IN THE UPPER TRIBUNAL

R (on the application of Masalskas) v Secretary of State for the Home Department (Regulations 24AA and 29AA EEA Regs) IJR [2015] UKUT 00677 (IAC)

F ield House

London

Heard on: 14 October 2015

Handed down: 26 November 2015

BEFORE

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN

(ON THE APPLICATION OF VIDMANTIS MASALSKAS)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

1. A decision to certify a person's (P's) removal under regulation 24AA of the European Economic Area Regulations 2006 operates as a temporary measure that can be applied only for so long as there is a statutory appeal which could be brought in time or which is pending.

2. Regulation 24AA is a discretionary measure whose implementation is currently subject to Home Office guidance entitled "Regulation 24AA Certification Guidance for European Economic Area deportation cases".

3. EEA decisions to remove or deport taken against EEA nationals do not have automatic suspensive effect. No removal can take place, however, until an applicant has had a decision on any application made for an interim order to suspend removal.

4. As with the very similar power in section 94B to the Nationality, Immigration and Asylum Act 2002, when deciding whether to certify the removal of a person under regulation 24AA the avoidance of "serious or irreversible harm" is not the sole or overriding test. It is also necessary for the decision-maker to assess whether removal of P would be unlawful under section 6 Human Rights Act 1998 (HRA): see Kiarie, R (on the application of) and Another v Secretary of State for the Home Department [2015] EWCA Civ 1020.

5. Whilst the assessment pursuant to section 6 HRA requires a proportionality assessment, it is one that is limited to the proportionality of removal for the period during which any appeal can be brought in time or is pending.

6. P's right under regulation 29AA to be temporarily admitted to the UK in order to make submissions in person at the appeal:

(a) is qualified by regulation 29AA(3) ("except when P's appearance may cause serious troubles to public policy or public security"); and

(b) does not extend to the pre-hearing stages of the appeal.

Mr Z Malik, Counsel, instructed by Salamons Solicitors appeared on behalf of the applicant.

Ms J Smyth, Counsel, instructed by the G.L.D. appeared on behalf of the respondent.

JUDGMENT

JUDGE STOREY :

1.
This application for judicial review concerns regulations 24AA and 29AA of the Immigration (European Economic Area) Regulations 2006 (hereinafter "the 2006 Regulations"). These regulations are a relatively recent addition to the ever-expanding panoply of the 2006 Regulations, having been inserted with effect from 28 July 2014 (SI 2014/1976). As far as we are aware, ours is one of the first cases which seeks to deal in any depth with their proper scope and meaning. It has assisted our task that the day before our the hearing the Court of Appeal gave judgment in the case of Kiarie, R (On the Application Of) and Another v The Secretary of State for the Home Department [2015] EWCA Civ 1020 (13 October 2015) (hereafter " Kiarie and Byndloss ") which concerned a very similar provision to regulation 24AA set out in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (as amended), namely section 94B [1] . In order to set the scene, it is useful first of all to set out the relevant legislative and policy framework of which regulations 24AA and 29AA form a part.

The legislative and policy framework

The 2004 Citizens Directive

2.
Chapter V1 of the Directive 2004/38/EC ("the Citizens Directive") is concerned with ' Restrictions on the right of entry and the right of residence on grounds of public policy, public security and public health '. Articles 27 and 28 deal with the substantive conditions that must be satisfied before a Member State may restrict the freedom of movement and residence of EU citizens and their family members falling within the scope of the Directive. In summary, they permit a Member State to expel EU citizens and their family members on grounds of public policy, public security or public health, subject to certain restrictions. So far as material, Articles 27 and 28 provide:

Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3.

…

4.

…

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) …

Article 31

3.

Article 31, which is also part of Chapter V1 to the Directive, is entitled ‘procedural safeguards’. It provides:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or

- where the persons concerned have had previous access to judicial review; or

- where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except

when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

The 2006 EEA Regulations

Regulations 24AA and 29A) state as follows:

24AA

Human rights considerations and interim orders to suspend removal

(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b) P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, 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 removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a) where the expulsion decision is based on a previous judicial decision;

(b) where P has had previous access to judicial review; or

(c) where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6.

29AA

Temporary admission in order to submit case in person

(1) This regulation applies where –

(a) a person ("P") was removed from the United Kingdom pursuant to regulation 19(3)(b);

(b) P has appealed against the decision referred to in sub-paragraph (a);

(c) a date for P's appeal has been set by the First tier Tribunal or Upper Tribunal; and

(d) P wants to make submissions before the First tier Tribunal or Upper Tribunal in person.

(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act, as applied by this regulation) to the United Kingdom in order to make submissions in person.

(3) The Secretary of State must grant P permission, except when P's appearance may cause serious troubles to public policy or public security.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where—

(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;

(b) a hearing of P's appeal has taken place; and

(c) the appeal is not finally determined,

P may be removed from the United Kingdom pending the remaining stages of the redress procedure (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the redress procedure in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the purposes of paragraphs 8, 10, 10A, 11, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if—

(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and

(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P's case in person in accordance with this regulation.

(8) P will be deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation.

4.
Also relevant is regulation 26(1), which provides that "Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision", and regulation 29 which prescribes the effect of appeals to the First-tier Tribunal or Upper Tribunal. Regulation 29(3) provides that:

"If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom (other than a decision under regulation 19(1(3)(b)), any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending."

The words in italics were inserted with effect from 28 July 2014.

5.

It is as well to mention also regulation 19(3) which specifies that subject to two exceptions:

“an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-

(a)
that person does not have or ceases to have a right to reside under these Regulations;

(b)
the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with regulation 21”; or

(c)
the Secretary of State has decided that the person’s removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).

