Home Office

Section 94B of the Nationality, Immigration and Asylum Act 2002

Version 6

09 May 2016

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Section 1: Introduction

Purpose

This guidance explains to case owners how to consider certifying a human rights claim made in the context of deportation under section 94B of the Nationality, Immigration and Asylum Act 2002.

Legislation

Section 94B of the Nationality, Immigration and Asylum Act 2002 came into force on 28 July 2014. It reads:

> **Appeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation**
>
> (1) This section applies where a human rights claim has been made by a person ("P") who is liable to deportation under—
>
> (a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or
>
> (b) section 3(6) of that Act (court recommending deportation following conviction).
>
> (2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, 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.

Background

Section 17(3) of the Immigration Act 2014 amended the Nationality, Immigration and Asylum Act 2002 to introduce a discretionary certification power in relation to human rights claims made by those liable to deportation under sections 3(5)(a) and 3(6) of the Immigration Act 1971.

Section 94B of the Nationality, Immigration and Asylum Act 2002 allows a human rights claim to be certified where the appeals process has not yet begun or is not yet exhausted and the Secretary of State considers that removal pending the outcome of

an appeal would not breach section 6 of the Human Rights Act 1998. One ground upon which the Secretary of State may certify a claim under section 94B is that the person liable to deportation would not, before the appeal process is exhausted, face a real risk of serious irreversible harm if removed to the country of return.

The result of section 94B certification is that the right of appeal against the decision to refuse the human rights claim is non-suspensive, meaning it is not a barrier to removal. Any appeal can only be lodged and heard, or continued if the claim is certified after the appeal is lodged, while the person is outside the UK.

Regulations 24AA and 29AA were introduced into the Immigration (European Economic Area) Regulations 2006 on 28 July 2014. Regulation 24AA allows non-suspensive appeals in certain EEA deportation cases to reflect the provision in Article 31 of the Free Movement Directive, although the power is different from section 94B. Separate guidance is available for EEA cases: Regulation 24AA of the Immigration (European Economic Area) Regulations 2006.

Although it is primarily used in non-EEA deportation cases, section 94B may also be relevant, and can be applied, in certain EEA deportation cases. This situation will arise where the claim under the EEA Regulations is being considered for certification under regulation 24AA, but the claim also constitutes a human rights claim which will give rise to a right of appeal under section 82 of the 2002 Act if refused. In these circumstances, if regulation 24AA could be applied, but section 94B could not be, or vice versa, then neither part of the case should be certified. This is unlikely to be the case in practice though as the substantive considerations are very similar in nature.

Case law

The leading judgment on section 94B Kiarie & Byndloss v SSHD [2015] EWCA Civ 1020 (link here) was handed down by the Court of Appeal on 13 October 2015.

Section 55 duty

The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that a child's best interests are a primary consideration in deportation cases. Specific guidance on section 55 in the context of section 94B is set out in section 3 of this guidance.

Section 2: Cases not suitable for section 94B certification

A case cannot be certified under section 94B where deportation for a limited period pending the outcome of any out-of-country appeal would be unlawful under section 6 of the Human Rights Act 1998.

Further submissions which raise human rights grounds, and are considered under paragraph 353 of the Immigration Rules, cannot be certified under section 94B if the submissions are refused and it is determined that they do not amount to a fresh claim. This is because the decision to refuse the submissions will not generate a right of appeal in these circumstances. For paragraph 353 guidance see section 3 of this guidance and Further submissions.

Human rights claims which fall for refusal and are certified under section 96 of the Nationality, Immigration and Asylum Act 2002 cannot be certified under section 94B because certification under section 96 means there is no right of appeal. For section 96 guidance see section 3 of this guidance and Section 96 of the Nationality, Immigration and Asylum Act 2002.

Human rights claims which fall for refusal and can be certified under section 94 of the Nationality, Immigration and Asylum Act 2002 either on the basis that the person is entitled to reside in a designated state and the SSHD is not satisfied that the claim is not clearly unfounded, or on the basis that the person is not entitled to reside in a designated state but the claim is clearly unfounded, should be certified under section 94 rather than section 94B. For section 94 guidance see section 3 of this guidance and Section 94 of the Nationality, Immigration and Asylum Act 2002.

Human rights claims (initial claims or further submissions accepted as fresh claims under paragraph 353) made on the basis of Article 2 and/or Article 3 of the European Convention on Human Rights (the “ECHR”), including medical claims, should not be certified under section 94B. This is because if the claim has not been certified under section 94, the claim is not clearly unfounded and therefore removal is likely to give rise to a real risk of serious irreversible harm such that deportation pending the outcome of an appeal may breach the person’s human rights.

