R (on the application of Ayache) v The Secretary of State for the Home Department (paragraph 353 and s94B relationship) [2017] UKUT 00122 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

Heard at Field House
On 15th December 2016

……

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE QUEEN ON THE APPLICATION OF
AHMED FATHE AYACHE

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr M Henderson, Counsel, for the Applicant (instructed by Gulbenkian Andonian Solicitors)
Mr L Glenister, Counsel, for the Respondent (instructed by GLD)

1. *Although paragraph 353 does not refer in terms to certification, a decision certified pursuant to s 94b is plainly a decision on a "human rights claim" albeit a claim regarding*

temporary removal as opposed to removal for a more lengthy period if a statutory appeal is unsuccessful. In deciding whether to certify under s94B the respondent, and the Tribunal, cannot act in a way which is incompatible with the applicant's Convention rights. It must follow that further submissions made and considered in accordance with paragraph 353 Immigration Rules would fall within their ambit, including the appropriateness of certification. Certification is a response to the human rights claim, albeit focused upon temporary removal rather than the main claim.

2. *Paragraph 353 Immigration Rules provides the appropriate remedy where further information and evidence is sought to be placed before the respondent, rather than such material being considered in judicial review proceedings*

JUDGMENT

1. The applicant, who is a citizen of Sierra Leone born on 7 July 1982, was issued with entry clearance on 11 August 1995 and entered the UK on 17 August 1995, aged 13. He then applied for and, on 24 July 1996 was granted, indefinite leave to remain.

2. On 5 December 2003, aged 21, the applicant was convicted of 2 counts of conspiracy to handle stolen goods, 2 counts of theft, robbery and having a firearm with intent to commit an indictable offence. He was sentenced to 5 years' imprisonment in total. On 11 May 2004, notice of intention to deport was served upon the applicant. Deportation was not pursued.

3. He was convicted of further offences:

12 October 2007	using disorderly behaviour or threatening, abusive, insulting words likely to cause harassment, alarm or distress and travelling on a railway without paying a fare: fine of £150, costs of £250 and £3 compensation.
8 April 2008	using disorderly behaviour or threatening, abusive, insulting words likely to cause harassment, alarm or distress: 12 month conditional discharge, costs of £60
8 July 2008	driving a motor vehicle with excess alcohol and failing to surrender to bail at appointed time: fine of £250, costs of £50, disqualified from driving for 12 months.

4 September 2014	possessing controlled Class A drug (cocaine) with intent to supply: 4 years' imprisonment and victim surcharge of £120.

4. On 10 February 2015, the applicant was served with a decision to deport. His representations, on Article 8 and 3 grounds, on why he should not be deported were refused for reasons set out in a letter dated 11 September 2015. His Article 8 human rights claim was certified under s94B Nationality, Immigration and Asylum Act 2002[1] and his Article 3 claim was certified under s94 of the 2002 Act as clearly unfounded.

   On 15 September 2015, the deportation order was signed and served on 18th September 2015 and the decision maintained in the Pre-Action protocol response letter.

5. On 9 December 2015, the applicant made the instant judicial review application challenging the respondent's decision to certify his Article 8 claim. There was no challenge to the certification of the Article 3 claim.

6. The applicant sought and, on 18th May 2016, was granted permission by Collins J in the following terms:

   > The relationship with Ms Digpal seems to exist and there was material which even at the time of the decision supported it. But, as the rights of the child are at issue, it is appropriate to consider the present situation.
   >
   > The applicant has a little merit, but the test is whether it would be proportionate having regard to the applicant's and his partner's and daughter's rights to remove him, albeit perhaps temporarily. The

[1] 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), or
(b) section 3(6) of that Act (court recommending deportation following conviction).
(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
(3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
The Immigration Act 2016 amended s94B to include potential certification of all human rights claims, not merely those where there has been a deportation order. That amendment is of no relevance in this application.

suggestion that they could go to Sierra Leone is obviously likely to be a key issue in this appeal.

7. Although initially contended by the respondent that the Article 8 claim had been certified under s94(1), this was no longer a live issue at the hearing before me, the respondent accepting that only the Article 3 claim had been certified under s94(1); the applicant has an out of country appeal against the refusal of his Article 3 claim. The Article 8 claim was certified under s94B.

