

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

Version 8.0

Archived

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## About this guidance

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

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

### Contacts

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

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

### Clearance and publication

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

- version **8.0**
- published for Home Office staff on **20 January 2017**

### Changes from last version of this guidance

The 2016 Immigration Act extended section 94B to apply to all refusals of human rights claims where certification would not cause serious irreversible harm or otherwise breach human rights.

#### Related content

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# Introduction

## Legislation

Amendments to section 94B of the Nationality, Immigration and Asylum Act 2002 come into force on 1 December 2016. The amended section reads:

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

- (1) This section applies where a human rights claim has been made by a person ("P").
- (2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, refusing P entry to, removing P or requiring P to leave the United Kingdom, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention).
- (3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if refused entry to, removed from or required to leave the United Kingdom.

Between 28 July 2014 and 1 December 2016 section 94B applied only in relation to human rights claims made by those liable to deportation under section 3(5)(a) and 3(6) of the Immigration Act 1971.

Section 63 of the Immigration Act 2016 amended the Nationality, Immigration and Asylum Act 2002 to extend the scope of section 94B to all human rights claims.

References in this guidance to section 94B are references to the power as amended by the Immigration Act 2016.

## Summary of section 94B

The effect of section 94B certification is that any appeal can only be lodged and heard, or continued if the claim is certified after the appeal is lodged, while the claimant is outside the UK. This means the right of appeal against the decision to refuse the human rights claim is non-suspensive, meaning it is not a barrier to removal.

Section 94B can only be used where the conditions set out in section 94B itself are met, namely that requiring the claimant to appeal from outside the UK would not be unlawful under section 6 of the Human Rights Act 1998. However, it is a discretionary power so consideration must also be given to whether there are other compelling reasons to exercise discretion and not certify the claim.

## Case law

The leading judgment on section 94B, [Kiarie and Byndloss v SSHD \[2015\] EWCA Civ 1020](#), was handed down by the Court of Appeal on 13 October 2015. The SSHD was successful in defending the claim. However, the Appellants have been granted permission to appeal to the Supreme Court and the hearing has been listed for February 2017.

## Section 55 duty

The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children who are in the UK means that a child's best interests are a primary consideration in making decisions in relation to immigration. Section 90 of the 2016 Immigration Act states, for the avoidance of doubt, that section 55 applies to decisions made under that Act, including section 94B as amended. Specific guidance on section 55 in the context of section 94B is set out in the [Summary of steps](#) within this guidance. See also Safeguard and promote child welfare.

## Decision makers

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

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## When to consider section 94B certification

There is a public interest in maintaining effective immigration control. In the context of human rights claims, it is the UK government's policy to further that public interest by ensuring that people who have been refused a right to be in the UK should leave the UK at the earliest opportunity and not automatically be able to remain and build up new claims or strengthen existing claims (under, for example, Article 8) where an appeal from outside the UK would not cause serious irreversible harm or otherwise breach human rights.

You must therefore consider whether section 94B certification is appropriate in all cases where a human rights claim has been made and is refused, unless it is:

- 1) (for non-deport cases only), outside the [Phased implementation for non-deport cases](#) or
- 2) a case listed below as not suitable for certification.

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

You should only consider a case for certification if the claimant has been informed that the power might apply and given the opportunity to provide reasons why their claim should not be certified. See [Process overview](#) for further information.

### Deport cases

Section 94B continues to be potentially applicable to all deport cases where a human rights claim has been refused. You should consider whether to certify any such case. For a summary of the process for certification see [process overview](#)

### Phased implementation for non-deport cases

Implementation of the extended power is being phased.

The power to certify non-deport cases should be applied on or after 1 December 2016 where the case under consideration meets both of the criteria below:

- the claimant did not have existing leave at the point that they made their human rights claim (for example, overstayers or illegal entrants)
- the claimant does not rely on their relationship with a British national family member

For the purposes of identifying this cohort, the term 'family member' means a partner, parent, or child, where there is evidence of the relationship.