Human rights claims from persons who are serving an indeterminate-length sentence where release is at the discretion of the Parole Board will not normally be suitable for section 94B certification. This includes those who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1991;
- given an Extended Sentence for Public Protection (EPP); and
- given an Extended Determinate Sentence (EDS).

The cases described above are not normally suitable for section 94B certification because applying section 94B to these cases may be counterproductive. The Parole Board will have made a decision about release based on the person’s deportation

rather than the possibility that he or she may return to the UK if any appeal is successful. Consequently, there would be no provision to recall to prison in the event of such return even if the Parole Board would otherwise have deemed it to be appropriate, or to impose licence conditions. These cases are not excluded from the scope of certification under section 94B. Consideration must be given to all such cases on an individual basis about whether or not it is appropriate to apply section 94B.

Human rights claims from persons who are liable to be deported while they are children (under the age of 18) will not normally be suitable for section 94B certification. Nevertheless, children are not excluded from the scope of certification under section 94B and consideration must be given to all such cases on an individual basis and having regard to the duty in relation to children set out in section 55, as to whether it is appropriate to apply section 94B.

Where a decision has to be served to file because the person's whereabouts are not known, the case is not suitable for certification under section 94B.

Section 3: Section 94B consideration process

The Government's policy is that the deportation process should be as efficient and effective as possible. Case owners must therefore consider whether section 94B certification is appropriate in all deportation cases where a human rights claim has been made and falls for refusal, unless it is a case to which section 2 of this guidance applies (and indeed certification should also be considered in relation to the cases set above).

In doing so, case owners must consider all relevant factors in the round, and in particular:

a. the best interests of any children who may be, or it is claimed may be, affected by the decision to deport, in compliance with section 55;

b. whether there is a real risk of serious irreversible harm to the person being deported pending the outcome of any appeal he or she may bring?

c. whether there a real risk of serious irreversible harm to any individual , for example family members, that the person to be deported claims would be affected by his or her deportation pending the appeal?

d. if there is not a real risk of serious irreversible harm to the person to be deported or anyone else that such person claims would be affected by his or her deportation, would that person's deportation pending the outcome of any appeal breach his or her rights under the ECHR for any other reasons?

e. whether there would be a breach of the ECHR rights of any individual , for example family members, that the person to be deported claims would be affected by his or her deportation pending the appeal?

f. where the person to be deported makes representations or provides evidence as to procedural unfairness, whether an out-of-country appeal would be procedurally unfair in the particular circumstances of the case;

g. any request the person to be deported makes for discretion to be exercised in his or her favour;

h. whether it is appropriate in all the circumstances to certify the human rights claim so that the person can only lodge or continue an appeal after he or she has left the UK.

The fact that it has been decided in an individual case that deportation would not breach the ECHR does not mean that the case owner can be satisfied that deportation for a limited period pending the outcome of any appeal would not breach that person's human rights. They are separate considerations. When considering

whether deportation pending appeal would breach the ECHR, caseworkers should assess the question on the basis that the person's appeal will succeed and consider whether serious irreversible harm or a breach of ECHR rights would be caused by that temporary removal from the UK.

For further human rights guidance see Considering human rights claims and Criminality guidance for Article 8 ECHR cases. As explained above, guidance must be applied in the context of temporary removal pending the outcome of an appeal rather than long-term deportation.

In considering whether to certify a claim under section 94B, case owners must have regard to all known circumstances and consider all relevant information. This means any evidence submitted specifically about the prospect of an out-of-country appeal (for example, in response to a decision to deport or a section 120 notice) and any evidence that is already on file or submitted in any other context. Any reference to "available information" below refers to such evidence. For the avoidance of doubt, information that would only be available if the case owner undertakes additional research or makes additional enquiries is not "available information" and does not need to be sought. However, if it is sought on the basis of the individual circumstances of the case, it should then form part of the consideration.

Section 55 duty

When considering whether to certify a human rights claim pursuant to section 94B, the best interests of any child under the age of 18 whom the available information suggests may be affected by the deportation decision must be a primary consideration. Case owners must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person liable to deportation to be able to appeal from the UK. This is particularly relevant in considering whether deportation pending appeal would cause serious irreversible harm to the child. The case owner must also consider whether those interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in effecting deportation quickly and efficiently.

