survey referred to by Lord Wilson, I too would have rated the functionality of the video system in my courtroom as poor. So the decision was not merely understandable; I would say it was almost inevitable.
22. There have not been many benefits derived from the Covid-19 pandemic. But the necessity of most civil and family hearings to be conducted remotely while the virus has rampaged has been the mother, not so much of the invention, but of an accelerated evolution of practice and procedure bringing the law into the digital age. While the taking of evidence by (often malfunctioning) video link has been happening for years, it has been traditionally reserved for witnesses from abroad, in detention or who are vulnerable. Now almost all witnesses give their evidence without a hitch from their homes (which may be here or overseas) or their lawyers’ offices; and the widely held misconceptions that this is unsatisfactory, or in some way renders the task of the judge in sifting truth from untruth more difficult, are being gradually displaced through wide experience. Some things are already clear enough. For example, there can surely be no going back in relation to electronic bundles, the introduction of which was already gathering pace by the time that the first lockdown took place on 23 March 2020.
23. I myself have conducted only remote hearings for well over a year now, and I have not used a hard paper bundle since 2019.
24. The enforced learning process has demonstrated that many of the concerns expressed by Lord Wilson have been overcome or have been shown to be unfounded. There is now no question of a party who is overseas having to go to a hearing centre to participate in his case. All he needs is a laptop and connectivity to a Wi-Fi or data network¹. In the unlikely event that he cannot download the Zoom or Microsoft Teams apps he can access a Zoom or Teams hearing via a browser; alternatively the hearing can be on the HMCTS developed platform, CVP, again accessed via a browser. I know from hearing many cases under the 1980 Hague Convention on the Civil Aspects of International Child Abduction since March 2020 that the typical left-behind parent is completely able to instruct his solicitor and counsel in London and to participate fully

¹ The Wi-fi network would need to have an internet speed of 1.5 mbps or more; the data network would need to be 3G or better. These standards are common world-wide.

in the hearing, notwithstanding that there may be some inconvenience caused by time differences. Time after time, sensitive cases of that type have been heard remotely. The improvement in the quality of the technology has meant that the failures and problems to which Lord Wilson referred occur very rarely.

25. In international child cases there is often an acute need to be able to adduce expert evidence assessing the quality of relationships within the family; this has been achieved remotely without giving rise to an impairment of the quality of evidence that Lord Wilson feared. Equally, it has been shown to be straightforward to assess, fully, medical and psychological issues remotely for forensic purposes.
26. It is noteworthy that Cafcass's policy on engaging with and seeing children has been for a year that there should be no in-person meeting between the FCA and the children unless this was judged essential. With effect from 18 March 2021 this has changed to a revised default position that there should be at least one in-person meeting with the relevant child, but this should not, other than in exceptional circumstances, take place at the children's home but rather in Cafcass's offices. The guidance does not stipulate that the FCA must meet the children and the parents all together. On the contrary, the meeting should be with the individual child alone. Para 1.2 provides:

“Children should be seen alone. Whilst it may also be important to see children together with their brothers and sisters, and observe them with parents or carers, or to see them with a trusted professional, individual time with the practitioner is also vital to ascertain their wishes and feelings away from the immediate influence caused by the presence of others” (original emphasis)

Clearly, it is not the view of Cafcass that a report compiled by a FCA who has not observed the children with their parents would be of “negligible value”.

27. Suggestions have been made that receiving oral testimony remotely is somehow less empathetic or humane than would be the case if the evidence is given physically from the witness box. In *A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam) Lieven J identified an irony in relation to such arguments. At [24] - [25], she pointed out that FPR Part 3A and PD 3AA provide for, and regulate, the giving of evidence remotely by vulnerable witnesses. She said:

“One of the reasons that vulnerable witnesses often give evidence remotely is to protect them from the stresses of the courtroom. It may therefore be that a compromise is made for that category of witness, in order to balance fair process with the interest of the individual. However ... it may also be the case that the vulnerable witness is more likely to give truthful and complete evidence if allowed to give it remotely, rather than in the witness box. So the benefit is not simply to the witness, but also potentially to the judicial process.”

No one would seriously argue that to allow a vulnerable witness to give evidence remotely is unempathetic or inhumane. So why is it suggested that it is for a non-vulnerable witness?

28. As for the old chestnut that is demeanour, Lieven J's observations at [27] - [29] are highly pertinent:

“27. ...Having considered the matter closely, my own view is that it is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from *Re A* [2020] EWCA Civ 583 that the Court of Appeal is not saying that all fact finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ (in *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [36] – [41]) that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.

