



## **Deportation Appeals**

**Challenging the Home Office decision to  
deport you before you can appeal  
(Certification under EEA Regulation 33)**

**July 2017**

Bail for Immigration Detainees (BID) is a national charity that provides legal advice and representation to individuals held under immigration powers to secure their release from detention. We also provide legal advice and representation to detainees facing deportation. BID works with detainees in all removal centres in the UK, and with immigration detainees held in prison at the end of their sentence.

- We provide free legal advice, information and support to immigration detainees to help them exercise their right to liberty and access to justice, and to help them challenge their deportation.
- We prepare and present (free of charge) applications for release on bail or temporary admission.
- We carry out research and use evidence from our legal casework to influence decision-makers, including civil servants, parliamentarians, and regulatory bodies through policy advocacy.

The Article 8 Deportation Advice project (ADAP) is a project that provides free legal advice and representation to individuals challenging deportation on the grounds of their long residence in the UK and/or their family life in the UK.

The right to respect for family and private life is protected by Article 8 of the European Convention on Human Rights.

## **Disclaimer**

Although every effort is made to ensure the information in this factsheet is accurate and up to date, it should not be treated as a complete and authoritative statement of the law. BID cannot be held liable for any inaccuracies and their consequences. The information in this factsheet is not legal advice. If you have a legal problem you should talk to a lawyer or legal adviser before making a decision about what to do.

Please check that this factsheet is up to date before using it. Please also check whether BID has written other factsheets or leaflets that might be relevant to you. All BID factsheets and leaflets can be found at [www.biduk.org](http://www.biduk.org)

## The Purpose of this Leaflet and Model Letter

The recent Supreme Court case of **Kiarie & Byndloss v SSHD [2017] UKSC 42** has found that the system of certification of appeals under s.94B is unlawful. Up until this case the certificate has allowed the Home Office to remove people from the UK before they can appeal. It has also been used to prevent people from returning to the UK for the purpose of giving evidence.

Although the Supreme Court was considering the system of certification under s.94B for non-EEA nationals, it also has important consequences for EEA nationals (whose cases may be certified under Regulation 33 of the EEA Regulations 2016).

This leaflet explains what the Supreme Court judgment means for you if your case has been certified under EEA Regulation 33 and how you can challenge the certification.

**Note: Before 01 February 2017, certification of EEA cases, allowing removal before the appeal was finally decided, was made under Regulation 24. Your Decision to Deport may therefore state that your case has been certified under Regulation 24 if the decision was made before 01 February 2017. This advice will still apply to you. It is only the Regulation number that has changed.**

### Q. What is certification under Regulation 33 of the EEA Regulations 2016?

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**A.** The Home Office can 'certify' the decision to deport an EEA national. If a case is certified, it means that a person can lodge the appeal in the UK but can be removed from the UK before the appeal has been finally decided by the Immigration and Asylum Chamber.

However, the Home Office can only lawfully certify a case if removal from the UK during the appeal period would not be in breach of the Human Rights Act 1998.

### Q. How will I know whether my case has been certified under Regulation 33?

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**A.** The Home Office letter headed 'Decision to Make a Deportation Order', which is the letter in which the Home Office gives full reasons for deciding to deport you and is usually served with a Deportation Order, will state whether the decision is certified. You will find this towards the end of the Home Office letter.

## Q. What does the Supreme Court case of Kiarie & Byndloss mean for people whose cases have been certified under Regulation 33?

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**A.** The courts had already found that certain factors must be carefully considered by the Home Office before deciding to certify a case under Regulation 33. This includes consideration of the length of a person's residency in the UK while exercising Treaty Rights (e.g. working); the strength of family ties in the UK compared to ties in the home country; and what if any risk of reoffending they may present.

However, the Supreme Court in Kiarie & Byndloss identified some specific ways in which removal of an individual from the UK before the appeal hearing made preparation of the appeal much more difficult. This was because of the obstacles to gathering the evidence from abroad that is needed for the appeal to have any real chance of success. In particular, the Court noted that removal from the UK before an appeal is heard makes it very difficult to:

- Gather the necessary evidence of length of residence in the UK and of integration into British society;
- Gather the necessary evidence of the strength of family life in the UK. In particular, it would not be possible to obtain expert reports such as an Independent Social Work report to comment on the relationship between the individual and their children because the expert would need to be able to observe them with the children;
- Obtain expert evidence on the risk of reoffending, such as a Forensic Psychologist report. This is because the individual would need to be present in the UK for the assessment by the expert to take place for the report to have any real weight as evidence.

## Q. How can people whose cases have been certified under Regulation 33 use the case of Kiarie & Byndloss to get the Home Office to cancel the certificate?

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**A.** People facing deportation whose decisions have been certified under regulation 33 should write to the Home Office urgently to request that the certificate is withdrawn and any removal directions are cancelled immediately.

A **model letter** is at the end of this Factsheet. The letter can be sent directly to the Home Office section that is dealing with your case. You will find the contact details on the Notice of Decision to Deport letter. You need to add your personal details to the letter.

It is best to fax it if you can so that you can keep the evidence of the fax transmission. If you do not have access to a fax, you should post it by Recorded Delivery. It is important that you keep the evidence of postage.

## Q. What if I already have Removal Directions arising from certification of my case under Regulation 33?

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**A.** The model letter requests that the Home Office cancels removal directions immediately upon receipt of the letter and provides you with written confirmation that this has been done.

## Q. What happens if the Home Office does not reply to my letter or does not cancel the Regulation 33 certificate or the Removal Directions?

