

JUSTICE CONFERENCE 2017:
IMMIGRATION AND HUMAN RIGHTS UPDATE:
ARTICLE 8 ECHR AND ACCESS TO JUSTICE

1. In recent years the Government has taken various steps the effect of which is to prevent Home Office caseworkers' decisions being scrutinised by an independent tribunal.
2. The Government has reduced appeal rights by the Immigration Act 2014 so that the majority of immigration decisions no longer carry a right of appeal to the Tribunal. It has also introduced legislation meaning that some appeals can only be pursued once a person has left the UK and purported to extend that under the Immigration Act 2016.
3. Immigration fees increases have the same effect - even fewer people will be able to access an independent review of their immigration decisions.
4. Home Office casework decisions are notoriously error-prone. Between October and December 2015, 41% of appeals against Home Office decisions were allowed in the First-tier Tribunal. The Parliamentary and Health Service Ombudsman revealed serious problems with Home Office decision-making, upholding 70% of complaints made. The Ombudsman commented that "*delays, poor decision making and not doing enough to address the injustice caused to individuals and their families are key issues in complaints about the Home Office*".
5. The Immigration Act 2014 introduced a new provision to amend section 94 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") to include the discretionary power to certify deportation appeals such that they could be heard out of country, with effect from 28 July 2014 so as to enable the Secretary of State to certify an appeal advanced on Article 8 human rights grounds against deportation to be brought from abroad. Previously such a power had only been available in national security cases.
6. After the Government success in the Court of Appeal in *Kiarie and Byndloss* in October 2015, (albeit that permission to appeal had been granted by the Supreme Court and the appeal listed to be heard in early February 2017), from 1 December 2016 section 63 of the Immigration Act 2016 extended section 94B to any human rights appeals removing the restriction on such cases to deportation only¹. This meant that the judicial review is the only avenue of challenge to such certificates to seek to challenge a decision to certify that the appeal should be out of country. The decision of the Supreme Court in *Kiarie and Byndloss* [2017] UKSC 42 [2017] 1 WLR 2380 has thrown that whole statutory provision and the policy that underpins it into chaos.

¹ The Immigration Act 2016 (Commencement No. 2 and Transitional Provisions) Regulations

Section 94B of the Nationality Immigration and Asylum Act 2002

7. It was more than 30 years ago that, in the House of Lords first expressed about the value of an appeal which was required to be brought from abroad. In *R (Khawaja) v Secretary of State for the Home Department* [\[1984\] AC 74](#) Lord Fraser of Tullybelton at pp 97-98:

“... 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.”

8. Section 94B of the 2002 Act allowed a human rights claim to be certified where the appeals process has not yet begun or is not yet exhausted if the Secretary of State considers that removal pending the outcome of an appeal would not breach section 6 of the Human Rights Act 1998. One ground upon which the Secretary of State *may* certify a claim under section 94B is that the person liable to removal or deportation would not, before the appeal process is exhausted, face a real risk of serious irreversible harm if removed to the country of return.
9. By section 92(3) of the amended 2002 Act, an appeal under s.82(1)(b) must be brought from within the UK unless a certificate has been made under s.94 or s.94B of the 2002 Act².
10. The result of section 94B certification was that the right of appeal against the decision to refuse the human rights claim is non-suspensive, i.e. it is not a barrier to removal. Any appeal can only be lodged and heard, or continued if the claim is certified after the appeal is lodged, while the person is outside the UK.
11. Section 94B of the Nationality, Immigration and Asylum Act 2002 as it stood when it came into force on 28 July 2014 provided:

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*

² There are also provisions relating to safe third countries which do not apply in the present circumstances.

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.

12. Regulations 24AA and 29AA were introduced into the Immigration (European Economic Area) Regulations 2006 on 28 July 2014. Regulation 24AA allows non-suspensive appeals in certain EEA deportation cases to reflect the provision in Article 31 of the Free Movement Directive. The Home Office has separate guidance is available for EEA cases: Regulation 24AA of the Immigration (European Economic Area) Regulations 2006. Although it is primarily used in non-EEA deportation cases, section 94B may also be used in certain EEA deportation cases where the claim under the EEA Regulations is being considered for certification under regulation 24AA, but the claim also constitutes a human rights claim which will give rise to a right of appeal under section 82 of the 2002 Act if refused.

Legislative History

13. The section 94B certification provisions were subject to considerable criticism while passing onto the statute books, mainly suggesting that they violated the ECHR and laws of procedural fairness laid down in the common law. It is clear from the statement of the Home Secretary during the passage of the bill that the stated aims were inter alia.

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)

14. Concerns were raised by MPs regarding the certification process, particularly with regard to maladministration in the SSHD decision-making and appeals process, as well as potential breaches of Article 8 ECHR the Home Secretary confirmed that the appeals system would protect fundamental human rights (Column 62).

Extension of the powers by the Immigration Act 2016

15. Between 28 July 2014 and 31 December 2016 the SSHD issued 1,175 certificates pursuant to section 94B in relation to foreign criminals, all, therefore, with arguable appeals. Of those 1,175 persons, the vast majority were deported in advance of their appeals. But by 31 December 2016 only 72 of them had filed notice of appeal with the tribunal from abroad and none had succeeded. In addition, over 1,200 EEA foreign national offenders were removed under equivalent powers and 288 lodged an appeal. This demonstrates that less than 1 in 3 of those in non-EEA cases lodged appeals and to date there has been 100% dismissal rate in those out of country appeals.
16. Hence it was the early “success” of this policy (when by that time between July 2014-June 2015, over 230 foreign national offenders were removed under these powers and 67 lodged an appeal, of which three have been determined and were dismissed) the Immigration Minister James Brokenshire said at the time of the Immigration Bill in 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 ‘deport 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.”*

17. Hence this led to the enactment of section 63 of the 2016 Act that now extends that to all human rights appeals under this section. In practice this will mean article 8 claims and not asylum or article 3 claims unless they are separately certified as ‘clearly unfounded’ under section 94 of the 2002 Act. Section 63 provides:

“Appeals within the United Kingdom: certification of human rights claims

(1)Section 94B of the Nationality, Immigration and Asylum Act 2002 (appeals from within the United Kingdom: certification of human rights claims made by persons liable to deportation) is amended in accordance with subsections [\(2\)](#) to [\(5\)](#).

