Landmark CHAMBERS

Section 94B: The impact upon Article 8 and the appeal rights. The landscape post-*Kiarie*

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Structure of talk

1) Background to s.94B
2) Decision in Kiarie: the Supreme Court's conclusions on the effect of s.94B on appeal rights and Article 8 rights
3) What next? Possible issues/scope for further challenges

Background to s.94B of the NIA 2002

S.94B as inserted by 2014 Act provides as follows:

(1) This section applies where a human rights claim has been made by a person ('P') who is liable to deportation under -

(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or

(b) …

(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, 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).

(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 removed to the country or territory to which P is proposed to be removed.

Therefore:

- Secretary of State can deport appellant in advance of determination of appeal;
- Appeal determined while appellant is out of country
- If appellant loses: s/he is already deported; if appellant succeeds: returns to UK?

Background to s.94B of the NIA 2002

- Original s.94B inserted into Nationality, Immigration and Asylum Act 2002 by s.17(3) of Immigration Act 2014;
- On 1 December, s.94B amended by s.63 of the Immigration Act 2016 so as to expand the power to certify to appeals other than those against deportation decisions

Background to s.94B of the NIA 2002


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CRACKDOWN ON FOREIGN CROOKS

Tougher new rules to boot them out fast

By Alison Little Deputy Political Editor

TOUGH action to speed up the removal of foreign crooks is being proposed today.

Appeals against deportation lodged by criminals from overseas would be dealt with by the courts within 28 days.

The same system would also apply to asylum seekers who lose their claims to stay in Britain.

The average time for the tribunal process is more than 60 days – with some cases taking over 100 days.

Justice Secretary Liz Truss, who is unveiling the plan today, said: "It is vital that foreign nationals who have no right to remain in the country should be removed as soon as possible."

Figures yesterday showed that the removal of failed asylum seekers has plunged to a record low.

The new system is intended to replace

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Background to s.94B of the NIA 2002

- *"Where there is no risk of serious and irreversible harm, we should deport foreign criminals first and hear their appeals later"*:
  - 30 September 2013, Home Secretary (now PM) speaking at the Conservative Party Conference
- *"Foreign criminals will not be able to prevent deportation simply by dragging out the appeals process, as many such appeals will be heard only once the criminal is back in their home country. It cannot be right that criminals who should be deported can remain here and build up a further claim to a settled life in the United Kingdom."*
  - Home Secretary in House of Commons, October 2013
- *"The new power is to help to speed up the deportation of harmful individuals, including foreign criminals … many people use the appeal mechanism not because they have a case but to delay their removal from the United Kingdom. In some cases, they attempt to build up a human rights-based claim under article 8, which they subsequently use,* ***sometimes successfully,*** *to prevent their departure."*
  - Minister for Immigration at Public Bill Committee, November 2013

Background to s.94B of the NIA 2002

s.94B power sits alongside power in s.94(1):

'The Secretary of State may certify a protection claim or human rights claim as clearly unfounded.'

- Secretary of State's guidance: no need to consider certification of a claim under section 94B if it can be certified under section 94;
- Therefore, as Supreme Court notes, for a case to be certified under s.94B, it must be not clearly unfounded, i.e. arguable.

The Supreme Court's decision in *Kiarie*

- ***R (Kiarie) v SSHD; R (Byndloss) v SSHD*** [2017] UKSC 42
- Supreme Court allowed the appeal; reversed decision of Court of Appeal
- Majority judgment given by Lord Wilson:
  - Recognised procedural protections in Art.8 of the ECHR
  - Court to take its own view of the facts on a JR to a s.94B certification
  - Fairness issues:
    - Instructing/seeking legal assistance
    - Giving live evidence. Lord Wilson noted particular important of live evidence to Art. 8 deportation appeals. For appeals to be effective, appellants **'would need at least to be able to give live evidence'** [76]**.**

The Supreme Court's decision in *Kiarie*

- Both judgments accepted that procedure was in principle capable of being fair:
  - *'…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 only that the appellant's opportunity to give evidence in that way was realistically available to him'* per Lord Wilson at [67]
  - *'I see 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':* Lord Carnwath at [103]

The Supreme Court's decision in *Kiarie*

– Judgment of Lord Wilson focused on practical difficulties in the out-of-country appeal system and the giving of live evidence via Skype/video link

