Trinity Term
[2017] UKSC 42
On appeal from: [2015] EWCA Civ 1020

JUDGMENT

R (on the application of Kiarie) (Appellant) *v* Secretary of State for the Home Department (Respondent)
R (on the application of Byndloss) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale, Deputy President
Lord Wilson
Lord Carnwath
Lord Hodge
Lord Toulson

JUDGMENT GIVEN ON

14 June 2017

Heard on 15 and 16 February 2017

Appellant (Kiarie)
Richard Drabble QC
Joseph Markus

(Instructed by Turpin & Miller LLP)

Respondent
Lord Keen of Elie QC, Advocate General for Scotland
Ms Lisa Giovannetti QC
Neil Sheldon
(Instructed by The Government Legal Department)

Appellant (Byndloss)
Manjit S Gill QC
Ramby de Mello
Tony Muman
Jessica Smeaton
(Instructed by JM Wilson Solicitors)

Intervener (Bail for Immigration Detainees)
Michael Fordham QC
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Intervener (The Byndloss Children)- written submissions only
Henry Setright QC
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(Instructed by Fountain Solicitors)

LORD WILSON: (with whom Lady Hale, Lord Hodge and Lord Toulson agree)

A: INTRODUCTION

1. The issue surrounds "out-of-country" appeals. These are appeals against immigration decisions made by the Home Secretary which immigrants are entitled to bring before the First-tier Tribunal (Immigration and Asylum Chamber) ("the tribunal") but only if they bring them when they are outside the UK.

2. Mr Kiarie, the first appellant, has Kenyan nationality. He is aged 23 and has lived in the UK with his parents and siblings since 1997, when he was aged three. In 2004 he was granted indefinite leave to remain in the UK. He has been convicted of serious offences in relation to drugs. Sent to him under cover of a notice dated 10 October 2014 was an order made by the Home Secretary for his deportation to Kenya.

3. Mr Byndloss, the second appellant, has Jamaican nationality. He is aged 36 and has lived in the UK since the age of 21. In 2006 he was granted indefinite leave to remain in the UK. He has a wife and their four children living here; and he has three or four other children also living here. He has been convicted of a serious offence in relation to drugs. Sent to him under cover of a notice dated 6 October 2014 was an order made by the Home Secretary for his deportation to Jamaica.

4. In deciding to make deportation orders against them, the Home Secretary rejected the claims of Mr Kiarie and Mr Byndloss that deportation would breach their right to respect for their private and family life under article 8 of the European Convention on Human Rights ("the Convention"). Mr Kiarie and Mr Byndloss have a right of appeal to the tribunal against her rejection of their claims and they propose to exercise it. But, when making the deportation orders, the Home Secretary issued certificates, the effect of which is that they can bring their appeals only after they have returned to Kenya and Jamaica.

5. As I will explain in paras 33 and 55, it may well, for obvious reasons, be difficult for Mr Kiarie and Mr Byndloss to achieve success in their proposed appeals. But the question in these proceedings is not whether their appeals should succeed. It is: are the two certificates lawful?

6. Yes, said the Court of Appeal (Richards LJ, who gave the substantive judgment, and Elias and McCombe LJJ, who agreed with it) on 13 October 2015, [2015] EWCA Civ 1020, [2016] 1 WLR 1961, when dismissing the applications of Mr Kiarie and Mr Byndloss for judicial review of the certificates.

B: CERTIFICATION

7. A requirement that some appeals against immigration decisions be brought "out-of-country" has been a feature of the legal system referable to immigration ever since the Immigration Act 1971 ("the 1971 Act") came into force. 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. The situation is different when the proposed appeal is based on human rights and when the requirement to bring it from abroad is imposed on an appellant who is in the UK and who must therefore leave before he can bring it.

8. The Home Secretary issued the two certificates which precipitated the present proceedings pursuant to a power conferred on her on 28 July 2014, when section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which had been inserted into it by section 17(3) of the Immigration Act 2014 ("the 2014 Act"), came into force. Until 30 November 2016, section 94B provided:

> "(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."

9. With effect from 1 December 2016, section 94B of the 2002 Act (to which I will refer simply as section 94B) has been amended by section 63 of the Immigration Act 2016 so as to extend the Home Secretary's power to certify under the section. Since then she has had power to certify any human rights claim irrespective of whether the claimant is liable to deportation. 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.

C: THE STATUTORY CONTEXT OF SECTION 94B

10. Section 3(5)(a) of the 1971 Act provides that a person who is not a British citizen is liable to deportation from the UK if the Home Secretary deems his deportation to be conducive to the public good.

11. Section 32(4) of the UK Borders Act 2007 ("the 2007 Act") provides that, for the purpose of section 3(5)(a) of the 1971 Act, the deportation of a "foreign criminal" is conducive to the public good. Section 32(1) and (2) defines a "foreign criminal" as a person who is not a British citizen and who is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months. My future references to a foreign criminal will be to a person as thus defined.

12. Section 32(5) of the 2007 Act provides that, unless an exception specified in section 33 applies and therefore, in particular, unless his removal would breach his rights under the Convention, the Home Secretary must make a deportation order in respect of a foreign criminal.

13. At the material times, section 82(1) and (3A) of the 2002 Act provided that, where a deportation order in respect of a person was stated to have been made in accordance with section 32(5) of the 2007 Act, he might appeal to the tribunal. By section 82(4), however, the right of appeal was subject to limitations.

14. One limitation, relevant to the present appeals, arose in the conjunction of section 92(1) and (4)(a) of the 2002 Act with section 94(1) and (2) of it. Section 92(1) provided that an appeal under section 82 could not be brought while the appellant was in the UK unless it fell within one of the exceptions specified in later subsections. Subsection (4)(a) specified one exception, namely where the appellant had made a human rights claim while in the UK. Section 94(1) and (2), however, provided that an appellant could not rely on section 92(4)(a), ie in order to be entitled to bring his appeal from within the UK, if the Home Secretary certified that his human rights claim was "clearly unfounded".

15. But another limitation is of even greater relevance to the present appeals. This was the provision which accompanied the coming into force of section 94B on 28 July 2014. The provision was that, where under that section the Home Secretary certified a human rights claim made by a person liable to deportation, his appeal could be brought only from outside the UK. In relation to the deportation orders made in relation to Mr Kiarie on 10 October 2014 and to Mr Byndloss on 6 October 2014, such was the effect of article 4 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820), continued by article 15 of a third commencement order (SI 2014/2771). In relation to deportation orders made on or after 20 October 2014, such was the effect of section 92(3)(a) of the 2002 Act.

16. There is no right of appeal to the tribunal against a certification under section 94B. As these proceedings show, the challenge is by way of judicial review.

D: MR KIARIE

17. In January 2014, when aged 20, Mr Kiarie received a suspended sentence of imprisonment for two years for the offence of possessing Class A drugs with intent to supply. In May 2014 the suspended sentence was activated following further convictions for possession of Class A and Class B drugs.

18. By letter dated 22 July 2014, the Home Secretary informed Mr Kiarie, who was detained in a Young Offender Institution, that his deportation to Kenya would be conducive to the public good, that he was therefore liable to deportation and that she was required to make a deportation order against him unless one of the

exceptions in section 33 of the 2007 Act applied. She enclosed a questionnaire and invited him to complete and return it. Mr Kiarie did so: he claimed that his deportation would breach his human rights because it would separate him from his family and remove him to a place where he had no family, no place of residence and no means of fending for himself.