Case owners must carefully assess the quality of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents.

For further guidance in relation to the section 55 duty, see:

- Section 55 children's duty guidance;
- Introduction to children and family cases; and
- Criminality guidance for Article 8 ECHR cases.

Removal pending appeal and the Human Rights Act 1998

Case owners can only certify under section 94B if satisfied that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights

Act. This means that case owners need to consider whether requiring a person to appeal, or to continue an appeal, from outside the UK would breach the ECHR.

The following steps set out how to consider whether requiring a person to appeal from outside the UK would breach the ECHR.

Which articles has the person raised either explicitly or implicitly, as grounds against removing him or her from the UK? The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceedings), but case owners need to be alert to any Convention rights which may be engaged by removal pending the outcome of an appeal.

When considering whether requiring a person to appeal, or to continue an appeal, from outside the UK would breach the ECHR, case owners must consider whether removal prior to the outcome of any appeal would result in a real risk of serious irreversible harm. The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in immigration cases to determine whether to issue a ruling under rule 39 of the Rules of Court, preventing a signatory State from removing a foreign national from its territory. In the context of section 94B, the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act and the absence of a real risk of serious irreversible harm is only one relevant factor.

The term “real risk” is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the ECHR. As explained in Considering human rights claims, in practice this is the same standard of proof as in asylum cases – a reasonable degree of likelihood. See section 5.2 of Assessing credibility and refugee status for further guidance on the standard of proof.

The terms “serious” and “irreversible” must be given their ordinary meanings. “Serious” indicates that the harm must meet a minimum level of severity, and “irreversible” means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible.

If the human rights claim is based on Article 8 of the ECHR, case owners must consider the effect of removal not only on the person liable to deportation, but also on any other person whom the available evidence suggests will be affected by deportation (for example, immediate family members such as a partner and/or children).

By way of example, in the following scenarios where a person is deported before his or her appeal is determined, it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm, or that removal pending appeal would otherwise breach the ECHR, while an out-of-country appeal is pursued

(case owners must note that this is an indicative list and not prescriptive or exhaustive):

- a person will be separated from his or her partner for several months while appealing against the refusal of a human rights claim;
- there is no current subsisting family relationship with a child and although a family court case is in progress to obtain access there is no evidence that the case could not be pursued while the person is abroad;
- a child or partner is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person liable to deportation to act as a carer;
- a person has strong private life ties to a community that will be disrupted by deportation (e.g. a job, a mortgage, a prominent role in a community organisation etc.).

The following are examples (as with the preceding paragraph, indicative only and not prescriptive or exhaustive) of when removal pending the outcome of any appeal might give rise to a real risk of serious irreversible harm or otherwise breach the ECHR:

- the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care;
- the person being deported is the sole carer of a British citizen child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant interruption to his or her education;
- the person to be deported is subject to a court order for a trial period of contact with his or her child, the outcome of that trial period will determine the future contact between that person and the child, and that future contact could affect the Article 8 assessment. If deportation pending the outcome of the appeal would prevent that person undertaking the trial period of contact, this may amount to serious irreversible harm;
- the person has a serious medical condition and medical treatment is not available, or would be inaccessible to the person, in the country of return, such that removal pending appeal gives rise to a risk of a significant deterioration in the person’s health;
- there is credible evidence that the person would, due to reasons outside his or her control, be prevented from exercising his or her right to an appeal (effectively or at all) against the decision to refuse a human rights claim. For example, where the person suffers from a serious mental health condition or serious physical disability that would prevent him from effectively pursuing his appeal absent the support of his carers in the UK (and where he will not be able to access the requisite assistance from abroad). For further guidance see the section below on human rights procedural protection.

In considering whether there is a real risk of serious irreversible harm or removal pending the outcome of any appeal would otherwise breach the ECHR, case owners need to have regard to all known circumstances and to consider all relevant information. This includes any evidence submitted specifically about the prospect of an out-of-country appeal (for example, in response to a decision to deport or a section 120 notice) and any evidence that is already on file or submitted in any other context.

Case owners must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents. There is no prescribed evidence to be submitted, but examples of relevant evidence might include:

- where a person claims that he or she or a family member has a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel;
- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed;
- birth, marriage or civil partnership certificates;
- documentary evidence from official sources demonstrating long-term co-habitation, etc.