Home Office Guidance

6.
To accompany the insertion of regulations 24AA and 29AA the Home Office also issued a document entitled “Regulation 24AA Certification Guidance for European Economic Area deportation cases”, which we have annexed in its Version 2.0, 20 October 2014 form. It explains that when the regulations came into force it was with an initial cohort limited to persons aged 18 or over who do not have a genuine and subsisting parental relationship with a dependent child or children. That first phase ended on 17 October 2014. Section 2 deals with cases not suitable for regulation 24AA certification. Section 3 addresses when to certify a human rights claim under regulation 24AA and at 3.3. (real risk of serous irreversible harm) and 3.4. (timing of certification) the caseworker is instructed to see for guidance the section 94B certification guidance for non-EEA nationals. Section 4 deals with interim orders. Section 5 concerns re-entry to present appeal in person.

The application

7.
The applicant is a citizen of Lithuania and seeks judicial review of the decision made by the respondent to certify his removal from the United Kingdom under regulation 24AA of the 2006 Regulations. That decision was originally made on 10 December 2014, at the same time as he was served a reasons for deportation letter and a deportation order. On 17 March 2015 the respondent issued him with a supplementary decision to certify his removal under regulation 24AA, together with a new notice of decision to make a deportation order. His judicial review claim form lodged on the same day identifies the decision being challenged as a decision of 12 March to set removal directions for 18 March 2015, but it is common ground that it is the underlying decision to certify that is in issue in these proceedings (we return to this matter in a moment). On the same day the applicant applied for judicial review he also applied for an interim injunction to prevent removal. This was granted on the specific basis that the position regarding the applicant’s appeal ‘should be clarified before any further steps are taken to remove the applicant”. It was ordered that the respondent was not to remove the applicant until determination of this application or further order.

The statutory appeal

8. The applicant had earlier (in January 2015) lodged a statutory appeal against the EEA decision to make a deportation order against him. At the date he brought his judicial review proceedings (17

March 2015) his statutory appeal was still pending. When permission was granted on 20 August 2015 to bring this judicial review, it was assumed that the applicant had not yet had a hearing before the First-tier Tribunal of his statutory appeal. In point of fact we now know that by then his appeal had been heard by the First-tier Tribunal and dismissed on 27 May 2015. However, he has applied for permission to appeal to the Upper Tribunal, which means that, albeit it is at a different stage, his statutory appeal is still one which is pending.

9. The reason why the applicant has found himself subject to adverse Home Office measures is that on 13 November 2013 he was arrested and on 22 January 2014 he was convicted of possession of a controlled drug class A – with intent to supply. For this offence he was sentenced to 28 months' imprisonment (with forfeiture and destruction of drugs and paraphernalia) and ordered to pay a victim surcharge. He was also sentenced to four months' consecutive imprisonment (with forfeiture and destruction of 440 counterfeit £10 bank notes) for an offence of having counterfeit banknotes **.**

The decision under challenge

10. It is common case that the challenge brought in this judicial review is to the decision to certify under regulation 24AA taken on 10 December 2014. The further decision to certify taken on 17 March 2015 was specifically described as being supplementary and we entirely agree that this was all it was. The gravamen of the applicant's challenge in December 2014 was that the decision to certify was unlawful because it prevented him from being present at his statutory appeal and to that end the interim relief he sought was an interim order prohibiting his removal.

11. As already noted, the applicant has had since then a hearing before the First-tier Tribunal, at which he was able to attend and present his case and he has also had a decision on his appeal: on 27 May 2015 the First-tier Tribunal dismissed his appeal against the deportation order against him under regulation 19(3).

12. Two things flow from this. First, even if the applicant is successful in his judicial review application, he cannot expect relief aimed at securing his attendance at his statutory appeal before the First-tier Tribunal as he has already achieved this. Second, if he is unsuccessful in this judicial review and the respondent acts to remove him by way of directions, he will still be entitled to apply under regulation 29AA to return to be present in person at any relevant hearing for as long as his appeal is still pending.

13. Nevertheless, particularly because his appeal remains pending, we do not consider that his application has been rendered academic. Success in this application would have inevitable consequences for any further decision to certify in respect of what regulation 29(5) refers to as "the remaining stages of the redress procedure in accordance with this regulation". Given the wide-ranging nature of the submissions before us in this case, our decision may additionally assist in clarifying the proper ambit of regulations 24AA and 29AA in other cases.

The grant of permission

14. In the grant of permission to bring judicial review proceedings made on 20 August 2015 reference was made to the case of Macastena v Secretary of State for the Home Department [2015] EWHC 1141 (Admin), a renewed permission hearing and the question was posed whether observations by Collins J in that case disclosed grounds for considering that regulation 24AA was consistent with Article 31.

The grounds

15. In presenting the grounds Mr Malik before us cast his submissions in the following terms. First he submitted that the regulation 24AA decision made against the applicant was unlawful in public law terms by dint of having four defects:

(a) failure to appreciate that there was a discretion;

(b) failure to take into account material considerations;

(c) failure to balance competing considerations against each other; and

(d) failure to make a decision that was reasonable.

Second, he submitted that the respondent had erred in law in using "real risk of serious irreversible harm" as the sole or overarching test for certifying under regulation 24AA. He submitted that the test set out in regulation 24AA also had to establish that the decision to certify was compliant with s.6 Human Rights Act 1998 ("HRA 1998") and thus entailed a test of proportionality. Third he argued that the decision of Collins J in the Macastena case reinforced his underlying arguments.

