Home Office

Certification under section 94B of the Nationality, Immigration and Asylum Act 2002

Version 9.0

 Published for Home Office staff on 5 June 2023

Contents

About this guidance

This guidance explains to decision makers how to consider certifying a refused human rights claim under section 94B of the Nationality, Immigration and Asylum Act 2002.

This guidance relates to section 94B as amended by the Immigration Act 2016.

Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors email the Appeals Policy team.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

Clearance and publication

Below is information on when this version of the guidance was cleared:

- version **9.0**
- published for Home Office staff on **5 June 2023**

Changes from last version of this guidance

This guidance has been updated following the Supreme Court judgment in Kiarie and Byndloss v the Secretary of State for the Home Department [2017] UKSC 42, which found that the opportunity to give oral evidence would normally be required for an out of country appeal certified under section 94B to be fair and effective.

Steps have now been taken to allow people whose claims have been certified under section 94B to have access to a video link during their appeal. This guidance reflects the fact that where a video link is in place certification under section 94B can resume.

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Introduction

Legislation

Section 94B of the Nationality, Immigration and Asylum Act 2002 (as amended) states:

94B Appeal from within the UK: certification of human rights claims

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

2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, refusing P entry to, removing P from or requiring P to leave the United Kingdom, 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 the Human Rights Convention).

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

Between 28 July 2014 and 1 December 2016 section 94B applied only in relation to human rights claims made by those liable to deportation under section 3(5)(a) and 3(6) of the Immigration Act 1971. Section 63 of the Immigration Act 2016 amended the Nationality, Immigration and Asylum Act 2002 to extend the scope of section 94B to all human rights claims. At present the policy is to focus the use of section 94B only on those liable to deportation. This will be kept under review. For further guidance contact Appeals Policy.

Summary of section 94B

If a claim is certified under section 94B, the effect is that any appeal can only be lodged or continued while the claimant is outside the UK. This means the right of appeal against the decision to refuse the human rights claim is non-suspensive, so the appeal is not a barrier to removal.

Section 94B can only be used where the conditions set out in section 94B itself are met, namely that requiring the claimant to pursue an appeal from outside the UK would not be unlawful under section 6 of the Human Rights Act 1998. However, it is a discretionary power so consideration must also be given to whether or not the claim should be certified.

There is a public interest in maintaining effective immigration control. In the context of human rights claims, it is the UK government's policy to further that public interest

by ensuring that people who have been refused a right to be in the UK should leave the UK at the earliest opportunity and not automatically be able to remain and build up new claims or strengthen existing claims (under, for example, Article 8) where an appeal from outside the UK would not cause serious irreversible harm or otherwise breach a person's human rights. The starting point is therefore that certification should always be considered where it is lawful to do so, and that the public interest is generally best served by certification under section 94B unless there are good reasons not to certify. There may nonetheless be good reasons not to certify a particular claim, such as compassionate circumstances: see the section on Consideration for further guidance.

Case law

The leading judgment on section 94B, Kiarie and Byndloss v The Secretary of State for the Home Department [2017] UKSC 42 was handed down on 14 June 2017. The Supreme Court found that in order to certify a claim under section 94B, the Secretary of State must ordinarily ensure that a claimant who wants to give oral evidence at the appeal will have the opportunity of doing so. Following this judgment, the Upper Tribunal gave guidance on what procedure was required for an appeal certified under section 94B to be procedurally fair in AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC). Guidance on Kiarie and Byndloss and AJ can be found in the section Procedural fairness

There has also been litigation on whether the processes the Home Office has set up for video links comply with data protection legislation. The Court of Appeal in the case of Johnson V Secretary of State for the Home Department [2020] EWCA Civ 1032, found that the General Data Protection Regulation (GDPR) was not breached simply because a person did not consent to their data being transferred.

Decision makers

'You' in this guidance refers to decision makers considering section 94B certification. Decision makers may be in Immigration Enforcement, or UK Visas and Immigration.

You cannot certify under section 94B unless you are satisfied that removal pending appeal would not be unlawful under the Human Rights Act 1998, that is that it would not breach the European Convention of Human Rights.

Standard and Burden of proof

The standard of proof is the civil standard of the balance of probabilities (whether it is more likely than not), when considering whether removal pending appeal would be a breach of human rights. The burden of proof when deciding whether or not to certify is on you, having regard to the available evidence. This requires the individual to be given an opportunity to provide reasons why they should not be deported pending their appeal. You must consider any representations made when reaching your decision on certification.

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 consideration of the child's best interests must be a primary consideration in immigration decisions affecting them. Section 90 of the 2016 Immigration Act states, for the avoidance of doubt, that section 55 applies to decisions made under that act, including section 94B as amended. Specific guidance on section 55 in the context of section 94B is set out in the Summary of steps within this guidance. See also guidance Safeguard and promote child welfare.

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When to consider section 94B certification

Certification under section 94B is being restarted after a period of non-use following the judgment in Kiarie and Byndloss. The initial policy is to focus the use of section 94B on those liable to deportation (mainly Foreign National Offenders). This reflects the high public interest in deporting Foreign National Offenders and others whose presence is not conducive to the public good. We will monitor the effectiveness of section 94B in achieving its policy aim, with the intention of extending consideration of section 94B certification to all human rights claims in due course. This guidance will be updated as necessary.

You must consider whether to certify under section 94B in all cases where a human rights claim has been made and the person is a Foreign National Offender, or otherwise liable to deportation, and the human rights claim is refused.

It will not be possible to certify the claim, and you do not need to go on to consider other factors in respect of the decision to certify under section 94B, where either of the following applies:

- it is not possible for the person to give evidence from the country they are to be removed to via a video link
- the case should not be certified for other reasons, see Examples: serious irreversible harm or breach of human rights

Some cases may be suitable for dual certification (certification of different elements of the same claim under different certification powers).

You should only consider a case for certification under section 94B if the claimant has been informed that the power to certify under section 94B applies to them and they are given the opportunity to provide reasons why their claim should not be certified. See Process overview for further information.