(2)In the heading omit “made by persons liable to deportation”.

(3)In subsection (1) omit the words from “who is liable” to the end of paragraph (b).

(4)In subsection (2) for the words from “removal” to “removed” substitute “refusing P entry to, removing P from or requiring P to leave the United Kingdom”.

(5)In subsection (3) for the words from “removed” in the first place it appears to “removed” in the second place it appears substitute “refused entry to, removed from or required to leave the United Kingdom”.

(6)In section 92(3)(a) of that Act (cases where human rights claim appeal must be brought from outside the United Kingdom) omit “made by persons liable to deportation”.

18. Under that provision an appeal can (and with reference to the stated policy intention it appears) will be certified:

- where the Home Office view is that removal would not breach the HRA 1998 (and therefore the ECHR) (section 94B(2))
- where the Secretary of State considers that the person would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the proposed destination (section 94B(3))

19. In the House of Lords Committee debate on 3 February 2016 Lord Keen of Elie (the Advocate General for Scotland and the Government’s leading counsel in the Supreme Court) emphasised that it was a manifesto commitment to extend the certification power to all article 8 human rights claims:

“we suggest that it is in the public interest that we maintain immigration control across the board, that means and included prompt removal in cases where it is safe to do so. It is simply counter-productive to allow people whose human rights claims have been refused ...or rejected to build up their private or family life while they wait for their appeal to be determined”

20. He said the power will never apply and does not apply in its existing form under section 94 in cases based on article 3 of the ECHR. Where it does apply each case will need to be assessed on its own facts: *“We will always ask whether there are reasons why an effective appeal could not be brought from outside the United Kingdom and any reasons will be fully considered when deciding whether to certify such a case”.*

21. He noted the concerns about out of country appeals as to whether they can be an effective remedy but sought to emphasise by comparison (as he did unsuccessfully in the Supreme Court) that the Home Office statistics from the 5 years to July 2015 shows that 38% of entry clearance appeals succeeded and hence sought to draw an analogy from that.

22. In introducing the extension of this provision the Home Office relied on the approach of the Court of Appeal in *Kiarie and Byndloss* [2015] EWCA Civ 1020 :

“In the first year that the Immigration Act 2014 was in force, over 230 foreign national offenders have been deported before their appeal was heard. Previously, most of these individuals would not have left the UK until their appeal had been determined. The Court of Appeal recently considered two cases concerning the operation of the certification provisions that were introduced in the Immigration Act 2014, in relation to those liable to deportation. It held that the Government are

generally entitled to proceed on the basis that an out-of-country appeal would be a fair and effective remedy”.

23. He emphasised that the power was subject to the scrutiny of judicial review and the Home Office have confirmed that where a judicial review claim challenging the decision to certify under the new power, removal would normally be suspended pending a decision on permission.
24. As at 3 March 2016 there had been 852 certificates, 52 out of country appeals and 0 successes. It is not clear how many certificates have issued and withdrawn/challenged following judicial review proceedings.

The operation of section 94B certification

25. The power created is discretionary and in common with any such provision which significantly restricts access to a tribunal, s.94B must be read restrictively.
26. In exercising the discretionary power to certify a claim pursuant to s.94B of the 2002 Act, the Secretary of State must therefore consider the impact of a **temporary** removal from the UK. Thus, in justifying such removal for the purposes of any qualified human right, the Secretary of State must thus demonstrate that removal of a person **before** consideration of a person’s ECHR rights has been completed, and for the period while that process is being completed (thereby requiring his/her absence from the jurisdiction during that process), is justified. In particular, she must demonstrate that there is no less intrusive means of achieving any legitimate aim pursued (see *SSHD v Huang* [2007] UKHL 11 at 19).
27. Hence whilst the power is discretionary, the Home Office guidance in the deportation cases showed the Home Office had sought to use these powers in all cases:

‘The Government’s policy is that the deportation process should be as efficient and effective as possible and therefore case owners should seek to certify a case using the section 94B power in all cases meeting these criteria where doing so would not result in serious irreversible harm’.

28. Similarly the further guidance initially published in December 2016 provided³:

“There is a public interest in maintaining effective immigration control. In the context of human rights claims, it is the UK government’s policy to further that public interest by ensuring that people who have been refused a right to be in the UK should leave the UK at the earliest opportunity and not automatically be able to remain and build up new claims or strengthen existing claims (under, for example, Article 8) where an appeal from outside the UK would not cause serious irreversible harm or otherwise

³ All 94B guidance has now been withdrawn as of 1 August 2017

breach human rights. You must therefore consider whether section 94B certification is appropriate in all cases where a human rights claim has been made and is refused, unless it is:

(for non-deport cases only), outside the Phased implementation for non-deport cases or a case listed below as not suitable for certification”.

29. Importantly, and following the criticisms by the Court of Appeal in *Kiarie*, the new guidance that followed it stated that a case should only be considered for certification if the claimant has been informed that the power might apply and given the opportunity to provide reasons why their claim should not be certified.

Kiarie and Byndloss in the Court of Appeal

30. The challenge to section 94B was initially heard in the Court of Appeal. The Court of Appeal’s judgment in *R (Kiarie and Byndloss) v SSHD* [2015] EWCA Civ 1020, concluded:

- the statutory precondition for certification under s.94B is that set out at s.94B(2): the Secretary of State “cannot lawfully certify unless she considers that removal pending the outcome of an appeal would not be in breach of any of the person’s Convention rights [...]” [*Kiarie and Byndloss* at 34];
- while one “ground” for certification is that a person would not, before the appeals process is exhausted, face a real risk of serious, irreversible harm (if removed), that ground “does not, however, displace the statutory condition in subsection (2), or does it constitute a surrogate for that condition”. This means that, even if the Secretary of State is satisfied that removal would not give rise to such risk, “that is not a sufficient basis for certification” [35].
- It follows that the [originally] published guidance on s.94B is “inaccurate and misleading” in focusing as it does on the criterion of serious, irreversible harm [36].
- In deciding whether a s.94B certificate can be made, (i) consideration must be given “to whether removal pending determination of an appeal would interfere with the person’s rights under article 8”; (ii) if so, consideration must be given to whether “the interim period would meet the requirements of proportionality”. If the answer to the first question is ‘yes’ and the second ‘no’, then certification is unlawful [38].