8. The letter of 11th September 2015 considers (in so far as is relevant to the s94B challenge), in sub-headed paragraphs, the applicant's immigration history ([3] – [8]), the reasons for his deportation ([9] – [13]), '*Zambrano*' ([14] – [17]), Article 8 ([18] – [22]), 'very compelling circumstances' including his history of offending, the public interest in his removal, the impact on his family of his removal, the best interests of his children, the impact of removal on his private life and his arrival prior to the age of 18 ([23] – [[88]). [115] – [116] consider and decide certification under s94B in the following terms:

> 115. Consideration has been given to whether your article 8 claim should be certified under section 94B of the 2002 Act. 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 risk exists because there is no evidence to indicate that you have a subsisting and genuine parental relationship with a child; as noted above you were not cohabiting with your partner and your daughter prior to your imprisonment; or your claimed son from a (sic) your previous relationship. Further to this there is no evidence submitted which would indicate that there compelling (sic) circumstances in your case which would prevent your daughter or claimed son from accompanying you to Sierra Leone or remaining in the United Kingdom with their respective mothers when you are deported. It is noted that none of the children are dependent on you for their right to remain in the United Kingdom. There are no compelling private life matters apparent: you may establish and maintain a private life to a similar standard in your country of origin.
>
> 116. 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 UK.

9. The only issue to be determined by the Tribunal is the lawfulness of the decision to certify under s94B. The applicant relies upon the following grounds:

   (a) "The respondent has made a material mistake of fact/failed to consider material matters and that relevant material matters were not considered."
   (b) "The respondent failed to consider or apply policy/failed to consider material matters relevant to procedural fairness."

10. With regard to the first of those grounds, the applicant submitted the respondent had failed to give adequate consideration to evidence submitted that he was married to Ms Digpal and that he maintained a relationship with Ms Digpal and his daughter as a husband/father. He submitted that it was plain from the evidence filed with the judicial review application form that the respondent's conclusions were unsustainable. In making this submission, the applicant relied upon post decision evidence. The applicant submitted that the Tribunal was not, when considering the lawfulness of the certification of a claim under s94B, confined only to consideration of the material that was before the respondent on the date of the decision but should consider all the material presently before the Tribunal

> "in order to assess whether the respondent's analysis of the facts is undermined by a failure to consider material matters, or whether the decision maker simply got the facts wrong."

The applicant submitted that it was "particularly clear" from the documents submitted with the claim form that the applicant was in a subsisting relationship with Ms Digpal. The applicant also submitted that the duty of the respondent under s55 Borders, Citizenship and Immigration Act 2009 obliged the respondent to consider the welfare of his daughter and this had not been done; furthermore, it could not be assumed that a correct determination of the facts would have made no difference to the decision to certify under s94B.

11. With regard to the second ground, the applicant referred to the respondent's policy on certification under s94B, as amended following *Kiarie and Byndloss* [2015] EWCA Civ 1020. Particular reference was made in the grounds accompanying the application, by way of example, to paragraph 3.27 and the absence of a return route. The applicant referred to the Ebola outbreak and the poor travel infrastructure which, it was submitted, gave rise to a significant risk that the applicant would face serious difficulties and that the respondent had failed to consider this possibility thus amounting to a procedural breach of the applicant's Article 8 rights. This was not significantly pursued in those terms before me. Rather the applicant relied upon the Guidance issued to Home Office staff on 1 December 2016, which had been produced following *Kiarie and Byndloss v SSHD* [2015] EWCA Civ 1020. It was therefore, it was submitted, the correct process to be followed. There had been no formal application to amend the grounds to include reliance upon this guidance. Nor was it referred to in terms in the skeleton argument submitted by the applicant although reference is made to the claimed failure by the respondent to follow the Guidance. Although some objection was raised by the respondent, it was acknowledged that the Guidance reflected the Secretary of State's position following *Kiarie and*

Byndloss[2]. I am satisfied that this issue is properly before me albeit not raised formally in the grounds. The issue is the lawfulness of the s94B certificate and thus it must take account of *Kiarie and Byndloss* and by extension the Guidance issued by the respondent as a consequence. Thus in this case it is not said to be an error by the SSHD in failing to apply Policy but as the approach set out in the guidance is the proper approach it should have been followed but was not.