Availability of a video link

You should not certify a claim where it is not possible for the claimant to give evidence at their appeal by video link. Following Kiarie and Byndloss, use of section 94B was paused while steps were taken to put in place measures to allow for video link facilities that would enable people to give evidence from overseas at their appeal. This means not only that a video link facility is available but also that the country has given consent for evidence to be given via a video link. You should check with the Overseas Video Team who will be able to confirm whether or not a video link can be arranged for the appeal and whether consent for the use of a video link has been agreed by the country. If the use of a video link is not possible you do not need to consider the rest of this guidance as certification under section 94B will not be appropriate.

Cases that should not be certified under section 94B

Section 6 of the Human Rights Act 1998
A case cannot be certified under section 94B where removal for a temporary period pending the outcome of any out-of-country appeal would be unlawful under section 6 of the Human Rights Act 1998, see the section on Section 94B consideration process.

Protection claims: Articles 2 and 3 of the ECHR
Human rights claims (initial claims or further submissions accepted as fresh claims under paragraph 353 of the Immigration Rules) made on the basis of Article 2 (right to life) and/or Article 3 (freedom from torture or inhuman or degrading treatment or punishment, including medical claims) of the European Convention on Human Rights (the 'ECHR') should not be certified under section 94B. This is because if the claim has not been certified under section 94 or has met the threshold to be accepted as a fresh claim under paragraph 353, the claim is not clearly unfounded and therefore, because of the nature of the claim, removal pending the outcome of the appeal may give rise to a risk of serious irreversible harm or breach human rights.

See Dual certification where a claim is based on Article 2 and/or Article 3 ECHR and other ECHR Articles.

Paragraph 353: fresh claims
Further submissions which raise human rights grounds and are considered under paragraph 353 of the Immigration Rules, should not be certified under section 94B if the submissions are rejected and it is determined that they do not amount to a fresh claim. This is because the decision to reject the submissions is not a refusal of a human rights claim and will not generate a right of appeal. For paragraph 353 guidance see both the Consideration within this guidance, and the Further submissions guidance.

See Dual certification where further submissions are based on Article 2 and/or Article 3 ECHR and other ECHR Articles.

Section 94 of the 2002 Act: clearly unfounded claims
Human rights claims which are refused and can be certified under section 94 of the Nationality, Immigration and Asylum Act 2002 as clearly unfounded should be certified under section 94 rather than section 94B. Following changes brought in by the Nationality and Borders Act 2022 any claim certified under section 94 on or after the 28 June 2022 will no longer have a right of appeal. For further guidance on section 94 see the guidance Certification of Asylum and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded cases).

Section 96 of the 2002 Act: late claims
Human rights claims which are refused and certified under section 96 of the Nationality, Immigration and Asylum Act 2002 should not be certified under section 94B because certification under section 96 means there is no right of appeal. For

section 96 guidance see both the section on Consideration within this guidance, and Section 96 of the Nationality, Immigration and Asylum Act 2002.

Whereabouts unknown
Where a decision is served to file because the claimant's whereabouts are not known, the case is not suitable for certification under section 94B. Should the claimant later come to light, the question of whether to certify can then be considered in line with this guidance. See Non-detained cases, contact management, absconders.

Cases not normally suitable for section 94B certification

Criminal cases with indeterminate sentence
Human rights claims from claimants 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)
- 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 claimant's deportation rather than the possibility that they may return to the UK if any appeal is successful. Consequently, there may 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, but careful consideration about whether it is appropriate to certify under section 94B must be given to all such cases on an individual basis.

Unaccompanied children
Human rights claims from unaccompanied 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 certify under section 94B.

Potential Victim of Human Trafficking
Where a claimant has made a human rights claim and been referred for assessment of whether they are a victim of human trafficking or modern slavery (under the National Referral Mechanism) their claim is unlikely to be suitable for certification while the assessment is outstanding. See the guidance on Victims of modern slavery.

Dual certification: when to certify

Where the human rights claim involves Articles 2 or 3 ECHR
If a person makes a human rights claim which includes Articles 2 and/or 3 ECHR and any other ECHR Articles, and the elements of the claim made under Articles 2 and/or Article 3 ECHR can be certified under section 94 or 96 of the 2002 Act, but it is not possible to certify the other elements of the human rights claim under either of those powers, then consideration must be given, in line with the factors in this guidance, to certifying the other elements of the human rights claim under section 94B. However, if the Article 2 and/or Article 3 elements of the claim can be certified under section 94, but the other elements cannot be certified under section 94, 96 or section 94B, then section 94 and s94B should not normally be applied. If the Articles 2 and/or Article 3 ECHR claim cannot be certified under section 94 or 96, there will be an in-country right of appeal against the refusal of those elements of the human rights claim. There is no operational benefit in certifying part of a claim if there is an in-country appeal on another part. It is better for all elements of the claim to be decided at the same appeal.

For further guidance see:

- Section 94 of the Nationality, Immigration and Asylum Act 2002
- Section 96 of the Nationality, Immigration and Asylum Act 2002

Dual certification and paragraph 353 of the Immigration Rules: fresh claims
If further submissions are made which include claims under Article 2 or 3 ECHR and another Article of ECHR, and the Article 2 or 3 elements are not accepted as a fresh claim, but the other elements of the claim are accepted as a fresh human rights claim and refused there will be a right of appeal against the refusal of the human rights claim. Then it will be possible (subject to consideration of the claim in line with the factors set out in this guidance) to certify that refused claim under section 94B. For paragraph 353 guidance see Further submissions.

Citizens' Rights Appeals and EEA Regulations appeals as saved

Section 94B does not apply to appeals under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (the Citizens' Rights Appeals Regulations) as there are separate certification powers for those appeals which allows for non-suspensive appeals in certain cases. For further information on Citizens Rights Appeals see the rights of appeal guidance, and for guidance on certification see EU Settlement Scheme appeals: Certification in National Security and deportation cases. Section 94B also should not be applied to any appeals under The Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) as saved by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 or the Citizens' Rights (Application Deadline and Temporary Protections) (EU Exit) Regulations 2020 which also have separate certification provisions that allow for non-suspensive appeals in certain circumstances.

Where a person has an appeal under the Citizens' Rights Appeals Regulations or the EEA Regulations representations they wish to make in relation to a refusal of a human rights claim may be considered by the tribunal considering the Citizens' Rights Appeal or EEA Regulations appeal, in accordance with Regulation 9 of the Citizens' Rights Appeals Regulations/Schedule 2 of the EEA Regulations, as saved. However, it is nevertheless possible for appellants to lodge a separate human rights appeal and a Citizens Rights Appeal.