19. By the notice to Mr Kiarie dated 10 October 2014, the Home Secretary rejected his claim that deportation would breach his human rights, in particular under article 8 of the Convention. She said that she accepted neither that he was socially and culturally integrated into the UK nor that there would be significant obstacles to his reintegration into Kenya nor that there were any very compelling circumstances which outweighed the public interest in his deportation. Nevertheless she did not certify that Mr Kiarie's claim was clearly unfounded; the length of his life in the UK was probably thought to preclude her doing so.

20. Prior to 10 October 2014 the Home Secretary had not invited Mr Kiarie to address whether she should exercise her new power under section 94B. In the notice of that date, however, she said as follows:

> "45. Consideration has been given to whether your article 8 claim should be certified under section 94B … The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring …
>
> 46. It is acknowledged that your parents and siblings are in the United Kingdom. However, any relationships you may have with family members can be continued through modern means of communication upon your return to Kenya. There is nothing to suggest that you would be unable to obtain employment in Kenya. You are 20 years old and have no serious medical conditions. Furthermore, any skills/qualifications you have gained in the United Kingdom can only serve to assist you in finding employment in Kenya. It is noted that English is one of the official languages of Kenya and therefore it is considered that there would be no communication barriers upon your return.
>
> 47. For all the above reasons, it is not accepted that you face a real risk of serious irreversible harm if removed to Kenya while you pursue your appeal against deportation, should you choose to exercise that right. Therefore, it has been decided to certify your article 8 claim under section 94B and any appeal

you may bring can only be heard once you have left the United Kingdom."

E: MR BYNDLOSS

21. In May 2013, when aged 32, Mr Byndloss was sentenced to imprisonment for three years for the offence of possessing Class A drugs with intent to supply.

22. By letter dated 21 June 2013, the Home Secretary informed Mr Byndloss, who was in prison, that he was liable to deportation and that she was required to make a deportation order against him unless one of the exceptions in section 33 of the 2007 Act applied. She enclosed the same questionnaire later sent to Mr Kiarie.

23. Under cover of a letter to the Home Office dated 4 October 2013, solicitors for Mr Byndloss returned the questionnaire which he had partially completed. He said little more than that in 2004 he had married a British woman living in England, by whom he had sons then aged eight, six and two and a daughter whose age he did not identify; that, by a second partner living here, he had sons then aged three and eight months and a daughter then aged two; and that, by a third partner living here, he had a daughter whose age he did not identify. The solicitors also enclosed letters from Mr Byndloss and from two of the mothers of his children and other witnesses, and birth certificates relating to six of the children; and the solicitors explained that they had had only a limited opportunity to assist Mr Byndloss and that he was claiming that deportation would breach his rights under article 8 of the Convention.

24. It was more than a year later, namely on 6 October 2014, that the Home Secretary sent notice of her decision to Mr Byndloss, who remained in prison and who in the interim had sent further information to her. By the notice, she rejected his claim that deportation would breach his rights under article 8; and she enclosed the deportation order. She acknowledged that he was the father of the seven children by his wife and by his second partner but did not accept that he had a genuine and subsisting relationship with any of them. She said that, pursuant to section 55(1) and (2) of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), she had, in making her decision, had regard to the need to safeguard and promote the welfare of the children, including also that of the eighth child in case, which had not been demonstrated, she was indeed his daughter. Nevertheless the Home Secretary did not certify that Mr Byndloss' claim was clearly unfounded; the existence of his children in the UK was probably thought to preclude her doing so.

25. One of the consequences of the long unexplained delay in the Home Secretary's determination of Mr Byndloss' claim was that in the interim section 94B

had come into force. Although she had not at any time invited him to address whether she should exercise the new power, she explained in the notice dated 6 October 2014 that she had decided to do so. She concluded her reference to the section as follows:

> "Consideration has been given to whether your article 8 claim should be certified under section 94B … The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists. Therefore, it has been decided to certify your article 8 claim under section 94B and any appeal you may bring can only be heard once you have left the United Kingdom."

26. In November 2014 Mr Byndloss issued an application for judicial review of the certificate under section 94B. He filed witness statements which gave further details about his relationship with the eight children; but at that time he was still detained, albeit in an immigration removal centre following completion of his sentence. Permission to apply for judicial review was refused in the High Court but he secured permission to appeal against the refusal; and the hearing of his appeal, together with that of Mr Kiarie who had also been refused permission to apply for judicial review of the certificate referable to him, was fixed to take place in the Court of Appeal on 23 September 2015.

27. Less than three weeks before that hearing, namely on 3 September 2015, the Home Secretary sent to Mr Byndloss a 21-page letter which she described as supplementary to the decision dated 6 October 2014 but which she claimed to incorporate her entire reasoning. In effect it replaced the earlier notice and amounted to a fresh, up to date, decision to reject Mr Byndloss' claim. She noted that in April 2015 he had been released from immigration detention and that he had therefore been incarcerated, in all, for 705 days. She maintained, contrary to prison records by then already provided to her, that there was no evidence that the four children of the marriage had visited him in prison. Following a detailed analysis she maintained her refusal to accept that he had a genuine or subsisting relationship with any of the eight children or that he played any meaningful parental role in their lives.

28. In the letter dated 3 September 2015 the Home Secretary also reiterated her decision to certify Mr Byndloss' claim under section 94B. But she expressed her reasons for doing so differently. She expanded her explanation in order to address the alleged difficulties in bringing an appeal from Jamaica to which Mr Byndloss had referred in the proceedings. She said that if necessary he could give evidence from there by video link; that the proposed evidence about his relationship with the

children could be given orally by their mothers and in a written statement by himself; and that his concern to be able to react to whatever might be said against him at the hearing could be met by his study of her skeleton argument, by which he could in advance discern what would be said. She referred, as before, to her duty under section 55 of the 2009 Act; but she now placed her reference to it in the specific context of her function under section 94B. Her central conclusion was as follows:

> "The Secretary of State does not consider that your removal pending the outcome of any appeal would be unlawful under section 6 of the Human Rights Act 1998 and considers that there is no real risk of serious irreversible harm in your case. It is considered that your removal pending your appeal would be proportionate in all the circumstances."

29. In the days between receipt of the letter dated 3 September 2015 and the hearing in the Court of Appeal Mr Byndloss, by his solicitors, filed a mass of evidence intended to contradict some of what the Home Secretary had said in the course of it. In particular he filed a lengthy report by an independent social worker to the effect that following his release Mr Byndloss had had frequent contact with all eight children; had resumed a loving and committed relationship with each of them; and had maintained a good relationship with their mothers.

30. In the event the Court of Appeal resolved to treat the Home Secretary's letter dated 3 September 2015 as the decision under challenge in Mr Byndloss' appeal but not to consider the evidence filed subsequently on his behalf. In this connection it accepted an offer by the Home Secretary that, were his appeal dismissed, she would consider the new evidence when making yet a further determination whether to certify the claim under section 94B. On any view, however, the court's treatment of the letter dated 3 September 2015 as the decision under challenge cut away aspects of the argument proposed to be advanced on behalf of Mr Byndloss, including in particular an argument that the certification dated 6 October 2014 had run counter to published policy which had governed the use of section 94B during the initial 11 weeks for which it had been in force. Following delivery of the judgments of the Court of Appeal in the present case, a different constitution of that court has delivered valuable judgments relating to the difficulty which confronts courts and tribunals when deciding how to treat "supplementary" decision letters sent by the Home Secretary, often shortly before a hearing: *R (Caroopen) v Secretary of State for the Home Department* [2016] EWCA Civ 1307. Mr Byndloss does not suggest, and has never suggested, that it was wrong for the Court of Appeal to treat the letter dated 3 September 2015 as the more material decision by then under challenge; but, had the guidance in the *Caroopen* case been available to it, the court might have been more concerned to address the disadvantage which he had suffered as a result of the Secretary of State's last minute reconstitution of the issues.