For a summary of the process for certification see [process overview](#)

## Cases that should not be certified under section 94B

### Section 6 of the Human Rights Act 1998

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

### Protection claims: Articles 2 and 3 of the ECHR

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

See [Dual certification](#) where a claim is based on Article 2 and/or Article 3 ECHR and other ECHR Articles.

### Paragraph 353: fresh claims

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

See [Dual certification](#) where further submissions are based on Article 2 and/or Article 3 ECHR and other ECHR Articles.

### Section 96 of the 2002 Act: late claims

Human rights claims which are refused and certified under section 96 of the Nationality, Immigration and Asylum Act 2002 should not be certified under section 94B because certification under section 96 means there is no right of appeal. For section 96 guidance see both the [Consideration](#) within this guidance, and Section 96 of the Nationality, Immigration and Asylum Act 2002.

### Section 94 of the 2002 Act: clearly unfounded claims

Human rights claims which are refused and can be certified under section 94 of the Nationality, Immigration and Asylum Act 2002 as clearly unfounded should be certified under section 94 rather than section 94B. For section 94 guidance see the Certification of Asylum and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded cases).

### **Whereabouts unknown (deport cases only)**

Where a decision is served to file because the claimant's whereabouts are not known, the case is not suitable for certification under section 94B. Should the claimant later come to light, the question of whether to certify can be considered in line with this guidance. See *Serving decisions on file*.

## **Cases not normally suitable for section 94B certification**

### **Criminal cases with indeterminate sentence**

Human rights claims from claimants who are serving an indeterminate length sentence where release is at the discretion of the Parole Board will not normally be suitable for section 94B certification. This includes those who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1991
- given an Extended Sentence for Public Protection (EPP)
- given an Extended Determinate Sentence (EDS)

The cases described above are not normally suitable for section 94B certification because applying section 94B to these cases may be counterproductive. The Parole Board will have made a decision about release based on the claimant's deportation rather than the possibility that they may return to the UK if any appeal is successful. Consequently, there may be no provision to recall to prison in the event of such return even if the Parole Board would otherwise have deemed it to be appropriate, or to impose licence conditions. These cases are not excluded from the scope of certification under section 94B. Consideration must be given to all such cases on an individual basis about whether or not it is appropriate to certify under section 94B.

### **Unaccompanied children**

Human rights claims from unaccompanied children (under the age of 18) will not normally be suitable for section 94B certification. Nevertheless, children are not excluded from the scope of certification under section 94B and consideration must be given to all such cases on an individual basis and having regard to the duty in relation to children set out in section 55, as to whether it is appropriate to certify under section 94B.

### **Potential Victim of Human Trafficking**

Where a claimant has made a human rights claim and been referred for assessment of whether they are a victim of human trafficking or modern slavery (under the National Referral Mechanism) their claim is unlikely to be suitable for certification. Decision makers should only consider certification when the question of whether they are a victim of human trafficking or modern slavery has been resolved, see *Victims of modern slavery: competent authority guidance*.

## **Dual certification: when to certify**

### **Where the claim involves Articles 2 or 3 ECHR**

If a person makes a claim which includes Articles 2 and/or 3 ECHR and any other ECHR Articles, and the claim made under Articles 2 and/or Article 3 ECHR is

certified under sections 94 or 96, but it is not possible to certify the other part of the human rights claim under either of those powers, then consideration must be given, in line with the factors in this guidance, to certifying the other parts of the human rights claim under section 94B. If the other parts of the human rights claim cannot be certified there will be an in country right of appeal for that human rights claim.

If the Article 2 and/or Article 3 ECHR claim cannot be certified under section 94 or 96, there will be an in-country right of appeal against the refusal of that human rights claim. Therefore in this situation any other parts of the human rights claim should not be certificated under section 94B.

For further guidance see:

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

### **Dual certification and paragraph 353 of the Immigration Rules – fresh claims**

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

### **EEA cases**

Section 94B only applies where the claimant has made a human rights claim. This means it does not apply to claims to residence under the EEA regulations. There are separate regulations – Regulations 24AA and 29AA – which allow non-suspensive appeals in certain EEA deportation cases. Separate guidance is available for EEA cases: Regulation 24AA of the Immigration (European Economic Area) Regulations 2006.