In the context of an Article 8 claim, case owners must also consider the public interest in requiring a person to appeal from abroad. The Court of Appeal held in Kiarie & Byndloss v SSHD [2015] EWCA Civ 1020 (link here):

> "44. In general terms, and subject to specific factors such as risk of reoffending, it may be thought that less weight attaches to the public interest in removal in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period pending determination of any appeal, than when considering the underlying issue of deportation for the longer term. But the very fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in that context too: Parliament has carried through the policy of the deportation provisions of the UK Borders Act 2007 into section 94B. In deciding the issue of proportionality in an article 8 case, the public interest is not a trump card but it is an important consideration in favour of removal".

Human rights procedural protection

ECHR rights, such as Article 8, have a procedural aspect which means that a breach of that right can arise where there is no effective procedural protection. Procedural protection means access to an effective remedy by way of a mechanism to challenge a refusal decision. Whether a person has an effective remedy is relevant to whether it is lawful to certify a claim under section 94B. If the requirement to appeal from

outside the UK means that the person cannot access a fair and effective appeal process, removal pending the appeal will be a breach of section 6 of the Human Rights Act and the human rights claim cannot be certified under section 94B.

An appeal from overseas may be less advantageous to the person. That does not mean that requiring someone to appeal from overseas is a breach of his or her Convention rights. An effective remedy does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. The question to be answered is whether the appeal from overseas can be determined effectively and without obvious unfairness.

Process and consideration

When a preliminary decision to deport is made, the person is invited to make representations as to why he or she could not or should not be expected to appeal from outside the UK. If no representations are made the case owner does not need to consider whether an out-of-country appeal will meet the procedural requirements. Case owners do not need to make proactive enquiries, or proactively to investigate the circumstances of a person to establish whether he or she can have a fair and effective appeal if required to appeal from overseas. It is for the person to raise those points. If representations are made about why a person should not be required to appeal from overseas, they must be carefully considered. If, notwithstanding such representations, the claim is certified under section 94B, that consideration must be set out in the decision letter. Where representations about an out-of-country appeal are made, the principles under which they must be considered are that:

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

The person may make representations to the effect that, despite the powers of the Tribunal to secure a fair and effective appeal, his or her personal circumstances mean that he or she would not be able to access a fair and effective remedy.

Examples of the steps the Tribunal could take to ensure a fair and effective appeal where the appellant is outside the UK are to:

- consider whether the appeal can be fairly determined without the appellant giving oral evidence including considering any written evidence submitted by the appellant, documentary evidence and oral or written evidence from family members, friends and others;

- consider an application from the appellant to give oral evidence via video-link, Skype or telephone and make the necessary arrangements to overcome any practical difficulties if it considers that such evidence is necessary for the fair determination of the appeal;

- summon the appellant to attend as a witness. The Tribunal may take this step if it has decided that it is necessary for the appellant to give oral evidence in the appeal in order for it to be fairly determined and it is not possible to receive evidence by video-link or other means of electronic communication, or if the Tribunal decides for some other reason that the appellant must attend the appeal in person in order for it to be fairly determined. A summons does not amount to an enforceable direction to the SSHD to permit the appellant to return to the UK. However if the SSHD does not permit the appellant to return to the UK in these circumstances, the Tribunal may draw inferences in the appellant's favour. Moreover, any decision not to return the appellant to the UK in these circumstances may be vulnerable to challenge by judicial review on basis that it is unreasonable.

The following are examples of representations that will not, without more, amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- a desire to participate in the proceedings, including to give oral evidence or to attend the appeal;
- an inability to communicate with ease with family members or legal representatives to prepare the appeal;
- the cost, availability or reliability of internet or telephone use in the country to which the person is to be removed;
- complexity of legal proceedings and inability to afford legal representation;
- the cost, availability or reliability of video-link, for the purpose of participating in and / or giving oral evidence at the appeal, in the country to which the person is to be removed;
- the person is disabled to the extent that he or she cannot instruct legal representatives or liaise with family members or others who will give evidence in the appeal but the person has family members or others who can assist him or her in the country to which he or she is to be removed.

The following are examples of representations that may amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- the person is disabled or otherwise personally not capable of giving instructions to legal representatives or communicating with family members or others who will give evidence in the appeal and there is no one who can assist the person with such instructions or communications in the country to which he or she is to be removed;
- the accepted absence of a route by which the person could return to the

UK if the Tribunal considered that his or her presence at the appeal was necessary for it to be fair.

