



**Upper Tribunal  
Immigration and Asylum Chamber  
Judicial Review Decision Notice**

R (on the application of JT) v Secretary of State for the Home Department (s.94B NIAA 2002 certification) IJR [2015] UKUT 00537 (IAC)

The Queen on the application of JT  
**(ANONYMITY ORDER MADE)**

applicant

versus

Secretary of State for the Home Department

respondent

**Before Upper Tribunal Judge Gill**

Having considered all documents lodged and having heard the parties' respective representatives, Ms B Asanovic of Counsel instructed by M & K Solicitors on behalf of the Applicant and Mr J Anderson of Counsel, instructed by the Government Legal Department on behalf of the Respondent at a hearing at Field House on 10 August 2015

- 1. The strength or otherwise of an underlying Article 8 case is relevant to a decision by the respondent whether to certify a case under s.94B of the Nationality, Immigration and Asylum Act 2002, in that it may disclose a case without a specific case being advanced by the applicant as to why temporary separation whilst an appeal is pursued from abroad may lead to a real risk of serious irreversible harm.*
- 2. In passing s.94B into law, Parliament has plainly and unarguably envisaged the possibility of family members, including children, being separated from the individual being removed for a temporary period whilst an appeal is pursued from abroad as well as the possibility that, in some cases, appeals pursued abroad will succeed. It also envisaged the possibility of some appeals from abroad after certification under s.94B succeeding under Article 8. It is not enough for an individual resisting removal pursuant to certification under s.94B merely to rely upon general assertions of the impact of temporary separation from family members including children. There must be specific engagement with the reasons why it is said that there is a real risk of serious irreversible harm during such temporary absence, particularly if the underlying substantive claim does not on its face raise the possibility that the impact on the family members will be beyond what one may generally assume will be the impact when family members are separated.*
- 3. The judgment of the majority of the European Court of Human Rights in De Souza Ribeiro v France (Application No.22689/07) – HEJUD [2012] ECHR 2066 did not state in terms that a suspensive remedy was necessary whenever a claim is not manifestly ill-founded in relation to Article 8. What the majority spoke of was the need to have “sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality”. Judicial review proceedings are such an appropriate procedural safeguard.*

## **Decision by Upper Tribunal Judge Gill:**

- 1. The application for a stay of the proceedings pending judgment following the grant by the Court of Appeal of permission in R (Byndloss and others) v SSHD [2015] EWCA Civ 678 is refused.**
  - 2. The application for permission to bring judicial review is refused.**
1. The applicant is a national of Sri Lanka. He seeks permission to challenge the lawfulness of a decision of the respondent of 2 March 2015 to refuse his Article 8 human rights claim and to certify it under s.94B<sup>1</sup> of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”). If I am not minded to grant permission, Ms Asanovic requested that I stay these proceedings pending judgment following the grant of permission by the Court of Appeal in R (on the application of Byndloss and another v SSHD) [2015] EWCA Civ 678.
  2. The effect of the certification under s. 94B is that the applicant may only pursue an appeal after he has left the United Kingdom.
  3. The decision of 2 March 2015 followed the making of a deportation order on 20 February 2015 under s.32(1) of the UK Borders Act 2007 (the “2007 Act”) on the ground that the applicant was a foreign criminal. The criminal conviction which precipitated the deportation order was a conviction on 4 September 2013 at the Central Criminal Court of an offence of violent disorder for which the applicant was sentenced to a period of three and a half years’ imprisonment.
  4. The applicant was remanded in custody on 10 May 2013. He was convicted and sentenced on 4 September 2013. He was taken into immigration detention on 7 February 2015. He was released from immigration detention on 27 May 2015. Accordingly, he was on remand, in prison or in detention for a total period of two years. At the time of his release from immigration detention, his child was 9 years old.
  5. The immigration history is as follows. The applicant entered the United Kingdom illegally and claimed asylum when encountered in December 1999. His claim was refused and he was served with illegal entry papers on 10 May 2001. His appeal rights were exhausted on 5 July 2005. He made an application under the Assisted Voluntary Return Scheme to return to Sri Lanka. That application was approved and he was removed to Sri Lanka in July 2005. He then made an application for entry clearance as the spouse of a British citizen, a marriage that was entered into at a time when he had no right to live in the United Kingdom permanently. His application for entry clearance was refused but his appeal against that decision was allowed. He was then granted entry clearance following which he returned to the UK on 17 July 2007. On 14 September 2009, he was granted indefinite leave to remain.