12. On 20th December 2016, the Court of Appeal handed down judgment in *Caroopen and Myrie v SSHD* [2016] EWCA Civ 1307. I invited the parties to make written submissions if so advised on the extent that decision may impact upon this application and I received submissions from both parties, which I have taken into account.

The evidence submitted by the applicant after the decision the subject of challenge, in the judicial review application.

13. The applicant did not refer to any authority under which evidence submitted after the decision the subject of challenge and not before the decision-maker, whether accompanying the judicial review application or thereafter, could or should be taken into account in the review of the decision the subject of challenge. It is plain that the jurisprudence does not permit of a 'rolling review' of evidence. The decision the subject of challenge is that which is challenged. In the absence of a secondary/subsidiary or supplemental decision which looks at any further evidence submitted whether direct to the respondent or within judicial review proceedings which the respondent chooses to consider, the respondent cannot be criticised for failing to take account of information of which she was not aware at the date of the decision under challenge. It may of course be that in some cases the respondent is under a duty to investigate or enquire prior to making a decision, but that is not the position in this application. In this application, it was submitted that the extensive evidence provided after the decision should be taken into account in determining the lawfulness of the certification.

14. I do not accept that proposition. As is said in *Kiarie and Byndloss* [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

[2] The Immigration Act 2016 amended s94B to include potential certification of all human rights claims, not merely those where there has been a deportation order. That amendment is of no relevance in this application.

> 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.

15. That post decision evidence is not at large in a judicial review of a decision to certify was made clear in the observations of Beatson LJ in *R (FR & KL (Albania)) v SSHD* [2016] EWCA Civ 605. At [56], discussing the decision of the House of Lords in *ZT (Kosovo) v SSHD* [2009] UKHL 6, he said:

> "As to the approach of a court considering a judicial review of certification, it was stated that the court was not to substitute its own view as to whether the claims were "clearly unfounded" but should apply the normal principles of judicial review…"

Beatson LJ explained at [49] the reviewing court must ask itself essentially the questions which would have to be asked by a Tribunal considering an appeal. He referred with approval at [53] of *R (FR & KL) (Albania)* to the earlier explanation of Lord Phillips that:

> "…the test for certifying a claim as "clearly unfounded" is an objective one. It depends not on the Home Secretary's view but upon a criterion which a court can readily reapply once it has the materials which the Home Secretary had…"

At [56]:

> "…the court was not to substitute its own view as to whether the claims were "clearly unfounded" but should apply the normal principles of judicial review."

And at [[62]:

> "…the jurisdiction remains a supervisory and reviewing one."

As was made clear in *ZT (Kosovo)*, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. The way the Tribunal can consider whether the decision by the respondent to certify the human rights claim was a rational one is by asking itself the same question. This does not mean that the Tribunal is substituting its own decision but that the Tribunal is asking itself the same question in order to decide whether the respondent's decision was rational. In doing so it exercises a supervisory jurisdiction which is why it only considers the materials that were available to the respondent at the date of decision.

16. In the absence of any reasoned arguments supported by authority that the Tribunal should consider evidence that was not before the respondent on the date she took her decision, I am not prepared to consider the evidence submitted either with the judicial review application or subsequently in determining the lawfulness of the s94B certificate.

17. The respondent submits that given the applicant seeks to rely upon further evidence then the proper course would be to withdraw this application, present the new material in the form of further submissions and this would be considered in accordance with paragraph 353 Immigration Rules. The applicant submits that such a course of action is not one they are seeking - they are not seeking a review of the Article 8 decision but of the s94B certificate and that paragraph 353 does not provide for consideration of a 94B certificate.

