

IN THE UPPER TRIBUNAL

JR/11757/2015

Field House,
Breams Buildings
London
EC4A 1WR

Wednesday 11th January 2017

BEFORE

UPPER TRIBUNAL JUDGE REEDS

Between

**THE QUEEN
(ON THE APPLICATION OF)
YO**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr R. Khubber, Counsel, instructed by Duncan Lewis Solicitors on behalf of the Applicant.

Mr Chapman, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

(HANDED DOWN ON 8th March 2017)

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UPPER TRIBUNAL JUDGE REEDS:

Introduction

1. This is an application for judicial review of a decision made by the Secretary of State ("the Respondent") on 10th September 2015: the application having been lodged on the 28th September 2015 and permission having been granted after a hearing by order of Upper Tribunal Judge O'Connor dated 25th May 2016.
2. I was invited to make an anonymity order to protect the identity of members of the applicant's family and the victim of his criminal offending. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269 as amended) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the applicant or his partner. For the avoidance of doubts, this order also applies to both the applicant and to the Respondent. The failure to comply with this order could lead to contempt of court proceedings.

Background:

3. The applicant is a national of Nigeria born on 16th June 1993. The exact date his mother and siblings entered the United Kingdom is not known however the applicant claims to have entered the United Kingdom in 2007 using his own Nigerian passport at the age of 13. Prior to his entry in the UK he resided with his grandmother in Nigeria who is now deceased.
4. The applicant was granted a residence card on 16th February 2011 as a dependant of an EEA national. The applicant's mother was married to a Portuguese national who was exercising Treaty Rights and as a result the applicant, his mother and twin brothers were all granted residence cards in the UK which expired on 16th February 2016. The applicant has a sister who is a British citizen.

5. The Applicant has a number of criminal convictions. They are set out in the papers and specifically considered in the decision letter of the 10th September 2015. On 16th August 2013 he appeared before the Magistrates' Court on two counts relating to driving offences namely driving otherwise than in accordance with a licence and using a vehicle uninsured. He received a fine and his licence is endorsed and ordered to pay costs and compensation.
6. On 24th July 2014 the applicant pleaded guilty to a number of offences; one count of sexual activity with a female under 16, one count of offering payment for sexual services to a child and four counts of fraud in relation to bank or credit cards and one count of possession of a computer with credit/banking and personal details.
7. On 11th September 2014 the applicant was sentenced to a period of imprisonment totalling three years and four months. In the decision letter the remarks of the sentencing judge are set out. In summary, the judge observed that the most serious offences committed were the sexual offences where it is said the applicant took advantage of a vulnerable 15 year old girl, that the event had been planned and the child had been groomed. The judge considered the applicant's sexual offending to fall within "Category 1" of the sentencing guidelines in relation to harm (involving penetrative sex) and within "Category (a)" relating to culpability due to the planning and grooming involved. The judge took into account his age and that he had been of effective previous good character. The judge gave him a full one third credit and he received a sentence of 40 months imprisonment. As regards the fraud offences which used the misuse of approximately two and a half thousand pounds, the judge ordered sentences of imprisonment to run concurrently. Thus the total sentence was one of three years and four months.

8. There have been two sets of proceedings for judicial review issued on behalf of the Applicant and the first set is relevant to the background of the present claim issued. I will therefore summarise the salient facts.

The first set of judicial review proceedings:

9. On 26th September 2014 the Secretary of State wrote to the Appellant informing him that in view of his offending background that she was to make a deportation order against him and invited the applicant to make representations having given him 20 days to respond. On the 28th November 2014, his solicitors sought an extension of time to provide representations. On the 12th February 2015 the Respondent served a preliminary decision to make a deportation order against the Applicant. As a result of his criminality his deportation was considered to be justified on grounds of public policy and/or public security. The decision was one made pursuant to the Immigration (European Economic Area) Regulations 2006 thus it was considered on the basis that he was a family member of an EEA national and as such qualified for consideration under the 2006 Regulations.
10. The notice went on to state that the Secretary of State proposed to give directions for his removal to Nigeria and if there were reasons why he should not be deported the applicant should tell the Secretary of State in writing within twenty days of service of the letter. The notice referred to a leaflet being attached to the letter explaining what information and evidence could be submitted. In the notice it made reference to Regulation 29 of the 2006 Regulations that an appeal against the decision to deport did not prevent the Secretary of State from obtaining or executing a deportation order to remove the applicant from the United Kingdom. The letter went on to state that in certain circumstances the

Secretary of State may certify that the applicant's removal notwithstanding that the appeal process has not yet begun or been finally determined would not be unlawful under Section 6 of the Human Rights Act 1998. It makes specific reference to Regulation 24AA of the 2006 Regulations. In highlighted type it stated

"If you have any reasons why you should not be expected to continue an appeal after you have left the United Kingdom you must inform us within twenty working days of the date of service given at the end of this letter".

11. On the 11th March 2015 representations were received from the applicant's representatives in response to that letter. The applicant was in custody at that time serving his sentence (see ABB68 - 141). The representations made reference to matters relevant to the EEA Regulations and in particular, that the applicant was a dependent family member of an EU national; the applicant's mother having married a Portuguese national who was exercising treaty rights in the UK. It further made reference to the applicant, his mother and siblings having been granted residence cards until February 2016.
12. As to Article 8 of the ECHR, the representations set out the applicant's factual background making reference to his entry to the UK aged 13 in 2007 and that upon entry resided with his mother and siblings. The applicant's sister was a British citizen and that the applicant and his siblings resided in the UK under a residence card. The representations made reference to his social and cultural integration relying on his educational studies in the UK and his relationship with his mother and siblings and made reference to the lack of any ties to his country of origin. Reference was made to the applicant playing an active role in his siblings' daily life prior to imprisonment involving the taking and collection of them from

school. The representations included a number of documents which included a number of school certificates and letters of support from his siblings which commented upon the adverse effects upon them of the applicant being deported from the UK. The letter from one of his siblings (AB120 - 121) made reference to the adverse impact that the threat of deportation had upon his education, the closeness of the relationship between him and the applicant and the positive support that he had given to his school and football activities. A similar letter from his other sibling made reference to the adverse impact of deportation beyond the adverse impact of separation resulting from imprisonment.