In considering proportionality [44]:

- it “may be thought that less weight attaches to the public interest in removal [of foreign national criminals] in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period”; but

- *“the fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in this context also”*; and so
- public interest is *“not a trump card”* but is an *“important consideration in favour of removal”*.
- Even if the statutory condition is met, the Secretary of State *“has a discretion whether to certify or not”* [45].

Hence the Court held in summary

- 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]⁴.
- But, importantly, *“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].
- The Court concluded [64] that although 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.
- There is a clear requirement that a person should be *“informed in advance that consideration was being given to the certification of [his/her] claim under section 94B”*. Absent that process, a person will not have been *“given a fair opportunity to make representations on the subject”*. Such procedural failings *“have to be viewed with caution and they will often invalidate a decision”* [73(i); 74].

Hence her subsequent guidance was:

- *an out-of-country appeal is generally fair;*

⁴ For reasons for this conclusion, see paras 64-70 of the Judgment. However the Court had very limited evidence to suggest that there might be any difficulties in requiring the Tribunal to comply (in practice) with its obligations of fairness.

- *oral evidence from the appellant and/or attendance at the appeal by the appellant are not generally required for an appeal to be fair and effective; and*
- *the SSHD is entitled to rely on the specialist immigration judges within the tribunal system to ensure that the person is given effective access to a remedy against the decision.*

31. She accepted that the person may make representations to the effect that, despite the powers of the Tribunal to secure a fair and effective appeal, his or her personal circumstances mean that he or she would not be able to access a fair and effective remedy. She cited examples of the steps the Tribunal could take to ensure a fair and effective appeal where the appellant is outside the UK are to: consider whether the appeal can be fairly determined without the appellant giving oral evidence including considering any written evidence submitted by the appellant, documentary evidence and oral or written evidence from family members, friends and others.

The Supreme Court in Kiarie and Byndloss

32. The Supreme Court granted permission to appeal in both *Kiarie and Byndloss* (those appeals were heard on 15 and 16 February 2017) and judgment given on 14 June 2017.

33. The issues to be considered in the appeal were

- The correct approach to cases where there is a dispute before the court or tribunal regarding the conclusions of fact reached by the Secretary of State in the course of determining whether to exercise her power to certify a human rights claim under s.94B of the 2002 Act; whether in resolving that dispute the court or tribunal should hear evidence, including evidence that post-dates the decision of the Secretary of State; and whether, in any case, the Court of Appeal was wrong to hold that the Wednesbury standard should be applied.
- The correct approach to be taken to an assessment of the proportionality of, and in particular the nature of the public interest in, the removal of a person liable to deportation under s.3(5)(a) of the Immigration Act 1971, pursuant to certification under s.94B of the 2002 Act and pending the resolution of his human rights appeal against deportation, and in particular, as against, the protection to be given to children's best interests.
- Whether the Court of Appeal was wrong in concluding that a requirement to pursue a human rights appeal against deportation from abroad will not, in the generality of criminal deportation cases, amount to a breach of the procedural guarantees provided by Article 8, including those guarantees arising from and under the Convention on the Rights of the Child.
- The correct approach to the assessment of the best interests of any children affected by the removal of a person liable to deportation under s.3(5)(a) of the Immigration Act 1971, pursuant to certification under s.94B of the 2002 Act and pending the

resolution of his human rights appeal against deportation. In particular, having regard to the Secretary of State's own policies, the nature and extent of any duty on her to conduct inquiries as to the best interests of any affected children before taking the decision to certify and or maintain certification.

34. The Supreme Court held that the 94B certificates represented a potential interference with the appellants' rights under article 8. Hence deportation pursuant to them would interfere with their right to respect for their private or family lives established in the UK and, in particular, with the aspect of their rights which required that any challenge to a threatened breach of those rights should be effective.
35. Inherent in a lawful section 94B certification is a recognition that notwithstanding the SSHD's position on substantive deportation or removal (i.e. that she has taken a decision to deport or remove and concluded that no breach of article 8 ECHR would arise) that there is a right of appeal against that decision and it is open to an immigration judge to conclude differently. Lord Wilson [35,54] was keen to emphasise that the SSHD has accepted that these appeals were arguable and had not been certified as clearly unfounded.
36. Hence the key issue is whether there is breach of section 6 HRA 1998 occasioned by removal pending appeal on the facts by a breach of article 8 ECHR.
37. The burden was on the secretary of state to establish that the interference was justified and, in particular, that it was proportionate. Among other things, she had to show that deportation in advance of an appeal struck a fair balance between the rights of appellants and the interests of the community and the Court concluded that the secretary of state had failed to do that.

Obstacles to presenting the appeal from abroad

38. Lord Wilson giving the main judgment focussed on the procedural aspects of Article 8 in allowing the appeal: "*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].
39. There were several obstacles in the way of pursuing an effective appeal from abroad from the evidence filed by the solicitors and from Bail for Immigration Detainees ("BID") as the interveners which was critical to the successful outcome in this case and in the Court understanding the practical impact.
 - The first related to legal representation. It was not clear that legal aid would be available for the appeals. The appellants might well have to represent themselves. Even if they were able to secure legal representation, the appellants and their

lawyers would face significant and formidable difficulties in giving and receiving instructions both before and during the hearing.

- Second, the appellants would be prevented from giving oral evidence about matters such as rehabilitation and the quality of their relationships with others living in the UK, in particular any children, partners or other family members. In many cases, an arguable appeal against deportation was unlikely to be effective unless there was a facility for the appellant to give live evidence to the tribunal. An appellant might be able to give evidence on screen, but there were a number of financial and logistical barriers to his doing so.
- Third, appellants would probably face insurmountable difficulties in obtaining supporting professional evidence, for example evidence from the relevant probation officer as to the risk of reoffending, evidence from a consultant forensic psychiatrist about the level of risk and evidence from an independent social worker about the quality and importance of the appellant's relationships with family members (see paras 60-61, 63, 74, 76, 78 of judgment of Lord Wilson).

40. In determining whether the procedural obligations under article 8 had been breached, Lord Wilson at 52-54 observed that the relevant circumstances must be considered against four features of the background.