The relationship between paragraph 353 Immigration Rules and s94B Nationality, Immigration and Asylum Act 2002

18. Although paragraph 353 does not refer in terms to certification, a s94B certificate is plainly a decision on a human rights claim albeit a claim regarding temporary removal as oppose to removal for a more lengthy period if a statutory appeal is unsuccessful. In deciding whether to certify under s94B the respondent, and the Tribunal, cannot act in a way which is incompatible with the applicant's Convention rights. It must follow that further submissions made and considered in accordance with paragraph 353 Immigration Rules would fall within their ambit, including the appropriateness of certification. Certification is a response to the human rights claim, albeit focused upon temporary removal rather than the main claim.

19. The duty imposed upon the Tribunal by s6 HRA is not infringed by it not reviewing post decision evidence which is said to do what the pre-decision evidence failed to achieve, namely establishing that removal would bring about an impermissible infringement of rights protected by Article 8. That is because the nature of the task being performed by the Tribunal is the exercise of a supervisory jurisdiction in respect of an historic decision. If there is more to be said by an applicant, then the machinery of paragraph 353 provides for it to be considered by the respondent. If the applicant is correct that the post decision evidence demonstrates that temporary removal would infringe protected Article 8 rights, that infringement does not flow from the decision of the Tribunal that the decision under challenge in the proceedings before it was, at the time it was taken, a lawful one.

20. It therefore follows that paragraph 353 Immigration Rules provides the appropriate remedy where further information and evidence is sought to be placed before the respondent, rather than such material being considered in judicial review proceedings.

21. I have in any event considered the challenge to the s94B certificate made in this application.

Article 8 in general and under s94B Nationality, Immigration and Asylum Act 2002.

22. The respondent, in her detailed grounds of defence, states:

> …it is acknowledged that in terms of certification specifically, the decision was made on the basis of an explicit analysis of serious irreversible harm. However, there was significant assessment of the applicant's Article 8 rights earlier in the decision letter which is referenced under the certification heading. As such the decision does address both section 94B (2) and (3).

23. The assessment of Article 8 undertaken by the respondent in the decision the subject of challenge is an assessment in accordance with established jurisprudence of the applicant's human rights claim and the proportionality of the decision in the light of the public interest in deportation of the applicant who, it is acknowledged, has been convicted of very serious offences for which he has received significant and substantial prison sentences in excess of four years. In order to succeed in his appeal against the refusal of his Article 8 claim in the context of his deportation, he will, in summary, have to show that there are serious and compelling reasons over and above those in Exceptions 1 and 2 – see s117C Nationality, Immigration and Asylum Act 2002. The respondent has considered the applicant's Article 8 claim in accordance with the Immigration Rules. That decision is not the subject of this application – and nor should it be. That is a matter for consideration by the First-tier Tribunal in the applicant's statutory appeal which, because of the s94B certificate in this case, is exercisable by the applicant after he has left the UK.

24. The respondent is required to specifically address whether the conditions set out in s94B are met namely, would the applicant's removal pending the outcome of an appeal result in a breach of s6 Human Rights Act 1998 and give consideration to whether there are compelling reasons to exercise discretion. Those reasons

include (but not exclusively) that the applicant would not be at real risk of serious irreversible harm if removed from or required to leave the UK. The applicant submits it is not sufficient for the respondent simply to consider whether there is a real risk of serious irreversible harm; both elements have to be considered. The respondent submits that a failure to specifically address both elements does not, of itself, render a decision to certify under s94B unlawful.

25. The respondent drew attention to the fact that the certificate in *Kiarie* was upheld despite it being flawed for two legal errors: firstly that he had not been notified in advance that consideration was being given to the certification of his claim and secondly the decision focused erroneously on whether there was serious irreversible harm and failed to address whether removal would be in breach of Kiarie's procedural or substantive rights under Article 8.

The respondent's Guidance

26. The respondent's Guidance issued on 1 December 2016 explains to decision makers how to consider certifying a refused human rights claim under s94B. Of relevance in this application is the following:

> **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-ofcountry 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 are not required to undertake additional research or make additional enquiries in the generality of cases. 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. However, in practice, claimants will be asked to provide information on the impact their removal pending appeal will have.
> …….
> **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 the 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 appeal will succeed, such that the removal will be temporary** [my emphasis]. You should consider whether serious irreversible harm or other breach of human rights would be caused by that temporary removal from the UK.
> …..
> **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.

……

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).