16. Ms Smyth first asked us to rule as a preliminary point that in order to advance these grounds, which Mr Malik had only drafted the day before, he would need to apply formally for leave to amend his grounds as they differed significantly from those set out in the original pleadings. We disagree. Given that the day before the hearing, the Court of Appeal had given judgment in Kiarie and Byndloss , it was inevitable – and indeed only good sense – that Mr Malik should reorient his submissions, but they still bore a sufficient correspondence to those originally pleaded. We would accept that the original grounds make no mention of the discretion ground and that certain passages betoken a misunderstanding of what was being certified, but one can still see an express contention that the decision to certify wrongly failed to consider s.6 of the HRA1998 and we discern that paragraph 48 did at least seek to identify factors that were relevant to the legality of the decision both in terms of discretion and proportionality.

17. Even had we decided that Mr Malik needed to apply to amend his grounds formally, he helpfully stated that if needed, he wished to apply to do so and on that basis we would have acceded to his request. In the event Ms Smyth was content to respond to Mr Malik's submissions without needing to ask for more time. As Ms Smyth herself emphasised, the fact that both parties had invested considerable time in addressing the three key issues identified by Mr Malik, coupled with the plain need for their submissions before us to deal with the implications of Kiarie & Byndloss , are strong pointers in favour of our taking a holistic view.

18. Ms Smyth asked us to note that no challenge has been made to the legality of regulation 24AA; and that in the light of the Court of Appeal analysis in Kiarie & Byndloss of the very similar provision at section 94B of the 2002 Act, no such challenge could succeed. As regards ground 1, she urged us to find that just as the Court of Appeal had found the discretion point in Kiarie & Byndloss to fall away, so should we in this case. Even if discretion had not been exercised perfectly in the applicant's case, any shortcoming was not material. There was an additional reason in this case why any defect was immaterial, in that the applicant had simply not identified evidence of material or competing considerations. Further, to the extent that Collins J in Macastena appeared to query the public policy rationale for this power, that overlooked that it had been given legislative endorsement by the EU legislature in Article 31 of (the Citizens Directive (which clearly contemplates that removal can take place whilst an appeal is pending) and UK Parliamentary endorsement by the insertion into the 2006 EEA Regulations of regulation 24AA. The provisions enacted by both legislatures reflected a balancing

of public policy and individual considerations. She urged us to find the Macastena decision as affording no help to the applicant.

19. In relation to Mr Malik's ground 2, Ms Smyth said the Secretary of State accepted that "serious irreversible harm" in regulation 24AA was not the sole or overarching test and that in order to certify lawfully the respondent had also to be satisfied there was no breach of section 6 of the HRA 1998. She accepted that the latter test required the respondent to assess whether a decision to certify was proportionate, but urged us to find that the proportionality assessment was limited to the period of the pending appeal, which could be presumed to be short-term.

ANALYSIS

We shall deal first with general matters raised by this application.

The relevance and import of Article 31

J udicial redress

20. It is not in dispute that UK law faithfully transposes Article 31(1) and 31(3). The requirements of Article 31(3) are for a form of judicial redress that extends to an examination not just of the "legality of the decision", but also of "the facts and circumstances on which the proposed measure is based". These requirements are met in the UK by provisions in the 2006 EEA Regulations, in particular by regulation 26 which affords a statutory right of appeal against EEA decisions and by provisions in Schedule 1 which apply certain sections of the 2002 Act that ensure the appeal deals with the merits, not just with the legality of the EEA decision. The statutory appeal under these Regulations also provides at regulation 21 for an assessment of whether decisions taken on public policy, public health or public security grounds are disproportionate in relation to the safeguards guaranteed by Articles 27 and 28 of the Directive.

21. It is also not in dispute that Article 31(2) is faithfully transposed by regulation 24AA(4). Both Counsel agreed that these judicial review proceedings provided for an application for "an interim order to suspend enforcement of [the expulsion decision] …until such time as the decision on the interim order has been taken." The applicant sought such an order and was granted it so that the position regarding his appeal could be clarified. This injunction has remained in place pending the handing down of this judgment.

Suspensive effect

22. Likewise it was common ground that regulation 29AA seeks to give effect to the provisions of Article 31(4). Whilst Mr Malik disputed that it fully achieved this, we consider Ms Smyth is entirely right in her submission that Article 31 is predicated on recognition that expulsion decisions against Union citizens do not attract automatic suspensive effect. As we have just explained, the article does require that no removal can take place until an applicant has had a decision on an application for an interim order to suspend enforcement of that decision (Article 31(2)). It also stipulates that Member States may not prevent the individual from submitting his/her defence in person (except in two specified circumstances). But it does **not** prevent removal prior to the hearing of his statutory appeal – subject only to a right to a decision on an application for an interim order to suspend enforcement of that decision (Article 31(2) and (4)).

23. Consistent with the terms of Article 31, the new wording of regulation 29(3) provides that a statutory appeal against an EEA decision to remove an EEA national from the United Kingdom has

suspensive effect except where that decision is made under regulation 19(3)(b) (which is the provision under which the decision to deport was made against the applicant in this case).

The regulation 24AA test

24. As now clarified by Kiarie & Byndloss in respect of identical wording in section 94B of the 2002 Act, the statutory test set out in regulation 24AA is two-pronged and cannot be reduced to a mere question of whether an affected person faces a ”real risk of serious irreversible harm if removed…”. The latter is not the overarching test. Mirroring s.94B of the 2002 Act, regulation 24AA contains a first requirement (at regulation 24AA(2)) that the Secretary of State may only give directions for P’s removal if she certifies that removal pending the outcome of P’s appeal would not be unlawful under section 6 of the HRA 1998. The “real risk of serious irreversible harm…” test arises only as a “ground” on which the Secretary of State “ **may”** certify a removal under paragraph (2) (emphasis added).