28. I was concerned that a witness might be more likely to tell the truth if they are in the witness box and feel the pressure of the courtroom, but having heard Mr Goodwin and Mr Verdan I do now accept that this could work the other way round. Some witnesses may feel less defensive and be more inclined to tell the truth in a remote hearing than when feeling somewhat intimidated in the court room setting. In the absence of empirical evidence, which would in any event be very difficult to verify, I can reach no conclusion on what forum is most likely to elicit the most truthful and/or revealing evidence.

29. For these reasons I do not think that it is possible to say as a generality that a remote hearing is less good at getting to the truth than one in a courtroom. ...”

29. I have to say that the digital world has completely changed since Lord Wilson gave his judgment. Back in 2017 the idea of easily and routinely doing hearings remotely, including hearings where oral evidence is to be given, was for traditional lawyers and judges a very hard pill to swallow. The then prevailing view about using remote technology seemed to be captured by the old aphorism that change is good, but no change is better.

30. But that was then. As the Lord Chief Justice stated in his speech at the Mansion House on 28 July 2020:

“Technology has enabled much to happen in the past four months which would otherwise have come to a halt. We have taken three steps forward and no doubt we will take one step back. But there is no going back to February 2020.”

31. I do not believe, were *Kiarie and Byndloss* to be heard in the Supreme Court today, that the same conclusion would be reached. I believe that the conclusion would be that since

March 2020 there has been a transformation in the use of remote video technology so that, for almost all cases of this type, provided that suitable facilitative directions are given (see below), it cannot now be said that having to conduct an appeal out-of-country is, in procedural terms, unfair.

32. GY's grounds state at para 13(c):

“The Supreme Court also held [§§57-58] that s.94B decisions damage both the substantive and procedural protections of Art 8. Thus, a pre-appeal deportation and its continuing effects causes substantial interference with the substantive protections given by Art 8 ECHR, e.g. it ruptures the family, weakens family ties and swings the appeal before the FTT in favour of the Home Secretary, who gains an advantage by deporting in advance of the appeal.”

I do not agree that in [57] and [58] Lord Wilson decided that a pre-appeal deportation invariably caused “substantial interference” with the substantive protections given by Article 8. On the contrary, while Lord Wilson referred to the consequences of a pre-appeal deportation as being matters to which the FTT would no doubt have regard when hearing the appeal, he was careful to state that his decision was solely based on the violation of procedural rights guaranteed by Article 8: see [39], [59] and [78].

33. Mr Gill QC has strenuously argued that the s.94B certification of GY, made on 29 October 2015, was clearly unlawful as it breached his Convention rights and in any event was the product of an erroneous application of the legal test, as exposed by the Supreme Court in *Kiarie and Byndloss*. Therefore, he argues, his client should certainly be granted permission to pursue his claim, and, further, that I should grant an injunction requiring the Home Secretary to bring him back here. Mr de Mello argues comparably for Mr Arman.
34. The s.94B certifications in the instant cases were in 2015 and 2017. Had there been a hearing about the legality of those decisions at that time, I can accept, for the reasons given above, there may well have been a conclusion that the decisions, and the consequential deportations, were unlawful. But that would have been in the past, which as we know is a foreign country where things are done differently. Now, in 2021, I am very confident that the FTT will be able to give the necessary directions to enable both claimants to communicate online reasonably with their solicitors and to participate online reasonably in their appeals. I emphasise “reasonably”. When Parliament passed the s.94B regime it would have been well aware that the standard of preparation for, and the presentation of, an appeal by an absent overseas appellant would be less than optimal, when compared to an in-country appeal. Then, the standard of the former was markedly inferior to the latter and the Supreme Court inevitably held that it was unacceptable and therefore unlawful. The question for me is whether the much improved standard for out-of-country appeals is now good enough to enable an overseas appellant reasonably to prepare for, and reasonably to participate in, his appeal.
35. In my judgment, in 2021 the answer is likely to be yes in almost all cases (and certainly is yes in the two cases before me), provided that suitable directions are given by the FTT in those appeals where appropriate measures cannot be agreed between the parties. The directions might extend to inviting the Home Secretary to pay for data charges for

an appellant who has very limited means and who genuinely cannot afford to pay for them. They might extend to inviting the Home Secretary to pay for a laptop if the appellant genuinely could not gain access to one. If the Home Secretary refused to do so, then the FTT would not find it difficult to conclude that the appellant's ability to present his appeal was obstructed to such a degree that that his Convention rights were breached.