…

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 Commissioner for England's 2015 report on the Skype family discussion paper talks about impacts of separation from parents in children generally and 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?

27. The applicant relies on three additional authorities: *R(X)v SSHD* [2016] EWHC 1997 (Admin), *MB's Application (Judicial Review)* [2016] NIQB 75 and *R (Masalskas) v SSHD IRJ* [2015] UKUT 677 (IAC). In *Masalskas* the Upper Tribunal specifically considered whether it should take the course the Court of Appeal took in *Kiarie and Byndloss* namely identifying that although the decision was legally flawed, the error was not material. In *Masalskas* there were four young children and the removal of the claimant in that case from them and their mother was considered to be significant. In *Kiarie* it was noted that there were no children involved. For that reason, the error was immaterial. The applicant, in the instant application, submits that in *Kiarie* only private life was engaged and that in *Byndloss*, although there were at least seven children Byndloss had no relationship with any of them whereby he provided a parental presence in their daily lives. The applicant submits that the facts of his case distinguish his claim from that of Kiarie and Byndloss.

28. *Caroopen* concerns a situation where the Secretary of State has issued a fresh decision. That is not the case here. The Secretary of State submits that it has no direct impact on this case whereas the applicant submits the Court of Appeal's judgment is supportive of the approach they have advanced. *Caroopen* is not, in my view, directly relevant in this application given that it specifically concerns the legal relevance of "supplementary" letters in the context of an application for judicial review of an earlier decision. In [82] of *Caroopen,* Underhill LJ, having reviewed the authorities, concluded that he did not think there is now any doubt about the approach to be taken when 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. He referred to the position as being succinctly stated in *Kiarie and Byndloss*. He did go on to say that this does not mean that what the authorities say is entirely unproblematic. In so far as *Caroopen* is concerned Underhill LJ concluded that if it was clear that the judge would have reached the same conclusion if he had adopted the correct approach, then the appeal would not be allowed (see [87]). This reflects the position in *Kiarie and Byndloss* namely that even if a decision is legally flawed, there is an inherent discretion as to the remedy.

29. The factual conclusions drawn by the respondent are as follows:

- The applicant is not married to Ms Digpal and they were not cohabiting prior to his imprisonment. He does not have a genuine and subsisting relationship with Ms Digpal although contact has been maintained.
- The applicant's daughter was cared for by her mother, Ms Digpal, during his imprisonment and continues to be cared for by her. The applicant's absence will result in some negative emotional impact upon his daughter.
- There was no evidence that the applicant's deportation would result in him losing all contact with his daughter.
- The applicant does not have any contact with his son or his son's mother.

30. Those factual conclusions are made in the context of removal pursuant to the signing of a deportation order, not in consideration of the s94B certificate. The grounds relied upon by the applicant rely on fresh material submitted to the respondent in order to challenge those factual conclusions. The grounds do not challenge those conclusions made on the basis of the information and evidence that was before the Secretary of State on the date that she made her decision. For the reasons I have set out earlier, I have not taken account of the subsequent evidence. The factual conclusions in the decision letter which are not challenged therefore form the basis upon which I consider for myself the proportionality of the making of the s94B certificate and thus whether the decision of the respondent was rational.

31. It is accepted by the parties that the Secretary of State has not undertaken an assessment of the proportionality of temporary removal. On the face of it the making of the s94B certificate was legally flawed. Whether or not this falls within the parameters of *Kiarie and Byndloss* (and indeed *Caroopen and Myrie*) depends on a consideration of all the applicant's factual circumstances in the context of the Guidance issued by the Secretary of State which includes in particular the impact of removal on a partner, children and himself. This requires consideration of the nature and extent of the relationship between him and his partner/ children as well as, for example, potential difficulties that he may have in pursuing his appeal from out of the country. Bearing in mind that this is a challenge to a s94B certificate and not to the Article 8 claim against deportation and that the arena for consideration of that claim is the statutory appeal, it is inappropriate for the Upper Tribunal in determining the lawfulness of the s94B certificate to consider and reach conclusions on the issues to be resolved in the statutory appeal, should the applicant decide to pursue it. The question before me is a different one: whether, during that temporary period during which the applicant is removed and pursuing his statutory appeal there will be an infringement of his Convention rights. I cannot trespass on the statutory appeal because that is not the basis of the application. This is why addressing Article 8 generally is not the answer as to whether temporary removal would be disproportionate. For example, there may be circumstances when a removal of say three months may not be proportionate even though the merits of a case may justify a virtual permanent separation. The justification of removing for three months, say, may not be proportionate to the damage it causes to children.