- The first is that the proposed deportations would be events of profound significance for the future lives the appellants and their families.
- The second is that, in the absence of certificates that they are clearly unfounded, the proposed appeals of these appellants must be taken to be arguable:
- The third is that, particularly in the light of this court's decision in the *Ali* case, 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: see para 33 above. He needs to be in a position to assemble and present powerful evidence.
- The fourth is that 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. He approved Lord Dyson's *obiter* suggestion in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 WLR 5341, that, had the rules for the fast track been fair, it would have been irrelevant that it was the Home Secretary who had caused them to be engaged, but then went on to note:

"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”.

41. Lord Wilson concluded [76] that, for their appeals to be effective, they would need at least to be afforded the opportunity to give live evidence from abroad. The evidence of the SSHD was that in such appeals applications to give evidence from abroad are very rare. HE rejected the argument that the appellant had no interest in giving oral evidence in support of his appeal and concluded that it was because the financial and logistical barriers to his giving evidence via video-link were “almost insurmountable”. In this case he found that the Court of Appeal had indorsed a practice in which, so it seems, the Home Secretary has, not always but routinely, exercised her power under section 94B to certify claims of foreign criminals under article 8, but that she had done so in the absence of a Convention-compliant system for the conduct of an appeal from abroad and, in particular, in the absence of any provision by the Ministry of Justice of such facilities at the hearing centre, and of some means by which an appellant could have access to such facilities abroad, as would together enable him to give live evidence to the tribunal and otherwise to participate in the hearing.

Lord Carnwath: a note of caution?

42. There is however a clear note of caution in Lord Carnwath’s minority judgment: Whilst he agrees that the appeals should be allowed, he clearly sets out his view as to how matters should proceed henceforth. Whilst agreeing that there was no evidence from the SSHD that any serious consideration had been given by her at the time of certification or later as to how those problems were to be overcome in practice, and noting that the evidence did not show that the Secretary of State had the material necessary to satisfy herself, before certification, that the procedural rights of these appellants under article 8 would be protected, such that the appeals would be “effective, it was only on that limited basis he allowed the appeal [105]. He went on to find

- No reason on 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 (observing that things have moved on a long way since Khawaja) [103]
- Observed that the appeals had come to the Court “by a less than ideal route” [104] without regard to what has become the critical issue.
- Whilst observing some of the most compelling evidence now available had come from BID, he noted that it had come in very late in the day (no criticism of BID(!), and without time for evaluation by the tribunal or the Court of Appeal.

- With hindsight, it might have been better if the Court of Appeal, having decided to grant permission, had 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 in cases such as this.
- He posits that it may be that the best way to clarify these issues would be some form of a test case before the Upper Tribunal, at which the practicalities can be looked at in more detail, and guidance developed for the future.

Proportionality Assessment

- 43.** In order to undertake a lawful, fully informed proportionality assessment with the requisite anxious scrutiny, it is quite proper (and, indeed, necessary) for the Court to consider the evidence even in the context of a judicial review, with reference to the wording of the statutory scheme and the HRA 1998 itself.
- 44.** The UKSC concluded that in the context of a claim that deportation pursuant to the certificates under section 94B would breach the procedural requirements of article 8, 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: see *R (Aguilar Quila) v Secretary of State for the Home Department* [\[2011\] UKSC 45](#), [\[2012\] 1 AC 621](#), para 45.
- 45.** The Court concluded that addressing the fair balance required by article 8 the proper analysis is that the Home Secretary has failed to establish that it is fair [78]. The SSHD had failed in the circumstances to discharge the burden on her 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.
- 46.** The Court did not go on to address whether the power (as set out in the alleged objectives behind the power to certify a claim under section 94B) was rationally connected to them and as to whether nothing less intrusive could accomplish them.
- 47.** The Court did not address whether there was a different public interest in temporary removal pending appeal and permanent removal/deportation. Whilst it may be thought less justification is required for temporary removal pending appeal because it is short-

term and not permanent, in fact and in particular in cases involving children precisely temporary and unknown period of separation and/or disruption to education and housing by travel abroad go directly to the proportionality of such removal.

Role of the Court

48. The Court of Appeal had accepted that the challenge to a certification decision is by way of Judicial Review. Importantly because of the express terms of section 94B and the reference to a breach of section 6 HRA 1998, the Court of Appeal in *Kiarie* had held [32] :

*“it follows from all this that the line of cases to the effect that, where a right of appeal exists against a removal decision, judicial review will not lie unless special or exceptional factors are in play [...] has no direct relevance in this context”*⁵.

49. As for the principles applicable to the judicial review (i) the findings of fact made by the Secretary of State are amenable to judicial review on normal *Wednesbury* grounds; but (ii) for the assessment of proportionality, the Court must *“form its own view, while giving appropriate weight (which will depend on the context) to any balancing exercise carried out by the primary decision-maker”* [33].

50. The lawfulness of the decision must be assessed on the basis of the evidence before the Secretary of State at the time of that decision under challenge. The Court rejected the contention that the court should decide the matter for itself on the basis of all the evidence now before the court. That would go beyond the usual parameters of judicial review of the Secretary of State's decisions and would involve a usurpation of her role as the person entrusted by Parliament with the power to certify under section 94B [99]. Although the Court did observe [30] the decision of the Court of Appeal in *R (Caroopen) v Secretary of State for the Home Department* [2016] EWCA Civ 1307 in relation to subsequent decision letters not necessarily falling foul of the general admonition against “rolling review”.

51. In order to assess whether there is a breach of section 6 HRA 1998, the Court (and the SSHD) must address why and how the public interest in removal pending appeal requires this on the facts. The Court is a public authority for the purposes of the Human Rights Act 1998 and, accordingly, it must act compatibly with ECHR rights. It is clear from the decision of the Court of Appeal in *Kiarie* [33] in an application for judicial review of the certification decision, the Court must assess *for itself* whether the interim removal of the applicant for the indeterminate duration of his appeal proceedings would constitute a disproportionate interference with his rights under Article 8 ECHR (with appropriate weight to be given to the position adopted by the Respondent, which will depend on the circumstances of the case). Para [33], applying the decision of the Supreme Court in *R (Lord Carlile of Berriew QC and others) v SSHD* [2014] UKSC 60, [2014] 3 WLR 1404):

⁵ The Secretary of State had argued that the existence of an out-of-country appeal was presumptively an adequate remedy not only for the deportation decision but for the s.94B certificate. The Court did not accept that approach.