F: OBJECTIVES OF SECTION 94B

31. On 30 September 2013, at the Conservative Party Conference, the Home Secretary said:

> "Where there is no risk of serious and irreversible harm, we should deport foreign criminals first and hear their appeals later."

An Immigration Bill was swiftly laid before Parliament and clause 12 of it provided for the insertion of section 94B into the 2002 Act. The Bill had not been preceded by a green paper or other form of consultation. An Impact Assessment of the Bill, dated 14 October 2013, described the objective of the proposed insertion as the removal of unnecessary delay in the determination of appeals. On 22 October 2013, in proposing the second reading of the Bill, the Home Secretary said (HC Deb, vol 569, col 161):

> "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."

On 5 November 2013, when attending on the Public Bill Committee, the Minister for Immigration said (Immigration Bill Deb 5, cols 205, 206):

> "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."

32. Thus the specific, linked objectives of section 94B were alleged to have been to reduce delay in the determination by the tribunal of human rights appeals and to prevent an appellant's abuse of the system by seeking to strengthen his claim during the pendency of his appeal. But, as the Secretary of State no doubt correctly submits, there was also a more fundamental objective, arising from the very fact that the

potential subjects of certification were very largely, like the two appellants, foreign criminals.

33. The deportation of a foreign criminal is conducive to the public good. So said Parliament in enacting section 32(4) of the 2007 Act: see para 11 above. Parliament's unusual statement of fact was expressed to be for the purpose of section 3(5)(a) of the 1971 Act so its consequence was that every foreign criminal became automatically liable to deportation. Parliament's statement exemplifies the "strong public interest in the deportation of foreign nationals who have committed serious offences": *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, para 14, Lord Reed. In the *Ali* case the court was required to identify the criterion by reference to which the tribunal should determine an appeal of a foreign criminal on human rights grounds against a deportation order. The decision was that the public interest in his deportation was of such weight that only very compelling reasons would outweigh it: see paras 37 and 38, Lord Reed.

34. The Home Secretary submits that the strong public interest in the deportation of foreign criminals extends to their deportation in advance of their appeals. Her submission found favour in the Court of Appeal. In para 44 of his judgment Richards LJ observed that the very fact of Parliament's enactment of section 94B exemplified the public interest in deportation even in that situation; that therefore "substantial weight must be attached to that public interest in that context too"; and that, in assessing the proportionality of a certificate, "the public interest is not a trump card but it is an important consideration in favour of removal".

35. Notwithstanding the respect which over many years this court has developed for the opinions of Richards LJ, particularly in this field, I disagree with his observations. I have explained in para 31 above that one aspect of this public interest is said to be a concern that, if permitted to remain in the UK pending his appeal, a foreign criminal might seek to delay its determination in order to strengthen his personal and family connections here. But the tribunal will be alert not to allow objectively unwarranted delay. A somewhat stronger aspect of the public interest is the risk that, if permitted to remain pending his appeal, the foreign criminal would, however prejudicially to its success, take that opportunity to re-offend. To that extent there is a public interest in his removal in advance of the appeal. But in my view that public interest may be outweighed by a wider public interest which runs the other way. I refer to the public interest that, when we are afforded a right of appeal, our appeal should be effective. To be set alongside Parliament's enactment of section 94B was its enactment of section 82(1) and (3A) of the 2002 Act, by which it gave a foreign criminal a right of appeal against the deportation order: see para 13 above. In published guidance to her case-workers the Home Secretary has made clear that there is no need to consider certification of a claim under section 94B if it can be certified under section 94, as to which see para 14 above. So, as exemplified in the cases of Mr Kiarie and Mr Byndloss, a certificate under section

94B is of a human rights claim which is not clearly unfounded, which in other words is arguable. In my view therefore the public interest in a foreign criminal's removal in advance of an arguable appeal is outweighed unless it can be said that, if brought from abroad, the appeal would remain effective: as to which, see section I below.

G: ANALYSIS OF SECTION 94B

36. It is clear, for example from the Home Secretary's announcement to her party's conference set out at para 31 above, that the initial conception was of a power to require a foreign criminal to bring his appeal from abroad in all cases in which his removal created no risk that he would suffer serious irreversible harm. The criterion of serious irreversible harm was drawn from the practice of the European Court of Human Rights ("the ECtHR") when it considers whether to indicate an interim measure under rule 39 of its Rules of Court: if, for, example, an applicant who is challenging a decision to deport or extradite him would face "an imminent risk of irreparable damage" if removed in advance of determination of the application, the ECtHR may indicate that it should not take place: *Mamatkulov v Turkey* (2005) 41 EHRR 494, para 104. There is clearly a parallel between the power of the ECtHR under rule 39 and the Home Secretary's power of certification under section 94B; but the parallel is not exact, if only because the demands made of an appellant in adducing evidence to a UK tribunal in an appeal against a deportation order, to which I will refer in para 55 below, have no parallel in those made of an applicant in pursuing an application before the ECtHR.

37. For whatever reason, Parliament wisely decided that the overarching criterion for certification under section 94B should be that removal pending appeal would not breach the claimant's human rights and that the real risk of serious irreversible harm should be only an example of when such a breach would occur. Subsections (2) and (3) might be thought to have made this clear but unfortunately it was made far from clear to case-workers. Guidance issued by the Home Office entitled "Section 94B certification guidance for Non-European Economic Area deportation cases", in both its first version dated July 2014 and its second version dated 20 October 2014, stated:

> "Section 94B … allows a human rights claim to be certified where the appeal process has not yet begun or is not yet exhausted where it is considered that the person liable to deportation would not, before the appeal process is exhausted, face a real risk of serious irreversible harm if removed to the country of return."

So it is easy to understand why the certification of Mr Kiarie's claim on 10 October 2014 and the first certification of Mr Byndloss' claim on 6 October 2014 were both

expressly based on a conclusion that they would not face a real risk of serious irreversible harm if removed to Kenya and Jamaica in advance of any appeal: see paras 20 and 25 above.

38. In the Court of Appeal Richards LJ inevitably held that those two certifications were based on a legal misdirection. He proceeded to hold, however, that the misdirection in Mr Kiarie's case had not been material because, even had she applied the overarching criterion, the Home Secretary would still have certified his claim; and that the misdirection in the first certification of Mr Byndloss' claim had been cured by a correct direction in the second certification of it.

39. Earlier Richards LJ had observed:

> "There may in practice be relatively few cases where removal for an interim period pending an appeal would be in breach of Convention rights in the absence of a risk of serious irreversible harm, but it is a possibility which must be focused on as a necessary part of the decision-making process."

With respect, I would not associate myself with this observation of Richards LJ. It would lull case-workers into thinking that they would be safe to concentrate on weighing a real risk of serious irreversible harm *to the prospective appellant himself*. But, as I will explain, a specific focus on the risk of serious harm *to the prospects of his appeal* might very well ground a conclusion that his removal in advance of it would breach his Convention rights.

40. Any analysis of section 94B must also include reference to the discretion which it confers on the Home Secretary not to certify the claim even when she concludes that to do so would not breach Convention rights. No doubt its exercise will be rare.

H: JUDICIAL REVIEW OF CERTIFICATION

41. In their proposed appeals to the tribunal Mr Kiarie and Mr Byndloss will argue that their deportation would breach their rights under article 8. In the present proceedings for judicial review they argue analogously that their deportation in advance of their proposed appeals would breach their rights under article 8. Although the focus of the two inquiries is different, should the judicial approach to the Home Secretary's respective decisions be different? After all, both the tribunal when it hears the appeals and the court or tribunal when it hears the applications for judicial review are public authorities, which act unlawfully if they act in a way which

is incompatible with a Convention right: section 6(1) of the Human Rights Act 1998 ("the 1998 Act").