Where there is a separately lodged human rights appeal you should only certify the human rights appeal under section 94B when the Citizens Rights Appeal has also been certified under the Regulations. This is because unless certified the Citizens Rights Appeal will be a barrier to removal. Where this happens a request to link the human rights appeal to the Citizens Rights Appeal should be made by the decision maker who has decided the claim. The request to link the appeals should go to the hearing centre dealing with the appeal, the address for which should be on the Home Office file.

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Consideration of evidence

In considering whether to certify a claim under section 94B, you must have regard to all known circumstances and consider all relevant information. This includes any evidence submitted specifically about the potential difficulties arising from an out-of-country appeal, and any other relevant evidence, including evidence that has been submitted for example as a consequence of further enquiries you have made. Any reference to 'available information' in this guidance refers to such evidence.

You must follow the process set out in the Procedural fairness section which requires the person to be given the opportunity to put forward any reasons they have for why their claim should not be certified under section 94B. The Supreme Court in Kiarie and Byndloss emphasised the importance of procedural fairness in ensuring there is no breach of Article 8 ECHR. The courts have been clear (see for example SS (Nigeria) [2014] 1 WLR 998) that it is for the claimant affected to make their case and raise matters of relevance, not for the Secretary of State to seek such information proactively. Therefore, you are not required to undertake additional research or make additional enquiries in the generality of cases. Information that would only be available if you did so is not 'available information'.

However, in some circumstances, the information provided by the claimant may suggest that further enquiries are necessary to establish the situation. Where that is the case, you should make those enquiries. Whether it is necessary to make such further enquiries should be assessed on a case-by-case basis.

For example, further enquiries may be necessary where the evidence submitted by the claimant indicates that a child will or may be affected by their removal pending appeal, but, for example, there is no information on the care arrangements for that child following the claimant's removal. Or where you are made aware that social services are engaged with a child, you may make further enquiries of social services. This is in line with the guidance on the safeguarding Children strategy.

You should consider whether the information provided is recent (for example where it has been provided as part of the claim) or whether more up-to-date information is needed, for example if there is evidence that a claimant suffers from health problems that may have deteriorated over time since the information was provided.

Decision makers should seek guidance from their senior case worker before undertaking further enquiries.

You 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 uncertified copies of documents or documents that it is not possible to verify.

There is no prescribed evidence to be submitted, and all evidence provided must be considered, but examples of relevant evidence might include:

- where a claimant claims that they or a family member have a medical condition, a signed and dated letter on -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 (and in the latter case, making plain the outcome)
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation and such like
- letters from schools or youth workers in relation to the situation of an affected child
- letters and statements from family members
- witness statements

When considering what weight to give a witness statement or letter from, for example, family members or schools, you should consider whether:

- the person giving the evidence has recognised expertise or authority an expert witness statement from an independent source is likely to be given more weight than a statement from someone without recognised expertise in the area on which they are providing evidence
- the evidence is based on assertion or hearsay and not direct knowledge; a witness statement from a person in a position to know specific information, such as a family member providing evidence on the impact on themselves is likely to be given more weight than one from someone who is only in a position to attest to generalities
- the evidence provides sufficient detail of a causal link between a temporary absence while any appeal is decided and any alleged impact or harm
- the evidence is corroborated by any independent source; a witness statement that contains unsubstantiated assertions is likely to be given less weight than one that is corroborated

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Consideration

Summary of steps in the consideration process

You must decide whether to certify based on the individual circumstances of each case.

The fact that it has been decided in an individual case that removal from the UK permanently or indefinitely would not breach human rights does not mean that you can be satisfied that removal for a temporary period pending the outcome of any appeal would not cause serious irreversible harm or otherwise breach human rights. They are different considerations.

When considering whether removal pending appeal would breach human rights, you should approach the question on the basis that the claimant's removal will be temporary if the appeal succeeds. You should consider whether serious irreversible harm or other breach of human rights would be caused during that temporary period of removal from the UK.

In doing so, you must consider all relevant factors, and in particular:

- the best interests of any children who may be affected by the temporary removal of the claimant, see guidance below on Children
- whether there is a real risk of serious irreversible harm to the claimant being removed pending the outcome of any appeal or to any individual, for example family members, see guidance below on Serious irreversible harm
- whether that claimant's removal pending the outcome of any appeal would breach the human rights of the claimant or any other person for any other reasons, see guidance below on Breach of human rights
- where the claimant to be removed makes representations or provides evidence as to the potential procedural unfairness of an out of country appeal, you should consider whether an out-of-country appeal would be procedurally unfair in the particular circumstances of the case, see guidance below on Procedural unfairness
- any reasons given by the claimant as to why the discretion not to certify should be exercised in their favour, and whether it is appropriate in all the circumstances to certify the human rights claim so that the claimant can only lodge or continue an appeal after they have left the UK, see guidance below on Discretion

You should follow each of the above steps, where relevant to the circumstances of the case.

Serious irreversible harm

Summary

1) Does the available information show that temporary absence from the UK for the duration of an appeal will create a real risk of harm to the claimant or another person?
2) Does it amount to serious irreversible harm?

What is serious irreversible harm?
You must consider whether removal pending the outcome of any appeal would give rise to 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 an immigration case 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. The absence of a real risk of serious irreversible harm is only one relevant factor in that analysis.

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. An example of serious irreversible harm would include where there is a real risk that the person affected would be subject to significant deterioration in their physical or mental health.

See examples of serious irreversible harm or breach of human rights.

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.

Breach of human rights

Summary

1) Does the available information show that temporary absence from the UK for the duration of an appeal will cause a breach of the human rights of the claimant or another person?
2) What human right is affected? For example, if it is Article 8, does any claimed interference with the right amount to a breach? You will need to determine if the interference is proportionate in light of the public interest in maintaining immigration control (and in deportation cases any other relevant public interest factors), taking into account all the relevant factors in the round.

How to consider breach of human rights in the context of temporary removal

You 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 you need to consider whether requiring a claimant to appeal, or to continue an appeal, from outside the UK would breach human rights.

The following steps set out how to consider whether requiring a claimant to appeal from outside the UK would breach human rights.