However, section 94B may be relevant, and can be applied, in certain EEA deportation cases. This situation will arise where the claim under the EEA Regulations is being considered for certification under regulation 24AA, but the claim also constitutes a human rights claim which will give rise to a right of appeal under section 82 of the 2002 Act if refused. In these circumstances, if regulation 24AA could be applied, but section 94B could not be, or vice versa, then neither part of the case should be certified. This is unlikely to be the case in practice though as the substantive considerations are very similar in nature.

### **Related content**

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## Consideration of evidence

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

You 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.

Information that would only be available if the you undertook additional research or made additional enquiries is not 'available information'. Such information does not generally need to be sought.

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

For example, further enquiries may be necessary where the evidence submitted by the claimant indicates that a child will or may be affected by their removal pending appeal, but, for example, there is no information on the care arrangements for that child following the claimant's removal. Or where you are made aware that social services are engaged with a child, you may make further enquiries of social services. This is in line with the guidance on the section 55 children's duty.

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

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

You must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or uncertified copies of documents or documents that it is not possible to verify.

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

- where a claimant claims that they or a family member have a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical

professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel

- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed (and in the latter case, making plain the outcome)
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation, etc
- letters from schools or youth workers in relation to the situation of an affected child
- letters and statements from family members
- witness statements

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

- the person giving the evidence has recognised expertise or authority, an expert witness statement from an independent source is likely to be given more weight than one from someone without recognised expertise in the area they are providing evidence on
- the evidence is based on assertion or hearsay, a witness statement from a person in a position to know specific information, such as a family member providing evidence on the impact on another family member, is likely to be given more weight than one from someone who is only in a position to attest to generalities
- the evidence provides sufficient detail of a causal link between a temporary absence while any appeal is decided and any alleged harm
- the evidence is corroborated by any independent source, a witness statement that contains unsubstantiated assertions is likely to be given less weight than one that is corroborated

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# Consideration

## Summary of steps in the consideration process

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

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

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

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

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

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

## Serious irreversible harm

### Summary

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

2) Does it amount to serious irreversible harm?

### **What is serious irreversible harm?**

You must consider whether removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm. The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in an immigration case to determine whether to issue a ruling under rule 39 of the Rules of Court, preventing a signatory State from removing a foreign national from its territory. In the context of section 94B, the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act. The absence of a real risk of serious irreversible harm is only one relevant factor in that analysis.

The terms 'serious' and 'irreversible' must be given their ordinary meanings. 'Serious' indicates that the harm must meet a minimum level of severity, and 'irreversible' means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible: it needs to be both serious and irreversible. An example of serious irreversible harm would include where there is a real risk that the person affected would be subject to significant deterioration in their physical or mental health.

See [examples](#) of serious irreversible harm or breach of human rights.

The term 'real risk' is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the ECHR. As explained in [Considering human rights claims](#).

## **Breach of human rights**

### **Summary**

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

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

You can only certify under section 94B if satisfied that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act. This means that you need to consider whether requiring a claimant to appeal, or to continue an appeal, from outside the UK would breach human rights.

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

Which Articles of ECHR has the claimant raised either explicitly or implicitly, as grounds against temporarily removing them from the UK? The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceedings), but you need to consider any ECHR rights which may be engaged by removal pending the outcome of an appeal.

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

See [examples](#) of serious irreversible harm or breach of human rights.

### **Proportionality**

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

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

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

### **Examples: serious irreversible harm or breach of human rights**

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

- the mere fact that a claimant will be separated from their partner for a period of time (even if that is for a yet to be determined period) while appealing against the refusal of a human rights claim
- the claimant is the parent of a child in the UK, but there is no current subsisting relationship with that child and although a family court case is in progress to obtain access, there is no evidence that the case could not be pursued while the claimant is abroad

- a child or partner is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and / or does not require the claimant to act as a carer
- a claimant has strong private life ties to a community that will be disrupted by removal (for example a job, a mortgage, a prominent role in a community organisation)

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

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

## Children

### Summary

You must consider:

- 1) Is there evidence a child will be affected by the removal?
- 2) What would the impact be on the child of the temporary removal of the claimant pending the outcome of an appeal?