42. When on an appeal the tribunal considers an argument that deportation would breach the appellant's Convention rights, for example under article 8, its approach to the Home Secretary's decision is not in doubt. It was recently explained by Lord Reed in the *Ali* case, cited at para 33 above, in paras 39 to 50. In summary, the tribunal must decide for itself whether deportation would breach the appellant's Convention rights; in making that decision, it can depart from findings of fact made by the Home Secretary and indeed can hear evidence and make findings even about matters arising after her decision was made (section 85(4) of the 2002 Act); and, in making that same decision, it must assess for itself the proportionality of deportation, albeit attaching considerable weight to the considerations of public policy upon which the Home Secretary has relied and to any other part of her reasoning which, by virtue of her position and her special access to information, should carry particular authority.

43. 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."

Lord Neuberger proceeded, however, to add a qualification referable to the degree of respect to be afforded to the judgment in that regard of the primary decision-maker; and he did so along the lines of the last part of my summary in para 42 above.

44. 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 said of the Home Secretary:

> "In my judgment, her findings of fact are open to review on normal *Wednesbury* principles, applied with the anxious scrutiny appropriate to the context: … *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784 …"

45. In the *Giri* case, now reported at [2016] 1 WLR 4418, the issue was whether the Home Secretary 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* criterion in holding that her finding of fact had not been unreasonable.

46. The difficulty is that the *Giri* case did not engage the court's duty under section 6 of the 1998 Act. In *Manchester City Council v Pinnock* (*Nos 1 and 2)* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104, a tenant of a house owned by a local authority argued that possession of the house pursuant to the order which it sought against him would breach his rights under article 8. This court held at para 74 that:

> "… 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."

In the *Lord Carlile* case, cited at para 43 above, Lord Sumption said, more broadly, 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."

47. Even when elevated by the protean concept of "anxious scrutiny", application of the *Wednesbury* criterion to the right to depart from the Home Secretary's findings of fact (including any refusal to make such findings) in the course of a judicial review of her certificate under section 94B is in my opinion inapt. 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. Take the case of Mr Byndloss. He contends that, even by reference only to the evidence before her on 3 September 2015, she was wrong, by her letter of that date, to refuse to accept his contention that he had a genuine or subsisting relationship with any of his children. I will explain why, in my view, his application for judicial review can be determined without the need for a court to inquire into the correctness of her refusal to accept his contention. 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.

I: THE REQUIREMENTS OF ARTICLE 8

48. At last I can begin to address the central issue. But, in answering the question "did the certificates breach the rights of the appellants under article 8?", the first task is to identify what, in this context of proposed deportation in advance of an appeal, article 8 requires.

49. In *Al-Nashif v Bulgaria* (2003) 36 EHRR 655 the Bulgarian authorities had deported the first applicant to Syria on grounds of national security. When prior to his deportation he had sought to appeal against the deportation order, the court had ruled that, inasmuch as it was on grounds of national security, the order was not open to appeal. The ECtHR held that the deportation had interfered with the first applicant's right to respect for his family life and that it followed from the absence of any facility to appeal against the order that the interference was not "in accordance with the law" within the meaning of article 8(2). It held:

> "123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information."

So the court held that Bulgaria had breached the first applicant's rights under article 8. It proceeded to hold, separately, that it had breached his rights under article 13 of the Convention in conjunction with article 8. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before

> a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

When domestic UK courts are asked to determine allegations of breach of Convention rights, it is of no consequence to them that article 13 was omitted from the articles included in Schedule 1 to the 1998 Act. The right to an effective remedy for breaches of the substantive Convention rights is generally recognised elsewhere in the 1998 Act (*Brown v Stott (Procurator Fiscal, Dunfermline*) [2003] 1 AC 681, 715, Lord Hope of Craighead) and indeed, in the case of the present appellants, has been specifically recognised by the grant of a right of appeal under section 82 of the 2002 Act.

50. In subsequent decisions the ECtHR seems to have preferred to locate the right to an effective remedy for breach of article 8 within article 13 rather than within the phrase "in accordance with the law" in article 8(2). The leading authority, recently indorsed in *Khlaifia v Italy*, Application No 16483/12, is *De Souza Ribeiro v France* (2014) 59 EHRR 454. A Brazilian man was arrested in French Guiana and ordered to be removed on the basis that his presence there was illegal. On the day following his arrest he filed an application for judicial review of the order but, later on that very day, he was removed to Brazil. The Grand Chamber of the ECtHR held that France had breached his right under article 13 in conjunction with article 8. He had argued that, whenever an order for removal was challenged by reference to article 8, article 13 required an automatic suspension of the removal pending determination of the challenge, just as when the challenge was by reference to articles 2 or 3. But the Grand Chamber declined to go so far. It held:

> "83. By contrast [to challenges under articles 2 or 3], where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, article 13 in conjunction with article 8 of the Convention requires that states must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality."

There was a powerful concurring opinion to the effect that article 13 did require automatic suspension of the order when removal "would allegedly put migrants in

danger of irreversible damage to their family lives" (para OII-21). But the jurisprudence of the ECtHR seems to be clear that

(a) the facility for challenge has to be effective;

(b) an effective facility for challenge will not automatically require suspension of the removal order; and

(c) whether its suspension is required in order to make the facility effective will depend on the circumstances.

51. In *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247, the Court of Appeal, by a judgment delivered by Lord Dyson MR, also, albeit by a different route, reached the conclusion that article 8 required that an appeal against a deportation order by reference to it should be effective. The court

(a) cited at para 65 the decision of the ECtHR in *W v United Kingdom* (1987) 10 EHRR 29, para 64, to the effect that article 8 required that parents who had sought contact with a child in care should have been involved in the decision-making process to a degree sufficient to provide the requisite protection of their interests;

(b) held at para 69 that the same requirement applied to article 8 claims by immigrants; and

(c) concluded at para 70 that it amounted to a requirement that their access to the tribunal should be effective.

J: BACKGROUND TO THE CIRCUMSTANCES

52. The relevant circumstances must be considered against four features of the background.

53. The first is that the proposed deportations would be events of profound significance for the future lives of Mr Kiarie, his parents and siblings; and of Mr Byndloss and, to the extent that he has or might otherwise develop a genuine relationship with them, also of his children. In the absence of exceptional

circumstances the Home Secretary would not even consider whether to readmit either of the appellants to the UK within ten years of the date of the deportation orders: para 391(a) of the Immigration Rules, HC 395 (as amended).

54. 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: see para 35 above.

55. 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. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters:

> (a) the depth of the appellant's integration in UK society in terms of family, employment and otherwise;
>
> (b) the quality of his relationship with any child, partner or other family member in the UK;
>
> (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise;
>
> (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the UK;
>
> (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case,
>
> (f) any significant risk of his re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.

56. The fourth is that the authority responsible for having directed the dramatic alteration in the circumstances of the appellant even in advance of his appeal is the respondent to the appeal herself. In *R (Detention Action) v First-tier Tribunal*

(Immigration and Asylum Chamber) [2015] EWCA Civ 840, [2015] 1 WLR 5341, the Court of Appeal upheld the quashing of "Fast Track Rules" which, in particular, required asylum seekers, if detained by the Home Secretary at specified locations, to present any appeal against the refusal of asylum within seven days of the refusal. Having referred in para 27 of his judgment to "the principle that only the highest standards of fairness will suffice in the context of asylum appeals", Lord Dyson explained at para 38 that the timetable for the conduct of the appeals was so tight that a significant number of appellants would be denied a fair opportunity to present them. He explained at paras 46 to 48 that in those circumstances the court had no need to address a further argument that it had been in breach of natural justice for the Home Secretary, as the respondent to any appeal, to have been able, by detaining the asylum seeker at a specified location, to cause him to be placed into the fast track. Lord Dyson suggested, however, 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. I respectfully agree. 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.