36. Mr Kovats QC therefore develops an additional response to the ECHR ground. He argues that at the hearing of the appeal the FTT will determine whether the appeal can, notwithstanding the absence of the claimant, be heard compatibly with his Convention rights. If the FTT decides that it can, then it will proceed to hear and determine the appeal on its merits. If it decides that it cannot (for example because the Home Secretary has refused to accede to an invitation to pay for data for the appellant), then it will so declare in its judgment. If the Home Secretary refuses to react positively to such a declaration, then it would be open, at that point, for the claimant to make a claim for judicial review.
37. Thus, Mr Kovats QC submits that these applications for judicial review by these claimants are premature and there exists a satisfactory alternative remedy, namely an appeal to the FTT.
38. I accept this submission provided that the question of the claimant's access to a laptop and to data has either been agreed or, in the absence of agreement, considered and determined at a directions hearings. In the two cases before me, in the absence of agreement about these matters, there needs to be a directions hearing in each case to consider the sufficiency of each claimant's online access both to his lawyers and to the FTT, and to the extent that it is insufficient, to facilitate it. In this way the out-of-country appeal will be seen as lawful.
39. Judicial review is a discretionary remedy of last resort. In my judgment there is no good reason to grant permission in order for there to be an inquest about the lawfulness in 2015 and 2017 of the certification decisions, in circumstances where I am satisfied that, were the certification decisions to be made today, they would, if necessary with facilitative directions from the FTT, be lawful.
40. Mr Gill QC has submitted that it is open to his client GY to commence civil proceedings for false imprisonment in respect of the claimed historic illegality, and therefore I might as well grant permission. This strikes me as an unprincipled submission. It is an iron rule that judicial review is not available if there is an alternative remedy.
41. In my judgment, the ECHR ground is not arguable and permission to proceed with it should be refused. In my judgment it is not arguable that these claimants cannot be enabled, realistically and reasonably, to prepare for, and participate in, their appeals to the FTT from Turkey. If the claimants wish to pursue an inquest into alleged historic illegality, then they should commence separate civil proceedings.

The Ankara Agreement ground

42. The 1963 Ankara Agreement, the Additional Protocol of 1970 and Decision 1/80 confer certain rights on Turkish workers in EU states. These provisions apply to the claimants,

the relevant events having occurred before the completion of Brexit on 31 December 2020. For my purposes the relevant provisions are as follows:

- i) Article 41(1) of the Additional Protocol of 1970 states that the contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. While this provision has been held to be directly effective, it is not concerned with remedies, see: *R (CA (Turkey)) v Home Secretary* [2018] EWCA Civ 2875, [2019] 1 WLR 2689. Therefore, Article 41 does not help the claimants' case that they are entitled to an in-country appeal.
- ii) Article 59 of the Additional Protocol provides that in the fields covered by the Protocol, Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community.
- iii) Article 6 of Decision 1/80 grants a Turkish worker the right to work in a member state, subject to conditions. Article 7 grants a right to work to members of his family. The right to work carries with it a right of residence in the member state in question: *Bozkurt v Staatssecretaris van Justitie* [1995] C-434/93.
- iv) Articles 13 and 14 of Decision 1/80 make further provisions concerning the right to work. They state:

“Article 13

The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.

Article 14

1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.

2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals”.

- 43. These provisions plainly give rise to the right of a Turkish worker not to be arbitrarily expelled from a member state. The scope of that right was considered in *Ziebell v Land Baden-Württemberg* [2012] CMLR 35. Mr Ziebell, a Turkish national who had lived in Germany all his life and who had an unlimited residence permit, challenged an expulsion order issued on the basis of his criminal convictions. The Court of Justice identified a “reference framework” under EU law for the purposes of applying Article 14(1) of Decision 1/80. That framework, or analogue, was not the Citizens’ Directive 2004/38/EC as contended by Mr Ziebell, but, rather, was Directive 2003/109/EC

concerning the status of third-country nationals who are long-term residents. The relevant provisions of this state:

“Recital 16

Long-term residents should enjoy reinforced protection against expulsion. This protection is based on the criteria determined by the decisions of the European Court of Human Rights. In order to ensure protection against expulsion Member States should provide for effective legal redress.

Article 10

1. Reasons shall be given for any decision rejecting an application for long-term resident status or withdrawing that status. Any such decision shall be notified to the third-country national concerned in accordance with the notification procedures under the relevant national legislation. The notification shall specify the redress procedures available and the time within which he/she may act.

2. Where an application for long-term resident status is rejected or that status is withdrawn or lost or the residence permit is not renewed, the person concerned shall have the right to mount a legal challenge in the Member State concerned.

Article 12

Protection against expulsion

1. Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.