13. Further enquiries were made by the Secretary of State concerning the nature of the claim made under the EEA Regulations (which are not material for the purposes of this judgment). On the 4th June 2015 the Applicant's solicitors provided further evidence to the Secretary of State [see AB 42-23] including the Decree Absolute relating to the Applicant's mother's end of her marriage to her EEA national spouse and a tax return to demonstrate that her spouse was exercising Treaty Rights up until the date of the divorce. The letter made reference to the position that if the Applicant could not qualify under the EEA Regulations that his case should be considered under Article 8 of the ECHR.
14. On the 17th June 2015 a letter was sent to the applicant via the Prison Governor in which he was informed of the Secretary of State's decision to deport him to Nigeria. In that letter the applicant was informed of the possibility that his claim might be certified under Section 94B of the 2002 Act and he was invited to provide any reasons why he should "not be expected to appeal only after he has left the United Kingdom".

15. In material received by this Tribunal in January 2017, the applicant's solicitors stated that they were not served with that letter notwithstanding earlier correspondence as long ago as 2014 stating that they were acting for the applicant. The material served also included a handwritten letter from the applicant in which he stated that he had not been served with such a letter or that he had not seen the letter of 17th June 2015. It further confirmed that he had had no knowledge of the letter and that the first time that he saw the letter was during the proceedings for judicial review. However in response to that assertion, further material was obtained by the Secretary of State consisting of the Case Information Database (CID) which documented that a confirmation of conveyance was received on 23rd June 2015. The contents of that confirmation of conveyance was set out in a further document annexed to the Respondent's skeleton argument. This was a document whereby the applicant was provided with the opportunity to sign for the letter dated 17th June 2015 which was conveyed to him on 23rd June 2015. This section is unsigned and below which is a space which was entered "Prison use only" where it was confirmed that the Appellant refused to sign or was unable to sign. No reasons are given for any refusal to sign.
16. On the 17th July 2015 the Secretary of State notified the Applicant in writing of the decision made to deport him which was accompanied by a letter of the same date [see AB37-41].
17. The Applicant's solicitors sent a pre-action protocol letter ("PAP") letter before claim on the 25th July 2015 challenging the lawfulness of his removal on the basis that no decision was received with regard to the representations made on the 11th March 2015 and the 4th June 2015. As the removal was imminent the Applicant's solicitors lodged a claim for judicial review. The basis for that challenge was the failure

of the Respondent to consider the representations relating to his Article 8 and EEA claim prior to making the decision to remove.

18. The grounds of challenge are summarised at [AB13]. It was stated that the Secretary of State had failed to make a decision on the applicant's outstanding representations which had been made in March 2015 but also decided to make a deportation order against him on 17th July 2015 which was made on the mistaken assumption that the applicant had not made any representations resisting removal.
19. After the claim had been issued the Respondent agreed to defer removal and to consider the submissions made. The UT subsequently refused a stay and permission to apply for judicial review as the application was academic (see decision of UT Judge Southern [AB172]). The proceedings were therefore concluded with an order being made subsequently that the Applicant's costs should be paid by the Respondent (see order made by UTJ Taylor 26th November 2015).

The present proceedings:

20. On 10th September 2015 the Secretary of State responded to those representations and a decision was made to refuse his human rights claim and certified the claim under Section 94B NIAA 2002 (as amended by the Immigration Act 2014).

The Decision Letter:

21. I shall summarise the decision letter relied upon by the Secretary of State.
22. By a notice of decision dated 10th September 2015, the applicant was informed of the Secretary of State's decision to make a deportation order against him. The decision was headed "Decision to Refuse a Protection and Human Rights Claim".

The decision referred to the letters dated 11th March, 21st and 24th July 2015 sent to the Respondent setting out the submissions made and set out his immigration and criminal history. The letter made reference to representations made on 11th March, 21st and 24th July 2015 and in that letter concluded by rejecting those representations in relation to Article 8 of the ECHR, to refuse to revoke the deportation order previously made and to certify his claim under Section 94B of the 2002 Act thus to remove him from the UK.

23. The letter began by considering the applicant's immigration and criminal history and made express reference to the sentencing remarks to which I have already referred. It made reference also to the previous judicial review proceedings which had become academic on the basis that she would consider the representations that had been made and were set out at the beginning of the decision letter. The decision letter began by considering his claim to reside under EU law under the EEA Regulations on the basis of retention of rights as a dependent family member of an EEA national exercising treaty rights. However, it was concluded that insufficient evidence had been provided in relation to the applicant's stepfather's right to permanent residence or being a qualified person at the time of the divorce (see page 4 of the decision letter).

24. In relation to Article 8 the Secretary of State set out that his deportation was conducive to the public good and in the public interest because he had been convicted of an offence for which he had been sentenced to a period of less than four years but at least twelve months and thus in accordance with paragraph 398 of the Immigration Rules, the public interest required his deportation unless an exception to deportation applied. The Secretary of State went on to apply those exceptions set out in paragraphs 399 and 399A of the Immigration Rules. As to family life with any relevant

children, the decision letter made reference to Section 55 of the 2009 Act but made reference to the applicant's representations in that it was confirmed he had no dependants but that he had established family life with three siblings under the age of 18. Consideration was given to his claim that he had assisted his siblings in their daily life by dropping off and collecting them from school and supporting them in their day-to-day care. The Secretary of State considered that those relationships did not constitute family life for the purposes of Article 8. It was stated that there was no evidence of further elements of dependency beyond normal emotional ties and that he had failed to provide any evidence of the level of dependency the siblings had placed on him or any evidence that should he be removed from the United Kingdom there would be no one else who could continue to provide social, emotional, financial care for them. It further made reference to his mother as the main carer for those dependants who had also provided the same level of care on a daily basis and thus was able to continue to provide that upon his removal. It was therefore not accepted that he had a genuine and subsisting parental relationship with his siblings and thus paragraph 399(a) did not apply.

25. As to family life with a partner, it made reference to a named partner but that there was no evidence to support the view that he was in a subsisting relationship with any partner.
26. As to private life, the Secretary of State applied paragraph 399A and it was not accepted that he had been lawfully resident in the United Kingdom for most of his life. It was accepted that the applicant was socially and culturally integrated in the United Kingdom having attended education in the United Kingdom. However, the Secretary of State made reference to his criminal offending and his lack of positive contribution to the UK community. It was not accepted that

there were very significant obstacles to his integration into Nigeria having lived there until the age of 13 and that he would have retained cultural/traditional practices. The decision took into account his claim that he had no family ties in Nigeria since the death of his grandmother (in 2011) but that the applicant "might still have extended family members that reside there". The decision letter places weight on the fact that he was an adult and was single with no dependants and thus was of an age where it was reasonable to expect him to support himself and live independently. Thus it was not accepted that he met the requirements of the private life exception to deportation.