K: WEAKENING THE ARGUMENTS ON THE APPEAL

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: see para 55 (a) and (b) above. 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.

59. For present purposes, however, I put these substantial concerns aside. 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.

L: OBSTRUCTING PRESENTATION OF THE APPEAL

60. The first question is whether an appellant is likely to be legally represented before the tribunal at the hearing of an appeal brought from abroad. Legal aid is not generally available to an appellant who contends that his right to remain in the UK arises out of article 8: para 30, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. So, in order to obtain legal aid, he must secure an "exceptional case determination" under section 10 of that Act. Although an appeal brought from abroad is in principle as eligible for such a determination as an appeal brought from within the UK, the determination cannot be made unless either the absence of legal aid *would* breach his rights under article 8 or it *might* breach them and provision of it is appropriate in all the circumstances: section 10(3). It suffices to say for present purposes that it is far from clear that an appellant relying on article 8 would be granted legal aid. One can say only that, were he required to bring his appeal from abroad, he might conceivably be represented on legal aid; that alternatively he might conceivably have the funds to secure private legal representation; that alternatively he might conceivably be able to secure representation from one of the specialist bodies who are committed to providing free legal assistance to immigrants (such as Bail for Immigration Detainees: see para 70 below); but that possibly, or, as many might consider, probably, he would need to represent himself in the appeal. Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, article 8 requires that he be not removed abroad in advance of it.

61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal

itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.

62. When the power to certify under section 94B was inserted into the 2002 Act, an analogous power was inserted into the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"), now recently replaced. Regulation 24AA(2) enabled the Home Secretary to add to an order that an EEA national be deported from the UK a certificate that his removal pending any appeal on his part would not be unlawful under section 6 of the 1998 Act. But regulation 24AA(4) enabled him to apply "to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision". In *Secretary of State for the Home Department v Gheorghiu* [2016] UKUT 24 (IAC), the Upper Tribunal (Blake J and UTJ Goldstein) observed at para 22 that, on an application for an order to suspend enforcement, the court or tribunal would take due account of four factors. The fourth was

> "that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process …"

It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.

63. The Home Secretary submits to this court that the fairness of the hearing of an appeal against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal.

64. But in any event, suggests the Home Secretary, there is, in each of two respects, a facility for an appellant in an appeal brought from abroad to give live evidence.

65. The first suggested respect was the subject of a curious submission on the part of the Home Secretary to the Court of Appeal. It was that from abroad the appellant could apply for, or that the tribunal could on its own initiative issue, a summons requiring his attendance as a witness at the hearing pursuant to rule 15(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) ("the 2014 Rules"). The curiosity of the submission is that such a summons is not enforceable in respect of a person outside the UK. Nevertheless the Court of Appeal held that the issue of a summons would be a legitimate way of putting pressure on the Home Secretary to allow the appellant to return to the UK to give oral evidence. Before this court the Home Secretary does not continue to contend for the suitability of a summons under rule 15(1). She nevertheless suggests that the tribunal could, by direction, stress the desirability of the appellant's attendance before it and that, were she thereupon to fail to facilitate his attendance, the appellant could seek judicial review of the certificate under section 94B and, if successful, a consequential order for his return at least pending the appeal. But whether the tribunal could, or if so would, give such a direction in the teeth of a subsisting certificate is doubtful; and in any event it seems entirely impractical for an appellant abroad to apply first for the unenforceable direction and then for judicial review of any failure to comply with it.

66. The second suggested respect has been the subject of lengthy and lively argument. The suggestion is that the appellant can seek to persuade the tribunal to permit him to give live evidence from abroad by video link or, in particular nowadays, by Skype.

67. There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box. The recent decision of the Upper Tribunal (McCloskey

P and UTJ Rintoul) in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) concerned a claim for judicial review of the Home Secretary's decision to curtail a student's leave to remain in the UK on the grounds that he had obtained it by deception. The Upper Tribunal quashed the decision but, in a footnote, suggested that the facility for a statutory appeal would have been preferable to the mechanism of judicial review and that it would be preferable for any statutory appeal to be able to be brought from within the UK. It said:

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

Although the Home Secretary stresses that the Upper Tribunal was addressing the determination of issues relating to deception, its reservations about the giving of evidence by electronic link seem equally apt to appeals under article 8 against deportation orders. Indeed one might add that the ability of a witness on screen to navigate his way around bundles is also often problematic, as is his ability to address cross-examination delivered to him remotely, perhaps by someone whom he cannot properly see. But, although the giving of evidence on screen is not optimum, it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way was realistically available to him.

68. Inquiry into the realistic availability of giving evidence on screen to the tribunal gets off to a questionable start: for in her report entitled "2016 UK Judicial Attitude Survey", Professor Thomas, UCL Judicial Institute, records that 98% of the judges of the First-tier Tribunal throughout the UK responded to her survey and that, of them, 66% rated as poor the standard of IT equipment used in the tribunal.

69. In *Secretary of State for the Home Department v Nare* [2011] UKUT 443 (IAC) the Upper Tribunal (Mr CMG Ockelton VP, UTJ Grubb and IJ Holmes), in the course of considering an allegation that a judge of the First-tier Tribunal had too readily allowed a witness to give evidence by telephone, gave guidance as to how the tribunal should approach any application for a direction that evidence be given by electronic link. At that time the rules specifically provided for such a direction to be given; now, by rules 1(4) and 14(1)(e) of the 2014 Rules, provision for it is encompassed in the definition of a "hearing", together with the power to direct "the manner in which any evidence or submissions are to be provided [including] orally at a hearing". The Upper Tribunal prefaced its guidance by observing at para 17 that departure from the usual model of oral evidence given directly in the courtroom was likely to reduce the quality of evidence and the ability both of the parties to test it and of the judge to assess it. Its guidance, given in para 21, included:

> (a) that the application should be made and determined well before the substantive hearing;
>
> (b) that the application should not only explain the reason for evidence to be given on screen and indicate the arrangements provisionally made at the distant site but also include an undertaking to be responsible for any expenses incurred;
>
> (c) that, were the evidence to be given from abroad, the applicant should be able to inform the tribunal that the foreign state raised no objection to the giving of evidence to a UK tribunal from within its jurisdiction;
>
> (d) that the applicant should satisfy the tribunal that events at the distant site were, so far as practicable, within its observation and control, that the evidence would be given there in formal surroundings and be subject to control by appropriate officials and that nothing could happen off camera which might cast doubt on the integrity of the evidence; and
>
> (e) that a British Embassy or High Commission might be able to provide suitable facilities.

70. Bail for Immigration Detainees ("BID"), a charity which provides a small minority of those facing deportation with free legal advice and even representation and which intervenes in the appeals before the court, provides a helpful example of how the tribunal seeks to implement the guidance given in the *Nare* case. In 2016 BID represented a Nigerian citizen in his appeal against a deportation order by reference to his rights under article 8. His claim had been certified under section

94B so he had been removed to Nigeria in advance of the appeal. On his application, through BID, to give evidence on the appeal from Nigeria by Skype, the tribunal sought to implement the guidance summarised at para 69(d) above by the following direction:

> "The tribunal must be advised in advance of the hearing of the arrangements made to enable the appellant to give evidence in a secure location, attended by a local agent or representative instructed by the appellant's solicitors and whose identity has at the time of such advice been provided to the tribunal."