- 3) Is the child likely to leave the UK with the claimant and, if so, what would be the impact on the child?
- 4) Is removal of the claimant justified and proportionate, having regard to the child's best interests, and all the circumstances of the case?
- 5) You will need to balance any impact on the child against the other factors which are relevant to the decision, including the [Discretion](#). See further guidance on the section 55 duty (links are available below).

## Glossary

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

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

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

## Section 55 consideration

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

Where it is or may be contrary to a child's best interests to certify a claim, you must consider whether the child's interests are outweighed by the reasons in favour of certification in the individual case. These reasons may include the [Discretion](#) in maintaining immigration control.

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

- Section 55 children's duty guidance
- Introduction to children and family cases
- Criminality guidance for Article 8 ECHR cases
- Family and private life

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

## General considerations in relation to children

You must carefully assess the quality of any evidence provided in relation to the impact on a child. You should consider what evidence is available on the circumstances of the individual child. It is the claimant's responsibility to provide evidence about the impact of certification on any child they claim will be affected. See above as to when to make [Evidence](#) if there is not sufficient evidence.

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

An application from an [unaccompanied child](#) will not normally be suitable for certification. However, there may be circumstances where it is appropriate to certify. For example, 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.

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

### **Will the child relocate or remain in the UK?**

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

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

If the indication that the child will be left in the UK is credible, the case should be considered on the basis that the child will remain in the UK and be separated from the claimant pending the outcome of the appeal. You should proceed on the basis that the well-being of the child has been taken into account in reaching this decision.

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

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

taken into account the impact on the child of their remaining in the UK.

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

### **Relocation**

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

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

### **Education**

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

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

### **Health**

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

### **Private life**

You should consider the impact of temporary departure on the child's private life, including, for example, their relationship with family members and friends in the UK. The fact that a child will be temporarily separated from friends and wider family or

their peer/support network is unlikely on its own to amount to serious irreversible harm or a breach of the child's human rights.

### **Examples: case may be unsuitable**

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

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

### **Separation**

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

A child's temporary distress due to separation would not usually be enough by itself to demonstrate that the removal of the claimant would cause a child serious irreversible harm or otherwise breach their human rights. Many people are separated from their child for temporary periods (for example, for work reasons or while serving a prison sentence) without the child suffering serious irreversible harm. The evidence relied upon should be specific to the individual child, for example the Children 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?

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

### **Education**

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

### **Health**

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

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

### **Examples: may be suitable for certification**

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

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

### **Examples: case may be unsuitable**

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

- if the child is seriously ill such that there is a risk (supported by appropriate evidence) that they could die or their condition could deteriorate significantly

during a temporary separation and the claimant has a parental or similarly close relationship with them

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

## Procedural unfairness

### Summary

- 1) Has the claimant said or provided evidence that an out of country appeal would be procedurally unfair in the particular circumstances of this case?
- 2) The Home Office are entitled to proceed on the assumption that the independent judiciary will take such steps as are necessary to ensure fairness. Is there anything about the claimed procedural unfairness which means this assumption cannot apply?

### Fairness of overseas appeals

If there is no effective procedure by which an ECHR right can be asserted and protected then that in itself can cause a breach of that right. This is known as procedural protection. Procedural protection requires access to an effective remedy, providing a mechanism by which an affected person can challenge a refusal of a human rights claim. If the requirement to appeal from outside the UK means that the claimant cannot access a fair and effective appeal process, removal pending the appeal will be a breach of human rights and the human rights claim cannot be certified under section 94B.

An appeal from overseas may be less advantageous to the claimant. That does not mean that requiring that claimant to appeal from overseas is a breach of their human rights. An effective remedy 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.

Claimants who may be considered for section 94B certification have the opportunity to submit evidence or make representations about why certification is not appropriate in their case, and, in particular, as to why an out of country appeal would not constitute an effective remedy.

If no representations are made on this basis, you do not need to consider whether an out-of-country appeal will meet the procedural requirements. As set out above, you are entitled to proceed on the assumption that the independent judiciary will take such steps as are necessary to ensure that the appeal is conducted fairly.