Which Articles of ECHR has the claimant raised either explicitly or implicitly, as grounds against temporarily removing them 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 you need to consider any ECHR rights which may be engaged by removal pending the outcome of an appeal.

The Supreme Court in Kiarie and Byndloss emphasised the importance of procedural fairness, in ensuring there is no breach to Article 8 this fairness requires there to be an effective remedy, which means the appeal has to be fair and effective. Where a human rights claim has been certified under section 94B, the out of country appeal does not have to be optimum; the key question is whether the appeal can be fair and effective. This is a fact specific exercise. Guidance on the approach you should take can be found in the Procedural fairness section.

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

See examples of serious irreversible harm or breach of human rights.

Proportionality
A temporary absence pending the outcome of an appeal may amount to an interference with a claimant's human rights without amounting to a breach. Where the human right in question is a qualified right, you must assess whether any such interference is proportionate when set against the Discretion in maintaining immigration control (and in deportation cases any other relevant public interest factors).

The test to be applied when considering whether temporary removal is proportionate in light of the public interest in removal differs between human rights claims in cases subject to deportation and other human rights claims.

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

Examples: serious irreversible harm or breach of human rights

The following are examples where certification may be appropriate in the absence of additional factors (this is an indicative list and not prescriptive or exhaustive):

- the mere fact that a claimant will be separated from their partner for a period of time (even if that is for a yet to be determined period) while the partner is appealing against the refusal of a human rights claim
- the claimant is the parent of a child in the UK, but there is no current subsisting relationship with that child
- the claimant has a subsisting relationship with a child in the UK, but the child will relocate with the claimant
- 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 / or does not require the claimant to act as a carer
- a claimant has strong private life ties to a community that will be disrupted by removal (for example a job, a mortgage, or prominent role in a community organisation)

The following are examples where, in the absence of additional factors, removal pending the outcome of any appeal may give rise to a real risk of serious irreversible harm or otherwise breach human rights (this is an indicative list and not prescriptive or exhaustive):

- the claimant has a genuine and subsisting relationship with a partner, or parental relationship with a child, who has a serious illness and requires full-time care by the claimant, see elsewhere in this guidance on children for further examples of when certification may not be appropriate where a child is ill
- the claimant is subject to a court order for a trial period of contact with their child and there is evidence that the outcome of that trial period will determine the future contact between that claimant and the child - if removal pending the outcome of the appeal would prevent that claimant undertaking the trial period of contact, this may amount to serious irreversible harm
- the claimant has a serious medical condition and medical treatment is not available, or would be inaccessible to the claimant, in the country of return, such that removal pending appeal gives rise to a risk of a serious and irreversible deterioration in the claimant's health
- there is credible evidence that the claimant would, due to reasons outside their control, be prevented from exercising their right to an appeal (effectively or at all) against the decision to refuse their human rights claim, for example, where the claimant suffers from a serious mental health condition or serious physical disability that would prevent them from effectively pursuing the appeal absent the support of carers in the UK (and where they will not be able to access the requisite assistance from abroad), for further guidance see the section on Procedural unfairness

- where the claimant has a close relationship with a terminally ill family member who will remain in the UK, that relationship could not be maintained remotely, and the family member's life expectancy is shorter than the anticipated date of the claimant's return to the UK if any appeal were to succeed

Children

Summary

You must consider:

1) Is there evidence a child will be affected by the removal?
2) What would the impact be on the child of the temporary removal of the claimant pending the outcome of an appeal?
3) Is the child likely to leave the UK with the claimant and, if so, what would be the impact on the child?
4) Is removal of the claimant justified and proportionate, having regard to the child's best interests, and all the circumstances of the case?
5) You will need to balance any impact on the child against the other factors which are relevant to the decision, including the Discretion. See further guidance on the section 55 duty.

Glossary

Affected child: means a child who is affected by the decision to certify the claim of another person, usually an adult; they may or may not have made a claim themselves.

Dependent child: means a child who has made a human rights claim as the dependant of an adult also making a human rights claim.

Unaccompanied child: means a child who is not accompanied by a parent or guardian who has made a human rights claim on their own behalf.

Section 55 consideration
When considering whether to certify a human rights claim under section 94B, the best interests of any child under the age of 18 who may be affected by the decision are a primary consideration. You must carefully consider all available evidence to determine whether and how the child's best interests may be affected by certifying the claim. Determining the child's best interests informs the decision as to whether removal pending appeal would be a breach of the child's human rights.

Where it is or may be contrary to a child's best interests to certify a claim, you must consider whether the child's interests are outweighed by the reasons in favour of certification in the individual case. These reasons may include the need for effective immigration control: see the section on Discretion.

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

- Working together to safeguard children
- Criminality guidance for Article 8 ECHR cases
- Family and private life
- Every Child Matters statutory guidance

When considering whether or not to certify, you should assume that removal will be temporary pending return to the UK following the successful outcome of any appeal.

General considerations in relation to children
You must carefully assess the quality of any evidence provided in relation to the impact on a child. You should consider what evidence is available on the circumstances of the individual child. It is generally the claimant's responsibility to provide evidence about the impact of certification on any child they claim will be affected. See guidance on Evidence on when to make further enquiries if there is not sufficient evidence of the impact.

All the circumstances of the case should be considered in the round. In most cases, a single factor, such as the age of a child or the fact they are in education, will not be sufficient to demonstrate that a child will suffer serious irreversible harm or a breach of human rights if the person making the human rights claim is removed pending appeal.

An application from an unaccompanied child will not normally be suitable for certification. However, there may be circumstances where it is appropriate to certify. For example, it may be appropriate where a child, who is living in the UK with members of their wider family, has made a human rights claim which has been refused, and they have parents in another country to whom they can return and who can support them with any appeal.

Where the child has made a claim, but they are, for example, part of a family group who are all making human rights claims, or if they are a dependent child, they must be considered both in their own right and as an affected child in relation to the adult or adults.

Will the child relocate or remain in the UK?
If the family as a whole, including the child, has no right to remain in the UK, and removal would not give rise to a real risk of serious irreversible harm or other breach of human rights, then the expectation would be that the family should all leave the UK for the duration of any appeal.

Where the adult liable to certification is the child's primary carer, the starting point for your consideration of the impact on the child should be that the adult and child will temporarily relocate together, unless the claimant has indicated that this will not be the case, and that the child will remain in the UK. If the claimant provides this indication, you should consider whether it is credible that the parent and child will separate and assess whether appropriate arrangements are being made for the child's care that will allow them to remain in the UK.