71. In the same order the tribunal also sought to implement the guidance summarised at para 69(b) above by the following direction:

> "All necessary equipment and Skype link must be provided and paid for by the appellant but must include:
>
> (i) Projection equipment
> (ii) Audio equipment
> (iii) Wi-fi link
>
> to enable all present to see and hear the appellant give evidence."

As is apparent from this direction, the tribunal requires an applicant to pay for provision of the necessary equipment not only at the distant end but also at the hearing centre itself. When, in a letter written in response to the direction, BID requested the tribunal to buy, install and maintain its own equipment for the purpose of hearing evidence from abroad, one of its judges replied:

> "Unfortunately, the Tribunal has no funds to provide equipment or technical ability, hence the onus in that regard we have to place upon appellants and their representatives."

In the event the appellant represented by BID was furnished by a friend with the equipment necessary for his use in Nigeria in giving evidence by Skype; and, since the friend was a lawyer, he was able and willing also to exercise free of charge the degree of control required by the tribunal. But the appellant could not afford to purchase the equipment for use at the hearing centre; and so it was BID which

bought a laptop computer (£240), a projector (£252) and a 3G mobile telephone contract (£33.97 per month), for use there at the hearing of his appeal.

72. The researches of the solicitors for Mr Kiarie indicate that it would cost the equivalent of £240 per hour to rent a video conference room for his use in Nairobi and that therefore a rental for say seven hours, so as to enable counsel to conduct a pre-hearing conference with him as well as to cover the probable length of the hearing, would cost £1,680. The researches of the solicitors for Mr Byndloss indicate that the hourly cost of renting a video conference room for his use in Kingston would be marginally less but they estimate that it would be necessary to rent it for 11 hours in order to cover the probably lengthier hearing of his appeal.

73. It is already clear however that the cost of hiring the necessary equipment for use at the distant end of any evidence given by video link or Skype is only part of the cost which an appellant must bear. He must also bear the cost of providing the equipment for use at the hearing centre and he may well have to pay for the attendance beside him of someone able and willing to exercise the degree of control required by the tribunal. Apart, however, from having to meet the overall costs of giving evidence in that way, an appellant has to confront formidable technical and logistical difficulties. Powerful evidence is given by the appellants' solicitors and other legal specialists in the field to the effect that:

(a) it can be a slow and tortuous process to obtain the consent of the foreign state for evidence to be given from within its jurisdiction;

(b) it can be difficult to achieve compatibility between the system adopted at the distant end and the system installed at the hearing centre, with the result that a bridging service sometimes needs to be engaged and funded;

(c) it can be difficult to alight upon a time for the link to begin and end which is both acceptable to the tribunal and practicable at the distant end in the light of the time difference; and

(d) if, as is not uncommon, the link fails during the hearing and cannot then and there be restored, the tribunal can prove reluctant to grant an adjournment to another date.

74. Apart from the difficulty surrounding his giving live evidence to the tribunal, an appellant deported in advance of the appeal will probably face insurmountable difficulties in obtaining the supporting professional evidence which, so this court is told, can prove crucial in achieving its success. In support of his claim to present no

significant risk of re-offending, an appellant is likely to wish to submit evidence from his probation officer; but, upon his deportation, his probation officer will have closed his file and will apparently regard himself as no longer obliged to write a report about him. An appellant may also wish to submit evidence from a consultant forensic psychiatrist about that level of risk. But the evidence in these proceedings of Dr Basu MRC Psych, Clinical Director at Broadmoor Hospital, is that he has never sought to assess the risk posed by a person visible to him only on screen and that any such assessment would have to be treated with considerable caution. In support of an appellant's likely claim to have a close and active relationship with a child, partner or other family member in the UK, an appellant will not uncommonly adduce, as in these preliminary proceedings Mr Byndloss has already sought to do, a report by an independent social worker who, so he hopes, will speak of the quality, and in particular for the family the importance, of the relationship. But a report compiled in the absence of the social worker's direct observation of the appellant and the family together is likely to be of negligible value.

75. It was more than 30 years ago that, in the appellate committee which preceded the creation of this court, concern was 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 observed 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."

76. Today, however, this court is invested with responsibility for deciding whether two foreign criminals who, by reference to article 8, each have arguable appeals against the deportation orders made against them and who have rights thereunder for their appeals to be effective, would suffer a breach of those rights if they were to be deported in advance of the hearing of the appeals. I conclude that, for their appeals to be effective, they would need at least to be afforded the opportunity to give live evidence. They would almost certainly not be able to do so in person. The question is: as a second best, would they be able to do so on screen? The evidence of the Home Secretary is that in such appeals applications to give evidence from abroad are very rare. Why? Is it because an appellant has no interest in giving oral evidence in support of his appeal? I think not. It is because the financial and logistical barriers to his giving evidence on screen are almost

insurmountable. In this case the Court of Appeal has 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 she has 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.

77. Between 28 July 2014 and 31 December 2016 the Home Secretary 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 no doubt duly 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. It may well be that on 13 February 2017 a few of those appeals remained undetermined. The fact remains, however, that, as of that date, not one of the 72 appeals had succeeded.

78. It remains only to re-cast the reasoning expressed in this judgment within its proper context of a claim that deportation pursuant to the two 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. The alleged objectives behind the power to certify a claim under section 94B have been set out in section F above. I will not prolong this judgment by addressing whether the power is rationally connected to them and as to whether nothing less intrusive could accomplish them. I therefore turn straight to address the fair balance required by article 8 and I conclude for the reasons given above that, while the appellants have in fact established that the requisite balance is unfair, the proper analysis is that the Home Secretary has failed to establish that it is fair.

M: CONCLUSION

79. So I would allow the appeals and quash the certificates.

LORD CARNWATH:

80. I agree with Lord Wilson that these two appeals should be allowed, but my emphasis is rather different.

81. The starting point is section 94B(2) of the 2002 Act, under which it is a precondition of certification that the Secretary of State "considers that" removal of P to the relevant country in advance of the hearing of the appeal "would not be unlawful under section 6 of the Human Rights Act 1998 …" Given the important consequences of certification, I would read the section 6 precondition as implying a requirement for the Secretary of State to satisfy herself, on adequate information, that there will be no breach of section 6. In this case the alleged breaches relate to the appellants' respective rights under article 8 of the Convention.

82. If the section 6 precondition is satisfied, then (under subs (3)) the Secretary of State may certify, on grounds which "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 (relevant) country …" The drafting is awkward. Although the power is discretionary, and the grounds are stated to "include" absence of risk of irreversible harm, there is no indication what other grounds there might be for exercise of the power, or indeed for declining to exercise it. Indeed, absence of such risk might be more readily understood as a pre-condition to certification (under subs (2)) rather than as a positive ground for exercising the power. It is not clear why in this respect a distinction is drawn between the pre-condition and the grounds.

83. In any event, the policy of the Secretary of State at the relevant time, as stated in the then current guidance (dated 29 May 2015), and as confirmed by the evidence of Mr Kenneth Welsh (the Departmental witness), was that the power to certify should normally be exercised whenever the statutory criteria were satisfied:

> "The Government's policy is that the deportation process should be as efficient and effective as possible. Case owners should therefore seek to apply section 94B certification in all applicable cases where doing so would not result in serious irreversible harm." (Guidance para 3.2)

Mr Welsh tells us that "applicable cases" were intended to be confined to those which would satisfy the precondition of compliance with section 6 of the Human Rights Act 1998, although he accepts that the "clarity" of the guidance "could be improved".