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<sup>1</sup> Section 94B provides:

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.

6. In the decision letter dated 2 March 2015, the respondent took the view that the applicant had been lawfully present in the UK for a period of six years one month as at the date of the conviction on 4 September 2013.
7. The applicant's criminal history is set out in full in the reasons for the decision. The applicant has several convictions beginning from May 2001. The decision letter shows that he has nine convictions for about fifteen offences of which the most serious was the conviction of 4 September 2013.
8. In the decision letter, the respondent accepted that the applicant had a genuine and subsisting relationship with his British citizen spouse and child. The child was born in the UK in April 2006. The respondent considered her duty under s.55 of the Borders, Citizenship and Immigration Act 2009. She accepted that the child was sufficiently integrated within British society and that it may be in her best interests to remain in the UK. However, she concluded that the exceptions in paragraphs 399 and 399A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs") did not apply and that there were no "*very compelling circumstances*" over and above those described in paragraphs 399 and 399A.
9. I shall now summarise the reasons for the decision. The respondent did not accept that it would be unduly harsh for the child to live in Sri Lanka as she considered that the applicant who she considered had sufficient awareness of the linguistic, cultural and social norms of Sri Lanka could support the child to adapt to life in Sri Lanka. She did not accept that it would be unduly harsh for the child to remain in the UK even if the applicant were to be deported. Although she accepted that the child was dependent on the applicant, she did not accept that the child was primarily dependent upon him for her financial needs, subsistence or accommodation which the respondent considered had been "*readily provided*" by the child's mother (the applicant's spouse) prior to the applicant's imprisonment. She therefore concluded that the exception in paragraph 399(a) did not apply.
10. In relation to the applicant's relationship with his spouse, the respondent considered that the applicant's spouse was not wholly dependent on the applicant for accommodation, subsistence and finance as the respondent considered she had demonstrated through her employment and other matters referred to at page 7 of the decision letter. She accepted that the applicant had demonstrated a degree of dependence on his wife. She did not accept that their relationship was formed at a time when the applicant was in the UK lawfully or during a time when his immigration status was not precarious. This was because she considered that the documentation submitted demonstrated that the marriage had been entered into prior to the applicant having any lawful leave in the United Kingdom. She did not accept that it would be unduly harsh for the applicant's wife to live in Sri Lanka or that it would be unduly harsh for her to remain in the United Kingdom whilst he was abroad given that in the respondent's view the wife had demonstrated a high degree of independence having undertaken responsibilities for accommodation, finance and subsistence for both herself and her child.
11. The respondent then considered the wife's mental health problems. It was said that she suffered from poor concentration, difficulty sleeping, low mood and being anxious and tired. While she accepted that support provided for by the social services could not be a substitute for the physical and emotional support that the applicant would be able to give his wife as a husband, she nevertheless considered that the family would be effectively supported and cared for in the United Kingdom through the social services. She therefore concluded that the exception in paragraph 399(b) did not apply.

12. She went on to consider the right to private life exception in paragraph 399A. No issues have been raised on the applicant's behalf in relation to this aspect of the respondent's assessment. Accordingly, I shall not summarise the respondent's reasons for concluding that this exception did not apply.
13. The decision letter also deals with other aspects of the applicant's case, such as his Article 3 claim based on his medical condition. These matters have not been relied in the grounds or in submissions before me in relation to the challenge to the s. 94B certification.
14. The applicant's case concerning the respondent's decision to certify his case under s.94B may be summarised as follows.
15. Firstly, reliance is placed upon the judgment of the Strasbourg Court in De Souza Ribeiro v France (Application No.22689/07) – *HEJUD* [2012] ECHR 2066. In particular, reliance is placed upon paragraphs 82 and 83 of the judgment of the majority. In considering Article 8, the majority said that, at paragraph 83:

“... it is not imperative in order for a remedy to be effective that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality....”
16. Although the majority did not state that a suspensive remedy must be given in Article 8 cases, Ms Asanovic relied upon the opinion of Judges Pinto De Albuquerque and Vučinić stating, inter alia:

“... When the case is not manifestly ill-founded, a stay of execution of the appealed decision is called for by the very nature of the review proceedings. In other words, either the appeal against an expulsion or removal order is manifestly ill-founded and therefore the reviewing authority is in a position to take an immediate decision on it, making the suspension of the effects of the appealed expulsion order otiose: or the appeal is not manifestly ill-founded and a refusal of suspensive effect could seriously compromise the very aim of the judicial review proceedings and deprive the guarantee provided to the appellant of its meaning....”
17. Ms Asanovic submitted that it is at least arguable, taking the opinions of Judges Pinto De Albuquerque and Vučinić *together with* the majority decision, that the appropriate test in relation to the phrase '*serious irreversible harm*' in s.94B is whether there is an arguable Article 8 claim. She also relied upon the judgment of the Strasbourg Court in Nunez v Norway reported at [2011] ECHR 1047. In that case, as a consequence of an exclusion order, the children of the claimant affected by the decision would have been separated from their mother for a period of two years because that was the period for which the exclusion order against the claimant applied. The court considered that there was a breach of Article 8 in that case.
18. In my judgment, it is unarguable that the opinions of Judges Pinto De Albuquerque and Vučinić in the Ribeiro case set the test for deciding when it is unlawful for the Secretary

of State to certify a case under s.94B. In the first place, this was the view of two judges from a panel of seventeen judges in total who decided the case. The majority did not state in terms that a suspensive remedy was necessary whenever a claim is not manifestly ill-founded in relation to Article 8. What the majority spoke of was the need to have “*sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality*”. The views of the majority of fifteen judges are to be preferred over the minority of two judges.

19. These judicial review proceedings are unarguably such an appropriate procedural safeguard. Ms Asanovic accepted that, speaking generally, judicial review proceedings are an adequate remedy. In my view, that is also unarguably so even in cases of certification under s.94B. If, in an individual case, there is evidence of serious irreversible harm during the period of temporary absence whilst the appeal is pursued abroad which the respondent has not considered or if she has materially erred in law in her consideration of the evidence before her and there will be a real risk of serious irreversible harm, then judicial review proceedings will be available to the claimant in question.
20. The reality is that, in passing this legislation, Parliament has plainly and unarguably envisaged the possibility of family members, including children, being separated from the individual being removed for a temporary period whilst an appeal is pursued from abroad as well as the possibility that, in some cases, appeals pursued abroad will succeed. It also envisaged the possibility of some appeals from abroad after certification under s.94B succeeding under Article 8.
21. Nunez can be distinguished on the ground that there was an exclusion order in that case for two years with the result that the parent could not return within the period of the exclusion order. I agree with Mr Anderson that the current case is unarguably different. The applicant may return if he wins his appeal.
22. Secondly, reliance has been placed on the strength of the underlying case to demonstrate that the decision to certify under s.94B is arguably unlawful. However, in the decision letter, the respondent considered the substantive claim before she turned to the s.94 certification issue as is clear from my summary of the decision letter. In relation to the substantive claim, she considered the case advanced by the applicant in considerable detail. The grounds assert that the applicant has an arguable Article 8 claim before a Judge of the First-tier Tribunal but they make no attempt to argue that the respondent has omitted any relevant consideration or considered facts that are irrelevant. Nothing was said by Ms Asanovic in this respect at the hearing.
23. In my view, it is plain that the strength or otherwise of the underlying case is relevant to a decision by the respondent whether to certify a case under s.94B, *in that*, it may disclose a case without a specific case being advanced by the applicant as to why temporary separation whilst an appeal is pursued from abroad may lead to a real risk of serious irreversible harm. Thus, the approach of the respondent in considering the substantive Article 8 case first is unarguably correct.
24. In assessing the strength of the underlying Article 8 claim in the context of the exceptions in paragraphs 399(a) and (b) and 399A of the IRs, the respondent did unarguably consider the best interests of the applicant’s child. The grounds do not contend otherwise.
25. Having considered the substantive case, the respondent then considered whether there was a real risk of serious irreversible harm if the applicant is removed and during the

period of his absence whilst he pursued an appeal. Generally speaking at this point, I accept that the respondent would be required to consider any evidence that has been presented to her that there would be such a real risk of serious irreversible harm if removal were to take place pending the outcome of any appeal. If such evidence is presented and it relates to children, then the Secretary of State may have to engage once again with the best interests of the children pursuant to her duty under s. 55. The substantive case may also reveal obvious points in this regard beyond the stress and emotion that one would normally anticipate will be experienced by family members who are separated from each other.