If the indication that the child will be left in the UK is credible, the case should be considered on the basis that the child will remain in the UK and be separated from the claimant pending the outcome of the appeal. You should proceed on the basis that the claimant and the child's carers will normally be best placed to assess the consequences for the child of separation from the claimant and that in making the decision on where the child will live (whether to stay in the UK or relocate with the claimant) the claimant and carers will act in the child's best interests.

Where the child has more than one primary carer, for example they have 2 parents, and only one parent is liable to removal, the starting point is that the whole family will temporarily relocate unless they indicate that the child and/or other parent will remain in the UK (as above). It will not always be the case that the temporary separation of the child from one primary carer where the other is able to care for them will give rise to a real risk of serious irreversible harm or otherwise be a breach of human rights. You should make an assessment using a case by case approach and taking into account the factors set out in this guidance.

Where the claimant is not the child's primary carer, the starting point should be that he or she will be removed and the child will remain in the UK, and that the existing arrangements for the child's care will not be interrupted unless there are indications, supported by evidence, that this will not be the case. Absent such evidence, it is likely to be legitimate to conclude that the claimant and the child's primary carer have taken into account the impact on the child of their remaining in the UK.

In cases where the claimant is in prison or detention, they are unlikely to be the primary carer due to their incarceration. However, where there is evidence that they will be the primary carer for the child on release (for example because the alternative arrangements in place while they were in prison were temporary and it is not possible for them to continue) they should be considered as such.

Relocation

Where the child will leave the UK or be removed, you must consider whether relocation is in the child's best interests and, if not, whether removal is nonetheless proportionate or whether the child's temporary absence from the UK pending the outcome of the appeal would cause serious irreversible harm to the child or otherwise breach the child's human rights.

A child's temporary distress due to relocation would not usually be enough by itself to demonstrate serious irreversible harm or otherwise breach human rights. Many people temporarily relocate with a child to another location or country without the child suffering serious irreversible harm.

Education

If the child will leave the UK, you should consider whether the child is in education, and, if so, what stage of education has been reached and whether there is evidence that their education would be significantly adversely affected by a temporary removal for the duration of an appeal.

The fact that the child is in school would not, without more, prevent certification. Where the whole family would need to leave the UK as a result of certification, the question would be whether the impact on the child's education would cause serious irreversible harm or otherwise breach their human rights. Many children live outside the UK for temporary periods and are able to continue their education and access schooling abroad. Moving to another country need not have a negative impact on education, even if the educational provision is different or is of an apparently lower standard than that available in the UK. A temporary absence where education is of a lower standard, has to be paid for, or is not available, does not, on its own, amount to serious irreversible harm or a breach of human rights. There may be positive benefits to children in experiencing a different educational system or culture, particularly in the country of a parent's nationality.

Health
You should consider whether or not the child has any identified healthcare needs and, if so, whether there is evidence that their treatment would be affected by a temporary departure from the UK for the duration of the appeal. This is separate to the consideration of the long-term impacts of removal that you will already have done (where medical treatment is raised as an issue).

Private life
You should consider the impact of temporary departure on the child's private life, including, for example, their relationship with family members and friends in the UK. The fact that a child will be temporarily separated from friends and wider family or their peer/support network is unlikely on its own to amount to serious irreversible harm or a breach of the child's human rights.

Examples: case may be unsuitable
The following are examples (indicative only and not prescriptive or exhaustive) of when the best interests of a child might make a case unsuitable for certification:

- where certifying the case at that time would lead to a child missing their GSCE or A Level exams which, as public qualifications, may well have a lasting effect on their future - in such a situation it may be appropriate to postpone certification until after any exams are completed
- where a child has a pre-existing Education Health and Care Plan and requires significant levels of support to continue their education which could not be arranged on a temporary basis in another country and the effect of removal on the child's long-term education would amount to serious irreversible harm

Separation
Where the child will remain in the UK and be separated from the claimant, you must consider whether the temporary absence from the UK of the claimant liable to removal pending his or her appeal would be consistent with the child's best interests, and if not, whether it would nonetheless be proportionate or whether it could create a real risk of serious irreversible harm to the child or otherwise breach the child's human rights.

A child's temporary distress due to separation would not usually be enough by itself to demonstrate that the removal of the claimant would cause a child serious irreversible harm or otherwise breach their human rights. Many people are separated from their child for temporary periods (for example, for work reasons or while serving a prison sentence) without the child suffering serious irreversible harm. The evidence relied upon should be specific to the individual child. For example the Children Commisioner for England's 2015 on the Skype families discussion paper considers impacts of separation from parents in children generally and this type of general evidence would not by itself constitute adequate evidence to demonstrate a significant impact on a specific child.

You should consider the nature and extent of the relationship between the claimant and the child. For example, you should consider:

- whether or not the claimant has parental responsibility for the child?
- how is the relationship between the claimant and the child currently maintained?
- does the claimant have frequent and meaningful contact with the child?
- do they live together or does the claimant maintain contact by visits, telephone calls and emails?
- is the claimant's relationship with the child such that a temporary separation for the duration of the appeal would change this relationship to the extent that it could cause serious irreversible harm or otherwise breach the child's human rights?

Where a relationship can be sustained through visits, telephone calls and other methods, it is unlikely that the length of separation alone (or the fact that this separation is for a yet to be determined period of time) will amount to serious irreversible harm or otherwise breach human rights. However, you should carefully consider any evidence that the length of separation would result in particular impacts on the affected or dependent child.

Education
If the child is unlikely to accompany the claimant, his or her education will continue in the UK. You should consider any evidence provided that suggests that the child's education may nevertheless be disrupted (for example, because the child will have to change schools, as a result of alternative arrangements being made for their care). However, this in itself is unlikely to constitute serious irreversible harm or otherwise breach that child's human rights.

Health
If the child is likely to remain in the UK and is receiving ongoing medical treatment, you should consider any representations made about the role the claimant takes in relation to that treatment/care and what impact their temporary absence would have on that treatment/care and whether that would amount to serious irreversible harm or otherwise breach human rights.

You should also consider any other evidence about the impact of separation on the child's health.

