



# information sheet

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## IMMIGRATION ACT 2016: APPEALS

The Immigration Act 2016 will broaden the power to certify certain human rights claims with the effect that the applicant will only be able to bring an appeal from outside the UK. This is not yet in force, but will extend to a wider group of people the provisions for people facing deportation introduced under the Immigration Act 2014. Both sets of provisions are explained here.

### Immigration Act 2014: 'deport first, appeal later'

Under the Immigration Act 2014, the Government introduced a provision allowing the Home Office to certify certain human rights claims made by foreign nationals who had served a criminal sentence and face deportation. It applies to all human rights claims except those involving asylum or Articles 2 or 3 of the European Convention on Human Rights (protecting the right to life and prohibiting torture and ill-treatment). Certifying the claim in this way has the effect of requiring the appellant to bring any appeal against a refusal from outside the UK. The Home Office may only certify a claim under this provision if bringing an appeal from outside the UK would not breach the individual's rights under the European Convention on Human Rights, for example if it causes them serious and irreversible harm. The provision became known as 'deport first, appeal later' because the individual risked being deported after an initial decision by the Home Office on their claim and then having to appeal later from their country of origin.

The provision has been challenged in a case that has so far reached the Court of Appeal: *Kiarie & Byndloss v Secretary of State for the Home Department* [2015] EWCA Civ 1020 (13 October 2015). The case has so far confirmed that removal could not take place for the appeal if this would lead to a breach of human rights and that a risk of 'serious irreversible harm' was just one way that a breach of human rights could occur rather than the test itself. Home Office guidance had wrongly interpreted the law up until the case was heard.

It was argued in this case that the requirement to bring their appeal from outside the UK would breach the appellants' rights to private and family life under Article 8 of the European Convention on Human Rights. It was also argued that their rights under Article 8 could not be guaranteed because of the unfairness that would be caused by the difficulties of obtaining evidence and presenting their appeal. These arguments were unsuccessful in the Court of Appeal but permission has been granted for the case to be heard in the Supreme Court and this is scheduled to take place in February 2017.

### Immigration Act 2016: 'remove first, appeal later'

The Immigration Act 2016 will extend the provisions for certifying certain human right claims to all individuals, not just those who face deportation after serving a criminal sentence. This has been called 'remove first, appeal later' because it works in the same way as the 'deport first, appeal later' process described above but will affect people who face removal under normal

administrative processes as well as those who have served criminal offences and face deportation when this part of the Act comes into force on 01 December 2016.

As above, the Home Office will have the power to certify a human rights claim under this provision unless the claim involves issues of asylum or protection under articles 2 or 3 of the European Convention on Human Rights (protecting the right to life and prohibiting torture and ill-treatment). The types of claims affected may therefore include human rights claims made under article 8 of the European Convention on Human Rights protecting the right to private and family life, for example because the applicant has strong family ties in the UK or has built a life in the UK over a long period of time.

Certifying the claim will mean that the individual will only be able to bring an appeal against a refusal by the Home Office from outside the UK. Their claim may only be certified however if their removal for the appeal would not breach their rights under the European Convention on Human Rights. Such a breach might include a real risk of serious irreversible harm but this is not the only type of breach that must be considered.

The Home Office has stated that it will consider human rights concerns and the best interests of any children involved before making the decision to certify a claim. It must therefore consider the ability of the individual to bring and participate effectively in their appeal from their country of origin, the impact on the individual and of any separation from their family, including their children, particularly in the context of lengthy delays in hearing appeals by the Tribunal. Decisions to certify a claim under these provisions may be challenged by judicial review.

The Courts may consider the cases of people affected by the extended provisions differently from the earlier cases involving deportation when it considers whether the requirement to bring an appeal from outside the UK would breach human rights. For example, the Courts may be more likely to find that separation of an individual from their children for a long period during an appeal would breach human rights in cases where the applicant has not been separated from the family through being in prison, as may have been the case in earlier deportation cases. The Courts may also make a different assessment of whether it is proportionate to remove a person before their appeal is heard in cases where they are not required to consider the public interest in the deportation of foreign nationals who have committed serious criminal offences.

### **Other forms of certification**

There are other ways in which claims may be certified and it may be helpful to explain these to avoid confusion. As above, however, the decision to certify a claim may be challenged in the UK through bringing a judicial review.

Under other provisions, an asylum or human rights claim (again, of any kind) may be certified as 'clearly unfounded' and this also has the effect of requiring the applicant to bring any appeal from outside the UK. A claim may be certified as 'clearly unfounded' if the applicant is from a list of designated countries where the Home Office does not consider that there is a serious risk of persecution or human rights breaches for people generally or for certain classes of people in that country. The Home Office may also certify a claim as clearly unfounded if it considers there is no reason to believe that the applicant's rights will be breached if returned to the relevant country. The Home Office needs to show that any appeal that would be brought would be 'bound to fail' which is a high threshold. This is important because in cases where it is argued that an individual is at risk in the country of return it is unlikely that the ability to bring an appeal from that country will be a meaningful safeguard.

An asylum or human rights claim may also be certified if the same issues were raised or could have been raised at an earlier stage in the determination process.