25. In Kiarie & Byndloss at [35] Richards LJ stated:

“By subsection (3) a ground for certification is that the person 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 he or she is proposed to be removed. That ground does not, however, displace the statutory condition in subsection (2), nor does it constitute a surrogate for that condition. Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she considers, in accordance with subsection (2), that removal pending determination of any appeal would not be unlawful under section 6 of the Human Rights Act. That the risk of serious irreversible harm is not the overarching test was rightly accepted by Lord Keen on behalf of the Secretary of State at the hearing of the appeal.”

Regulation 24AA as a discretionary power

26. It is clear that regulation 24AA does not mandate the Secretary of State to certify a removal in every case in which she considers the two-pronged statutory test is made out. The language of the provision clearly imports discretion: as already noted, it provides only that “The Secretary of State may certify a removal …”

27. Mr Malik sought to submit that it was a discretionary power that could only be lawfully exercised if the decision-maker undertook a balancing of competing considerations and reached a decision as to its proportionality. We shall address that submission when dealing with the applicant’s particular case.

Regulation 24AA as a temporary measure tied to the appeals process

28. Regulation 24AA is not a free-standing power to certify removal. It is parasitic on there being an “appeals process” (24AA(2)). Thereby its scope is limited jurisdictionally and temporally. It is limited jurisdictionally by being tied to the actuality or possibility of an appeal: regulation 24AA (2) provides that directions for removal may only be given if the Secretary of State certifies that “despite the appeal process not having been begun or not having been finally determined, removal of P pending the outcome of the appeal …“ The temporal limits to its scope are that there must be the possibility of an **in-time appeal:** “P has not appealed against the EEA decision but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time, with permission)”(24AA(1)(a)) or **an appeal which is still pending** (24AA(1)(b)).

The proportionality issue

29. Mr Malik submitted that any decision to certify removal under regulation 24AA could **not** lawfully be made unless the Secretary of State was satisfied it would be proportionate in human rights terms. He submitted that a proportionality test could not be diminished just because the context was removal/deportation in the context of a pending appeal. With both of these propositions we agree. If there was any doubt about their efficacy it has been settled by the Court of Appeal analysis of s.94B in Kiarie and Byndloss . Ms Smyth was quick to accept as much.

30. Nevertheless, as Mr Malik was equally quick to accept, the proportionality assessment cannot be the same wide-ranging one that the decision-maker must conduct when deciding the substantive matter of whether there are grounds of public policy, security or health for the deportation or removal under regulation 21/Articles 27 and 28 in the context of a statutory appeal. It can only be one that confines itself to the context of an appeals process which is not yet exhausted. By regulation 29(3) read together with regulation 29AA, the respondent is obliged to afford a person who is the subject of an EEA decision to deport or remove a right to attend his hearing in person. The decision is to certify removal until such time as such a person (P) has a hearing of his statutory appeal which is still pending. Ordinarily this entails that what will be at issue in any attempt to obtain an interim order suspending enforcement is the impact on P and/or his family members of short-term separation limited to the period up to final determination of an appeal. Furthermore, the decision arises within a legal framework which guarantees that even if removed a person can apply to come back to the UK to attend his or her statutory appeal hearing.

31. We derive from the above that the assessment to be made under regulation 24AA requires the decision-maker to focus not just on whether removal would cause serious and irreversible harm, but whether, for the period while the appeal process remains unexhausted, P's removal would have an unduly harsh impact on him and/or his family members. One possible example, to borrow from the Home Office document "Section 94Bthe Nationality, Immigration and Asylum Act 2002", Version 5, 30 October 2015, at 3.18, concerns the situation where "the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care". But, going by the Court of Appeal's analysis in Kiarie & Byndloss and the guidance given in the aforementioned document on the similar provision, section 94B, such cases are likely to be relatively rare.

The right of "defence" in person and regulation 29AA

32. Article 31(4) prohibits a Member State excluding the individual concerned from their territory pending the redress procedure from preventing the individual "from submitting his/her defence in person" (subject to two limited exceptions). (We do not need to explore why the word "defence" is used, although we posit that it may be linked to the fact that in some Member States expulsion decisions are made by criminal courts.) Reflecting that prohibition, regulation 29AA provides for "temporary admission to submit a case in person". It provides that if a person who has been removed wants to make submissions before the First-tier Tribunal or Upper Tribunal in person, "P may apply to the Secretary of State to be temporarily admitted". Indeed, there is even provision for a person who has (i) been removed, (ii) has then been admitted back into the United Kingdom for a First-tier Tribunal hearing; (iii) who has then pursued onward appeal, (iv) is then removed again, to then (v) apply under regulation 29AA(5) "to return to make submissions in person during the remaining stages of the redress procedure" (regulation 29AA(5)).

Meaning of Exclusion

33. Mr Malik voices two objections to any reading of either provision that confines the right to return under regulation 29AA to attendance at the hearing of the statutory appeal. First he argues that the use of the verb "exclude" limits the scope of Article 31(4) to cases in which a person has not yet been admitted to/entered the United Kingdom. (If he were right in this submission, that would of course raise an issue as to whether regulation 29AA is a lawful transposition of Article 31). We can dispose of this objection summarily, it being entirely clear from the wording of Article 31(4) that exclusion is used to denote the expulsion of persons. That is also the primary sense of the word as used in Article 32 (Duration of exclusion orders). Indeed, in Article 31(4) exclusion is juxtaposed with cases when there is an appeal or judicial review concerning a "denial of entry to the territory". Whether recourse is had to a literal, contextual or purposive meaning, exclusion exists within Article 31 as a procedural safeguard for those who have been removed or expelled "pending the redress procedure".

