14 June 2017

PRESS SUMMARY

R (on the application of Kiarie) (Appellant) v Secretary of State for the Home Department (Respondent)
R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department (Respondent)
[2017] UKSC 42
On appeal from [2015] EWCA Civ 1020

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Carnwath, Lord Hodge, Lord Toulson.

BACKGROUND TO THE APPEAL

Mr Kiarie has Kenyan nationality. He came to the UK in 1997 with his family at the age of three. Mr Byndloss has Jamaican nationality. He has lived in the UK since the age of 21 and has a wife and children living in the UK. Following their separate convictions for serious drug related offences, in October 2014 the respondent made orders for their deportation to Kenya and Jamaica respectively and rejected the appellants' claims that deportation would breach their right to respect for their private and family life under article 8 of the European Convention on Human Rights ("ECHR").

When making the deportation orders, the Home Secretary issued certificates under section 94B of the Nationality, Immigration and Asylum Act 2002. In certifying the appellants' claims under section 94B, the respondent chose not to instead certify their human rights claims as "clearly unfounded" under section 94, indicating that their appeals were arguable. The effect of section 94B certification is that the appellants can bring their appeals against the respondent's immigration decisions only after they have returned to Kenya and Jamaica. Until 30 November 2016, section 94B provided that where a human rights claim had been made by a person liable to deportation, the Secretary of State may certify the claim if she considers that the removal of the person pending the outcome of their appeal would not be unlawful under section 6 of the Human Rights Act 1998 and that the person would not face a real risk of serious irreversible harm if removed to that country.

The court stresses that this appeal is not about the circumstances in which a person can successfully resist deportation by reference to his private or family life. It recently addressed that question in the case of *Ali* and ruled that he can do so only if the circumstances are "very compelling". The question in this appeal is: where the law gives such a person a right to appeal to a tribunal against a deportation order, then, however difficult it may be for him to succeed, does the Home Secretary breach his human rights by deporting him before he can bring the appeal and without making proper provision for him to participate in the hearing of it? The Court of Appeal's answer was no.

JUDGMENT

The Supreme Court unanimously allows the appeal of Mr Kiarie and Mr Byndloss and quashes the certificates. Lord Wilson gives the lead judgment, with which Lady Hale, Lord Hodge and Lord Toulson agree. Lord Carnwath gives a concurring judgment.

REASONS FOR THE JUDGMENT

The fundamental objective of section 94B arises from the fact that the appellants are "foreign criminals" and, by virtue of section 32(4) of the UK Borders Act 2007, the deportation of a "foreign criminal" is conducive to the public good **[32-33]**. However, Parliament gave foreign criminals a right of appeal against a deportation order by enacting

section 82(1) and (3A) of the Nationality, Immigration and Asylum Act 2002. The public interest in the removal of an appellant in advance of his appeal is outweighed by the public interest that a right of appeal should be effective **[35]**.

In proceedings for judicial review of a section 94B certificate, the tribunal must decide for itself whether deportation in advance of appeal would breach the appellant's ECHR rights. It must assess for itself the proportionality of deportation at that stage, albeit attaching considerable weight to public policy considerations relied on by the respondent **[42-43]**. The application of the *Wednesbury* criterion to the right to depart from the Home Office's findings of fact, even when heightened to "anxious scrutiny", is inapt. Under section 6 of the Human Rights Act 1998, the court may require to be more proactive than application of that criterion would permit. The residual power of the court to determine facts, and to receive evidence including oral evidence, needs to be recognised **[47]**.

Article 8 requires that an appeal against a deportation order by reference to a claim in respect of private and family life should be effective **[51-52]**. While the effect of an appellant's immediate removal from the UK is likely to significantly weaken his arguable appeal **[58]**, what is determinative of these appeals is whether the issue of a section 94B certificate obstructs an appellant's ability to effectively present his appeal against the deportation order **[59]**. In an appeal brought from abroad, the appellant's ability to present his case is likely to be obstructed in a number of ways. Even if he is able to secure legal representation, the appellant and his lawyer would face formidable difficulties in giving and receiving instructions prior to and during the hearing **[60]**. Further, the effectiveness of an arguable appeal is likely to turn on the ability of the appellant to give live evidence to assist the tribunal in its assessment of whether he is a reformed character and the quality of his relationships with others in the UK, in particular with any child, partner or other family member **[61, 63]**.

An effective appeal requires that the appellants are afforded the opportunity to give live evidence **[76]**. While the giving of evidence on screen is not optimum, it might be enough to render the appeal effective for the purposes of article 8, provided that the opportunity to give evidence in that way is realistically available to them **[67]**. However, the financial and logistical barriers to their giving evidence on screen from abroad are almost insurmountable.

The respondent has therefore certified article 8 claims of foreign criminals under section 94B in the absence of a ECHR-compliant system for the conduct of an appeal from abroad. The Ministry of Justice has failed to make provision for facilities at the hearing centre, or for access to such facilities abroad, as would allow the appellants to give live evidence and participate in the hearing **[76]**. Deportation pursuant to the certificates would therefore interfere with the appellants' rights to respect for their private and family life in the UK pursuant to article 8 and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective. The respondent has failed to establish that deportation in advance of appeal strikes a fair balance between the rights of the appellants and the interests of the community and therefore the decisions to issue the certificates were unlawful **[78]**.

In a concurring judgment, Lord Carnwath concludes that an effective appeal for the purposes of article 8 is unlikely to turn on subjective issues requiring the appellant to give direct evidence, such as whether the appellant is a reformed character **[100]**. However, it is wrong in principle for the respondent, as the opposing party to the appeal, to be allowed to dictate the conduct of the appellant's case or the evidence on which he chooses to rely. The respondent must be able, at the time of certification, to satisfy herself that the necessary facilities can and will be provided **[102]**.

References in square brackets are to paragraphs in the judgment