52. “But as to the assessment of proportionality, the decision of the Supreme Court in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 shows that the court is obliged to form its own view, whilst giving appropriate weight (which will depend on context) to any balancing exercise carried out by the primary decision-maker”.

53. Importantly the Supreme Court agreed [43] that in proceedings for judicial review of a certificate under section 94B:

“There is no doubt that, in proceedings for judicial review of a certificate under section 94B, the court or tribunal must also decide for itself whether deportation in advance of the appeal would breach the applicant’s Convention rights. There is no doubt that, in making that decision, it must assess for itself the proportionality of deportation at that stage. As Lord Neuberger of Abbotsbury said in the proceedings for judicial review in R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945, at para 67:

“... where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision.”

54. Here the issue which arises relates to the court’s treatment of the Home Secretary’s findings of fact when it comes to decide for itself whether deportation in advance of the appeal would breach the applicant’s human rights. To what extent should it inherit and adopt them? In the Court of Appeal Richards LJ relied on *Giri v SSHD* [2015] EWCA 784 for the conclusion that the SSHD’s findings of fact are open to review on normal *Wednesbury* principles, applied with the anxious scrutiny appropriate to the context.

55. However as Lord Wilson observed the difficulty is that the *Giri* case did not engage the court’s duty under section 6 of the HRA Act 1998. He distinguished it with reference to the Supreme Court decision in *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104, held: [74]

“... where it is required in order to give effect to an occupier’s article 8 Convention rights, the court’s powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view.” Citing Lord Sumption in the *Lord Carlile* case, at para 30: *“... when it comes to reviewing the compatibility of executive decisions with the Convention, there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate.”*

56. Hence in the course of a judicial review of her certificate under section 94B if it is to discharge its duty under section 6 of the 1998 Act, the court may need to be more

proactive than application of the criterion would permit. In many cases the court is likely to conclude that its determination will not depend on the Home Secretary's findings of fact or that, if it does, her findings are demonstrably correct and should not be revisited. But, even in the course of a judicial review, the residual power of the court to determine facts, and to that end to receive evidence including oral evidence, needs to be recognised in this context.

Impact on Children

57. The Supreme Court did not go on to consider Byndloss's argument relating to the duty of inquiry in relation to the position of children affected by deportation in such circumstances which was disappointing.
58. In an earlier decision post the Court of Appeal in *Kiarie* but before the judgment of the Supreme Court the Court of Appeal held in *OO(Nigeria) v SSHD* [2017] EWCA Civ 338 that in relation to the best interests of children affected by interim removal under s.94B, a person who was liable to deportation had to be told that interim removal was under consideration so that they could make representations on it. Hence it should not be necessary for the SSHD to make separate enquiries as to the position of any child. If the SSHD was not satisfied that all had been said that might be about the interests of the child, then there might be a duty to enquire further.
59. On the facts in *OO* the Court concluded that it would be in his son's best interests for O to remain in the UK while he pursued his appeal against the order. If O were to be removed under s.94B, he and his son would be separated for a likely substantial period. The alternative, of moving the whole family to Nigeria, was unrealistic. Such separation was contrary to the son's best interests. His education was likely to suffer and he would be likely to suffer distress and anxiety. However, that was not because of anything specific to the son's situation or circumstances during the interim period, it was because it was better that he should not be separated from his father, and because a further separation would be likely to exacerbate the effect of the separation that had already occurred during O's imprisonment and immigration detention. The son's best interests were a primary consideration. There was a strong public interest in O's removal as a foreign criminal, even on an interim basis pending the pursuit of an appeal against the deportation order which might succeed. However it was not so strong a factor as that in favour of permanent removal on deportation. The public interest was not a trump card, but it was an important consideration. The strength of the public interest in removal was reduced by the mitigating factors present the Court concluded it would be a disproportionate interference with O and his son's article 8 rights to be removed under s.94B pending the pursuit of his appeal. The best interests of the son should prevail over the public interest in the removal of foreign criminals, given the mitigation as regards the offence, O's conduct in relation to it and his conduct since it was committed.

Impact on ILR

60. In *OO* the Court also agreed that an appellant would be in a less favourable position after an out-of-country appeal than he would be after a successful in-country appeal, because he would lose his indefinite leave to remain on deportation from the UK (by operation of statute, sections 78 and 79 NIAA 2002) and would not regain it on the success of the appeal. However, the Court concluded that this was *not* a relevant factor in assessing the effect of a possible s.94B certification because in practice, other things being equal, an appellant would be able to return to the UK after a successful out-of-country appeal and he would be able to resume his family life. NB it was the SSHD's argument (*not recorded in the judgment*) that if an out of country appeal were successful in such circumstances the person would not necessarily be able to return to the UK, only that the deportation order would be set aside.

Remedies going forward

- What remedies there are for those persons deported from the UK pursuant to section 94B who either lodged appeals and lost, lodged appeals but those are still pending or who did not lodge an appeal at all.
- Whether they can be returned without issuing further proceedings, whether they need to show prejudice evidenced by reasons for not pursuing their appeals. Legal aid is available for such judicial review claims (subject to the permission test of course), unlike funding for the article 8 ECHR appeals themselves (save for Exceptional Case Funding "ECF").
- For those who brought appeals and lost whether and how they can apply to appeal out of time to the Upper Tribunal or apply to have their determinations set aside under rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
- Whether as alluded to by the SSHD in a recent Court of Appeal hearing she has introduced facilities for "effective" out of country appeals in certain countries
- Whether there is to be a test case as suggested by Lord Carnwath: its terms and parameters and the impact of that on the statutory scheme

Access to Justice : common law principles:

The UNISON case

61. The approach of the Court on access to justice in *Kiarie and Byndloss* in the human rights context was then followed in the Supreme Court in *Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] 3 WLR 309 in reliance on common law principles.

62. The issue in this case was whether the fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal

("EAT") were unlawful because of their effects on access to justice. In this judicial review, the trade union UNISON was the appellant, supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain as interveners, challenged the lawfulness of the Fees Order, which was made by the Lord Chancellor in the exercise of statutory powers which was argued was an unlawful exercise of those powers, because the prescribed fees interfere unjustifiably with the right of access to justice under both the common law and EU law, frustrate the operation of Parliamentary legislation granting employment rights, and discriminated unlawfully against women and other protected groups.