Accordingly, you do not need to make additional proactive enquiries, or proactively to investigate the circumstances of a claimant to establish whether they can have a fair and effective appeal if required to appeal from overseas. It is for the claimant to raise those points. If representations are made about why a claimant should not be required to appeal from overseas, they must be carefully considered. If, notwithstanding such representations, the claim is certified under section 94B, that consideration must be set out in the decision letter.

Where representations about an out-of-country appeal are made, the principles under which they must be considered are that:

- an out-of-country appeal is generally fair
- oral evidence from the appellant and/or attendance at the appeal by the appellant are not generally required for an appeal to be fair and effective
- the SSHD is entitled to rely on the specialist immigration judges within the tribunal system to ensure that the claimant is given access to a fair and effective remedy

Examples of the steps the Tribunal could take to ensure a fair and effective appeal where the appellant is outside the UK are to:

- consider whether the appeal can be fairly determined without the appellant giving oral evidence including considering any written evidence submitted by the appellant, documentary evidence and oral or written evidence from family members, friends and others
- consider an application from the appellant to give oral evidence via video-link, Skype or telephone and make the necessary arrangements to overcome any practical difficulties if it considers that such evidence is necessary for the fair determination of the appeal.
- summon the appellant to attend as a witness; the Tribunal may take this step if it has decided that it is necessary for the appellant to give oral evidence in the appeal in order for it to be fairly determined and it is not possible to receive evidence by video-link or other means of electronic communication, or if the Tribunal decides for some other reason that the appellant must attend the appeal in person in order for it to be fairly determined; if the SSHD does not permit the appellant to return to the UK in these circumstances, the Tribunal may draw inferences in the appellant's favour.

The claimant may make representations to the effect that, despite the powers of the Tribunal to secure a fair and effective appeal, their personal circumstances mean that they would not be able to access a fair and effective remedy.

## Examples

The following are examples of representations where it would normally be appropriate to conclude that the powers of the Tribunal will generally be sufficient to secure a fair and effective appeal:

- a desire to participate in the proceedings, including to give oral evidence or to attend the appeal
- an inability to communicate with ease with family members or legal representatives to prepare the appeal
- the cost, availability or reliability of internet or telephone use in the country to which the claimant is to be removed
- complexity of legal proceedings and inability to afford legal representation
- the cost, availability or reliability of video-link, for the purpose of participating in and/or giving oral evidence at the appeal, in the country to which the claimant is to be removed
- the claimant is disabled to the extent that they cannot instruct legal representatives who are based in the UK or liaise with family members or others who are in the UK and will give evidence in the appeal but the claimant has family members or others who can assist them in the country to which they are to be removed

The following are examples of representations that may amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- the claimant is disabled or otherwise personally not capable of giving instructions to legal representatives or communicating with family members or others who will give evidence in the appeal and there is no one who can assist the claimant with such instructions or communications in the country to which they are to be removed
- the absence of a route by which the claimant could return to the UK if the Tribunal considered that their presence at the appeal was necessary for it to be fair

You should discuss with their senior caseworker any case where they are considering not certifying under section 94B as a result of representations about procedural fairness.

## Discretion

### Summary

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

### Exercising discretion

If satisfied that removal pending the outcome of any appeal would not create a real risk of serious irreversible harm or otherwise breach human rights, you must consider whether there is any other compelling reason not to certify.

Section 94B is a discretionary power, meaning that it does not have to be applied in all cases where removal pending the outcome of any appeal would not breach human rights. This means that you must consider whether to exercise discretion in every case, not just in cases where the claimant has asked for discretion to be exercised.

You must consider any request to exercise discretion not to certify, even in the event that removal pending the outcome of any appeal would not breach human rights. If a claimant asks for discretion to be exercised this should be responded to with reasons in the certification letter. If a claimant does not ask for discretion to be exercised, the fact that discretion has been considered should still be mentioned in the certification letter but you do not need to give detailed reasons for refusal to exercise discretion.