84. It is unfortunate that, whether because of the awkward drafting of the section or lack of clarity in the guidance, the existence of the section 6 precondition was wholly overlooked at the time of the original decisions in both cases (made in October 2014). There was no express consideration whether removal pending any appeal would be consistent with the appellants' rights under article 8. Nor had the appellants been given any notice of, or chance to comment on, the proposed certification. For those reasons, as the Court of Appeal correctly held, the decisions were legally flawed. They accordingly fell to be quashed, unless (in the case of Mr Byndloss) the error was remedied in the "supplementary" letter of 3 September 2015; or (in Mr Kiarie's case, where there was no such supplementary letter) it was clear that the errors were immaterial, in the sense that proper consideration would have yielded the same result. The Court of Appeal so concluded in each case.

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.

86. In fairness to Richards LJ, however, (and in respectful disagreement with Lord Wilson at para 35) I should add that, in the context of substantive rights, I would not criticise him for according weight to the public interest attached by Parliament to the removal of a foreign criminal, even in the interim period pending an appeal. Lord Wilson observes that the limited risk of reoffending in the period before appeal is not outweighed by the public interest in ensuring that any appeal is effective. However, that was not the issue. No-one disputed that the appeal mechanism needed to be effective. On the other hand, the objectives of the new provision, indicated by the Ministerial statements quoted by Lord Wilson (para 31), were directed, not specifically to the risk of offending in the interim period, but rather to speeding up the process of deportation both as an end in itself, and for the purpose of reducing what was seen as abuse by building up further claims to a settled life. The emphasis given by Richards LJ to the public interest in deportation can be seen as a natural extension of this court's reasoning in *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 (see para 38) recognising the "great weight" attached to the public interest in the deportation of

foreign offenders. That is now given statutory form in section 117C of the 2002 Act, introduced at the same time as section 94B by the Immigration Act 2014.

87. I turn to the more difficult issue concerning the procedural aspects of article 8: whether (as Richards LJ put it - para 40) the Secretary of State took "the necessary steps to satisfy herself that the procedural guarantees of article 8 would be met by an out-of-country appeal before certifying under section 94B". He was right in my view to emphasise the duty of the Secretary of State in this respect. Under section 94B the responsibility for certification entrusted by Parliament to the Secretary of State carries with it the responsibility to satisfy herself (if necessary with the co-operation of the Secretary of State for Justice, as the minister responsible for supporting the tribunal system) that the procedural mechanisms to ensure an effective appeal will (not may) be in place.

88. Lord Wilson (para 50) has summarised the relevant Strasbourg jurisprudence. He refers in particular to the Grand Chamber decision in *De Souza Ribeiro v France* (2014) 59 EHRR 454, as establishing that, while suspension of removal is not a necessary requirement, the opportunity to challenge the removal decision must be "effective", that is, at para 83 -

> "… the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality."

I note that the Chamber in *IR v United Kingdom* [2014] ECHR 340; [2014] 58 EHRR SE14 cited *De Souza* as illustrating the proposition that an "effective remedy" in this context "is to be read as meaning 'a remedy that is as effective as can be' having regard to the restricted scope for recourse inherent in the particular context" (para 62). I agree with Richards LJ (para 64) that it is not enough that the out-of-country appeal may be less advantageous in some respects than an in-country appeal; article 8 does not require access to the best possible procedure, but access to one which meets, as he puts it, "the essential requirements of effectiveness and fairness".

89. The "relevant issues" for this purpose will depend on the circumstances of each case. They will have to be considered within the framework explained by Lord Reed in *Ali* (paras 26, 38) (based on the so-called *Boultif v Switzerland* (2001) 33 EHRR 50 criteria, as developed in later Strasbourg cases), and having regard to the need to show a "very compelling" case to outweigh the presumption in favour of deportation. It is not in dispute that judged by those criteria each of the appellants has at least an arguable case: for Mr Kiarie based on his relative youth, his

dependence on his family in this country, and his lack of any significant connection with Kenya; for Mr Byndloss based principally on his ties with his various children and the need to safeguard their interests. I agree with Lord Wilson (para 7) that the issues in such cases, depending as they do primarily on evidence of the life, conduct and relationships of the appellants in this country, are quite different in kind from other more established forms of out-of-country appeal.

90. As already noted, the need to consider this issue was overlooked at the time of the original decisions. By the time the appeals came before the Court of Appeal (23 September 2015) the issue had been given some consideration, albeit only very recently. The material available to the Secretary of State, and her consideration of this issue, are apparent from the witness statement of Mr Welsh (sworn on 14 September 2015), and in the case of Mr Byndloss, the supplementary letter sent (under Mr Welsh's signature) a few days before. It is convenient to start with the latter.

91. The letter, extending to 21 pages, contained a very detailed consideration of Mr Byndloss' substantive case under article 8, but the procedural arguments were dealt with relatively shortly. The writer noted Mr Byndloss' stated wish to participate in the hearing: by giving evidence of his remorse for his crimes and his reasons for committing them, and to show that he was a good father and was trying to maintain contact with his children; by listening to the Home Office's evidence and submissions; and by assisting his representatives with preparation for the hearing and reading. The response was that he would be able to submit a written statement of his own evidence, supported by evidence from the mothers of the children; and that he would be able to read the Home Office's statements and give instructions to his legal advisers by email. Further:

> "It is open to you to apply to the Tribunal to give evidence by video link if you and your legal representatives consider that this is essential to the fair determination of the appeal. Alternatively, if the Tribunal considers that oral evidence from you on this point is essential to the fair determination of the appeal, it can order that you give evidence by video link."

92. There appears to have been no equivalent letter in relation to Mr Kiarie's procedural rights. However, Mr Welsh's witness statement was addressed to both appeals. It was designed to provide evidence about the practice and procedure followed by the Secretary of State and the tribunals when dealing with out-of-country appeals. In respect of the latter he drew on statements said to have been obtained from resident judges of the FTT and UT "on an informal basis", based on "their vast experience" of out of country appeals. Before the Court of Appeal it was accepted for the Secretary of State that such statements could not properly be relied

on. But in any event both the statements, and Mr Welsh's reliance on them, are open to the criticism that they did not adequately address the distinctive features of an article 8 appeal in a deportation case. On the other hand, Mr Welsh fairly noted the "practical limitations" of use of video link particularly in the First-tier Tribunal, including the lack of facilities in some centres and competing demands from other priorities (such as bail hearings), the need for compatibility with overseas equipment, the need for the appellant to bear the costs, and the need to co-ordinate timings with appeal hearings. As Richards LJ explained (para 56), in addition to evidence on this aspect for the appellants, the Court of Appeal received a joint note agreed by counsel providing an outline of out-of-country appellate procedures, including guidance from the Upper Tribunal on the use of video facilities.

93. At the heart of the Court of Appeal's reasoning, in line with the submissions of the Secretary of State, was the proposition that the tribunal, whose independence and impartiality were not in doubt, could be relied on to provide the necessary procedural safeguards to ensure a fair process. As Richards LJ said, at para 65:

> "They will be alert to the fact that out of country appeals are a new departure in deportation cases, and they will be aware of the particular seriousness of deportation for an appellant and his family. All this can be taken into account in the conduct of an appeal. If particular procedures are needed in order to enable an appellant to present his case properly or for his credibility to be properly assessed, there is sufficient flexibility within the system to ensure that those procedures are put in place. That applies most obviously to the provision of facilities for video conferencing or other forms of two-way electronic communication or, if truly necessary, the issue of a witness summons so as to put pressure on the Secretary of State to allow the appellant's attendance to give oral evidence in person."