2. The decision referred to in paragraph 1 shall not be founded on economic considerations.

3. Before taking a decision to expel a long-term resident, Member States shall have regard to the following factors:

(a) the duration of residence in their territory;

(b) the age of the person concerned;

(c) the consequences for the person concerned and family members;

(d) links with the country of residence or the absence of links with the country of origin.

4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.

5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside.”

44. These provisions say nothing whatsoever about the right to an in-country appeal. This is in contrast to the predecessor analogue, namely Directive 64/221/EEC of 25 February 1964. That Directive regulated the terms on which freedom of movement by citizens of member states could be exercised. It had been held to be the relevant analogue for Turkish workers in *Dörr and Ünal v Sicherheitsdirektion für das Bundesland Kärnten* [2005] CMLR 11. Article 9 of that Directive specifically granted a suspensory in-country appeal to an EU worker facing expulsion. The CJEU held that this right should be extended to Turkish workers who enjoyed protection under Decision 1/80. But Directive 64/221/EEC was repealed in 2006 and replaced by the Citizens’ Directive, and in the process the right to a suspensory in-country appeal was not replicated, intentionally it would seem.
45. Mr Gill QC protests that it is unthinkable that the rights of Turkish workers should have been thus watered down in 2006. I do not agree. The arrival of the Citizens’ Directive meant that the criterion for freedom of movement within the Union was citizenship rather than employment. While the criterion was employment it was plainly logical to treat EU workers and Turkish workers the same way. But once the criterion changed to citizenship it was obviously inapt to treat non-citizens in the same way as citizens. Rather, it was apt to treat Turkish workers equivalently to third-country workers. And third-country workers were not explicitly granted a suspensory, in-country appeal if they were the subject of an expulsion decision.
46. The references to the right to mount a legal challenge “in the Member State” in Article 10(2) and to a judicial redress procedure being available to a long-term resident “in the Member State” in Article 12(4) certainly do not signify, in my judgment, a right to a suspensory, in-country appeal. Rather, they signify no more than what they say, namely that an appeal will be afforded in the Member State. That is all that the words mean. And that is exactly what has been afforded to these claimants. The interpretation urged on me by Mr Gill QC involves me mentally inserting words into these provisions which substantially alter their natural meaning. Even by the fairly lax standards of statutory interpretation applied to EU law that is a step too far.
47. Mr Kovats QC has referred me to Regulation 41 of the Immigration (European Economic Area) Regulations SI 2016/1052. This states that where a person (“P”) who is a national of an EEA state, or a family member of such a national (and who is not a British citizen also), is subject to an expulsion decision made under Regulation 23(6)(b) and has appealed against that decision to the FTT or UT and wishes to make submissions to the Tribunal, he may apply to the Home Secretary for permission to be temporarily admitted to the UK in order to make submissions in person. The Home Secretary must grant P permission, except when P’s appearance may cause serious troubles to public policy or public security. These Regulations implement the corresponding provisions of the Citizens’ Directive to which I have referred.

48. It can be seen that Regulation 41 does not afford, even to an EEA national, an in-country right of appeal in the sense of allowing P to be permanently present within these shores while his appeal is being prepared. Rather, he is merely allowed to attend the appeal hearing itself. Even then, admission may be refused if his appearance may cause serious troubles to public policy or public security. The argument on behalf of the claimants would put a Turkish worker facing expulsion in a better position than his EEA counterpart, which would be directly contrary to the terms of Article 59 of the Additional Protocol (see above).
49. This is all very interesting but seems to me to be a red herring because, as explained above, the Citizens' Directive is not the appropriate analogue for a Turkish worker facing expulsion. I agree with Mr Kovats QC that if Parliament had intended these Regulations to extend to people in the position of the claimants then it could easily have said so. But it did not.
50. I am not satisfied that it is arguable that the Ankara Agreement (and its ancillary instruments) afford the claimants a suspensory in-country appeal. On this ground also permission is refused.
51. Finally, I repeat that the Home Secretary can only certify a case under s.94B where she is satisfied that to remove P to an overseas place and to deny him an in-country appeal would not breach P's Convention rights. Equivalently, Recital 16 of Directive 2003/109/EC states that a non-EU worker facing expulsion should enjoy reinforced protection based on the criteria determined by the decisions of the European Court of Human Rights. It seems to me that, although the language in the two measures is different, the standard of protection is the same - it is the basic human rights protection. I do not accept that the standard is fiercer under Directive 2003/109/EC than under s.94B. Whether the Turkish worker is in the UK, or elsewhere in the EU, he cannot be deported prior to the hearing of his appeal if to do so would violate his Convention rights.

