



ACCESS TO JUSTICE : ARTICLE 8 ECHR AND BEYOND

The implications of the Supreme Court judgment in *Kiarie and Byndloss* [2017] 1 WLR 2380



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OUT OF COUNTRY APPEALS

R (Khawaja) v Secretary of State for the Home Department [1984] AC 74 Lord Fraser of Tullybelton :

"... in spite of [a] decision ... that the illegal immigrant be removed from this country, it will still be open to him to appeal under section 16 of [the 1971 Act] to an adjudicator against the decision to remove him. The fact that he is not entitled to appeal so long as he is in this country - section 16(2) - puts him at a serious disadvantage, but I do not think it is proper to regard the right of appeal as worthless. At least the possibility remains that there may be cases, rare perhaps, where an appeal to the adjudicator might still succeed."



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Section 94B of the Nationality, Immigration and Asylum Act 2002 (as at 28 July 2014):
Appeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation

- This section applies where a human rights claim has been made by a person ("P") who is liable to deportation under – section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or section 3(6) of that Act (court recommending deportation following conviction).
- The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
- The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

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Statements by Home Office minister

Not to allow foreign criminals who should be deported time to remain here and build up a further claim to a settled life in the UK (Second reading, 22 Oct 2013, Hansard, Column 161);

Not to permit the appeals system to be abused or manipulated to delay removal of those who do not have a good case when set against the new immigration rules and statutory public interest provisions which are a complete code (Second reading, 22 Oct 2013, Hansard, Column 162)

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Immigration Minister James Brokenshire : December 2015:



"Those with no right to be in the UK should return home – they can do so voluntarily, but if not we will seek to remove them.

"Through the Immigration Act 2014, we introduced a 'depart first, appeal later' rule for foreign national offenders

"And now, through the Immigration Bill, we will now remove even more illegal immigrants by extending this rule to all immigration appeals including where a so-called right to family life is involved, apart from asylum claims."

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Section 94B of the 2002 Act (as amended)



94B Appeal from within the United Kingdom: certification of human rights claims [...]²

(1) This section applies where a human rights claim has been made by a person ("P") [...]

[...]

(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, [refusing P entry to, removing P from or requiring P to leave the United Kingdom]⁴, pending the outcome of an appeal in relation to P's claim, would not be unlawful under [section 6](#) of the [Human Rights Act 1998](#) (public authority not to act contrary to Human Rights Convention).

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

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Court of Appeal decision in Kiarie and Byndloss [2016] 1 WLR 1961



- The Secretary of State had been entitled to "proceed on the basis that an out of country appeal will meet the procedural requirements of article 8 in the generality of criminal deportation cases" [71];
- An out of country of appeal does not by its nature "deprive [... a claimant] of effective participation in the decision-making process" [69]
- "if particular reasons are advanced as to why an out of country appeal would fail to meet those requirements, they must be considered and assessed" [71].
- An out of country appeal will be less advantageous to the appellant than an in country appeal, article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available, it requires access to a procedure that meets the essential requirements of effectiveness and fairness, and with specific comparison to entry clearance appeals [64].

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Supreme Court decision in Kiarie and Byndloss [2017] 1 WLR 2380



Lord Wilson :

"In my view what is crucial to the disposal of these appeals is the effect of a certificate under section 94B in obstructing an appellant's ability to present his appeal" [59].

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Lord Wilson : [paragraphs 53-54]



- Proposed deportations would be events of profound significance for the future lives of the appellants and their families.
- In the absence of certificates that they are clearly unfounded, the proposed appeals of these appellants must be taken to be arguable:
- In the light of the decision in *Hesham Ali*, every foreign criminal who appeals against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: the appellant needs to be in a position to assemble and present powerful evidence.
- The SSHD is responsible for having directed the dramatic alteration in the circumstances of the appellant even in advance of his appeal who is the respondent to the appeal herself.

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Lord Wilson [56]



"But the role of the respondent to the proposed appeals in seeking to achieve the removal of the appellants in advance of their determination, taken in conjunction with the first three of the background features set out above, requires this court to survey punctiliously, and above all realistically, whether, if brought from abroad, their appeals would remain effective. For that is what their human rights require".

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Lord Carnwath: a note of caution



- No reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary facilities and resources are available ("things have moved on a long way since *Khawaja*") [103]
- The appeals had come to the Court "by a less than ideal route" without regard to what has become the critical issue. [104]
- Some of the most compelling evidence now available had come from Bail for Immigration Detainees had come in very late in the day (no criticism of BID(I) without time for evaluation by the tribunal or the Court of Appeal.
- The Court of Appeal should have remitted the substantive application to be dealt with by a specially convened panel of the Upper Tribunal to look in detail at what is required to ensure an effective appeal
- Maybe need for a test case to clarify these issues before the Upper Tribunal
- On that limited basis he agreed the appeal was allowed

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Impact on Children: *OO(Nigeria) v SSHD* [2017] EWCA Civ 338 : decided pre-Kiarie in the UKSC

The Supreme Court did not deal with the duty to inquire in relation to the assessment of best interests of children affected by the decision to certify.

In *OO* a person who was liable to deportation had to be told that interim removal was under consideration so that they could make representations on the best interests of children affected [30]

Not in child's best interests to be separated from parent pending appeal [58]

Strong public interest in the removal of foreign criminal, even on an interim basis pending the pursuit of an appeal against the deportation order which may succeed, but not so strong a factor as that in favour of permanent removal on deportation as such [59].

Merits of the appeal not relevant though the nature of the offence, and conduct since then is [60]

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Issues for the Future?



Can deportees be returned without issuing further proceedings

Whether the person need show prejudice evidenced by reasons for not pursuing appeals previously.

For those who brought appeals and lost whether and how they can apply to appeal out of time or apply to have their determinations set aside

Whether the SSHD now has facilities for "effective" out of country appeals in certain countries

Whether there is need for a test case (as suggested by Lord Carnwath): its terms and parameters and the impact of that on the statutory scheme and the judgment in *Kiarie*

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Common law fairness and Access to Justice



Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2) [2017] 3 WLR 309

The Court recognised (as with the relationship between those facing deportation and the Home Secretary) there was a power imbalance, there between employers and employees which is generally characterised as an imbalance of economic power.

JCWI'/Liberty challenge to immigration appeal fees

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ETS Cases: Access to Justice: Issues in the Court of Appeal cases:



- the application of article 8 ECHR to such claims generally involving allegation of fraud where absent which allegation a person would be lawfully present in the UK;
- whether such claims can be said to be clearly unfounded;
- the lawfulness of the practice of the SSHD not to invite representations prior to such curtailment
- the application of *Kiarie and Byndloss* to such Article 8 ECHR out of country appeals where certified as clearly unfounded; and
- the parameters of the application of the *Lim* principle and whether in light of the conclusions in *Kiarie and Byndloss* as to the efficacy of out of country appeals, pursuant to common law principles of fairness or in any event there exist "special or exceptional" factors in cases where fraud is alleged upon which the decision to remove is founded, to inform the exercise of discretion to hear a judicial review in country prior or to removal, rather than rely on the out of country appeal as the appropriate remedy to be exhausted.

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THANK YOU!



Garden Court Chambers
57-60 Lincoln's Inn Fields
London WC2A 3LJ
Tel: 020 7993 7600

www.gardencourtchambers.co.uk @gardencourtlaw