The Supreme Court's decision in *Kiarie*

- In relation to live evidence, Lord Wilson judgment notes:
  - Cost of providing technology to support giving of evidence by video-link borne by appellant and is high;
  - Significant practical difficulties in ensuring such evidence is provided to appropriate standards: time difference; obtaining consent of foreign state for evidence to be given within its jurisdiction; where link fails, tribunal may not grant adjournment
  - Practical difficulties in obtaining professional evidence (e.g. from probation officer or psychiatrist) to support claim
  - 1.175 certificates issued between July 2014 and December 2016; not **a single out-of-country appeal** successful!
- <u>Therefore: out-of-country procedure represents a disproportionate interference with Art.8 rights of appellants</u>
- Lord Carnwath agreed, but on a narrower basis: accepted government's submission that such appeals *'likely to turn on the evaluation of factual matters which are either not in dispute, or capable of proof by evidence other than of the appellant in person'* [100]; still concluded that there was a disproportionate interference as Secretary of State could not be satisfied that there was an effective appeal at time of issuing certificate; but, more than the majority, emphasised that problems with procedure could be overcome

Post-Kiarie: Possible issues/scope for further challenges

1) Does ratio apply with equal force to other appeals? NB s.94B as amended by Immigration Act 2016
2) What is the legal basis for procedural protection under Article 8?
3) Question of effect of s.94B on substance of Article 8 rights

1) Does *Kiarie* apply with equal force to other appeals?

Immigration Act 2016 amends s.94B. Certifying power now extends to all human rights appeals, not only against deportation decisions:

(1) This section applies where a human rights claim has been made by a person ("P") ~~who is liable to deportation under—~~

~~(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or~~

~~(b) section 3(6) of that Act (court recommending deportation following conviction).~~

(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 ~~to the country or territory to which P is proposed to be removed~~ from or required to leave the United Kingdom

1) Does *Kiarie* apply with equal force to other appeals?

- Judgment of Lord Wilson:
  - Focuses on the importance of live evidence in context of deportation appeals on the basis of Art.8 (not distinguishing of entry clearance appeals where human rights not in issue)
  - standard of 'serious irreversible harm' is from interim measure test before ECtHR but *'the demands made of an appellant in adducing evidence to a UK tribunal in an appeal against a deportation order … have no parallel in those made of an applicant in pursuing an application before the ECtHR'* [36]
- Examples:
  - Art.3 appeal where credibility is not at issue: Secretary of State may argue that oral evidence from appellant not likely to add much of significance;
    - See judgment of Lord Carnwath
    - In such an appeal, appellant may wish to focus more on denial of ability to properly instruct legal representative/respond to submissions of Secretary of State
    - Scope for a **broader** argument than that accepted in *Kiarie* to the effect that, by its very nature, exclusion of appellant from tribunal where Secretary of State is making submissions leads to unfairness
  - Appeal on point of law (e.g. from FTT to UT): Secretary of State may argue that oral evidence/ability to respond to oral submissions not important enough to render process unfair;
    - Broader argument as per above;
    - Argument for reciprocal written procedure? Equality of arms

1) Does *Kiarie* apply with equal force to other appeals?

- Lord Wilson refers briefly to out-of-country appeals in the context of entry clearance refusals at [7]:
  - *'An obvious example is when people abroad apply unsuccessfully to entry clearance officers in British embassies and High Commissions for entry clearance, ie permission to be admitted to the UK. They often have a right of appeal to the tribunal against the refusal of entry clearance and they are required to bring their appeals from abroad. But such appellants* ***are already abroad****; indeed their appeals are* ***often in a narrow compass which surrounds their ability to satisfy the evidential (in particular the documentary) requirements of the Immigration Rules****; their appeals do not* ***usually include human rights claims*** *and it is* ***the oral evidence of their sponsors in the UK, rather than of themselves, which is often the more important****.'*
- Suggests that presence of a multifactorial human rights assessment is key to need for live evidence;
- Lord Wilson notes that *Kiarie* judgment likely to influence exercise of new, broader power: *'The extended power does not fall to be considered in these appeals but our decision today will surely impact on the extent of its lawful exercise'* [9]

2) What is the legal basis for procedural protection under Article 8?