The GDPR ground

52. It was argued by Mr Gill QC that if GY were to attend a video-link hearing from the British Embassy in Ankara, it would result in a breach of the GDPR and would be unlawful. Mr Gill QC submitted that the transfer of the personal data of GY, and of his family, to Turkey in the course of the video-link hearing amounted to the sending of personal data out of the EU; that such a transfer was not the least restrictive measure that can be used to enable an appeal hearing to take place; that the transfer was not justified by proportionality; and that the Home Secretary cannot show that sending the data out of the EU is necessary and proportionate pursuant to Article 49(1)(e) of the GDPR. He further submitted that the transfer would give rise to unlawful discrimination in terms of data protection rights.
53. This ground is wholly misconceived. Pure common sense dictates that if one individual in an EU member state has a video conference with another individual in Turkey, that video conference is not unlawful. I put it to Mr Gill QC that if that were indeed the case, the holding of a business meeting via Zoom between someone in the EU and someone in Turkey would result in a breach of the GDPR and would be unlawful. Mr Gill QC responded that that might be the case. I disagree.

54. If there were any doubt on the matter, it is laid to rest by the recent decision of the Court of Appeal in *Johnson v Secretary of State for the Home Department* [2020] EWCA Civ 1032. In that case, the appellant, Mr Johnson, had been deported from the UK to Jamaica. During the hearing before the FTT of his appeal against the decision of the Home Secretary to refuse his human rights claim in relation to his deportation, Mr Johnson had given evidence via video-link from the High Commission in Kingston, Jamaica. Mr Johnson argued that his giving of evidence via video-link from Jamaica to the FTT sitting in Birmingham was unlawful under the GDPR. The Court of Appeal robustly dismissed the appeal and held that Mr Johnson was not entitled to object to the processing of his data in the use of a video link. They further held that there was no basis for finding that there was any impermissible direct or indirect discrimination against Mr Johnson. I was told that the Supreme Court has refused permission to Mr Johnson to appeal the Court of Appeal's decision.
55. The decision in *Johnson* plainly applies in this case, and is binding on me. I was not persuaded by Mr Gill QC's attempts to distinguish GY's position from that of Mr Johnson. They are materially the same.
56. I am therefore not satisfied that it is arguable that the GDPR ground affords GY an in-country appeal.

Delay

57. The procedure governing the filing of claim forms for judicial review is clear: the claim form must be filed promptly, and in any event not later than three months after the grounds to make the claim first arose (CPR 54.5(1)). Plainly, the grounds to make a claim for judicial review first arise when the illegality being alleged first takes place. Although Mr Gill QC argued otherwise, in my judgment the limitation period countdown clock does not re-start at the beginning of every day on which the alleged illegality continues. If that were the case, the limitation period for every claim alleging ongoing illegality could be artificially stretched to a period far in excess of three months. That would be absurd, and is wholly contrary to the principle that public law claims are different to normal civil litigation, and require strict adherence to the time limits contained in the rules (see, for example, *R v Institute of Chartered Accountants in England and Wales Ex p. Andreou* (1996) 8 Admin L.R. 557).
58. The dates upon which the clock started to tick in this case were therefore the dates upon which the Home Secretary certified under s.94B the claimants' human rights claims challenging their deportation. In YA's case, the s.94B certification was made on 31 March 2017, yet YA did not file his judicial review claim form until 26 June 2020. In GY's case, the s.94B certification was made on 29 October 2015, yet GY did not file his judicial review claim form until 30 September 2020. I was not persuaded by Mr Gill QC's submission that the claimants came within the time limit because the illegality is ongoing, or by Mr de Mello's submission that there was no delay because no decision has been taken under Decision 1/80. I therefore find that both claimants are well out of time, and by several years.
59. The claimants' argument in effect invokes the doctrine of tolling, very familiar in the USA, but largely unknown to Anglo-Welsh law. Tolling, whether statutory or equitable, is a legal doctrine that states that a limitation period shall not bar a claim in a case where the claimant, despite the use of due diligence, could not, or did not, discover the

entitlement to sue until after the time had expired; or where the claimant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.

60. In my judgment, there is no good reason or adequate explanation for the delay. It would have been perfectly possible for the claimants to have filed their claim forms within the three-month time limit available to them. There is no evidence that the claimants, despite the use of due diligence, were only able to discover that they had an entitlement to sue years after time had expired. It is rightly not suggested that they were tricked by the defendant's misconduct into allowing time to expire.
61. It is my judgment that, quite independently of the reasons set out above, the claimants' gross delay in bringing their claims must lead to the dismissal of their permission applications.

Conclusion

62. For the reasons stated above, permission to proceed with the claims for judicial review dated 26 June 2020 (YA) and 30 September 2020 (GY) is, in each case, refused.
 63. That is my judgment.
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