63. The Court recognised as with the relationship between those facing deportation and the Home Secretary that there was a power imbalance, there between employers and employees was generally characterised as an imbalance of economic power.
64. The Court also recognised the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, such that Parliament has long intervened in those relationships to confer statutory rights on employees, (rather than leaving their rights to be determined by freedom of contract) and measures under legislation giving effect to EU law. Importantly the Court concluded in order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice.
65. There were two types of fees depending on complexity : fees for a single claimant bringing a type A claim total £390, payable in two stages: an issue fee of £160 and a hearing fee of £230. For a type B claim fees for a single claimant total £1,200, comprising an issue fee of £250 and a hearing fee of £950 (usually discrimination cases) . It was the imposition of a higher rate of fees in the latter type B cases which Baroness Hale held had a disparate impact on groups with protected characteristics, such as women, and was thereby indirectly discriminatory, contrary to [sections 19 and 29\(6\) of the Equality Act 2010](#). Charging higher fees for Type B claims had not been shown to be a proportionate means of achieving the stated aims of the fees regime. There was a fee remission system where applicable however the evidence was that since the introduction of the fees, there had been a 66-70% reduction in the number of claims brought in employment tribunals
66. The justification including that the fees would help to transfer some of the cost burden from general taxpayers to those that used the system, or caused the system to be used was rejected by the Court as sufficient given the evidence of the impact on claimants and given the constitutional right of access to the courts being inherent to the rule of law. Courts existed in order to ensure that the law was applied and enforced. In order for the courts to perform that function, people, in principle, had to have unimpeded access to them. That right of access was valuable to society as a whole, not just to the particular individuals involved. It had long been recognised and any hindrance or impediment by the executive to that right required clear authorisation by Parliament [paras 66-78 of Lord Reed's judgment].

67. The Court held that the Order was ultra vires as there was a real risk that persons would effectively be prevented from having access to justice. The fall in the number of claims since the introduction of the fees had been so sharp, substantial and sustained that it warranted the conclusion that a significant number of people who otherwise would have brought claims had found the fees to be unaffordable. The question of whether the fees effectively prevented access to justice had to be decided according to the likely impact of those fees on behaviour in the real world. The court was not to be deflected from that conclusion by the Lord Chancellor's discretionary power of remission as the effects of the Order had occurred notwithstanding the existence of the remission scheme. The fees order could not be justified as a necessary intrusion on the right of access to justice. Although the primary aim of the Order was to transfer some of the cost burden from taxpayers on to the users of the tribunal system and that objective had been achieved to some extent, it did not follow that fees which intruded to a lesser extent upon the right of access to justice would have been any less effective [99-100].

JCWI/Liberty fees challenge

68. Earlier than UNISON, in November 2016, following pre-action correspondence from JCWI and Liberty the Government backtracked on the huge fee increases imposed on the Immigration and Asylum Tribunal brought in to the Tribunal in October 2016.

69. Hence from 25 November 2016 everyone pursuing immigration and asylum appeals in the First-tier Tribunal will pay the old fees which are far lower (£140 instead of £800 for a full hearing in court and £80 instead of £490 for a paper hearing). Everyone who had to pay higher fees was entitled to have the difference refunded.

70. The new, slightly more generous, system of fee exemptions and remissions in place from 13 October will remain in place. In the course of negotiating with the Lord Chancellor prior to bringing a legal challenge against the fee hikes, there were also concessions and clarification on how the exemptions should be applied by court staff.

71. As a result of formal steps taken by JCWI, the Lord Chancellor has:

- Agreed to amend the wording of her guidance on remissions to remove words that wrongly suggested applicants for a fee remission would have to show that their case was 'unusual' in some respect;
- Confirmed that the application of the Lord Chancellor's power to remit fees would not be discretionary: anyone who can show that they cannot realistically afford the fees **must** be granted a remission;
- Stated that that it is the practice of HMCTS to allow a further 14 days for new evidence, if an application for fee remission is made with insufficient evidence.

72. However a Ministry of Justice spokesperson at the time stated, "*Our commitment to fee reform is unchanged, and we will bring forward new plans in due course*".

73. This intent stems from a fundamental problem with the Ministry of Justice's approach to court fees. They want to make the courts and tribunals system financially self-sufficient, so that the users of the justice system pay the full cost, and there is no additional cost to the taxpayer.
74. The desire to make immigration appeals pay for themselves is financially incoherent. In the Immigration Act 2014 most appeals against immigration decisions were scrapped and replaced with 'administrative review' by the Home Office. The only cases in which people can appeal to the Tribunal now are human rights cases, asylum and refugee protection cases, and cases involving fundamental EU rights. If, as the Lord Chancellor claims, those who can't afford the fees won't have to pay them, it leaves very few people left who are going to be contributing to the system. Such measures have the impact of reducing scrutiny of poor Home Office decision making, under the very questionable cloak of raising funds.

Nationality fees.

75. The Court of Appeal in *Ric Williams v SSHD* [2017] EWCA Civ 98 the appellant challenged the decision of the secretary of state's rejection of his application for citizenship for non-payment of the required fee. He was a child who had been born in the UK and had remained there since birth. His parents were Jamaican nationals who had overstayed. He and his family were accommodated by a local authority under the [Children Act 1989 s.17](#), which meant that the local authority had assessed them as destitute. He applied for registration as a British citizen under the British Nationality Act 1981 s.1(4) which is by entitlement upon completion of the 10 year qualifying period. He was unable to pay the £673 fee required by the [Immigration and Nationality \(Fees\) Order 2011](#) and the [Immigration and Nationality \(Fees\) Regulations 2013](#) made pursuant to section 51 Immigration, Asylum and Nationality Act 2006. There was no provision under the for a fee exemption or waiver.
76. The Appellant argued that the operation of the legislative scheme without a power of fee exemption or waiver for cases such as his was ultra vires the secretary of state's powers under the primary legislation; the scheme breached his [ECHR art.8](#) rights, both regarding family life, in that it imposed uncertainty of living in the UK on him and his parents, and regarding private life, in that he was denied the benefits to social identity conferred by citizenship; the scheme discriminated against him, breaching his rights under [ECHR art.14](#), read with article 8 ECHR. The Court concluded that the language of the statutory scheme was clear: Section 51 of the 2006 Act empowered the secretary of state to require that applications including those under s.1(4) of the 1981 Act had to be accompanied by a specified fee. Under [s.51\(3\)](#), the secretary of state had been given a discretionary power to make exceptions to any fee requirement and/or a discretion to waive fees. The secretary of state had chosen not to exercise such power regarding

