Immigration Bill: clause 34
Appeals within the UK: certification of human rights claims

1 Background

This change delivers the manifesto commitment to expand the use of the 'deport first appeal later' power.

It has long been established that in some cases a person can be removed or deported before their appeal is brought or heard. The last Labour government introduced powers in 2002 to certify that a person making a 'clearly unfounded' asylum or human rights claim could be removed prior to bringing their appeal. Then the 2014 Immigration Act created the power to allow arguable claims from foreign national offenders to be certified so that the appeal must be brought from outside the UK where removal pending the appeal would not cause serious irreversible harm or otherwise be in breach of the person's Convention rights (or the rights of any other person affected by the decision). This power is commonly called 'deport first, appeal later'

Clause 34 will extend that power so it applies to all cases where a person has made a human rights claim, been refused and has an appeal against that refusal, provided that requiring the appeal to be brought from overseas would not cause serious irreversible harm or otherwise breach human rights.

There is a public interest in maintaining effective immigration control. In the first year that the Immigration Act 2014 was in force, over 230 foreign national offenders were removed before their appeal was heard. In addition, over 1,200 EEA foreign national offenders have been removed under equivalent powers. Previously, most of these individuals would not have left the UK until their appeal had been determined. This change will mean more prompt removals in other human rights cases and prevent people whose human rights claims have been refused from building up their private or family life while they wait for their appeal to be determined, where an appeal from outside the UK would not breach their human rights or those of any other person.

Appeals can continue to be brought from within the UK where an asylum claim has been refused (provided it is not clearly unfounded) or where a human rights claim has been refused (provided it is not clearly unfounded) and there is a real risk of serious irreversible harm or other breach of human rights if the person is removed before the appeal.

2 Appeals from overseas

Since the Immigration Act 1971 there have been immigration appeals from people overseas. As well as appeals for 'clearly unfounded' claims, entry clearance appeals are always heard while the appellant is out-of-country.

Out of country appeals in entry clearance cases or clearly unfounded claims can raise human rights issues so looking at how those appeals work now is instructive when considering whether out-of-country appeals are fair and effective. Exercising an appeal right from outside the UK does not mean appeals are less likely to succeed. Internal Home Office statistics for the last 5 years (to July 2015) show that 38% of entry clearance appeals succeed.

The Court of Appeal examined overseas appeals in the context of the 'deport first, appeal later' power in the Immigration Act 2014, the power we are extending in this bill. In the case of *R (Kiarie and Byndloss) v SSHD* [2015] EWCA Civ 1020 the Court of Appeal held that fact that an appeal must be brought from overseas does not of itself breach Convention rights because it provides a remedy 'that meets the essential requirements of effectiveness and fairness'.

The Court of Appeal said that "an out of country appeal will be less advantageous to the appellant than an in-country appeal. But Article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness".

The Court confirmed that: "The Secretary of State is entitled... to rely on the specialist immigration judges within the tribunal system to ensure that an appellant is given effective access to the decision-making process and that the process is fair to the appellant, irrespective of whether the appeal is brought in country or out of country".

This reasoning applies to overseas appeals certified under the power in this Bill and is not limited to deportation cases.

Appellants from overseas are able to:

- submit written or documentary evidence;
- provide oral and /or written evidence from family members, friends or others (the determination of an article 8 appeal is more likely to turn on the evidence of family and friends than on complex legal arguments);
- instruct a UK legal representative;
- ask to provide oral evidence visa video-link, Skype or telephone – for which the tribunal will have to make arrangements if it considers such evidence to be necessary to the fair determination of the appeal;
- apply for legal aid under the exceptional funding provisions;
- instruct an expert in the UK or outside the UK to make an assessment and specialist report if required using video conferencing or electronic communications who can given written or, if necessary, oral evidence at the appeal hearing.

If the Tribunal considers oral evidence from the appellant is necessary and it is not possible to provide this electronically, or if the Tribunal otherwise considers that the appellant's attendance in person is necessary for the fair determination of the appeal, it can require the appellant's attendance as a witness by summons under rule 15 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 or a similar power in the Upper Tribunal.

In relation to preparing evidence for an appeal and presenting it to the Tribunal the Court noted that "There are difficulties for any appellant, particularly an unrepresented defendant, in preparing evidence for an appeal and presenting it to the tribunal, but I do not accept that those difficulties will be so much greater where the appeal is brought out of country as to amount to a denial of effective participation in the decision-making process or to render the procedure unfair."

Individuals will always be asked if there are reasons an effective appeal could not be made from outside the UK and any reasons given will be fully considered as part of the decision whether to certify.

3 Children

The power to certify that removal pending appeal against a refused human rights claim would not cause serious irreversible harm or breach human rights will in some cases impact on children. There is a clearly established framework of legislation, judicial decisions, guidance and procedure around how immigration decisions which affect children are made, which will apply to any decision to certify a refused human rights claim.

