



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00023/2015

THE IMMIGRATION ACTS

Heard at: Field House
On: 23 May 2018

Decision Promulgated
On: 29 May 2018

Before

LORD UIST (SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEBEDE

Between

PB
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Counsel
For the Respondent: Mr C Thomann, Counsel

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 18 September 1966. He has been given permission to appeal against the decision of First-tier Tribunal Judge Traynor dismissing his appeal, from outside the UK, against the respondent's decision to deport him and to refuse his human rights claim and certify the claim under section 94B of the Nationality, Immigration and Asylum Act 2002.

2. The appellant entered the UK on 25 March 2003 using a false British passport in a different name to his own and claimed asylum the same day in another identity as a Liberian national. His asylum claim was refused on 7 May 2003 and his appeal against that decision dismissed on 16 February 2004. On 13 November 2013 he made an application in his current identity for leave to remain on the basis of his relationship with his partner EK, a Gambian national settled in the UK, and their two British children, J and D, born on 12 May 2005 and 22 February 2007 respectively.
3. On 29 May 2014 the appellant was convicted of five counts committed between 2003 and 2008 involving offences of dishonesty, use of false identity documents and making false representations and he was sentenced that day to a total of 24 months' imprisonment. On 21 July 2014 he was served with a notice informing him of his liability to deportation and he made written representations in response which were then considered as a human rights claim. In those representations he referred to a third identity he had used. He also gave details again of his partner EK and their two children.
4. On 19 January 2015 the appellant's application for leave to remain on family and private life grounds was refused on the basis that he failed to meet the suitability requirements in S-LTR.1.5 of Appendix FM of the immigration rules as he was a persistent offender with convictions for five offences, that he did not meet the relevant eligibility criteria as a partner or parent, that he did not meet the criteria in paragraph 276ADE(1) on the basis of his private life and that there were no compelling circumstances justifying a grant of leave outside the immigration rules.
5. On 5 February 2015 a decision was made to deport the appellant and to refuse and certify his human rights claim under section 94B of the 2002 Act. A deportation order was signed against him the same day under section 32(5) of the UK Borders Act 2007.
6. In the decision refusing his human rights claim the respondent accepted that the appellant had a genuine and subsisting relationship with his partner who was settled in the UK and with their two British children, but considered that it would not be unduly harsh for them to live in Nigeria or for them to remain in the UK whilst he was deported. The respondent considered that the appellant could not, therefore, meet the requirements of the exceptions in paragraph 399(a) and (b) of the immigration rules. With regard to paragraph 399A the respondent considered that the appellant had not been lawfully in the UK for most of his life, that he was not socially and culturally integrated in the UK and that there were no very significant obstacles to his integration into Nigeria. Accordingly he could not meet the private life exceptions to deportation. The respondent concluded that there were no very compelling circumstances outweighing the public interest in his deportation and that his deportation would not, therefore, be in breach of Article 8. The respondent went on to certify the appellant's human rights claim under section 94B of the 2002 Act on the basis that there was no risk of serious irreversible harm if he was removed pending the outcome of any appeal and that his removal pending an appeal would not be unlawful under section 6 of the Human Rights Act 1998.

7. The appellant was duly deported from the UK on 24 March 2015. On 1 April 2015 he lodged a Notice of Appeal against the refusal of his human rights claim. In August 2015 he married his partner EK in Nigeria.

8. Following a case management review, directions were issued by the First-tier Tribunal on 18 April 2016 for the conduct of the appeal, including directions for the appellant to advise the Tribunal of any arrangements made for giving evidence through Skype link. The directions made it clear that the equipment and Skype link had to be paid for by the appellant and that if the Tribunal Judge considered the internet link to be unreliable or the arrangements inadequate, the hearing would continue in the appellant's absence.

9. The appellant's appeal came before the First-tier Tribunal on 3 August 2016. There was no appearance by the appellant through Skype link or otherwise, owing, it is said, to difficulties experienced by him in making the appropriate arrangements. The appellant's wife attended the hearing in person and gave oral evidence. The appellant was represented by Ms Record of Counsel who provided the Tribunal with two bundles of documents including his witness statement, school reports for his two children and an expert report from an independent social worker, Mr Peter Horrocks. The judge concluded that the appellant's deportation had not resulted in an unduly harsh outcome for his wife and children and that there were no exceptional circumstances in his case. He found that the appellant's deportation was proportionate and in the public interest and he dismissed the appeal on all grounds.

10. Permission to appeal to the Upper Tribunal was sought by the appellant, initially on the sole ground that the judge had erred in his proportionality assessment, but then in a renewed application to the Upper Tribunal on the additional ground that the assessment of the appellant's evidence was affected by his being compelled to appeal from abroad and that the ratio in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 accordingly applied.

11. Permission was granted on 3 August 2017 by Upper Tribunal Judge Kekic.

12. The appellant's appeal initially came before a Presidential panel on 21 September 2017 but was adjourned for several reasons including the awaited judgment of the Court of Appeal in Ahsan v The Secretary of State for the Home Department [2017] EWCA Civ 2009 and the proposed linking of the appellant's case with ACJ (HU/03027/2015). ACJ was in fact then heard separately by a different Presidential panel, resulting in the reported decision of AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115. The appellant's appeal was re-listed for 23 May 2018.

13. The Notice of Hearing for the appeal was sent out on 21 March 2018 and on 16 April 2018 the appellant, through his legal representative Ms Record, made a written request to the respondent to be permitted to return to the UK for the appeal hearing. The respondent declined the request in a letter dated 22 May 2018.