s.1(4) applications. An application, unaccompanied by a fee, was not to be treated as valid. There was no fundamental or constitutional right to citizenship registration for persons in the appellant's position. The right was one Parliament had chosen to create and bestow in specified circumstances. Those circumstances included the requirement of an application accompanied by a fee. Nothing in the fee requirement defeated the statutory purpose. Further, the limitation of the class to whom the postulated fee exemption or waiver applied did not work. The Court rejected the ultra vires argument on the basis that it could not be confined to children receiving assistance under s.17 of the 1989 Act: logically, it extended to all persons unable to pay the fee [38-48].

77. The Court rejected the argument as to the interference with Article 8 ECHR. There were few advantages over the grant of leave to remain, and he had the right to seek leave to remain without paying a fee. The secretary of state had conceded that she could not refuse an application for citizenship if such refusal were to involve a breach of article.8, but no authority had been cited in support of the proposition that refusal to grant citizenship could constitute a breach of art.8. The Court distinguished [R. \(on the application of Johnson\) v Secretary of State for the Home Department \[2016\] UKSC 56](#) was not authority for the contrary proposition. On the facts, there were no circumstances which could begin to engage article 8 and even if it had been engaged, the refusal to exempt the appellant from the fee was insufficient to amount to interference with his art.8 rights. Even if there was interference, it was marginal, and justified by the aim of an administratively efficient scheme (paras 56-64).

Pending Court of Appeal cases: Fraud and Article 8 ECHR

78. There has been a significant amount of litigation over the last few years in respect of the impact of alleged fraud in the context of the Test of English for International Communication (TOEIC) administered by the Educational Testing Service (ETS), following the BBC Panorama documentary in 2014.

79. In a large number of cases from 2014 onwards, ETS provided information to the Home Office claiming that certain TOEIC test results were procured by deception which led to the Home Office curtailing the leave of, or refused further leave to, a large number of people. Some of these decisions resulted in in-country rights of appeal, while others carried only an out-of-country right of appeal: under the old appeals regime, where a decision to remove was taken under section 10 of the Immigration and Asylum Act 1999, there was a right of appeal which was out-of-country only, unless an asylum or human rights claim had been previously made.

80. Under the new appeals regime a right of appeal is now contingent on the refusal of a protection or human rights claim, and so a decision to remove which does not involve human rights will not normally attract a right of appeal at all. Moreover those TOIEC fraud cases where human rights claims have been made largely in student cases have resulted in clearly unfunded certification by the SSHD under section 94 NIAA 2002.
81. However to date the courts have held in judicial review claims, the question of whether deception was used is not in general a question of precedent fact, and is reviewable only according to ordinary judicial review principles. By contrast, in an in-country appeal the tribunal must decide for itself whether deception was used, which will be an intrinsically fact-sensitive exercise.

Appeals:

82. In *SM & Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) the Upper Tribunal found that the Secretary of State's generic evidence in ETS/TOIEC cases suffered from '*multiple frailties and shortcomings*' including a lack of expertise, a lack of evidence from ETS itself, a lack of documentary evidence and a failure to adduce individual voice recording files in the case of the individual Applicants (at [63]; [100]). On the facts of the individual appeals it was found that the Respondent's generic evidence was not sufficient to discharge the legal burden of proof of dishonesty, though it was found to discharge what in *SM & Qadir* is described as an 'initial evidential burden' to be rebutted by appellants (successfully in that case). The UT's decision in *SM & Qadir* was upheld by the Court of Appeal, following the SSHD's concession that her appeal should be dismissed: *SSHD v Sharif Majunder; Ihsan Qadir* [2016] EWCA Civ 1167. In the course of giving judgement the Court reiterated that every ETS case will be fact-sensitive [27].
83. The SSHD agreed (post *SM and Qadir*) that she needs to review her decisions to refuse leave (where there are in-country appeals) based on that evidence and the Home Office Minister stated this to the Home Affairs Select Committee in December 2016. Consistent with that position, that inevitably she will also have review her decisions to refuse where there are out of country appeals. The issue is consistent with her public law duty when maintaining a decision to remove, *when* should that review take place: fairly and lawfully this should be now prior to any decision to maintain the decision to remove.

Judicial Review

84. Moreover in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC), McCloskey J at [89]-[90]⁶ held

We would observe that the forum of an in-country statutory appeal would be clearly superior to the hybrid model adopted in these proceedings for the full exploration and consideration of all the evidence and, in particular, the finding of whether the Applicant engaged in deception as alleged. This sounds on our conclusion concerning conspicuous substantive unfairness. The suitability of an out-of-country appeal in this sphere of litigation - and, indeed, in others - has not yet (to our knowledge) been fully tested at either tier and, thus, remains a moot question. In this context, we draw attention to what this Tribunal stated in SM and Qadir at [104]:

"We are conscious that some future appeals may be of the 'out of country' species. It is our understanding that neither the FtT nor this Tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination".

85. The Upper Tribunal now has experience of a broad range of "ETS/TOEIC" hearings: error of law hearings, remaking hearings, conventional judicial review hearings and the hybrid judicial review model adopted in this case. In SM and Qadir the Tribunal observed, at [102]:

"Furthermore, the hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind ..." .

86. The words "of this kind" refer to cases such as SM and Qadir and MA in which the facts relating to the relevant events are of critical importance and, in consequence, the evidence requires penetrating examination [90-91]. He went on:

"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

⁶ Referred to by the Supreme Court in *Kiarie and Byndloss* [67]

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. The conventional video link bail hearing, at which the subject is virtually present but making little or no active contribution, is to be contrasted.

For the avoidance of any doubt, we add that with the exception of the reception of limited oral evidence, the present challenge was of the classic judicial review variety and proved to be ideally suited to this species of legal challenge - without prejudice to (a) our comments in Gazi concerning the overall adequacy of this remedy in cases of this *genre* and (b) the further observation that the crucial issue of whether the Applicant engaged in deception in procuring his TOEIC certificates remains unresolved judicially.