The "children duty"

Section 55 of the Borders, Citizenship and Immigration Act 2009 establishes a statutory duty on the Secretary of State to have regard to the need to safeguard and promote the welfare of any child in the UK who will or may be affected by any immigration decision. This duty will apply to a decision to certify a human rights claim.

In any case, where the decision maker is aware that there is a child who is affected by her decision, the decision maker will have regard to the best interests of that child as a primary consideration in deciding the human rights claim and also in deciding whether to certify the claim so that the appeal is heard after the person has left the UK.

Individual circumstances of each case

While the best interests of the child are a primary consideration, they are not the only or an overriding consideration. The decision maker must have regard to all the circumstances of the case in reaching the decision on whether or not to certify the case. There is published guidance for decision makers on how to take into account the best interests of any child affected by the decision.

When considering whether to certify the decision maker is considering the effect of temporary interference with family/private life while the appeal is being determined. In some circumstances a non-suspensive appeal will not be appropriate because, although the appellant would normally return to the UK if the appeal was successful, the temporary removal would create a real risk of serious irreversible harm or otherwise breach human rights . This may be the case in some decisions concerning children.

There will also be some circumstances where any impact on a child would not give rise to such a breach. Many people around the world reasonably and legitimately take their children to live in another country either temporarily or permanently and many people temporarily live apart from their families for work or other reasons.

Assessment

The impact on a child of a decision to certify will vary depending on the child and the family circumstances. Those being removed will be asked to give reasons why their case is not suitable for certification prior to a decision on certification being made. Those reasons can include the impact on any children. All such reasons will be carefully considered.

The courts have been clear (for example in *Behary v SSHD* [2013] EWHC 3575 (Admin)) that it is for the person to set out their reasons. The family of the affected child will be best placed to identify the potential impact of certification in their particular circumstances. There are no restrictions on the evidence a family can submit, including evidence from the child's school, or medical practitioners, or any other evidence of the impact on the particular child.

Whether the decision maker will contact external agencies to establish the likely impact on a child will depend on the facts of the case. For example, where the decision maker is aware that social services are involved with the child, further enquiries may be made of social services if the decision maker thinks those enquiries are appropriate and necessary. There is no obligation to make proactive enquiries in every case, as confirmed by the Court of Appeal in *SS (Nigeria)* [2013] EWCA Civ 550.

Safeguards

The Secretary of State's decision that removal pending appeal will not give rise to a risk of serious irreversible harm or otherwise breach the person's human rights (or those of their child or other family members) can be challenged in judicial review proceedings.

Unaccompanied children

This power does not apply to asylum claims and so will not apply to unaccompanied asylum seeking children. Where the asylum claim is refused, a child will be granted leave until they are 17½ years old unless adequate reception arrangements are in place for them in their home country. Where a child has been in the UK for 7 or more years they may be entitled to be granted leave to remain on the basis of private life if it would not be reasonable to expect them to leave the UK.

However, there may be circumstances where it would be appropriate to use this power involving unaccompanied children, for example if a child who is living in the UK with members of their wider family has made a human rights claim which has been refused, and they have parents in another country to whom they can return and who can support them with any appeal.

4 Case studies of potential certification decisions

Whether we can apply the power in an individual case depends on its specific facts. Therefore to give comprehensive examples of the cases to which this power will apply would be misleading and suggest that we do not take seriously our obligation to consider each case on its own facts. The following examples are illustrative.

Certification may be appropriate where:

A man is married to an American national settled in the UK and has an American child who is 4 years old. He applied to remain in the UK on grounds of family life and with his wife and child was refused because he failed to meet the requirements in the Immigration Rules and there were no exceptional circumstances and no barrier to him or his family establishing life in his home country.

In addition his claim is certified under section 94B so that he must leave the UK before pursuing his appeal. It is appropriate to certify his claim because his family can travel with him and live in his home country, or his family can remain in the UK and maintain their relationship, for example by visits to his home country or by Skype, email and telephone calls. His wife can give oral evidence about their relationship at the hearing.

Certification may not be appropriate where:

As above, a man is married to an American national settled in the UK and has an American child who is 4 years old. However, in this case his child has learning difficulties such that she requires full-time parental care and the child's mother has been hospitalised temporarily such that she is unable to care for the child or leave the UK.

The man applied to remain in the UK on the grounds of family life and was refused because he failed to meet the requirements in the Immigration Rules and there were no exceptional circumstances and no barrier to him or his family establishing life in his home country. However, his claim is not certified under section 94B. As the child requires parental care which her mother is temporarily unable to provide and she cannot leave the UK, there is a real risk of serious irreversible harm to the child if the father is required to pursue his appeal from outside the UK and as a consequence the child has to be taken into care.