Right to be heard

34. Mr Malik's second objection is that to delimit the prohibition to prevention of return to attend a hearing would improperly circumscribe the "right to be heard" which must be understood to encompass not just the hearing itself but pre-hearing stages, including preparation of a case and oral conferencing with legal advisors. We are no more persuaded by this objection than we are by the first. If Mr Malik were right, then since pre-hearing preparation can both theoretically and sometimes in reality begin on the very day the deportation/removal decision is made, there would never be any lawful basis for exclusion "pending the redress procedure". We do not exclude that the Secretary of State may decide to temporarily admit an individual to make submissions in person for some period of days before an actual hearing; for her to do so would be an entirely lawful step under regulation 29AA. However, there is plainly no right of an individual to be present in the United Kingdom in advance of an actual hearing. Insofar as Mr Malik seeks in raising this objection to invoke the "right to be heard" under Article 47 of the Charter of Fundamental Rights, we would repeat a point made by this panel in Ahmed, R (on the application of) v Secretary of State for the Home Department (EEA/s 10 appeal rights: effec t) (IJR) [2015] UKUT 436 (IAC) at [50]-[51] in commenting on Ms Smyth's submission in that case (she having also been Counsel for the G.L.D on that occasion) that Article 47 was context-specific :

"50. We agree with that last submission. As was noted by the Court of Justice of the European Union in Case C-249/13 Khaled Boudjlida at [43]:

"… it is… in accordance with the Court's settled case law that … fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (the judgments in Alassini and Others, C-317/08 to C-320/08, EU:C2010:146 , paragraph 63; G and R, EU:C:2013:533, paragraph 33; and Texdata Software, C-418/11, EU:C:2013:588 , paragraph 84)".

51. In order to see where the balance is to be struck in cases of this kind, one looks to the provisions of the Directive. There, as we have noted, the relevant appeal rights are non-suspensive. However, in cases covered by Article 31 (which, we emphasise, does not include the applicant's type of EEA appeal), the persons concerned have a qualified right of re-entering in order to submit a "defence in person". The scheme of the Directive is, we find, entirely compatible with Article 47 of the Charter.

Article 47 does not necessitate the wholesale conferring of suspensive rights of appeal against any EEA decision."

35. It is fair to say that there is an important difference between regulation 24AA and section 94B. Whereas the latter envisages that the appeal itself will be heard whilst the appellant is out of country, the different scheme under the Directive and Regulations recognises a "right to be heard" for the purposes of being present at the hearing of the appeal.

36. That difference might be said to suggest that it would be proper to restrict the proper ambit of regulation 24AA to cases where there was a particularly strong reason to certify notwithstanding that an affected person would in any event have a right to return to be present at their hearing. It seems to us that there are two responses fatal to that suggestion. The first is one we have highlighted already. The EU legislature has expressly permitted states, subject to judicial supervision, to have the power to remove persons pending their appeal. Article 31(1) makes that clear, as does the Commission's Explanatory Memorandum, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2001/0257 Final – COD 2001/0111 * . In commenting on Article 29 of this document states:

"Giving appeals automatic suspensory effect would not be a suitable solution, since it would lay the arrangements open to abuse. The judgment of national courts can be relied on to ensure that the interests of both the individual concerned and the Member States are adequately protected."

37. We accept Ms Smyth's submission that in this respect the EU institutions were concerned to give legislative effect to the judgment of the Court of Justice in Case C 98/79 Pecastaing v Belgium , in which the applicant challenged an order that she leave Belgian territory whilst she had a pending action against the Belgian authorities for refusing her a residence permit. At [9] the Court set out the text of Article 8 of Directive 64/221 which states:

"9. According to Article 8: The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration."

38. At [12]-[13] it concluded:

"12. On the other hand Article 8 contains no specific obligation concerning any suspensory effect of applications available to persons covered by the directive. If that provision requires that the person concerned should be able to appeal against the measure affecting him it must be inferred, as the Court stated in its judgment in the Royer case (paragraph 60 of the decision), that the decision ordering expulsion may not be executed – save in cases of urgency – before the party concerned is able to complete the formalities necessary to avail himself of the remedy. However, it cannot be inferred from that provision that the person concerned is entitled to remain on the territory of the State concerned throughout the proceedings initiated by him. Such an interpretation, which would enable the person concerned unilaterally, by lodging an application, to suspend the measure affecting him, is incompatible with the objective of the directive which is to reconcile the requirements of public policy, public security and public health with the guarantees which must be provided for the persons affected by such measures.

13. Accordingly, the reply to be given to the questions submitted must be that Article 8 covers all the remedies available in a Member State in respect of acts of the administration within the framework of the judicial system and the division of jurisdiction between judicial bodies in the State in question. Article 8 imposes on the Member States the obligation to provide for the persons covered by the directive protection by the courts which is not less than that which they make available to their own nationals as regards appeals against acts of the administration including, if appropriate, the suspension of the acts appealed against. On the other hand there may not be inferred from Article 8 an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full."

39. The second response, which was also adumbrated earlier, is that the 2006 EEA Regulations at regulations 24AA and 29AA reflect a similar resolve of the United Kingdom legislature to make removal lawful pending the redress procedure, without any caveat save for the guarantee of a right to return to make submissions before the First tier Tribunal or Upper Tribunal in person except when P's appearance may cause serious troubles to public policy or public security".

Significance of the Macastena case

40. It is in the above context that we must consider Mr Malik's submission that the applicant should also succeed because the decision to certify his removal was contrary to the observations of Collins J in Macastena.