26. In the instant case, the relevant paragraph of the decision letter reads:

“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 a risk exists because there is insufficient evidence to demonstrate that such a risk exists. Therefore it has been decided to certify your Article 8 claim under section 94B and any appeal you may bring can only be heard once you have left the United Kingdom.”

27. I emphasise the phrase ‘*because there is insufficient evidence to demonstrate that such a risk exists*’. Ms Asanovic accepted before me that there was limited evidence. In fact, my attention has not been drawn to *any* evidence of the impact on the applicant's child of being temporarily separated from the applicant. As I said earlier, the statutory scheme passed by Parliament, in particular s.94B, plainly envisages the possibility of family members, including children, being separated from the individual being removed for a temporary period, as well as the possibility of some appeals pursued from abroad after certification under s.94B succeeding. It is unarguably not enough for an individual resisting removal pursuant to certification under s.94B merely to rely upon general assertions of the impact of temporary separation from family members including children. There must be specific engagement with the reasons why it is said that there is a real risk of serious irreversible harm during such temporary absence, particularly if the underlying substantive claim does not on its face raise the possibility that the impact on the family members will be beyond what may generally be anticipated.

28. In the instant case, the applicant spent a total period of two years on remand, in prison and in immigration detention. By the time he was released, his child was nine years old. Accordingly, the child was separated from the applicant on a daily basis for two out of her nine years. My attention has not been drawn to any evidence that was before the respondent of the impact on the child of being separated from the applicant in this way during this two year period. My attention has not been drawn to any evidence that was before the respondent of the impact on the child of being separated from the applicant whilst he pursues his appeal from abroad.

29. In all of these circumstances, and for the reasons I have given, in particular the absence of any specific evidence of serious irreversible harm to the applicant's child during the period of his absence whilst he pursues an appeal from abroad, I have concluded that the decision of the respondent to certify this claim under s.94B is unarguably lawful.

30. I have taken into account the fact that the Court of Appeal has granted permission in the Byndloss case<sup>2</sup>. I do not consider that the grant of permission by the Court of Appeal means that I must grant permission or a stay of these proceedings. I have given my reasons for refusing permission and for the same reasons I also refuse the application for a stay of the proceedings.

Permission to appeal to the Court of Appeal

31. Ms Asanovic did not make an application for permission to appeal to the Court of Appeal. I have considered whether to grant permission to appeal, as I am obliged to do by virtue of rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I refuse permission to appeal because there is no arguable error of law.

Costs

32. The costs of preparing the Acknowledgment of Service are to be paid by the Applicant to the Respondent, summarily assessed in the sum of £ 320.

**ANONYMITY ORDER**

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the applicant's child. To that end, the applicant's name has been anonymised as I take the view that disclosure of his (unusual) name may lead members of the public to identify the child. No report of these proceedings shall directly or indirectly identify the applicant or his child. This direction applies to both the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:  (delivered *ex tempore*, transcript signed on 24 August 2015)

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**Applicant's solicitors:**

**Ref:**

**Decision(s) sent to above parties on:**

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**Respondent's solicitors:**

**Home Office Ref:**

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**Notification of appeal rights**

A refusal by the Upper Tribunal of permission to bring judicial review proceedings, following a hearing is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

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<sup>2</sup> In granting permission, the Court of Appeal said that it was important that there be an authoritative and early decision of the Court for the guidance of tribunals and courts on the grounds which took issue with the lawfulness of s.94B, its correct construction and the approach which it requires for the guidance. However, Lord Justice Underhill specifically said that he would prefer not to express a definitive view that the grounds were arguable.