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

- the public interest
- removability

### **The public interest**

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

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

This public interest in requiring a claimant to appeal from outside the UK is strongest in deportation cases. Deportation means that the claimant's presence in the UK is not conducive to the public good, for example because it is in the interest of national security or to prevent crime and disorder, including deterring other foreign nationals from offending in the UK and to safeguard the economic wellbeing of the country and for the protection of the rights and freedoms of others. In the case of criminal convictions which have resulted in a custodial sentence of 12 months or more, the public interest in deportation has been set out in the UK Borders Act 2007.

In the context of considering the certification of two human rights claims made by persons subject to deportation, the Court of Appeal held in [Kiarie and Byndloss v SSHD \[2015\] EWCA Civ 1020](#):

44. In general terms, and subject to specific factors such as risk of reoffending, it may be thought that less weight attaches to the public interest in removal in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period pending determination of any appeal, than when considering the underlying issue of deportation for the longer term. But the very fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in that context too: Parliament has carried through the policy of the deportation provisions of the UK Borders Act 2007 into section 94B. In deciding the issue of proportionality in an article 8 case, the public interest is not a trump card but it is an important consideration in favour of removal.

Parliament has set out that the public interest in removal is strongest in national security cases, where there the claimant has been convicted of criminal offences, and where there is evidence showing on the balance of probabilities that the claimant has engaged in serious adverse behaviour even in the absence of a criminal conviction, and that public interest has been confirmed by the Court of Appeal (as set out above).

However, the public interest in the maintenance of effective immigration control remains an important factor in non-deportation cases too.

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

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

### **Removability**

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

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

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

- has a passport or travel document (including a Home Office Travel Document)

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

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

Where a claimant meets all of the following criteria:

- they do not have a passport or travel document (including a Home Office Travel Document)
- show credible evidence that they are unable to leave the UK within a reasonable timeframe, for example there is no realistic prospect of an acceptable travel document or other return information required for biometric returns being available
- the barrier to leaving the UK is not their own refusal to co-operate with the removal process

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

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## Procedures

### Timing of certification

It is possible to certify under section 94B at any stage prior to the claimant exhausting their appeal rights. In practice, this means that if a claim is not certified at the initial decision stage, and either party challenges the decision of the First-tier Tribunal (or that of the Upper Tribunal), you must consider whether it is appropriate to certify the claim before it is heard by the Upper Tribunal (or the Court of Appeal).

For example, if a claimant has an in-country appeal against the refusal of an Article 8 claim solely because they were entitled to an in-country appeal against the refusal of another claim, and the appeal is dismissed by the First-tier Tribunal, the other claim may no longer be relied upon if the appeal progresses to the Upper Tribunal but the Article 8 claim and appeal may be pursued. In this situation, consideration must be given to whether it is appropriate to certify in all the circumstances, having regard to the factors set out in this guidance, including the public interest in maintaining immigration control, the stage the appeal has reached, the reasons for not certifying when the decision to deport, remove or refuse was made, and any other relevant factors. If, for example, the only reason for not certifying was that a travel document was not available, and one has since been obtained, the question of whether to certify should be considered again in line with this guidance.

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

### 3C leave

Where a person who has made a human rights claim has 3C leave that leave will automatically be brought to an end by certification under section 94B. Section 3C leave following a decision on an application only lasts so long as the person has a right of appeal in the UK. Once a claim has been refused and certified they no longer have a right of appeal in the UK and therefore no longer have 3C leave.

### Reasons for decision

Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out in CID notes and on the case file. Reasons for any decision to certify must also be clearly set out in the decision letter. This is because a decision to certify (whenever made) can be challenged by judicial review and the Home Office may be required to provide records of each stage of the decision-making process.

### Decisions not to certify

A decision not to certify a human rights claim under section 94B is not a concession that the Secretary of State is satisfied that removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm or otherwise breach human rights.

This document was archived on 3 August 2017

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# Appeals

## Appeals lodged from within the UK

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

Where an invalid appeal has been lodged, the presenting officer must write to the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) to ask them to withdraw the listing on the basis that there is no jurisdiction to hear the appeal.

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

The Specialist Appeals Team will seek to appeal any allowed appeal where the appeal was lodged from within the UK despite a section 94B certificate.