41. In Macastena Collins J was considering whether to grant permission in the case of a claimant from Kosovo who had been the subject of a decision to certify removal under regulation 24AA pending his appeal to the First-tier Tribunal against a decision to remove him in light of his convictions and two year sentence. Having noted that regulation 24AA had two aspects (what we have called "prongs"), Collins J addressed a submission made by Mr Manjit Gill QC that the regulation failed to take account of the need for proportionality within Article 27 of the Citizens Directive. Collins J drew a distinction between the statutory appeal where Article 27 would be central and the challenge to a decision to certify under regulation 24AA by way of an application for an interim order to suspend enforcement of removal:

"16. However, it is not at the interim stage for a further consideration to be given to the factual basis. Only if it would be unlawful for interim removal, as I shall call it, to take place would it be appropriate to seek to come to court to prevent it. Such cases, I would have thought, would be comparatively rare. But one can see situations where, for example, a very damaging effect upon a child of the family might be such as to require such removal not to take place.

17. I am bound to say that, unless a very lengthy period was likely between appeal being lodged and hearing or the individual is in custody, it is difficult to see the point of exercising this power. It is particularly pointless if the individual is in work and providing for his or her family whilst in this country, because that will be removed and the likelihood is recourse to public funds by the family left there.

18. However, for some reason best known to the Secretary of State, that power has been required. In my judgment, it cannot be said that it is at all arguable that the regulation as it stands is itself unlawful. Equally, it would only be if the interim decision were unlawful and could be shown to be unlawful that it should not be permitted to be made.

19. I would have thought it is necessary for the Secretary of State to use this power with the greatest of care because one wants to avoid any satellite litigation which might otherwise result. Surely, it should only be in a case where it can be seen to be desirable and really desirable that such power should be exercised. It may depend on the view taken of the strength of the case which the Secretary of State has for removal in due course, because it may be obvious that there is little point in removing someone if it transpires that the appeal in due course is allowed."

42. We would underline the following points. First, this decision being on whether to grant permission, was not intended to give authoritative guidance; the observations made in it are obiter. Second, Collins J makes quite clear at [18] that regulation 24AA is an entirely lawful provision. Third, Collins J emphasises at [16] that cases in which there would be unlawfulness in the operation of regulation 24AA would be "comparatively rare". Third, insofar as Collins J addresses the public policy dimension of the operation of regulation 24AA, we cannot ignore the fact, highlighted earlier, that this regulation (like the corresponding provision of the Citizens Directive which it transposes), represents a decision of the EU legislature not to provide for automatic suspensive effect in EEA removal cases. Fourth, it seems to us that at most Collins J was here venturing suggestions for the Secretary of State to consider when adopting policy guidance as to the application of regulation 24AA. They are suppositions which may or may not find their way into future versions of the respondent's policy guidance to caseworkers. His decision is no foundation for identifying public law error in the applicant's case.

THE APPLICANT'S CASE

43. In light of our analysis of the general issues the only remaining live issue in the applicant's case is the discretion issue.

The discretion issue

44. Mr Malik has submitted that the certification of the applicant's case under regulation 24AA was unlawful because it failed to demonstrate either that the respondent had grasped that a decision under this provision was a matter of discretion or that it was a matter which required a weighing-up of competing considerations and a decision as to proportionality.

45. We think it beyond doubt that the respondent understood that her decision on certification involved the exercise of a discretion. At paragraph 84 of her December 2014 decision letter she correctly referred to the fact that under regulation 24AA the Secretary of State "may" certify removal and that the grounds on which she "may" certify included absence of serious irreversible harm. At paragraph 85 she commenced by noting that "[c]onsideration has been given to whether your case "should" be certified..."

46. We also consider that this decision letter together with the supplementary decision letter of 17 March 2015 shows that regard was given to section 6 HRA1998 matters separate from the issue of serious, irreversible harm. However, in much the same way as the decision letters in the Kiarie and Byndloss cases were found wanting, the wording of the decision letters with which we are concerned is defective, in that it wrongly framed the Secretary of State's consideration solely in terms of whether there was a real risk of serious, irreversible harm. It was stated that "such a risk" did not exist even having regard to family and private life factors, but it did not separately consider whether the applicant's family, private life circumstances might constitute a breach of Article 8.

47. Nevertheless, for very much the same reasons as Richards LJ gave in Kiarie and Byndloss in respect of the decision letters in those two cases, we find the defects in decision letters in the applicant's case to be immaterial. There are essentially two reasons for this. First, the applicant had simply failed to produce evidence to show that the decision would breach his human rights. He had not provided any evidence of any subsisting relationship with any persons who were dependent on him: he had not shown that he had very significant private life in the UK. The respondent could only respond to the evidence placed before her and what was produced in this regard was nugatory. Second, even on the basis of his own claim, he failed to particularise how his human rights were considered to be adversely affected by a temporary absence. Further, the decision under challenge did not purport to remove him unconditionally. It simply had the effect of overriding what would otherwise be potential suspensive effect of a pending appeal. If he were successful in his statutory appeal he would no longer be subject to exclusion or threat of such whilst still here.

48. Mr Malik sought to advance his submissions based on the discretion point by reference to the decision of Stadlen J in JR (in the application of) v Secretary of State for the Home Department [2009] EWHC 705 (Admin) and that by the Upper Tribunal in Ukus (discretion; when reviewable) [2012] UKUT 00307 (IAC).

49. We are not persuaded that either of these decisions assists his case.

50. As regards JR , the certification power in issue in that case was that under s.96(1) of the 2002 Act which applies when a person has relied on a matter that could have been raised in an appeal against the old decision and in the opinion of the Secretary of State there was no satisfactory reason for the matter not having been so raised in an appeal against the old decision. On Stadlen J's analysis, before the Secretary of State can lawfully decide to certify, she has to go through a four-stage process. The first two relate to notification and reliance. The third is that the Secretary of State must form the opinion that there is no satisfactory reason for the matter not having been raised in a previous appeal or previous s.120 statement. The fourth is stated at [106] as being: "she must address her mind to whether, having regard to all relevant factors she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in her favour". Stadlen J also considered this exercise had to be informed by anxious scrutiny (e.g. [124]).