- Lord Wilson referred to three possible bases for the the procedural requirements in Article 8:

  (i) Requirement that interference be 'in accordance with the law' per Art.8(2): Al Nashif v Bulgaria (2002) 36 EHRR 37

  (ii) Requirement of an effective remedy under Article 13 of the ECHR: Khlaifia v Italy (16483/12); DeSouza Ribeiro v France (2012) 59 EHRR 10 at [83]. Article 13 of the ECHR is not one of the directly enforceable rights under the Human Rights Act. But it is in practice implemented through ss.7-9 of HRA: Brown v Stott [2003] 1 AC 681 per Lord Hope at p.715

  (iii) Per R (Gudanaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622, in reliance of ECtHR decision in W v United Kingdom (1988) 10 EHRR 29, European Court found that procedural protections were relevant:

  > *62. …predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative carers, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.* ***It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8).***
  >
  > ***65. there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing****. And an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.*

  – Argument that requirement only applies by virtue of Art.8(2) would appear to implicitly exclude unqualified rights (e.g. Art.3)

3) Effect of s.94B on substance of Article 8 rights

- Distinction between substantive and procedural rights under Article 8.
- Both the Court of Appeal and the Supreme Court recognised that certification under s.94B certification is in principle capable of interfering with **substantive** rights under Article 8.
- Lord Carnwath at [85]:

'In considering the reasoning of Richards LJ, it is necessary to distinguish as he did (para 39) between the substantive and the procedural aspects of rights afforded by article 8; or as Lord Wilson puts it (para 39) between harm to the prospective appellant himself, and harm to the prospects of his appeal. As to the former I see no reason to disagree with Richards LJ's conclusion that the appellants' substantive rights would not be disproportionately infringed by temporary removal pending a decision on their appeals, and that the Secretary of State was entitled so to find. On that aspect, I do not understand Lord Wilson ultimately to take a different view. His conclusions (para 78) focus on the procedural requirements of article 8.'

3) Effect of s.94B on substance of Article 8 rights

- Lord Wilson does not take a clear view on whether facts of Kiarie/Byndloss are such that there is a disproportionate interference with their substantive Art.8 rights at [57]-[58]:

57. On an appeal against a deportation order the overarching issue for the tribunal will be whether the deportation would be lawful. But, if the certificate under section 94B is lawful, the appellant will already have been deported. In determining the overarching issue the tribunal will be likely to address in particular the depth of his integration in UK society and the quality of his relationships with any child, partner or other family member… ***But, were the certificate under section 94B lawful, his integration in UK society would already have been cut away; and his relationships with them ruptured****.*

58. Statistics now produced by the Home Secretary, which the appellants consider to be surprisingly optimistic, suggest that an appeal brought from abroad is likely to be determined within about five months of the filing of the notice. So, ***by the time of the hearing****, an appellant, if deported pursuant to a certificate,* ***will probably have been absent from the UK for a minimum of five months****.* ***No doubt the tribunal will be alert to remind itself of its duty to set aside the deportation order and thus to enable an appellant to re-enter the UK if his human rights were so to require. But, by reason of his deportation pursuant to a certificate, his human rights are less likely so to require!*** *It is one thing further to weaken an appeal which can already be seen to be clearly unfounded. It is quite another significantly to weaken an arguable appeal: such is a step which calls for considerable justification. The Home Secretary argues that, by definition, the foreign criminal will have been in prison, perhaps also later in immigration detention, in the UK and so he will already have suffered both a loosening of his integration, if any, in UK society and, irrespective of any prison visits, an interruption of his relationship with family members. I agree; but in my view the effect of his immediate removal from the UK on these two likely aspects of his case would probably be significantly more damaging than that of his prior incarceration here.*

3) Effect of s.94B on substance of Article 8 rights:

- Therefore, clear scope for making submissions as to effect of s.94B certification on substance of Art. 8 rights.
- Some guidance, e.g. *R (OO) (Nigeria) v SSHD* [2017] EWCA Civ 338 (decided before Supreme Court gave judgment in *Kiarie*):
  - Loss of immigration status (e.g. ILR) not relevant:
  - Strong public interest in appellant's removal as a foreign criminal, even on an interim basis pending the pursuit of an appeal against the deportation order which might succeed; but not so strong a factor as that in favour of permanent removal on deportation
  - Best interests of the child found to weigh decisively in favour of interference being disproportionate:
    - If appellant were removed under s.94B, he and his son would be separated for a likely substantial period; 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.
    - 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.

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