Examples: may be suitable for certification
The following are suggested as examples where certification may be appropriate in the absence of additional factors (this is an indicative list and not prescriptive or exhaustive):

- if the person who is presently the primary care giver will remain in the UK with the child
- if the child would be separated from a parent, but that parent is not a primary care giver or person with whom the child usually lives or they do not have a genuine, close and continuing parental relationship, and they can maintain that relationship with, for example, visits and calls/Skype
- if the child would be separated from another family member with whom they have a relationship, but do not live with or do not have a close relationship equivalent to a parental relationship (or, where they are both young children, close sibling relationship), and they can maintain their relationship with, for example, visits and calls/Skype

Examples: case may be unsuitable
The following are examples (indicative only and not prescriptive or exhaustive) of where a case may be unsuitable for certification:

- if the child is seriously ill such that there is a risk (supported by appropriate evidence) that they could die, or their condition could deteriorate significantly during a temporary separation and the claimant has a parental or similarly close relationship with them
- if a child is receiving medical treatment which could not be accessed elsewhere and / or the child is not fit to travel (supported by appropriate evidence) and certification would result in separation from their parent or parents (with whom they have a genuine, close and continuing relationship) or primary carers
- if a child had a medical diagnosis of significant learning difficulties or severe autism, and temporary separation from the claimant would cause them significant developmental harm
- if the child's parents are separated and the parent who is the normal primary carer is genuinely and unavoidably unavailable to take care of the child for a temporary period, and the claimant is acting as the sole primary carer for the child for a temporary period
- if certification would result in the separation of a young infant from their primary carer, for example because that infant was too young to travel

Where you have a case where a child will be affected by the decision you must refer to the section 55 duty and how it has been taken into account in your decision.

Procedural fairness

Central to the Supreme Court decision in Kiarie and Byndloss was the right under Article 8 ECHR to procedural fairness. Procedural fairness does not require that the claimant has the best possible means to challenge a decision, but rather that the individual has access to an effective remedy to challenge any arguable alleged breach of Convention rights.

In Kiarie and Byndloss the Supreme Court found the decision to certify under section 94B was unlawful as the claimants in that case would not be able to give oral evidence at their appeal. This resulted in a breach of the procedural requirements of Article 8 as the court considered that an effective human rights appeal requires that appellants are afforded the opportunity to give live evidence. However, the court also held that being given the opportunity to give evidence by video link could be sufficient for an appeal to be effective for the purposes of Article 8, provided that the opportunity to give evidence in that way is realistically available. At the time of the judgment, it was not considered that this was, however, logistically feasible.

Since this decision the Home Office has worked to ensure video links can be made available to claimants for overseas appeals. Where a video link is not available it will not normally be possible to certify a claim under section 94B. Whether or not an overseas appeal can be effective is not solely a question of whether video links will be available.

Following Kiarie and Byndloss, the Upper Tribunal (Immigration and Asylum Chamber) gave guidance in AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC) on how out of country appeals that have been certified under section 94B are to be to be considered. AJ advocated a step-by-step consideration by the Tribunal to determine whether an appeal certified under section 94B can be effective. It recommended these 4 questions be considered in turn (and the same factors are likely to be relevant to the decision to certify):

1) Would the appellant's removal pursuant to a section 94B certificate deprive the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?

2) If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?

3) If not, is it necessary to hear live evidence from the appellant?

4) If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?

Any representations that are made as to why the claimant cannot have an effective appeal from overseas must be considered and addressed in the decision to certify.

Has removal deprived the claimant of the ability to give instructions?
A claimant will normally have the opportunity to provide instructions before their removal. In addition, as the Tribunal said in AJ, given "the state of modern

communications, there is, in general, no reason why communication by telephone and email should not be regarded as adequate, particularly where the appellant's direct instructions can be supplemented by United Kingdom relatives or friends."

The Tribunal in the case of Juba (s. 94B: access to lawyers) [2021] UKUT 95 reiterated that the common law requirement for a person to have unimpeded access to justice, which includes access to a legal adviser, was not diminished by section 94B. The Tribunal reiterated that the key issue is that a claimant who is removed must be able to secure legal representation and/or to give instructions and receive advice from the United Kingdom. This will always be a question of fact and will be context specific.

The ability to give instructions before being removed from the United Kingdom and to make use of modern communications after removal will mean that your starting point should be that the claimant will have access to effective legal representation. However, you must consider any case specific representations made as to why removal would prevent the claimant having effective legal representation. You may need to consult CIPU to establish what means of communication the claimant can be reasonably expected to have access to after they have been removed.

Is the claimant's absence from the UK likely to impair the production of expert evidence?

A person who makes a human rights claim is expected to provide any evidence as to why their removal would be a breach of their human rights when making the claim.

Where a person is being deported, they will be given 28 calendar days to raise any protection or human rights grounds as to why they should not be deported. The person will also be asked to provide any reasons why their removal pending appeal would be a breach of human rights.

Where a person says they need to obtain expert evidence for their appeal, the presumption is that this evidence should be provided at the time which enables you to take it into account when considering the human rights claim. Where a person states there is expert evidence that they wish to rely upon which cannot be obtained, for example because they are subject to deportation and they are unable to obtain the expert evidence within 28 calendar days, you must consider any reasons for not obtaining the evidence earlier and when the expert evidence will be available. You must consider whether any such evidence is likely to affect your decision on the human rights claim and also whether the claimant can have an effective appeal without the expert evidence being obtained before removal. For example, in a deportation case, if the claimant says that they require a probation officer's report in order to support their claim that they are remorseful and/or that they present no significant risk of re-offending, this evidence will not be relevant if when reaching your decision on the human rights claim you already accept these submissions. Evidence which does not go to issues in dispute will not add anything additional to the case.

If the expert evidence may affect the decision on the claim or may affect whether the claimant will be able to have an effective appeal, you must consider an extension of

time to obtain the evidence before removal, where it is reasonable to do so. A failure by the person to organise themselves or others to meet a deadline will not in itself be a reason to extend the deadline. You should only grant an extension where the person can give a deadline as to when they expect to obtain the evidence. Where no deadline is given, you should write seeking a deadline and give 14 days for a response. Where the person says that they cannot give a deadline or the deadline is unreasonably long, for example a delay of 3 months without compelling evidence from the relevant expert as to why the report cannot be obtained sooner, you should normally decide the human rights claim.