This list is not exhaustive. Case owners should discuss with their senior caseworker any case where they are considering not certifying under section 94B as a result of representations about procedural fairness.

Discretion

If satisfied that there is not a real risk of serious irreversible harm and that removal pending the outcome of any appeal would not otherwise breach the ECHR, case owners must consider whether there is any other compelling reason not to certify. Section 94B is a discretionary power, meaning that it does not have to be applied in all cases where removal pending the outcome of any appeal would not breach the ECHR. In each individual case, case owners must be satisfied that it is appropriate in all the circumstances to certify. Exercising discretion should be considered where the person is not currently removable. It would be counterproductive to certify if the person could not then leave the UK to exercise a right of appeal, for example there is no realistic prospect of an acceptable travel document or other return information required for biometric returns being available.

Case owners must consider any request to exercise discretion not to certify, even in the event that removal pending the outcome of any appeal would not breach the ECHR. But in the absence of specific representations, and where there are no particular factors that would justify the exercise of discretion, it is not necessary to give reasons in the decision letter for not exercising discretion in favour of a person liable to deportation.

Dual certification

If a protection claim and/or a human rights claim made under Articles 2 and/or 3 is certified under sections 94 or 96, but it is not possible to certify a linked Article 8 claim (or other human rights claim) under either of those powers, then consideration must be given, in line with the factors in this guidance, to certifying the Article 8 claim under section 94B.

If the protection and/or Article 2/3 claim cannot be certified, there will be an in-country right of appeal against the refusal of that claim. It is preferable for all appealable decisions to be considered at a single appeal therefore in this situation any other human rights claim should not be considered for certification under section 94B.

For further guidance see Section 94 of the Nationality, Immigration and Asylum Act 2002 and Section 96 of the Nationality, Immigration and Asylum Act 2002.

Paragraph 353 of the Immigration Rules

Where case owners refuse further submissions which rely on Articles 2 and 3, and those further submissions are not accepted as a fresh claim under paragraph 353,

then it will be possible (subject to consideration of the claim in line with the factors set out in this guidance) to certify under section 94B any associated non-Article 2/3 human rights claim which is accepted as a fresh claim under paragraph 353. For paragraph 353 guidance see Further submissions.

Timing of certification

It is possible to certify under section 94B at any stage in the process as long as the person has not exhausted his or her appeal rights. In practice, this means that if a claim is not certified at the initial decision stage, and either party challenges the decision of the First-tier Tribunal (or that of the Upper Tribunal), the case owner must consider whether it is appropriate to certify the claim before it is heard by the Upper Tribunal (or the Court of Appeal).

For example, if a person has an in-country appeal against the refusal of an Article 8 claim solely because he or she was entitled to an in-country appeal against the refusal of a protection claim (see above), and the appeal is dismissed by the First-tier Tribunal, the protection claim may no longer be relied upon if the appeal progresses to the Upper Tribunal but the Article 8 claim and appeal may be pursued. In this situation, consideration must be given to whether it is appropriate in all the circumstances, including the factors set out in this guidance, to certify, including the public interest in effecting deportation as quickly as possible, the stage the appeal has reached, the reasons for not certifying when the decision to deport was made and any other relevant factors. If, for example, the only reason for not certifying was that a travel document was not available, and one has since been obtained, the question of whether to certify should be considered again in line with this guidance.

If it is decided to certify at any stage after the person has lodged an appeal, the case owner must provide prompt written notification to both the person to be deported (or his or her legal representative) and the relevant Court or Tribunal.

Peer review process

All decision letters which certify a human rights claim under section 94B should be subject to a peer review process prior to service of the decision. The peer review can be conducted by another case owner, a senior caseworker or a chief caseworker as deemed appropriate by the casework unit and must be recorded in CID notes and on the case file.

Decisions not to certify under section 94B should also be subject to a peer review process which can be by way of conversation or consideration minute as long as the review is recorded in CID notes and on the case file.

Reasons for decision

Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out in CID notes and on the case file. This is because a decision to certify (whether it is made at the same time as the decision to deport, or later on in the appeal process) can be challenged by judicial review and

the Home Office may be required to provide records of each stage of the decision-making process.

Decisions served to file

Where a decision has to be served to file because the person's whereabouts are not known, case owners should not certify under section 94B. Should the person later come to light, the question of whether to certify can be considered in line with this guidance. For guidance on service to file see Serving decisions on file.

Decisions not to certify

A decision not to certify a human rights claim under section 94B is not a concession that the Secretary of State is satisfied that removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act.