94. He acknowledged the difficulties for any appellant, particularly when unrepresented, in preparing evidence for an appeal and presenting it to the tribunal. But he did not regard these as sufficient to amount to a denial of effective participation in the decision-making process:

> "In these days of electronic communications, an out of country appellant does not face serious obstacles to the preparation or submission of witness statements or the obtaining of relevant documents for the purposes of an appeal. He can instruct a lawyer in the UK if he has the funds to do so. If he does not have the funds to instruct a lawyer but the case is so complex that an

> appeal cannot properly be presented without the assistance of a lawyer, he will be entitled to legal aid under the exceptional funding provisions considered in *R (Gudanaviciene) v Director of Legal Aid Casework* …" (para 66)

95. In considering that reasoning, in my view, it is necessary to distinguish between two separate elements: first, the ability of the appellant from abroad to assemble evidence and prepare and present his case; secondly, his ability to give oral evidence if required. In doing so we have the advantage of the new evidence (in the form of a witness statement by Mr Makhlouf, Assistant Director of BID), submitted by Mr Fordham without objection from the Secretary of State, as to the practical problems for appellants of conducting effective appeals from abroad.

96. On the first element, as Lord Wilson explains (para 60), it is at best uncertain what assistance will be available to an appellant without resources of his own when conducting his appeal from abroad. Richards LJ, at para 66, referred to the potential availability of exceptional legal aid funding under the provisions considered in *R (Gudanaviciene) v Director of Legal Aid Casework*. However, Mr Makhlouf refers to the difficulties in practice for those in the position of the appellants to obtain legal aid under these provisions. Without such assistance, or assistance from a body such as BID, it is difficult to see how an appellant from abroad can realistically prepare and present an effective appeal. Even if such legal assistance were available (as it appears to be in the present cases), there are likely to be major logistical problems in ensuring that documents are made available and instructions obtained in the run-up and during the course of the hearing.

97. With regard to the second element, there is a dispute between the parties as to the likely importance of such direct oral evidence from the appellant in person. Mr Drabble submits that in deportation appeals, as contrasted with entry clearance appeals, such evidence is likely to be of central importance. He relies on comments of the Upper Tribunal (Blake J and Judge Goldstein) in *Secretary of State for the Home Department v Gheorghiu* [2016] UKUT 24 (IAC) para 22(iv):

> "… in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process (see for example the observations of this Tribunal as to the benefits of having heard the offender in *Masih (Pakistan)* [2012] UKUT 46 (IAC) at para 18; see also Lord Bingham in *Huang* [2007] 2 AC 167 at para 15)."

98. By contrast Lord Keen for the Secretary of State, at para 90 of his case, submits that the issues raised in a deportation appeal brought by a foreign criminal are unlikely to require live evidence from the appellant:

> "The nature and extent of the foreign criminal's ties to the UK, including his length of residence and relationship with family members, is rarely in dispute. In those rare cases in which there is a dispute concerning, for example, the extent of a foreign criminal's relationship with a partner and/or her children, it is usually the evidence of the partner that is of most significance in resolving that dispute. The critical and determinative question is whether the interests of the foreign criminal and/or any affected family members are sufficient to outweigh the public interest in deportation. That resolves to a matter of judgment for the Tribunal, and very rarely turns on issues of disputed fact."

99. He points out correctly that *Gheorghiu* was concerned with different legislation (Immigration (EEA) Regulations 2006, regulation 21(5)(c)) under which the issue was whether the applicant represented a "present and sufficiently serious threat" (judgment para 9), thus raising directly the issue of his propensity to reoffend. There is no equivalent in the *Ali* criteria. Indeed, the Upper Tribunal in *Gheorghiu* had expressly distinguished the decision of the Court of Appeal in the present case.

100. Lord Wilson attaches weight in particular to the need, as he sees it, for the appellant to demonstrate by direct evidence (subject to cross-examination) his remorse and that he is a reformed character (paras 55(f), 61). For my part I have considerable doubts whether an "effective" appeal is likely to turn on such subjective issues. I see force in Lord Keen's submission that in general application of the *Ali* criteria is 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.

101. It is true that one of the *Boultif* criteria concerns "the time elapsed since the commission of the offences and the applicant's conduct in during that period". As the Grand Chamber explained in *Maslov v Austria* [2008] ECHR 546, [2009] INLR 47, para 90, a significant period of good conduct since the offence "has a certain impact on the assessment of the risk which that person poses to society". However, there is no suggestion in the court's own consideration of that issue in *Maslov* (paras 91-95) that it was seen as depending on subjective evidence as to the state of mind of the appellant, as opposed to objective evidence as to his actual conduct in the relevant period. So far as I am aware, there is nothing in the Strasbourg case law to

support a general view that oral evidence by the appellant is a necessary part of an "effective" appeal in the sense explained in *De Souza Ribeiro*.

102. However, I would be cautious about reaching a firm view on that issue, given my very limited practical experience of dealing with such issues at first hand, and I do not think it is necessary to do so. The problem for the Secretary of State seems to me more fundamental. As Lord Keen I think would accept, it would be wrong in principle for the Secretary of State, as the opposing party to the appeal, to be allowed to dictate the conduct of the appellant's case or the evidence on which he chooses to rely. There may, as Mr Welsh acknowledges, be cases where the appellant fairly believes that direct oral evidence is necessary, and in any event he may reasonably wish to participate actively in the appeal by hearing and responding to the evidence as it emerges. Lord Keen relies on the appellant's ability to apply to the tribunal to give evidence by video link, and on the tribunal's power, if it considers the request well founded, to give effect to it by use of its "extensive case management powers". That response only works if the Secretary of State is able, at the time of certification, to satisfy herself that the necessary facilities can and will be provided. She cannot afford to wait until the case comes before the tribunal, since by then it may be too late.

103. 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. (Things have moved a long way since the comments of Lord Fraser in *R (Khawaja) v Secretary of State for the Home Department* [1984] AC 74, to which Lord Wilson refers: para 75.) However, the evidence of Mr Welsh shows how far the material before the Secretary of State at the time of the relevant decisions fell short of demonstrating how that objective was to be achieved. The agreed note before the Court of Appeal (para 56) did not take things much further. That put the burden on the applicant to make all the necessary arrangements at his own cost, as was arguably appropriate for a party seeking an indulgence to depart from the norm. It did not address the problem of a party who, due to his forced removal the country, and with limited resources, is unable to present his evidence or participate in the hearing in any other way. The problems are underlined by the unchallenged evidence of BID described by Lord Wilson (paras 70-73). There is no evidence that any serious consideration had been given by the Secretary of State, at the time of certification or later, to how those problems were to be overcome in practice. Without such consideration I do not see how she could satisfy herself that the appeal would be "effective".

Conclusion

104. It is unfortunate that these appeals have come to us by a less than ideal route. They started with decisions by the Secretary of State on a flawed basis and without

regard to what has become the critical issue. They proceeded to the Court of Appeal without any detailed consideration of this issue by the Upper Tribunal. Finally, some of the most compelling evidence (now available from BID) has come in very late in the day, 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. That would have enabled it to look in detail at what is required to ensure an effective appeal in cases such as this. We are therefore lacking assistance from the body which is best equipped, and will ultimately be responsible, for determining what a fair and effective procedure requires. Neither the Court of Appeal, nor still less this court, has equivalent expertise or experience. 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.

105. For the moment, we have to deal with the appeals as best we can on the available material. As I have said, having made the initial decisions on a flawed basis it was for the Secretary of State to satisfy us that the error was immaterial. Her problem is that there is no real evidence of consideration of the practical problems involved in cases such as these in preparing and presenting a case from abroad. I am far from saying that those problems cannot be overcome. However, the evidence before us does 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. On that limited basis I would allow the appeal.