Where you do not accept that the expert evidence will affect your decision on the human rights claim, but it may be relevant to whether the claimant will be able to have an effective appeal, or you are satisfied they will not be able to have an effective appeal without the evidence being obtained, you should normally grant an extension if the expert report can be produced in a reasonable time frame, which would normally be within 6 weeks. Where a report will take longer than 6 weeks your starting point should be that the expert report should be obtained by the person after they have left the UK. You must ask the person to request the expert to give any reasons why the report cannot be produced from outside the UK, given the advances in modern communications. Where you accept that the report cannot be obtained from outside the UK, this will always be case specific, you should not normally certify under section 94B. Where you decide that it is possible for the person to obtain a report from outside the UK your starting point is that it will be person's responsibility to obtain the evidence and make any arrangements required to do so. However, where you accept that arrangements, such as a video link, cannot be made by the claimant, you must contact the Overseas Video Project Team to see if it would be appropriate for the Home Office to make the arrangements.

Where it is not possible to certify the claim under section 94B because of the inability of the person to obtain necessary expert evidence from overseas, but you are confident you can decide the human rights claim, you should do so and allow the appeal to proceed in-country.

When the evidence is obtained after removal, if the appeal is still pending, you must consider the evidence to see whether the decision to refuse the human rights claim is still sustainable. Where it is you must consider whether it will be operationally possible to return the person prior to the appeal hearing if required by the Tribunal and if so, consider certifying the claim under section 94B. If the First-tier tribunal appeal hearing is scheduled to take place within 6 weeks, it will normally be operationally more effective for the in-country appeal to proceed.

Is it necessary to hear live evidence from the appellant?

It will normally be necessary for the appellant to give live evidence for there to be a fair appeal unless the appellant states that they do not wish to give oral evidence. To ensure that the Home Office does not have to return an appellant to the UK for an effective appeal K if they change their minds about giving oral evidence, you should assume the appellant will want to give oral evidence and you should normally only certify cases under section 94B where a video link will be available. You must also consider not just the availability of a video link but also whether there are any

accessibility issues, due to health or disability. You must make a referral to the Foreign, Commonwealth and Development Office (FCDO) in the relevant country, with information about any medical, physical, mental health and any other needs of the individual, and request that the FCDO advise as to whether the video link venue in that jurisdiction is suitable. For example, it may be relevant whether or not a video link venue is accessible for a wheelchair user. If FCDO advise that the venue is not suitable, and reasonable adjustments are not possible, to enable an effective hearing then you must not certify under section 94B.

Official – sensitive: start of section

The information in this section has been removed as it is restricted for internal Home Office use only.

Official – sensitive: end of section

It will not normally be a barrier to an effective hearing because the person says they cannot travel to access the video link. Most countries have good transport links, and if the appellant remained in the UK, they would need to travel to the hearing centre in order to attend their hearing. However, you must consider the individual facts of the case, including whether the reason the person is unable to travel to or otherwise access any offered video link arises due to any health or disability issues or other protected characteristics.

Will the video link be satisfactory?
The Home Office has produced video links that have been found to be satisfactory by the First-tier Tribunal since the judgment in Kiarie and Byndloss.

The Court of Appeal in the case of FB (Afghanistan) [2020] EWCA Civ 1338, while not commenting on the Home Office video links specifically, did observe that since Kiarie and Byndloss the technology had been transformed, including use of video links, “and their use has become ubiquitous in courts and tribunals the world over, a process accelerated by the effects of the Covid 19 pandemic which has swept around the globe since the beginning of [this year]” and that the position in “courts and tribunals is entirely different from how it was even three or four years ago”.

The comments in FB reflect the realities of the improvements in technology and while it is a fact specific issue for the First-tier Tribunal or Upper Tribunal to determine whether the video links are satisfactory, where you have confirmation from the Overseas Video Project Team that a video link can be set up, and following an individual proforma referral to the section 94B overseas contact for that country no difficulties have been identified in making it available and accessible for that specific person, you should assume the video link will be satisfactory.

Discretion not to certify

Summary

1) Looking at the case in the round, are you satisfied that it is appropriate to certify the case?
2) Are there practical reasons not to certify?
3) Is there anything about the circumstances of the case that makes you think you should not certify?
4) Has the claimant requested that discretion not to certify be exercised in their favour?

If satisfied that removal pending the outcome of any appeal would not create a real risk of serious irreversible harm or otherwise breach human rights, you 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 human rights. This means that you must consider whether to exercise discretion in every case, not just in cases where the claimant has asked for discretion to be exercised.

You 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 human rights. If a claimant asks for discretion to be exercised for a particular reason this should be responded to with reasons in the certification decision. If a claimant does not ask for discretion to be exercised, the fact that discretion has been considered should still be mentioned in the certification decision, but you do not need to give detailed reasons for refusal to exercise discretion.

In each individual case, you must be satisfied that it is appropriate in all the circumstances to certify. This consideration includes but is not limited to considering:

- the public interest
- removability

The public interest
You must understand and have regard to the public interest in maintaining immigration control as this is a factor that must be part of the assessment as to whether, on balance, it is appropriate to certify on the individual circumstances of the case.

There is a public interest in fast, efficient and effective deportations and removals and in effective immigration control. This ensures that claimants who have been refused a right to remain in the UK leave the UK at the earliest opportunity and do not remain during their appeal and strengthen existing claims or build up new claims when an appeal from outside the UK would not cause serious irreversible harm or breach human rights.

This public interest in requiring a claimant to appeal from outside the UK is strongest in deportation cases. Deportation means that the claimant’s presence in the UK is not conducive to the public good, for example because it is in the interest of national security or to prevent crime and disorder, including deterring other foreign nationals

from offending in the UK and to safeguard the economic wellbeing of the country and for the protection of the rights and freedoms of others. In the case of criminal convictions which have resulted in a custodial sentence of 12 months or more, the public interest in deportation is set out in the UK Borders Act 2007.

The public interest in removal is strongest in cases which are national security cases, cases where there the claimant has been convicted of criminal offences, and cases where there is evidence showing on the balance of probabilities that the claimant has engaged in serious adverse behaviour even in the absence of a criminal conviction.