32. I invited submissions from the parties whether the underlying merits of the applicant's statutory appeal could or should be taken into account in any assessment of the proportionality of the temporary removal. Both parties indicated that this was not a matter that either had pleaded, one way or the other, and they did not have specific instructions but that their view was that the underlying merits of the statutory appeal play no part in the assessment of the proportionality of temporary removal given the Guidance states that when considering removal pending appeal, the question should be approached on the basis that the claimant's appeal would succeed. For the reasons I have set out in paragraph 31 above, I have adopted the approach that the applicant is to be treated as a person whose appeal will succeed and his removal will be temporary.

33. The focus of consideration of a challenge to a s94B certificate is on the applicant's protected rights but in the context, as per the Guidance, that his appeal will succeed to the extent that removal will be temporary. I am

concerned with whether temporary removal during the appeal period is in itself a disproportionate interference with protected article 8 rights.

The application of these principles to the applicant's case

34. In this case this applicant is neither married to nor was he cohabiting with Ms Digpal prior to his imprisonment. Although they are in contact with each other they do not have a genuine and subsisting relationship. He has no contact with his son or his son's mother. His daughter continues to be cared for by her mother, Ms Digpal. Although his absence from the UK would result in some "negative emotional impact" (as accepted by the respondent) there was, in fact, no evidence before the Secretary of State that his temporary removal from the UK would be any different or worse for her than when he was removed from society whilst he was in prison. There was no evidence before the Secretary of State which would enable a conclusion to be drawn that the applicant's temporary removal would be a disproportionate interference with either his or his daughter's Article 8 rights.

35. Insofar as the difficulties relating to pursuing an appeal out of country which, in the application grounds concerned transport difficulties and potential health problems this was not relied upon in the hearing before me. In any event the decision considered these matters and the challenge such as it is in the grounds is no more than a disagreement with those findings.

36. The question is, therefore, whether it would be a breach of s6 to remove the applicant temporarily. This was not answered in terms by the respondent but the facts upon which an answer could be reached are as referred to above. At most this applicant has a lawful private life in the UK extending to over 10 years and established from the age of 13. There was no evidence relied upon as to what that private life consisted of other than as set out above, which was formulated in terms of family life. Irrespective of whether it is characterised as private or family life or a combination of the two, it cannot be concluded that the temporary removal of the applicant from the UK during the currency of his appeal would be disproportionate and a breach of s6 Human Rights Act 1998. As this illustrates I have considered myself whether there would be any infringement of protected rights of any person during the appeal period but I conclude there would not.

37. The applicant does not assert there was evidence before the respondent such as would make her conclusion irrational. Despite this I have myself considered the evidence that was before the respondent and can find nothing in that evidence

that could rationally suggest that either the applicant or his daughter would be at real risk of serious irreversible harm or that there were any other reasons why the respondent should not exercise her discretion to certify the claim under s94B. The evidence of the consequences of temporary removal are as referred to above and there is nothing in there that could lead to a different conclusion.

38. The applicant ought to have made further submissions for consideration in accordance with paragraph 353 Immigration Rules but in any event, although the respondent failed to approach the question of certification under s94B in accordance with the approach laid down in *Kiarie and Byndloss*, the evidence before the respondent at the date of the decision led rationally to the findings of fact made by her. Of those findings of fact, considered in the context of the proportionality of temporary removal, (absent those relevant to the applicant's criminality and the consideration of the great public interest in his deportation), it is plain that, had the respondent taken a decision whether temporary removal would breach s6, she would have reached the rational conclusion that it would not.

39. For these reasons the claim must fail.

40. The applicant is to pay the respondent's reasonable costs, to be assessed by a Cost Judge if not agreed.

Date 8th March 2017

Upper Tribunal Judge Coker