27. As to whether there were very compelling circumstances the Secretary of State considered the nature and seriousness of the crime in the context of the public interest in securing his removal. The Secretary of State set out with particularity the sexual offences and also the fraud and kindred offences. Also having reached those conclusions, the Secretary of State considered that the circumstances did not outweigh the very significant public interest in his deportation. Consideration was given as to whether it would be appropriate to revoke the deportation order but reached the conclusion that it should be maintained. It was found that there were no grounds upon which revocation of the deportation order was justified. At page 9 of the decision letter it made reference to paragraph 353 of the Immigration Rules where it was accepted by the Secretary of State that the further submissions amounted to a fresh human rights claim within paragraph 353.

28. There was then a section on certification under Section 94B in which the following was stated:-

" The Secretary of State may certify a human rights claim under Section 94B of the Nationality, Immigration and Asylum Act 2002 where she considers that, despite the appeal process not having been begun or not having been exhausted, removal of that person to the country or territory to which he is proposed to be removed, pending the outcome of an appeal in relation to his claim, would not be unlawful under Section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention). The grounds upon which the Secretary of State may certify a claim under sub-Section (2) include (in particular) that the person 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 he is proposed to be removed.

Consideration has been given to whether your Article 8 claim should be certified under Section 94B of the Nationality, Immigration and Asylum Act 2002. The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists because you have failed to provide any evidence that you will face any irreversible harm if you were to be removed to Nigeria to which you spent the first 13 years of your life, You are an adult who is capable of re-establishing himself in his country of origin, and providing for yourself. You have no dependants born in the United Kingdom and you were not cohabiting akin to marriage with any persons residing here. 55. Therefore, it has been decided to certify your Article 8 claim under Section 94B and any appeal you may bring can only be heard once you have left the United Kingdom."

29. Removal directions were set for removal on the 29th September 2015 and on the 23rd September 2015, the applicant's solicitors sent a pre-action protocol letter to the Secretary of State.
30. On the 28th September 2015, the applicant lodged these proceedings for permission to apply for judicial review, including an application for interim relief, which was granted by UT Judge Rintoul.
31. On the 13th October 2015 the Court of Appeal handed down judgment in the decision of (**Kiarie, R (On the application of) v SSHD [2015] EWCA Civ 1020**).
32. On the 8th December 2015 Upper Tribunal Judge Southern refused permission to apply for judicial review on the papers. The procedural history demonstrates that new removal directions were set in January 2016 and an application was made for interim relief by way of a stay on removal which was refused on the papers. At an oral hearing a stay on removal was granted on the 26th January 2016. Further proceedings were lodged with the First-tier Tribunal relating to the EEA application but are not material to this application.
33. A request was made for oral reconsideration of the application for permission to apply for judicial review and this was heard by Upper Tribunal Judge O'Connor on 25 May 2016, who, after hearing argument from both parties, granted permission on grounds(i) (a)-(c) relating to unlawful consideration under Section 94B of the 2002 Act but refused on ground (2) relating to a failure to provide notice pursuant to Immigration (Notice) Regulations 2003.
- UT Judge O'Connor made the following observation in support of the limited grant of permission:-

"During the hearing a dispute arose between the parties as to the meaning and application of paragraph 44 of the judgment of the Court of Appeal in **Kiarie and Byndloss v SSHD** [2015] EWCA

Civ 1020. This might be an appropriate case for guidance to be given in relation to such dispute.

34. Since the grant of permission, the Supreme Court is to hear the appeals in (Kiarie, R (On the application of) v SSHD [2015] EWCA Civ 1020 in February 2017. No application has been made by either party for a stay in relation to these proceedings to await the decision. Indeed the submission made by Counsel expressly observes that it is inevitable that the judgment will be reserved and may not be handed down for some time and thus seeks a decision on the application now.
35. There have also been other relevant decisions made by the Supreme Court in *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799 and *Makhlouf v Secretary of State* [2016] UKSC (relevant to the issues of deportation of foreign nationals) and a decision of the Court of Appeal in *Caroopen and Myrie v Secretary of State* [2016] EWCA Civ 1307.
36. Both parties have provided skeleton arguments setting out their submissions on the relevant issues and supplemented their written arguments with oral submissions. It is not necessary to set out in detail all of those submissions but the relevant points made by each party in advancing their respective cases which I shall consider when addressing the three grounds advanced on behalf of the applicant.

Discussion:

37. There are three grounds of challenge raised by the applicant. They are as follows. The decision to use the power to certify the applicant's Article ECHR claim under Section 94B of the NIAA 2002 was flawed by way of:-

(i) Being based on an incorrect understanding of the scope of consideration required under Section 6 of the Human Rights Act 1988 (as to when it would be lawful to use the power);

(ii) being based on a flawed understanding of the applicant's Article 8 ECHR claim (thereby resulting in a breach of Article 8 during the interim period) and

(iii) being based on a failure to give the applicant a fair opportunity to make representations prior to the use of the power - was flawed by way of a failure of the Secretary of State to make adequate enquiries prior to the decision to use power.

38. In real terms Grounds 1 and 2 are considered together. The central issue in this application concerns whether the Respondent's decision to certify the applicant's human rights claim under Section 94B of the Nationality, Immigration and Asylum Act 2002 (as amended) is unlawful and, as set out in the submissions made by Mr Khubber, it is asserted that the Respondent has not applied the correct test following the decision of R (Kiarie) v SSHD and R (Byndloss) v SSHD [2015] EWCA Civ 1020 and had adopted a flawed approach to the issue of certification. It is also asserted that the Secretary of State failed to give the applicant a fair opportunity to make representations prior to the use of the power and had failed to make adequate enquiries prior to the decision to certify.

The Legal Framework:

39. Section 94B of the 2002 Act reads as follows:

"94B. 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) ...

...

(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."

40. That section was brought into force with effect from the 28th July 2014 and was in force at the date of the decision to which these proceedings relate.
41. The effect of certification under Section 94B is that any appeal against the decision on the human rights claim must be brought from outside the United Kingdom.
42. The Secretary of State has issued guidance to caseworkers on the application of Section 94B. The version in force at the date of the decision letters under challenge was version 4, dated 29th May 2015 and headed "Section 94B certification guidance for Non European Economic Area deportation cases. Mr Khubber has not pursued any separate argument relating to the policy guidance in this context.
43. The correct approach in relation to Section 94B has been set out in the decision of the Court of Appeal of **(R (Kiarie) v SSHD and R (Byndloss) v SSHD** [2016] 1 WLR 1961.
44. The decision illustrates that the central provision in Section 94B is sub-Section (2) and that the power to certify arises only:

"If the Secretary of State considers that... 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."