You should, for example, consider any non-compliance with immigration law on the part of the claimant, such as overstaying, or illegal entry. However, it is not a requirement that the claimant should have been in breach of the law or Immigration Rules to be subject to certification under section 94B.

The public interest is never the only consideration and must be balanced against the other factors such as the best interests of an affected child and the nature and extent of any interference with the human rights of the claimant or any other person affected by the decision

Removability
Individuals who have no right to be in the UK are expected to leave. Therefore, it is appropriate to certify a human rights claim (where all other conditions for doing so are met) even where a claimant is not currently having their removal or deportation from the UK enforced.

Where a claimant could not depart voluntarily and is not currently removable, you should consider whether to exercise discretion not to certify under section 94B. It may be counterproductive to certify if the claimant would be unable to leave the UK to exercise a right of appeal.

Section 94B certification is more likely to be appropriate where a claimant has made an immigration application or claim and either:

- has a passport or travel document (including a Home Office Travel Document)
- is able to obtain a passport or travel document (including a Home Office Travel Document)

as the assumption is that the claimant can and should leave the UK voluntarily.

Where a claimant meets all of the following criteria:

- they do not have a passport or travel document (including a Home Office Travel Document)
- show credible evidence that they are unable to leave the UK within a reasonable timeframe, for example there is no realistic prospect of an

acceptable travel document or other information required for their return being available
- the barrier to leaving the UK is not their own refusal to co-operate with the removal process

then certification under section 94B is unlikely to be appropriate.

Related content

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Procedures

Timing of certification

It is possible to certify under section 94B at any stage prior to the claimant exhausting their 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), you must consider whether it is appropriate to certify the claim before it is heard by the Upper Tribunal (or the Court of Appeal).

Where an appeal could have been certified under section 94B, but it was not possible to do so for operational reasons, consideration must be given to certifying the claim if the appellant loses their appeal and then seeks to onward appeal. At the start of restart of section 94B the focus will initially be on cases where our decision was upheld by the First-tier Tribunal in which only Article 8 ECHR (right to family and private life) is at issue and where evidence can be given from the country of return by video link and there is an operational video link facility. However, certification can also be considered on a case by case basis where the above criteria are not met.

At an error of law hearing oral evidence is rarely required and where the appellant is represented, they are also unlikely to be required to make submissions on their appeal in-person. While an error of law hearing is unlikely to require the appellant to give oral evidence, if the appellant wins the error of law hearing, then at any resumed appeal hearing, at either the Upper Tribunal or the First-tier, the appellant would normally expect to be able to give further oral evidence. In these circumstances if a video link cannot be set up then the appellant may need to be returned to the UK to attend their appeal hearing.

Where the claim was not certified and the appellant has won their human rights appeal at the First-tier Tribunal and the SSHD is appealing that decision, it will not normally be appropriate to certify under section 94B at that stage as it will normally be disproportionate to require interim removal where a person has won their human rights appeals, even if that is subject to an onward appeal.

If it is decided to certify at any stage after the claimant has lodged an appeal, you must write to the claimant asking if there are any new reasons that certification should not apply and provide prompt written notification of any decision to certify to both the claimant and the relevant Court or Tribunal.

Leave extended by section 3C

Where a person who has made a human rights claim has leave that has been extended by section 3C(2)(b) or (c) of the Immigration Act 1971 (where their pre-existing leave has been extended during any period when they could still make an in-time human rights appeal or where they have a pending human rights appeal) that leave will automatically be brought to an end by certification under section 94B. Leave extended by section 3C following a decision on an application only lasts so

long as the person has a right of appeal in the UK. Once a claim has been refused and certified they no longer have a right of appeal in the UK and their leave no longer extends. For further information on section 3C see Leave extended by section 3C (and leave extended by 3D in transitional cases).

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 on the casework system. Reasons for any decision to certify must also be clearly set out in the decision notice. This is because a decision to certify (whenever made) 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 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 breach human rights.

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Appeals

Appeals lodged from within the UK

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

Where an invalid appeal has been lodged, the presenting officer 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 and/or substantive hearing that there is no jurisdiction to hear the appeal. This is the case even if the claimant is removed before the hearing, because legally the claimant can only lodge an appeal after they have left the UK: the claimant's removal before the hearing does not render the invalid appeal valid. A valid appeal can be lodged after the claimant has left the UK.

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.

Successful appeals

If there is a deportation order and a claimant's out-of-country appeal against the refusal of a human rights claim succeeds, the order will normally be revoked and the claimant may apply to return to the UK. See the section Allowed appeals where the appellant was removed from or required to leave the UK pending the appeal in Implementing allowed appeals

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

In considering whether to pay for the claimant'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
- the status of the claimant before their removal
- whether the appeal was allowed on the basis of evidence or information that the claimant failed to submit to the Home Office in advance of their removal despite a section 120 notice 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 claimant will 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 claimant and any family members) - you should also take into account any evidence pertaining to the financial circumstances of the claimant and any family members which was already available prior to removal, and consider the claimant'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 the relevant business area, usually grade 7.

Where a claimant received financial assistance to leave the UK, for example from the Facilitated Returns Scheme (FRS), but then successfully appeals 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.

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Process overview

Deport cases: Criminal Caseworking

Where a person has made a human rights claim, before you consider certification, you must advise the person that their claim may be considered for certification and ask for reasons why a certification might not be appropriate in their case including the effect of certification on the individual and their family. Do this using the template ICD.4936 – decision to deport.

If a claim is refused and it is considered appropriate to certify, use the template ICD.4935 to provide your reasons.

If a claim is refused and it is considered appropriate to certify, use template 1183 to provide your reasons.

UK Visas and Immigration
Where a person has made a human rights claim, before you consider certification, you must advise the person that their claim may be considered for certification and ask for reasons why a certification might not be appropriate in their case, including the effect of certification on the individual and their family. The FLR(FP), FLR(HRO) and digital family application forms will do this for new applicants.

Where a claimant has made an application where the relevant questions were not included, you can only consider certification if you write to warn them that the power may be applied and ask whether there are reasons their claim should not be certified including the same questions as on the form or other templates.

If a claim is refused and it is considered appropriate to certify, use template 1183 to provide your reasons.

Peer review

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 decision maker, 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 will be subject to quality sampling as deemed appropriate by the caseworking unit.

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