- 87.** Hence the appropriate forum to resolve this issue of fact and whether judicial review is the remedy now requires consideration of whether there are 'special or exceptional circumstances' which make a case suitable for judicial review, albeit that the Applicant has a remedy in the form of an out-of-country appeal. The Court must examine whether that remedy is adequate to rectify the detriment caused to him by the section 10 decision, for the reasons identified below, which satisfies the *Lim* test.
- 88.** When the *Lim* test was examined in the Court of Appeal in *Mehmood and Ali v SSHD* [2015] EWCA Civ 744 to determine whether the out of country appeal was an effective remedy or whether there were special reasons why a JR could proceed, the Court of Appeal then concluded [49-53]:
- the court must accept that an out of country appeal is regarded by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act": *RK (Nepal)* at [33] *per* Aikens LJ.
 - Secondly, the existence of disputes of fact are rarely likely to constitute "special or exceptional factors" and would otherwise (per Sedley LJ in *Lim's* case (at [25]) be emptying Parliament's prescribed procedure of content"
 - judicial review proceedings are not best suited to resolve such issues
 - relied on the earlier approach of the President of UTIAC in *R (Gazi) v Secretary of State for the Home Department (ETS – judicial review)* [2015] UKUT 00327 (IAC) the default position in the case of disputes of opinion between experts, or between a witness of fact and an expert will also normally be an appeal.

- even if they sometimes have to be used for them, for example in "jurisdictional fact" eg in *Khawaja v Secretary of State for the Home Department* [1984] AC 74 and *R (A) v Croydon LBC* [2009] 1 WLR 2557 at [33].
- matters of procedural fairness arise in many cases, can be considered in the appellate process, and are rarely likely to constitute "special or exceptional factors": see Coulson J in *R (Ali Zahid) v Secretary of State for the Home Department* [2013] EWHC 4290 (Admin) at [16] ff.

Approach of the Court in Gazi

89. The Court of Appeal refused permission to appeal in the judicial review claim of *R (on the application of Gazi) v SSHD (ETS – judicial review)* IJR [2015] 00327 (IAC) on appeal from the Upper Tribunal. The Court referred to the SSHD's position that following her decision not to continue with her appeal in *Majunder & Qadir* [2016] EWCA Civ 1167 wherein she indicated that she will continue to oppose cases in which judicial review of a removal decision has been brought "following an ETS deception finding".
90. First in *Gazi* the Court did not consider there the duty on the SSHD to review her own section 10 decision to remove for the reasons given in circumstances where the Court itself noted in *Gazi* that the material change to that only came with subsequent evidence adduced in statutory appeals from a language-testing expert, Dr Harrison, which in statutory appeals cases has gone a significant way towards undermining the evidential force of the ETS material" [8].
91. Each case is fact sensitive and in light of any such subsequent decision the Applicant may or may not be able to satisfy the special or exceptional circumstances threshold in *Lim*.
92. Whilst Sales LJ held in *Gazi* that "since the Secretary of State did, and could rationally, form the view that the ETS material was good evidence of deception, as the evidence available to her stood at the time that she took her section 10 decisions", this does not absolve the SSHD her duty to review the decisions in light of that material.
- 93. In any event matters both legal and evidential have moved on significantly since that case was decided and the Supreme Court's judgment in *Kiarie and Byndloss v SSHD* on 14 June 2017.**
94. Where an Article 8 human rights claim has been made is trite law that such a claim if refused will attract a right of appeal pursuant to section 92 NIAA 2002 absent certification. Hence in any such claim clearly raises the question that the decision to remove breaches the Applicant's article 8 ECHR rights and the Court in that context the Tribunal must determine whether there has been a deception and if so whether the

decision to remove is proportionate. *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, Lord Sumption [30] [67]:

“... when it comes to reviewing the compatibility of executive decisions with the Convention, there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate...

“... where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision.”

This Tribunal is entitled to reach its own view of the facts when it determines the question of removal would breach the applicant’s human rights even in a judicial review”.

95. In *Giri v SSHD* [2016] 1 WLR 4418, the issue was whether the SSHD had been entitled to refuse to grant the applicant leave to remain in the UK. She had been entitled to do so if, in making his application for leave, he had failed to disclose a material fact. She found as a fact that he had failed to do so. The Court of Appeal applied the *Wednesbury* test and held that her finding of fact had not been unreasonable, but that case did not engage the court’s duty under section 6 of the 1998 Act. However in *Pinnock* [2011] 2 AC 104, the UKSC held at para 74:

“... where it is required in order to give effect to an occupier’s article 8 Convention rights, the court’s powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view.”

96. This is now expressly supported by *Kiarie and Byndloss* expressly distinguishing *Giri* in the Article 8 ECHR context [46-47].

97. Hence there is power in the course of a judicial review, for the court to determine facts, and to that end to receive evidence including oral evidence in determining whether the decision breaches article 8 ECHR.

98. Hence the following issues are still live:

- whether an out-of-country appeal for this Applicant is an adequate remedy in this sphere, given the obvious need for live evidence to be heard and for sufficient judicial intervention (*R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC));
- whether such an out of country appeal can properly cure the detriment suffered by the Applicant as the result of an unlawful section 10 removal decision, since a successful appeal will never lead to a quashing order placing the applicant (as an out of country appellant) in the same position he or she would have been in had the decision never been made;
- the impact of flawed decision making in section 10 removal cases on the recipient's rights under Article 8 ECHR and whether that article 8 claim on appeal can properly said to be without prospect of success on the facts of this case.

99. Such common law principles of fairness and access to justice and the adequacy of an out of country appeal hearing and human rights will be further considered by the Court of Appeal. In a series of linked cases concerning alleged ETS fraud: in *Ahsan, Kaur and others v SSHD* (heard 19 to 21 September 2017) the Court will address whether and how those common law principles inform the 'special or exceptional' factors to justify a judicial review, rather than being required to pursue and out of country appeal, under *Lim* principles, in light of *Kiarie and Byndloss*. The Court will examine the following issues:

- 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 Bundloss* 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* in light of 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.

100. This judgment will be the next important step in article 8 access to justice and principles of common law fairness in the immigration context.

Sonali Naik
Garden Court Chambers

13 October 2017