45. In other words, the Secretary of State cannot lawfully certify unless she considers that removal pending the outcome of an appeal would not be in breach of any of the person's Convention rights as set out in Schedule 1 to the Human Rights Act.
46. By sub-Section (3), a ground for certification is that the person 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 he or she is proposed to be removed. That ground does not, however, displace the statutory condition in sub-Section (2), nor does it constitute a surrogate for that condition.
47. Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she considers, in accordance with sub-Section (2), that removal pending determination of any appeal would not be unlawful under Section 6 of the Human Rights Act.
48. Consideration must therefore be given to whether removal pending determination of an appeal would interfere with the person's rights under Article 8 and if so, whether removal for the interim period would meet the requirement of proportionality unless a decision maker considers that there would be such interference or that such interference would be proportionate, the claim cannot lawfully be certified under Section 94B (see paragraph [38] of Kiarie).

49. As I have said, there is no dispute that a decision to certify under Section 94B is amenable to judicial review. It should, however, be stressed that the issue on such challenge is limited to the Section 94B certification and does not extend to the deportation decision itself or the related refusal of the person's human rights claim.
50. The scope of the challenge on judicial review is set out at paragraphs 31-33 of that decision:

"Amenability to judicial review

31. As I have said, there is no dispute that a decision to certify under section 94B is amenable to judicial review. It should, however, be stressed that the issue on such a challenge is limited to the section 94B certification and does not extend to the deportation decision itself or to the related refusal of the person's human rights claim. Section 94B will arise for consideration only in cases where there is a right of appeal against the refusal of the human rights claim (see, for example, the summary of the Secretary of State's guidance at paragraph 8(ii) above). The section is concerned with the distinct question whether the person can lawfully be removed pending such an appeal. Moreover, there is obviously no right of appeal against the section 94B certification itself.
32. It follows from all this that the line of cases to the effect that, where a right of appeal exists against a removal decision, judicial review will not lie unless special or exceptional factors are in play (see e.g. *R (Lim and Siew) v Secretary of State for the Home Department* [2007] EWCA Civ 773, [2008] INLR 60, and *RK (Nepal) v Secretary of State for the Home Department* [2009] EWCA Civ 359, [2010] INLR 37) has no direct relevance in this context.
33. As to the applicable principles on judicial review of a decision under section 94B, the terms of the statute require the Secretary of State to form her own view on whether removal pending an appeal would breach Convention rights (see, further, the next section of this judgment). For that purpose, in an article 8 case such as the present, she has to make relevant findings of fact and conduct a proportionality balancing exercise in relation to the facts so found. In my judgment, her findings of fact are open to review on normal *Wednesbury* principles, applied with the anxious scrutiny appropriate to the context: compare *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, applying *R v Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74 and *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, and distinguishing between cases of precedent or jurisdictional fact (where the court has to decide the facts for itself) and cases where facts have to be found by the decision-maker in the exercise of a discretionary power conferred on him or her (and where those findings of fact are open to review on *Wednesbury* principles). But as to the assessment of proportionality, the decision of the Supreme Court in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 shows that the court is obliged to form its own view, whilst giving appropriate weight (which will depend on context) to any balancing exercise carried out by the primary decision-maker. "

51. In the most recent decision of **Caroopen and Secretary of State for the Home Department** and **Myrie and Secretary of State for the Home Department** [2016] EWCA Civ 1307, the Court of Appeal revisited this issue and at paragraphs 67 to 83 reviewed the authorities relevant to the correct approach to judicial review in Article 8 cases. It is not necessary to set out the review that was made of those authorities but the conclusion reached by Underhill LJ is set out at paragraphs 82 to 83 as follows:-

82. I have for the reasons given reviewed the authorities in some detail, but in truth I do not think there is now any doubt about the approach which they say should be taken where a challenge is made by way of judicial review to the Home Secretary's assessment of the proportionality of interfering with a claimant's rights under article 8. The position was recently stated succinctly in *R (Kiarie) v Secretary of State for the Home Department* [2015] EWCA Civ 1020, [2016] 1 WLR 1961, which post-dated the decision in *Lord Carlile's case*. In that case the appellants had brought judicial review challenges against the decision of the Home Secretary to certify under section 94B of the 2002 Act their claims that their removal pending an appeal against deportation would be in breach of their rights under article 8. At para. 33 of his judgment (p. 1973 B-F), with which the other members of the Court agreed, Stephen Richards LJ said:

"As to the applicable principles on judicial review of a decision under section 94B, the terms of the statute require the Secretary of State to form her own view on whether removal pending an appeal would breach Convention rights For that purpose, in an article 8 case such as the present, she has to make relevant findings of fact and conduct a proportionality balancing exercise in relation to the facts so found. In my judgment, her findings of fact are open to review on normal *Wednesbury* principles, applied with the anxious scrutiny appropriate to the context: But as to the assessment of proportionality, the decision of the Supreme Court in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 shows that the court is obliged to form its own view, whilst giving appropriate weight (which will depend on context) to any balancing exercise carried out by the primary decision-maker."

83. To say that there that there is no doubt about what the authorities say does not mean that what they say is entirely unproblematic. There has been considerable discussion both in the academic literature and in the case-law about the nature and extent of the difference between a proportionality test and "high-intensity" reasonableness review^[13]. In *SA McCloskey J* anticipated that this would be the subject of further developments in the law: see para. 30 of his judgment. But no such developments will be found in this judgment. These conceptual issues were not material to the ground on which the appeal was pursued, and we were not addressed about them.

52. I would observe that the relevant point is that this court or court of Judicial Review would not be able to carry out a review of anxious scrutiny, unless the court has a starting point to judge from. Whilst the court in this context forms its own view, it is to equip the court to carry out its review and not to substitute its decision on the merits. Thus the role of the court is not to displace the review of the decision maker but to equip the court to carry out the review under challenge.
53. It is submitted on behalf of the applicant that the decision to certify the claim is unlawful as it was made in accordance with the guidance that was the subject of criticism in the decision of Kiarie and Byndloss and because the Secretary of State confined her consideration to whether the certification power should be used by asking whether the removal would result in "a real risk of serious irreversible harm" to the applicant (see 94B(3) and because it did not include an assessment of whether removal pending appeal would involve an interference with the applicant's Article 8 rights and if so, whether such breach be disproportionate.
54. Mr Chapman on behalf of the Secretary of State acknowledged the criticisms made by the Court of Appeal and there is no dispute that the decision letter of 10th September 2015 did contain that error as identified in the Court of Appeal's decision in Kiarie and Byndloss. It wrongly framed the Secretary of State's consideration solely in terms of whether there was a real risk of serious irreversible harm and did not address the statutory question of whether removal pending determination of an appeal would be in breach of Section 6 of the Human Rights Act 1998. The decision made by the Secretary of State in September 2015 relied upon the existing guidance which the court in Kiarie and Byndloss found to be unlawful and the decision was issued prior to the Court of Appeal's

judgment on 13th October 2015. Consequently there is no dispute that the applicant has established that the decision under challenge contains a public law error and the terms of that legal misdirection are set out in **Kiarie** at paragraph 73(ii).