Where deportation is pursued under regulation 19(3)(b) of the EEA Regulations, and the case is dual certified under regulation 24AA and section 94B, in an appeal under regulation 26 of the EEA Regulations the Tribunal can consider a human rights claim raised in response to a section 120 notice (see Schedule 1 to the EEA Regulations). It is therefore unnecessary for 2 separate appeals to be brought. If the claimant brings separate appeals under both regulation 26 of the EEA Regulations and section 82 of the 2002 Act, it is their responsibility to alert the First-tier Tribunal (Immigration and Asylum Chamber) that they will be lodging a regulation 26 appeal from within the UK, and a section 82 appeal from outside the UK, and that they should be linked for a single hearing.

## Successful appeals

If there is a deportation order and a claimant's out-of-country appeal against the refusal of a human rights claim succeeds, the order will normally be revoked and the claimant may apply to return to the UK.

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

In considering whether to pay for the claimant's journey back to the UK, regard should be had to the following factors:

- the quality of the Home Office's decision to refuse the human rights claim
- the status of the claimant before their removal

- whether the appeal was allowed on the basis of evidence or information that the claimant failed to submit to the Home Office in advance of their removal despite a section 120 notice or other opportunity, and if so, whether there is any reasonable explanation for this
- whether there is compelling evidence that if the Home Office does not pay for the return journey the claimant would be unable to return to the UK, there is no prescribed evidence to be submitted, but examples of relevant evidence might include bank statements for the claimant and any family members, you should also take into account any evidence pertaining to the financial circumstances of the claimant and any family members which was already available prior to removal, and consider the claimant's general credibility

Where it is considered that the Home Office should pay for the journey back to the UK, financial authority must be obtained and signed off at a sufficiently senior level within the relevant business area, usually Assistant Director.

Where a claimant received financial assistance to leave the UK, for example from the Facilitated Returns Scheme (FRS), but then successfully appeals the refusal of a human rights claim from abroad and wishes to return to the UK, the Home Office should not pay for the journey back to the UK.

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## Process overview

### Non-EEA deport cases: Criminal Caseworking

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

If a claim is refused and it is considered appropriate to certify, use the ICD.4935 (non-EEA) to provide your reasons.

### Non- Deport cases

While the initial implementation cohort is in place you must first determine if a claimant is within the cohort and therefore eligible to be considered for certification using section 94B.

### Immigration Enforcement

Where a person has made a human rights claim, before you consider certification, you must advise the person that their claim may be considered for certification, and ask for reasons why a certification might not be appropriate in their case including the effect of certification on the individual and their family if this has not already been asked previously. Do this using a RED notice 0001 and 0003 or, if for some reason that is not possible, by sending a letter with the same questions included.

While the initial implementation cohort is in place you must first determine if a claimant is within the cohort and therefore eligible to be considered for certification using section 94B.

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

Certification can be considered for any cases case-worked for enforcement purposes on or after 1 December 2016. This means that a human rights claim can be certified under section 94B, even if it was made and / or refused before 1<sup>st</sup> December 2016. However, prior to certification the person concerned must be provided with an opportunity to give reasons as to why certification would not be appropriate in their case.

### UK Visas and Immigration

Where a person has made a human rights claim, before you consider certification, you must advise the person that their claim may be considered for certification, and ask for reasons why a certification might not be appropriate in their case, including the effect of certification on the individual and their family. The FLR(FP), FLR(HRO) and digital family application forms will do this for new applicants after 1 December if they fall within the cohort.

Where a claimant has made further representations on an application received and/or refused before 1 December, or if the applicant applied on a form where the relevant questions were not included, you can only consider for certification if you write to warning them that the power may be applied and asking whether there are reasons their claim should not be certified including the same questions as on the form or other templates.

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

### Peer review

All decision letters which certify a human rights claim under section 94B should be subject to a peer review process prior to service of the decision. The peer review can be conducted by another decision maker, a senior caseworker or a chief caseworker as deemed appropriate by the casework unit and must be recorded in CID notes and on the case file.

Decisions not to certify under section 94B are subject to a peer review. This can be by way of conversation or consideration minute as long as the review is recorded in CID and on the case file.

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