51. This brief synopsis suffices to point up obvious differences between the ambit and context of the process to certify under s.96 on the one hand and that relating to process to certify under regulation 24AA on the other. The former has the effect of negating a right of appeal of any kind completely; whereas the latter only means it is non-suspensive since it does not even prevent the appeal against the EEA decision to remove/deport being in-country for the purposes of an actual hearing.

52. As regards Ukus , this case concerned discretion required to be exercised by statute in the context of a statutory appeal. It concerned a ground of challenge to an immigration decision under section 84(1)(f) of the 2002 Act, that "the person taking the decision should have exercised differently a discretion conferred by immigration rules". That is not the case here. Further, insofar as the Tribunal adverted to the context of judicial review, it made clear that it did not seek to enunciate any criteria of its own. The Tribunal confined itself simply to saying that one of the ways of assessing whether a decision was "in accordance with the law" under s.84 was "by reference to the criteria by which a decision can be approached…"

53. Even if we regarded Mr Malik as being right to say that the principles enunciated in these two cases had direct or even analogous application to regulation 24AA, it is clear from Kiarie and Byndloss

that unless their breach could be shown to have a material bearing on the outcome of the case, it would not give rise to a public law error.

54. For completeness we record that we reject also the applicant’s grounds as originally pleaded.

55. For the above reasons, we conclude that this application for judicial review must fail.

56. The interim injunction granted to the applicant at an earlier stage of this case (see [21] above) hereby ceases to have effect.

57. If agreement cannot be reached as to costs the parties are directed to make any submissions regarding costs in writing within 14 days of this judgment being handed down.

Signed

Dr H H Storey, Judge of the Upper Tribunal

Annex A

Home Office

Regulation 24AA certification guidance for European Economic Area deportation cases

Version 2.0

20 October 2014

Contents

Section 1: Introduction

Purpose

1.1 This guidance explains how case owners consider certifying a human rights claim, made by an EEA national in the context of deportation, under regulation 24AA of the Immigration (European Economic Area) Regulations 2006. This guidance applies to any EEA national or non-EEA national with enforceable EU law rights who falls to be deported under regulation 19(3)(b) of the EEA Regulations.

Legislation

1.2 Regulation 24AA of the EEA Regulations came into force on 28 July 2014. It reads:

Human rights considerations and interim orders to suspend removal

24AA. (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b) P has so appealed but the appeal has not been finally determined.

(1) The Secretary of State may only give directions for P's removal if the Secretary of

State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section

6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(3) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a) where the expulsion decision is based on a previous judicial decision;

(b) where P has had previous access to judicial review; or

(a) where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6.".

Background

1.3 The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2014 amended the Immigration (European Economic Area) Regulations 2006 so that an appeal against a deportation decision under regulation 19(3)(b) of the EEA Regulations no longer suspends removal proceedings, except where:

- the Secretary of State has not certified that the person would not face a real risk of serious irreversible harm if removed to the country of return before the appeal is finally determined.
- the person has made an application to the courts for an interim order to suspend removal proceedings (e.g. judicial review) and that application has not yet been determined, or a court has made an interim order to suspend removal.

1.4 The application of a regulation 24AA certificate does not prevent a person from lodging an appeal from within the UK, rather, by amending regulation 29 of the EEA Regulations, it removes the suspensive effect of that appeal. So, whilst a person may lodge their appeal in-country, the lodging of such an appeal does not suspend their removal from the UK. The new Regulations also do not impact on the period allowed for voluntary departure, and a person liable to deportation pursuant to the EEA Regulations still has 30 days in which to leave the UK voluntarily before their removal is enforced, save in duly urgent cases.

1.5 Therefore, regulation 24AA applies to:

- a person who appeals in time against an EEA deportation decision, where that appeal has not been finally determined;

- a person who has not appealed against an EEA deportation decision but would be entitled to do so from within the UK (this does not include out of time appeals).

1.6 The amended EEA Regulations also allow a person who was deported under regulation 19(3)(b) before their appeal is finally determined, to apply from out of country for permission to re-enter the UK solely in order to make submissions in person at their appeal hearing.

Initial Cohort

1.6 Regulations 24AA and 29AA came into force on 28 July 2014. They were initially rolled out to a limited cohort of cases where:

- the person was aged 18 or over at the time of the deportation decision; and

- the person did not have a genuine and subsisting parental relationship with a dependent child or children.

1.7 That first phase came to an end on 17 October 2014.

Section 55 duty

1.8 The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need 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 deportation cases.

1.9 Case owners must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK, in relation to the application of the regulations 24AA and 29AA of the EEA Regulations. Case owners must carefully assess the quality of any evidence provided. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests.

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

- Section 55 children's duty guidance ;

- Introduction to children and family cases ; and

- Criminality guidance for Article 8 ECHR cases .

Section 2: Cases not suitable for regulation 24AA certification

2.1 Where the following certificates can be applied in relation to all grounds which may be brought in an appeal, there will be no need to apply a regulation 24AA certificate:

- regulation 26(5) of the EEA Regulations, which states, "The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act";

- paragraph 4(5) of Schedule 2 (regulation 30) to the EEA Regulations, which requires the Secretary of State to certify a protection claim from an EEA national unless the claim is not clearly unfounded.