55. However, Mr Chapman on behalf of the Secretary of State whilst accepting that, submits that the error is not material and the determinative question is whether the deficiencies in the Secretary of State's decision are so material. The question in **Kiarie** was whether the outcome would have been different if the Secretary of State had considered whether removal pending the appeal would result in a breach of Section 6 of the Human Rights Act 1988. As the decision sets out the legal errors identified at [73] and [80] did not result in the Court of Appeal overturning the decision to certify under Section 94B. The Court of Appeal reviewed the circumstances of the Appellants cases and concluded that the errors in the decision letter were immaterial to the outcome on the basis that had the decision maker turned her mind to the correct question (whether removal pending appeal would be in breach of Mr Kiarie's human rights and that of Mr Byndloss), they would have reached the same conclusion. However, before making that assessment, paragraph 33 of **Kiarie** makes plain and which I have made reference to earlier, the Secretary of State must first make relevant findings of fact and conduct proportionality balancing exercise in relation to the findings so found and secondly, those findings of fact are open to review on normal **Wednesbury** principles with the anxious scrutiny appropriate to the context.

56. In terms of materiality, Mr Chapman submits that this was not a case in which the applicant would suffer serious and irreversible harm relying on paragraph 37 of **Kiarie and Byndloss** in which it was indicated that there were likely to

be relatively few cases in which removal would be in breach of Convention rights in the absence of serious and irreversible harm. Thus Mr Chapman submits that the evidence demonstrated that interim removal pending the outcome of the appeal on the facts of this particular case are proportionate. Thus he points to the applicant's characteristics as a fit and healthy 23 year old man with no children or family life. As to his connections with Nigeria, the country of destination, he had lived there until the age of 13 and thus could be taken to be familiar with the language and culture. He submitted that the removal period would be for a brief interim period and that in the case of this particular applicant there was a strong public interest in his removal having been convicted of serious child sexual offences and that substantial weight must be attached to the public interest in the context of Section 94B certification. In this context of the public interest, he made reference to paragraph 44 of Kiarie.

57. Mr Chapman submitted that when taking into account the strong weight attached to the public interest when balanced against the facts in this particular appeal and the role that he claimed to have with his younger siblings, and that of his length of residence that when taking into account the margin of appreciation, it could not be said that removal for the interim period pending the applicant's exercising his out of country right of appeal would be a disproportionate interference with Article 8 rights. Thus he submitted that whilst there were errors in the decision letter they were not material and the issue of materiality is dependent upon the representations made to the Secretary of State on 11th March 2015.

58. Thus he submits that the Secretary of State is able to rely on the nature of those representations and that they do not demonstrate that it would be a disproportionate interference

with Article 8 rights for his removal during the interim period. Whilst he accepted that the Tribunal was required to form its own view as to proportionality the task in hand was to assess the materiality as to whether Article 8 would be infringed during the interim period and that assessment to be on the basis of the material before the Secretary of State.

59. By way of reply Mr Khubber submits that the decision is one that is significantly flawed in that the Secretary of State did not apply the correct legal test but also did not appreciate that the decision to certify is discretionary (see paragraph 94B(2) "may certify") as referred to **Kiarie** at paragraph 45). Thus he submits the mechanism set out in Section 94B(2) of the Act is that the power to certify arises only once the Respondent is satisfied that removal pending appeal would not be contrary to her obligations under Section 6 of the Human Rights Act 1988. Thus there is a discretion.
60. In this case he submits that whether there is a material impact depends on the facts. When considering that issue, he submits there are a number of factors which the Secretary of State in the decision letter failed to properly appreciate and which included the extent and nature of the applicant's family and private life in the UK, the failure to consider the correct criteria set out in **Uner v The Netherlands** [2007] 45 EHRR 14 and **Maslov v Austria** [2009] INLR 47 which included for the purposes of this case, the length of the applicant's stay in the country from which he would be expelled, the time elapsed since the offence, his conduct and the solidity of social, cultural and family ties with the host country and the destination state. He submits that the flaw in the reasoning in the decision letter is a failure to appreciate the applicant's non-existent ties with Nigeria and the extent of his ties and integration in the UK as a result of his family links and his private life. He seeks to contrast the refusal

letter where it was said that he had "possible extended family" with the reality where none had been identified. He further submits that the extent of the family and private life had not been properly considered including the evidence from his siblings as to the effect upon them and the failure to appreciate the materiality of the applicant's residence and integration in the UK. This included his entitlement to his residence in the UK at least in part under EU law as underlined by the provision of a residence card.

61. He further submits that there were legal questions that required consideration when reaching the decision to certify during the appeal period which included whether the decision to certify during the appeal period will breach not only the applicant's Article 8 rights but those of any relevant children, taking into account their best interests.
62. In this context he relies upon the most recent cases of **Ali v SSHD [2016] UKSC 60** and **Maklouf [2016] UKSC 59**.
63. He further submits that when comparing and analysing the cases of **Kiarie and Byndloss**, the facts of this particular appeal are different to those in **Kiarie** and thus are relevant to the issue on materiality.
64. In considering the issue of materiality it is common ground that the burden rests on the Secretary of State to demonstrate any error identified is not material. I remind myself that the Tribunal would be entitled to refuse relief if it could be satisfied that the Secretary of State would inevitably reach the same decision (see **R (Smith) v North East Derbyshire PCT [2006] 1 WLR 3215**, paragraph 10) (May LJ) and that the Tribunal could not be so satisfied if there was a realistic possibility that the decision would be different (see **Ali and Anr v Newham LBC [2002] HLR 20** (at paragraph 19) (Latham LJ) and it is clear that the threshold is a high one and

particularly where obligations arise on the decision maker under Section 6 of the Human Rights Act 1988 and also Section 55 of the BCIA 2009 (dealing with the best interests of children who are involved).

65. As I have set out there is no dispute that the decision letter is flawed in law by way of a legal misdirection and it is further plain in my judgment that the power to certify is discretionary under Section 94B(2) as indicated by the words "may certify" as set out in Kiarie at paragraph 45. The mechanism set out in Section 94B(2) is that the power to certify arises only once the Respondent is satisfied that the removal pending appeal would not be contrary to her obligations under Section 6 of the Human Rights Act 1988. There is no recognition within the decision letter that the Secretary of State recognized that there was such a discretion to be exercised.