Section 4: Appeals

Appeals lodged from within the UK

There may be cases where a person lodges an appeal from within the UK despite the human rights claim having been certified under section 94B. If a case owner is not sure whether an appeal is valid or invalid, advice should be sought in the first instance from a senior caseworker or a chief caseworker.

Where an invalid appeal has been lodged, the case owner must write to the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") to ask them to withdraw the listing on the basis that there is no jurisdiction to hear the appeal.

If the listing is not withdrawn, the presenting officer must argue at the case management review (CMR) and/or substantive hearing that there is no jurisdiction to hear the appeal. This is the case even if the person is deported before the hearing, because legally the person can only lodge an appeal after he or she has left the UK: the person's deportation before the hearing does not render the invalid appeal valid.

Having made these first arguments, in writing or at a CMR, if the FTT proceeds with the hearing, the presenting officer will defend the case as normal, but these arguments should be presented "in the alternative" in the event that the FTT decides it has jurisdiction to hear the appeal. The presenting officer must not refuse to argue the substance of the appeal, as this will mean the appeal, subject to jurisdiction points, is uncontested and if allowed, the Secretary of State would be unable to challenge that decision.

The Specialist Appeals Team will seek to appeal any allowed appeal where the appeal was lodged from within the UK despite a section 94B certificate.

This guidance applies to all section 94B certifications, regardless of whether deportation is pursued under the Immigration Act 1971, the Immigration (European Economic Area) Regulations 2006 or the UK Borders Act 2007.

Where deportation is pursued under regulation 19(3)(b) of the EEA Regulations, and the case is dual certified under regulation 24AA and section 94B, in an appeal under regulation 26 of the EEA Regulations the Tribunal can consider a human rights claim raised in response to a section 120 notice (see Schedule 1 to the EEA Regulations). It is therefore unnecessary for two separate appeals to be brought. If the person brings separate appeals under both regulation 26 of the EEA Regulations and section 82 of the 2002 Act, it is his or her responsibility to alert the First-tier Tribunal (Immigration and Asylum Chamber) that he or she will be lodging a regulation 26 appeal from within the UK, and a section 82 appeal from outside the UK, and that they should be linked for a single hearing.

Successful appeals

Where a person's out-of-country appeal against the refusal of a human rights claim

succeeds, the deportation order will normally be revoked and the person may make arrangements to return to the UK.

If requested, consideration must be given to whether the Home Office should pay for the person's journey back to the UK.

In considering whether to pay for the person's journey back to the UK, regard should be had to the following factors:

- the quality of the Home Office's decision to refuse the human rights claim;
- whether the appeal was allowed on the basis of evidence or information that the person failed to submit to the Home Office in advance of his deportation despite a section 120 warning or other opportunity, and if so, whether there is any reasonable explanation for this;
- whether there is compelling evidence that if the Home Office does not pay for the return journey the person would be unable to return to the UK. There is no prescribed evidence to be submitted, but examples of relevant evidence might include bank statements for the person and any family members. Case owners should also take into account any evidence pertaining to the financial circumstances of the person and any family members which was already available prior to deportation, and consider the person's general credibility;
- where it is considered that the Home Office should pay for the journey back to the UK, financial authority must be obtained and signed off at a sufficiently senior level within Criminal Casework, usually Assistant Director.

Where a person was accepted onto the Facilitated Return Scheme (FRS) and received financial assistance to leave the UK, but then successfully appealed the refusal of a human rights claim from abroad and wishes to return to the UK, the Home Office should not pay for the journey back to the UK.

Section 5: Change record

Version	Author(s)	Date	Change References
1.0	LS (CPT)	28/07/2012	First draft.
2.0	LC (CPT)	20/10/2014	Added section 1: introduction; added a link to the EEA guidance; added section 2: when not to certify; combined “real risk of serious irreversible harm” into section 3: when to certify and added “dual certification”; added section 4: successful appeals; added section 5: change record.
3.0	LS (CPT)	20/01/2015	Removed a drafting error in paragraph 1.3.
4.0	LS (CPT)	29/05/2015	Removed reference to foreign criminals where no longer applicable; added paragraph 3.14 to section 3.
5.0	LC (CPT)	26/10/2015	Amendments made following the judgment in Kiarie and Byndloss [2015] EWCA Civ 1020.
6.0	LC (CPT)	09/05/2016	Amendments made in relation to deportation cases pursued under the Immigration (EEA) Regulations 2006.