2.2 Decisions to deport pursuant to the EEA Regulations where the person is serving a determinate-length sentence where release is at the discretion of the Parole Board will not normally be suitable for regulation 24AA 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); and

- given an Extended Determinate Sentence (EDS).

2.3 Decisions to deport pursuant to the EEA Regulations where the person is a minor will not normally be suitable for regulation 24AA certification.

2.4 Decisions to deport pursuant to the EEA Regulations where the person has been resident in the UK and exercising Treaty rights for a continuous period of at least five years and the person has not been sentenced to a period of imprisonment of at least four years will not normally be suitable for regulation 24AA certification.

2.5 Cases to which the scenarios at 2.3 and 2.4 apply will not usually be suitable for section 94B certification for practical operational reasons, not because there will necessarily be a real risk of serious irreversible harm. Consideration must be given to all cases on an individual basis about whether or not it is appropriate to certify.

Section 3: When to certify a human rights claim under regulation 24AA

3.1 Regulation 24AA certification must be considered in all deportation decisions made pursuant to the EEA Regulations unless it is a case to which section 2 of this guidance applies. The "test" phase where regulation 24AA was rolled out to a limited cohort of cases ended on 17 October 2014 and no longer applies.

3.2 The Government's policy is that the deportation process should be as efficient and effective as possible. Case owners should therefore seek to apply regulation 24AA certification in all applicable cases where doing so would not result in serious irreversible harm.

Real risk of serious irreversible harm

3.3 For guidance on serious irreversible harm, please see the section 94B certification guidance for Non-EEA deportation cases which is here .

Timing of certification

3.4 For guidance on when a regulation 24AA certificate can be applied, please see paragraphs 3.10 to 3.13 of the section 94B certification guidance for Non-EEA deportation cases which is here .

Section 4: Interim orders

4.1 Regulation 24AA establishes that removal may not be enforced if:

- the person has made an application for an interim order to suspend removal proceedings (for example, through judicial review); and
- that application has not yet been determined, or has been determined in favour of the applicant.

4.2 Regulation 24AA lists certain exemptions where an application for an interim order will not suspend removal proceedings (as established by Article 31(2) of the Free Movement Directive (2004/38/EC)). An application for an interim order will not suspend removal proceedings if:

- the notice of a decision to make a deportation order is based on a previous judicial decision; or
- the person has had previous access to judicial review; or
- the removal decision is based on imperative grounds of public security.

4.3 If the person is deported from the UK pursuant to regulation 19(3)(b) at any stage after the person has lodged an appeal then the case owner must notify the Tribunal.

4.4 Where a court or tribunal makes an interim order suspending removal, removal will not be possible even if one of the criteria outlined in paragraph 4.2 are met. In these circumstances, contact Litigation Operations (Criminality, Detention & International) to arrange making an application to the court which granted the interim relief to apply to have the effect of the interim order lifted.

Section 5: Re-entry to present appeal in person

5.1 Regulation 29AA reflects the requirements of Article 31(4) of the Free Movement Directive (2004/38/EC). Article 31(4) states that, “Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory”.

5.2 Accordingly, regulation 29AA establishes a process whereby a person who has lodged an appeal against a deportation decision and who has been deported from the UK may apply from outside the UK for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at their appeal hearing.

5.3 Caseworkers must ensure that the person is notified of the means by which they can make such an application using the following standard paragraphs in the decision to make a deportation order:

“Pursuant to regulation 29AA of the Immigration (European Economic Area)

Regulations 2006 (as amended) you may apply from outside the UK for permission to re-enter the UK in order to make submissions in person at your appeal hearing, if you meet the following conditions:

- you appealed within time against the notice of a decision to make a deportation order;
- you were deported from the UK pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 before your appeal was finally determined;
- a date for your appeal has been set; and
- you want to make submissions before the First Tier Tribunal or Upper Tribunal in person.

You should not apply for permission to re-enter unless you have been given a date for your appeal hearing by the Immigration and Asylum Tribunal, and you should provide us with evidence of the date of your appeal hearing.

It is your responsibility to notify the relevant Tribunal of your location and contact details and to update the Tribunal in the event of any changes to your location and contact details.

If you meet these criteria then you may apply for permission to re-enter the UK. You can make this application by contacting Immigration Enforcement at [insert email address].

Permission will not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.

You must apply for permission in advance of attempting to re-enter the UK or you will be refused admission at the UK Border.

If permission is granted, it will be a temporary admission pursuant to Schedule 2 of the Immigration Act 1971. If you were deported under the Early Removal Scheme then you will be recalled to prison if you are admitted to the UK before the expiry of your sentence. In any other case you are liable to be held in immigration detention for the duration of your stay.

You must leave the UK immediately after your appeal hearing or you will be enforcedly removed.

In the case of any subsequent hearing at which you wish to submit your case in person, you must apply again for permission to re-enter.

Any return to the United Kingdom is entirely at your own cost.”

5.4 Under regulation 29AA the Secretary of State must grant such permission, except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security.

Section 6: Successful appeals

6.1 For guidance on successful appeals where the deportation decision was certified under regulation 24AA, please see the section 94B certification guidance for Non-EEA deportation cases which is here .

Section 7: Change Record

Version	Author(s)	Date	Change References
1.0	LS (CPT)	28/07/2012	First draft.
2.0	LC (CPT)	20/10/2014	Added section 1: introduction;; added section 2: when not to certify; added section 5: re-entry to present appeal in person; added section 6: successful appeals; added section 7: change record.

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[1] This section applies to appeals from within the United Kingdom where a human rights claim has been made by a person who is liable f or deportation. Subsection (2) provides: "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, wold not be unlawful under section 6 of the Human Rights Act 1998…". Subsection (3) states that "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."