66. I also observe that it is possible to reject a claimant's appeal against the deportation order on its merits, taking into account all the relevant material and matters under consideration but that the possibility still exists that notwithstanding the substantive decision, that there may be circumstances in which it is not appropriate to certify the case under Section 94B. As Mr Chapman submitted it was recognized in the decision of Kiarie that there may in practice be relatively few cases where removal for an interim period pending an appeal would be in breach of Convention rights in the absence of a risk of serious irreversible harm, but it is a possibility which must be focussed on as a necessary part of the decision making process (see paragraph 37 of Kiarie).

67. Furthermore, whilst it can be said that it is often the case that aspects of the analysis relating to proportionality of a

deportation decision may be relevant to the decision to certify under Section 94B and may be carried across in the reasoning to support the certification decision (as observed by the Court of Appeal in Kiarie [76]). However in my judgment, the decision maker must not lose sight of the fact that the two exercises are not the same and that some factors placed in the balance may differ as may the weight attached or attributed to those differing factors. It is not sufficient in my judgment to look at the representations made on behalf of the applicant without consideration of the matters taken into account within the decision letter.

68. Having considered the decision letter it is, in my judgment, flawed in significant respects. I consider that the matters I will go on to identify are relevant in making an assessment of the materiality of the legal errors in the decision letter which are accepted by the Secretary of State.

69. In this context I remind myself that procedural failings have to be viewed with caution and will often invalidate a decision (see Kiarie at [74]). I further observe that whilst Richards LJ talks in terms of "procedural failings" and was referring to the claimant not being informed in advance of the consideration of certification, that procedural failings as referred to by him must also consider the legal errors that have been established here namely, that the decision to certify by focusing on the wrong legal question and failing to address the correct question was wrong and that the Secretary of State failed to consider or appreciate that the power to certify was a discretionary one to which she should apply her mind. Thus such legal flaws must be viewed with caution in my judgment.

70. I find that this is further underlined by the decision in R (Gudanaviciutine) v the Director of Legal Aid Casework [2014]

EWCA Civ 1622 [2015] 1 WLR 2247. That was a case which concerned the circumstances in which the procedural guarantees inherent in Article 8 required the grant of legal aid in an immigration case involving a claim based on Article 8 grounds. The court concluded that for relevant purposes the standard set by Article 8 were in practice the same as those set by Article 6. At [46] the court said this:-

"The general principles established by the European Court of Human Rights are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of Article 6.1 in proceedings which had already taken place. We accept the following summary of the relevant case law given by Mr Drabble:

- (i) The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts ...;
- (ii) the question is whether the applicant's appearance before the court or Tribunal in question without the assistance of a lawyer was accepted, in the sense of whether he or she was able to present the case properly and satisfactorily ...;
- (iii) it is relevant whether the proceedings taken as a whole were fair ...;
- (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair ...: and
- (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him at a substantial disadvantage vis-à-vis their opponent ...".

The court in that paragraph was summarising the general principles relating to Article 6. In relation to Article 8 the court said this:-

"70. It is true that the test for Article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for Article 6.1 (whether there has been effective access to court). The Article 8 test is broader than the Article 6.1 test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. There is nothing in the Strasbourg jurisprudence to which our attention has been drawn which suggests that the European Court of Human Rights considers that there is any such difference. In practice, the court's analysis of the facts in the case law does not seem to differ as between Article 6.1 and Article 8. This is not surprising. The focus of Article 6.1 is to ensure a fair determination of civil rights and obligations by an independent and impartial Tribunal. Article 8 does not dictate the form of the decision making process that the state must put in place. But the focus of the procedural aspect of Article 8 is to ensure the effective protection of an individual's Article 8 rights. To summarise, in determining what constitutes effective access to the Tribunal (Article 6.1) and what constitutes sufficient involvement in the decision making process (Article 8), for the present purposes the standards are in practice the same" and at [71]

"71. As Ms Kaufmann submits, the significance of the cases lies not in their particular facts but in the principles they establish, vis (1) decision making processes by which Article 8 rights are determined must be fair, (ii) fairness requires that individuals are involved in the decision making process, viewed as a whole, to a degree that is

sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) affective access may require the state to fund legal representation”

At paragraph [77] the court stated:-

“Deportation cases are of particular concern. It will often be the case that a decision to deport will engage an individual’s Article 8 rights. Where this occurs, the individual will usually be able to say that the issues at stake for him are of great importance. This should not be regarded as a trump card which usually leads to the need of legal aid. It is no more than one of the relevant factors to be taken into account. The fact that this factor will almost invariably be present in deportation cases is not, **however**, a justification for giving a reduced weight.”

71. Mr Khubber submits that in recognising the “great importance” of deportation appeals to those concerned as set out at paragraph 77 that it must follow there is an enhanced level of procedural protection required in deportation appeals. The factual basis for the decision in Gudanavicine do not have any relevance or bearing to this present case. Furthermore, as noted in Kiarie, the case related to the application of the EEA Regulations and issues relating to the welfare of her daughter and that the court held that legal aid was required as she would not be able to prepare any appeal or present it (see paragraphs 51 and 52 of Kiarie). The context in which Kiarie considered that authority was in the context of the procedural arguments advanced on behalf of the respective Appellants concerning the fairness of out of country appeals. Nonetheless I would accept that the decision made it plain that deportation cases are a particular concern and whilst it is a case relating to the availability of legal aid in the context of an Article 8 claim, it does not detract in my

judgment from an overarching principle of the importance of decisions to those being deported and that in such circumstances there is an enhanced level of procedural protection and as such is a relevant consideration when considering the issue of materiality.

72. Having made those observations, I now turn to the issue of materiality in the context of the substantive and procedural rights under Article 8 by way of removal during the interim period. In his submissions, Mr Chapman submitted that it is not useful to consider the circumstances of the particular Appellant in Kiarie or to make any comparison. However I am not satisfied that that is necessarily correct, and I accept the submissions made by Mr Khubber that there are differences between the Appellants in Kiarie and Byndloss and the present applicant and as such must go to the issue of materiality based as it is upon that premise that the court had found that the outcome would not have been different had the Respondent considered the correct legal test.