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**A.** If this happens you will need to obtain legal advice from a solicitor on whether you can take judicial review legal action against the Home Office. If you are in an Immigration Removal Centre, you should book an appointment with the detention duty adviser (DDA). If you are in prison, you could ask a family member or a friend to contact a lawyer on your behalf.

## Q. If the certificate is cancelled, what does this mean for the appeal?

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**A.** It means that you will be able to stay in the UK to prepare your appeal and attend the hearing to give evidence. You will be able to remain until your appeal is finally decided by the Immigration and Asylum Chamber. If it is finally decided in your favour, the Deportation Order will not be enforced and you will be able to stay in the UK.

## Q. If my certificate is cancelled and I am being held in Immigration Detention, can I apply for release?

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**A.** Yes, you should apply for release. This is because you can only be detained under immigration powers if your removal from the UK is imminent. If you are waiting for an appeal to be heard while you are in the UK this will take some time to be finally decided and so your removal from the UK cannot be said to be imminent.

## Q. If I am unsuccessful in my challenge to removal under Regulation 33 can I apply to return to the UK to attend my hearing?

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**A.** You have the right under Regulation 41 of the EEA regulations to apply to the Home Office to return to the UK to attend your appeal hearing. The EEA regulations state that permission should be granted by the Home Office except where return 'may cause serious troubles to public policy or public security'.

Before the judgement in *Kiarie & Byndloss*, the Home Office would often refuse permission to re-enter on the grounds that oral evidence was not needed for the appeal to be fair. It also argued that, if evidence was needed, that it could be given by video link such as Skype.

However, the Supreme Court found that the person who is appealing should be able to give evidence at their appeal. It found that:

- Evidence in person is more valuable to the court than evidence by video link;
- A video link may not be generally available and may be very difficult to arrange.
- Denial of entry could therefore be challenged through the legal process of judicial review on the grounds that this would prevent a person from having a fair hearing.

# Model Letter

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Home Office

*[Insert the address of the Home Office dealing with your case]*

**Date:**

**My Name:**

**My Address:**

**My Home Office Reference Number:**

Dear Sir/Madam,

**URGENT**

**Re: Request to cancel certificate under Regulation 33 EEA Regulations 2016 following the Supreme Court case of Kiarie & Byndloss v SSHD [2017] UKSC 42**

The Notice of Decision to deport me dated [.....] certified my case under Regulation 33. This means that I can be removed from the UK before my appeal has been finally determined.

The recent Supreme Court case of **Kiarie & Byndloss v SSHD [2017] UKSC 42** has found that the system of certification under Regulation 94B does not provide for an effective right of appeal and breaches the Human Rights Act 1998. One of the reasons for that was the difficulty of preparing the appeal from abroad.

*If I am removed before my appeal, I will not be able to effectively prepare my appeal from abroad because I will not be able to:*

- *Gather the necessary evidence of my length of residence in the UK and of my integration into British society;*
- *Gather the necessary evidence of the strength of my family life in the UK. In particular, I will not be able to obtain expert reports as may be required such as an Independent Social Work report to comment on my relationship with my children because the expert would need to be able to observe me with my children;*
- *Obtain expert evidence on my risk of reoffending, such as a Forensic Psychologist report. This is because I would need to be present in the UK for the assessment by the expert to take place.*

*I need to be present in the UK to give oral evidence at my appeal hearing. This is because I need to be able to answer points taken against me by the Home Office through cross-examination;*

- I do not have access to video link facilities abroad to give evidence from abroad;*
- In any case, giving evidence by video link would be unfair as it would be too difficult for me to try to follow the hearing process from abroad on a small screen. I need to be able to follow references in the process to pages in the Home Office Appeal Bundle. I also need to be able to properly see and hear the Home Office representative, the Immigration Judge and all participants at my hearing so as to follow my appeal and to be able to give my evidence in a fair and effective manner.*

It is therefore *unlawful to maintain the certificate* in my case. I request that you immediately cancel the certificate and allow me to remain in the UK until my appeal is finally decided by the Immigration and Asylum Chamber.

I also request that any removal directions issued to remove me under Regulation 33 be cancelled immediately.

If there are no outstanding Removal Directions in my case, please provide me with a written reply within 7 working days of the date of this letter confirming that the certificate has been withdrawn.

If I do not receive written confirmation within 7 working days that the certificate in my case has been withdrawn, I will have no alternative but to seek legal advice and permission to apply for judicial review of your failure to withdraw the certificate.

If there are Removal Directions outstanding arising from certification under Regulation 33 please provide me with confirmation that they have been cancelled immediately upon receipt of this letter and please confirm that I can remain in the UK until my appeal is finally determined by the Immigration and Asylum Chamber.

As the certificate under Regulation 33 should be cancelled so that I can remain in the UK while I appeal against the decision to deport me, my removal can no longer be said to be imminent. I therefore also request that you immediately release me from immigration detention.

Signed: .....

Dated: .....

## How to contact BID

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**By post:**

Freepost RTSU-ZJCB-XCSX

Bail for Immigration Detainees (BID)

1b Finsbury Park Road

London

N4 2LA

**Fax:** 020 3745 5226

**General enquiries:** [enquiries@biduk.org](mailto:enquiries@biduk.org)

**Casework enquiries:** [casework@biduk.org](mailto:casework@biduk.org)

Advice Line: 020 7456 9750  
(Mon-Thurs, 10am - 12 midday)

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Detainees

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