73. In this context on 11th March 2015 the applicant's solicitors made representations to the Secretary of State relying on matters relevant to EU law and on Article 8 grounds. These representations are set out at page [68] of the bundle and included with them a number of documents [AB75]. The applicant's factual circumstances were described including his method of entry, the date of entry and his age and his residence in the UK thereafter along with his three siblings. His residence by virtue of an EEA residence card was described and his level of integration in the UK was similarly evidenced in terms of his education, having completed his studies in 2011 and that he had continued to reside with this brother and siblings and being solely dependent upon his mother thereafter. The representations also made reference to his circumstances prior to entry at the age of 13 in which he had

lived with a relative who had died on 15th October 2011. The representations made it plain that in those circumstances he had no ties and no one to return to in Nigeria. There were further submissions relating to the role in which he played as regards his siblings daily life and annexed to the representations included were letters of support from his siblings.

74. It is plain from the decision letter that the Secretary of State concentrated on the issue of family life in the context of the Appellant having a parental relationship. Whilst it is correct that he provided evidence of some child care responsibility, the crux of the representations relied upon the nature of the relationship between himself and his minor siblings and whether or not that could accurately be described as "family life" within its legal meaning, it could be said to be sufficient to constitute elements of his "private life" and thus important to the question of certification. The evidence in this respect also included letters directly from the children concerned which made reference to the adverse effects upon them of the Appellant's departure including on their education and on their relationship. It is certainly arguable on that evidence that it made reference to the impact of the separation upon them during his custodial sentence and also in the light of the prospect of a further separation during the interim period.
75. Any decision maker was required or would be required to consider the best interests of the children concerned as a primary consideration. There is no dispute as to the applicable legal principles in this respect set out in Section 55 of the Borders, Citizenship and Immigration Act 2009.

76. The applicable principles have been summarised by the Supreme Court in **R (Zoumbas) v SSHD** [2013] 1 WLR 3690 at paragraph 10 (Lord Hodge JSC) as follows:-

"The best interests of a child are an integral part of the proportionality assessment under Article 8 of the Convention; (2) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) although the best interests of the child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; (4) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in place; (5) it is important to have a clear idea of the child's circumstances and what is in a child's best interests if one asks oneself whether those interests are outweighed by the force of other considerations; (6) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of the parent".

77. As set out in the decision of the President of the Upper Tribunal in **JO and Others (Section 55 duty) Nigeria** [2014] UKUT 517 (IAC) at paragraph 12:-

"I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis namely something cursory, casual or superficial, would plainly not be in accordance with the specific duty imposed by Section 55(3) or the overarching duty to have regard to the need to

safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. Ditto cases where the decision making process and its product entail little more than giving lip service to the guidance”.

78. The most recent decision in **Makhlouf v SSHD [2016] UKSC 59** held that where a decision was taken about the deportation of a foreign criminal who had children residing in the UK, separate consideration of the children’s best interests was required, especially if those interests did not converge with those of the parent facing deportation and that the child’s interests had to rank as a primary consideration. The court held that the issue was whether the Secretary of State had been provided with sufficient material on which to make a proper judgment on the Article 8 rights of the applicant and his children (paragraphs 40, 42 and 44) and the duty to treat the best interests of children as a primary consideration stemmed from the Borders, Citizenship and Immigration Act 2009 Section 55 and the Human Rights Act 1998 Section 6(1) which required public authorities to act compatibly with the rights contained in the ECHR, including those under Article 8 however, that did not mean that their rights were inevitably a passport to another person’s rights (per Lady Hale at paragraph 48).
79. Whilst the Secretary of State sought to apply this in the decision letter, it was in the context of family life with the relevant children, in which she formed the view that there was no genuine subsisting parental relationship. There does not seem to be any dispute that the applicant did have a genuine relationship with his minor siblings however their best interests as a primary consideration was not considered on the correct factual basis and in light of the express evidence from them. This is different from the decision in **Kiarie**. There, whilst he did have a relationship with his mother and siblings, there is no reference in the decision as

to the extent of that relationship or whether there was any express evidence from them. Similarly when considering the circumstances of the applicant Byndloss, the Court of Appeal found that he had no meaningful relationship with any children (see paragraphs 86 and 90 of Kiarie). Thus the Secretary of State did not consider the relationship, the impact upon them and their welfare in either the deportation decision but importantly in any decision to certify under Section 94B.

80. The second difference from the decision in Kiarie relevant to the issue of materiality was that in Kiarie the decision maker did not accept that he was socially and culturally integrated in the UK. That is not the position in the decision letter in which it was accepted that the applicant was socially and culturally integrated in the UK (see page 55 of the bundle). It is not clear from the decision letter on what basis this acceptance was made other than he had spent a significant period of time in the United Kingdom having arrived as a minor and had attended school, however, that is accepted in the decision letter. It did go on to make reference to the circumstances of his criminal offending in the context of fraud and also made reference there being no evidence of any positive contribution to the UK and therefore it seems to me that there was evidence upon which the Secretary of State could have taken a contrary view as to whether he was socially and culturally integrated. Nonetheless this has materiality when considering the issue of the proportionality of removal for the interim period when set in the context of whether he had any ties in Nigeria. It is accepted by the Secretary of State that his previous carer had died in 2011 but the Secretary of State went on to state that he "might still have extended family members that reside there". It was unclear upon what that is based, but in the context of the procedural rights protected under Article 8, no consideration was given

as to how he could pursue his appeal in those circumstances, in the light of the acceptance of having been socially and culturally integrated in the UK and having no relatives in Nigeria.

81. The decision in Kiarie did consider the legal question as to whether an out of country appeal would breach the procedural requirements of Article 8 and reached the conclusion that in the generality of deportation cases out of country appeals would not breach Article 8. The submissions made by Mr Khubber in my judgment do not demonstrate that the Court of Appeal were in error in reaching that view having had the advantage of the parties' respective submissions and having considered the relevant legal authorities as set out at paragraphs 46 - 71. However the court did make it plain that if particular reasons are advanced as to why an out of country appeal would fail to meet the requirements of Article 8 they must be considered and assessed (see paragraph 71 of Kiarie). There was little put before the Secretary of State concerning the procedural elements of Article 8. In this context I have considered the ground of challenge in which it is asserted on behalf of the applicant that there was a failure to make enquiries or give an opportunity for representations prior to the use of the certification power under Section 94B (Ground 3). In this context it is submitted that prior to making the certification decision the Secretary of State did not write to the applicant to inform him that the power was being considered and give him the opportunity to make representations as to why such a discretion should not be applied.

82. By way of reply Mr Chapman submits that the ground has no merit as firstly in February 2015, the Respondent invited the applicant to make representations as to why he "should not be expected to continue an appeal after you have left the United

Kingdom" to which the Applicant made representations in March 2015. He submits the fact that certification at that stage was intended on a preliminary basis to be under Regulation 24AA of the EEA Regulations rather than under Section 94B of the 2002 Act, did not deprive him of the invitation to make representations. Mr Khubber submits that notification of certification under Regulation 24AA can not be regarded as sufficient for lawful certification under Section 94B.

83. Mr Chapman further submits that even if the letter in February 2015 had not have been relied upon, there was no procedural unfairness on the Secretary of State's part because a letter of 17th June 2015 expressly invited the applicant to make representations as to the certification. It was asserted by the applicant that he had not received such a letter.

84. There is no dispute that the letter of 12th February 2015 was served on the Appellant and that included an invitation to make representations as to why he should not be expected to continue an appeal after he had left the United Kingdom and that that was in the context of the EEA Regulations and in particular Regulation 24AA. In my judgment the substance of the invitation to the Appellant to make representations was unaffected by the legal provisions under which it was made. In any event, the letter did result in representations being made on behalf of the applicant on 11th March 2015 not only on EEA grounds but also on detailed Article 8 grounds (see B43) although it did not expressly deal with the issue of certification.

85. Even if I were wrong in that respect, on 17th June 2015 a letter was sent to the applicant via the Prison Governor. That letter makes it plain that the Secretary of State was considering certification of the claim. Whilst the Appellant claims in a written witness statement that he has not seen

that letter, I am satisfied that the evidence demonstrates that that is untrue and that he did receive the letter. The Case Information Database (CID) demonstrates that a confirmation of conveyance was received on 23rd June 2015 and the contents of the confirmation of conveyance is set out in a further document in which the Appellant was required to sign for the letter sent on 17th June which had been conveyed to him on 23rd June 2015. The section is unsigned. Below that is a space in which it is said "prisoner refused", where it was confirmed that the applicant had refused to sign or was unable to sign for the papers, no reason was given by the applicant for refusing to sign.

86. I can only conclude from that evidence that contrary to the Applicant's account that he had no knowledge of the letter that he was indeed provided with a copy of the letter on 23rd June 2015 and that he refused to sign to say that he had received it. It is further plain from the evidence that when his instructing solicitors went to see him to take instructions on this issue that he did not tell them of the events of 23rd June 2015 thus I reject any assertion that he did not receive the letter. It is, however, right to observe that despite the Applicant being legally represented from 25th November 2014 (see AB27) the Secretary of State has sent documents and served them upon the applicant when he has been in custody. It is also right to observe that when the Secretary of State was deciding whether to make a deportation order (see page 13 AB39) they had not taken into account the representations made by the Applicant's solicitors in March 2015, a point which was the basis of the first judicial review proceedings.

87. Whilst there has been little put before the Secretary of State concerning the procedural elements and certification there is some reference in the PAP letter in September 2015 making it

plain that in the light of the Secretary of State's acceptance (whether rightly or wrongly) that he was socially and culturally integrated and that he had no relatives in Nigeria, that they were issues to be considered relevant to certification and the exercise of discretion.

88. In considering the issue of materiality I accept Mr Chapman's submissions that there are other factors relevant to the proportionality balance in favour of removal pending the appeal, including the seriousness of the offences and the sentence imposed and the fact that the Applicant has no children in the United Kingdom. Mr Chapman also submitted that there was great weight to be attached to the public interest (see Laws LJ in **SS (Nigeria) v SSHD [2013] EWCA Civ at [55]** and **Ali v SSHD [2016] UKSC** at paragraph 38.
89. Mr Chapman submitted that the public interest in removing an applicant started from the moment he became a foreign criminal and that cannot be reduced by the fact that he might have to bring an appeal out of the country. He therefore submitted that the weight to be attached to the public interest in removing foreign criminals is great in whatever context.
90. Mr Khubber by way of reply has submitted that the weight to be given to the general consideration of the public interest is qualified by general long term considerations for deportation which can not undermine or eclipse the right to effective procedural protection during the interim period. Furthermore, that removal during the interim period would require justification by the Secretary of State having accepted that the Applicant's claim could succeed. In this context he submitted that the decision letter accepted his case as a "fresh claim" and thus must have accepted that there were realistic prospects of success. I do not think that it follows from the Secretary of State's acceptance of the appeal

as a fresh claim necessarily means that it is accepted by the Secretary of State that it will succeed. The Secretary of State has to look at the fresh submissions and here it was accepted that the Secretary of State had not considered the representations made on 11th March 2015 and therefore did so. The next stage sequentially is to make a decision to accept it as a fresh claim. This is the starting point therefore and as a consequence the Secretary of State then carries out a detailed consideration within the decision and reaches a conclusion that she had not reached before when accepting that it was a fresh claim. Thus the Secretary of State therefore examines the material and gives it detailed consideration and reaches a conclusion. In such a case being entitled to certify it if that is the decision reached after a detailed consideration. That conclusion in my judgment is not inconsistent with the initial decision of the acceptance of the submissions as a fresh claim.

91. In my judgment there is substantial weight to be attached to the public interest not only when considering the substantive decision to deport but also when considering the question of whether a person should be allowed to remain in the UK for the interim period pending determination of their appeal. The reason given in **Kiarie** relates to the fact that parliament has chosen to allow removal for the interim period provided it does not breach Section 6 of the Human Rights Act. In other words there is a strong public interest in the removal of foreign criminals effectively and speedily pending determination of their appeals which is recognised by parliament in enacting Section 94B. However, it must be taken into account that parliament, by not making the power mandatory, recognises that the legislation did not intend to remove all foreign criminals during the appeal process. Thus the strong public interest has to be weighed against other

relevant matters, such as whether there is effective procedural protection during the appeal process and the extent to which an applicant's private and family life would be disrupted particularly where there are minor children involved. I do not have to reach a conclusion on this issue because for the purposes of this case I have reached the overall conclusion that the relevant considerations that I have identified could be material to the outcome so I conclude that in the circumstances caution should be exercised when considering substantive or procedural failings which invalidate a decision. As can be seen from the chronology in this case, the decision under challenge was issued before the Court of Appeal decision in **Kiarie and Byndloss**. However permission to apply for judicial review was granted after that decision was made available. There has been no supplementary decision issued dealing with the guidance that was subsequently issued post-Kiarie.

92. I have therefore found the decision to be legally flawed and apply paragraph [47] of **Caropen and Myrie** that the decision to certify should be quashed. It should not be drawn from my decision to quash the certificate that it would not be open to the Secretary of State to issue a further decision to certify this particular claim applying the correct test and taking into account any material provided. If she did so, it would, of course, be open to challenge by a fresh judicial review claim but unless and until she makes such a decision, the Appellant has an in country right of appeal.

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