Appeal Hearing

14. At the hearing before us, both representatives made submissions, relying upon their skeleton arguments.

15. Ms Record expanded upon the two grounds of appeal. With regard to the first ground, concerning the application of Kiarie and the effectiveness of an out of country appeal, she relied upon the President's decision in AJ which she submitted involved the same circumstances as the appellant's case. She submitted that the First-tier Tribunal had erred in law by failing to consider whether the appellant should be granted a facility to enable him to be heard in person. As the appellant's case involved proportionality under Article 8(2) oral evidence was necessary, whether in person or by video link, albeit that the latter would not achieve the best evidence. With regard to the second ground of appeal, Ms Record submitted that the First-tier Tribunal Judge had failed to address all issues relevant to proportionality. There had been no consideration of the offences committed by the appellant and no consideration of his expressions of remorse and the judge had failed to consider how the appellant's deportation had impacted upon his family. The judge had failed to consider factors such as the substantial length of time since the last offence was committed, in 2008. The judge's decision ought therefore to be set aside and the case remitted to the First-tier Tribunal to consider how oral evidence would be given.

16. Mr Thomann submitted that, contrary to Ms Record's assertion, the appellant's offences had not been committed a long time ago as it was only in 2013 that the deceit was discovered when he admitted his true identity in his application for leave to remain. There was therefore an extensive deception over a number of years and whilst the last of the charges was in 2008, the deception was maintained until 2013. The First-tier Tribunal Judge had considered all relevant matters. The key issue was the best interests of the children and the effect on them of the appellant's deportation and relevant evidence had been produced in that respect through the appellant's wife's evidence and the report of the social worker. None of the issues could have been materially affected by the appellant's inability to give live evidence. Mr Thomann relied on [33] and [34] of AJ and submitted that the exception mentioned at [51], where live evidence was not required, applied to this case, given that the Tribunal accepted all the evidence and there were no credibility issues. As for the second ground, the Tribunal reached a lawful conclusion in regard to the question of whether deportation was unduly harsh on the appellant's children and wife.

17. Ms Record, in response, reiterated the points previously made, submitting again that the appellant's case fell squarely within AJ.

Consideration and findings

18. The starting point in cases involving section 94B certification is Kiarie & Byndloss, where the Supreme Court found that the certification of the appellants' claims was unlawful given the Secretary of State's failure to consider the practical problems involved in such cases in preparing and presenting the case from abroad, as expressed at [105]:

“Her problem is that there is no real evidence of consideration of the practical problems involved in cases such as these in preparing and presenting a case from abroad. I am far from saying that those problems cannot be overcome. However, the evidence before us does not show that the Secretary of State had the material necessary to satisfy herself, before certification, that the procedural rights of these appellants under article 8 would be protected. On that limited basis I would allow the appeal.”

19. In the case of Nixon & Anor, R (On the Application Of) v Secretary of State for the Home Department [2018] EWCA Civ 3, the Court of Appeal considered Kiarie & Byndloss as well as earlier caselaw in relation to the effectiveness of, and difficulties involved in conducting, an appeal from abroad and set out the following propositions at [75]:

“i) Where the Secretary of State rejects a human rights claim of a proposed deportee, an out-of-country appeal will not always be ineffective in protecting the human rights involved. Whether it will be effective will depend upon the facts and circumstances of the particular case.

ii) Where the Secretary of State precludes an in-country appeal, by (e.g.) certifying a human rights claim under section 94B, that is not necessarily unlawful; but it is sufficient to establish a potential interference with the proposed deportee's article 8 rights, such that a burden is imposed on the Secretary of State to establish that that interference is justified and proportionate, and that removal from the UK without waiting for an appeal to run its course strikes a fair balance between the adverse effect of deportation at that stage on relevant rights under article 8 and the public interest. In particular, the Secretary of State will need to show that an out-of-country appeal will be effective to protect the article 8 rights in play.

iii) Where an individual is deported on the basis of an unlawful certificate, the court has a discretion as to whether to make a mandatory order against the Secretary of State to return him to the UK so that he can (amongst other things) conduct his appeal in-country. That discretion is wide, and there is no presumption in favour of return, even where certification is unlawful. The exercise of the discretion will be fact-sensitive. However, when assessing whether it is just and appropriate to make a mandatory order for return of a deportee, the fact that that person has been unlawfully deprived of an in-country appeal to which he is entitled under statute is the starting point and a factor telling strongly in favour of ordering his return.

iv) It will be a highly material consideration if the deportation was lawful or apparently lawful, in the sense that, even if a human rights claim that a deportation order should not be made or maintained has been unlawfully certified, the individual was deported on the basis of a deportation order that was not bad on its face and was not, at the relevant time, the subject of any appeal; and/or an application for a stay on removal had been refused or the court had directed that any further proceedings should not act as a bar to removal. On the other hand, it will also be material if the individual has been removed in the face of a stay on removal, or even if there is an active relevant appeal or judicial review in which the issue of a stay on removal has not been tested.

v) The extent to which the individual's appeal will be adversely affected if he is not returned to the UK will also be highly relevant. It will be adversely affected if it is assessed that, if he is restricted to bringing or maintaining an out-of-country appeal, that will be

inadequate to protect the article 8 rights of the individual and his relevant family members. The continuing absence of the individual from the UK may adversely affect his ability to present his appeal properly in a variety of ways, for example he may be unable properly to instruct legal representatives; he may be unable to obtain effective professional expert evidence; he may be unable to give evidence, either effectively or at all. If the court assesses that, even if the exercise would be more difficult than pursuing his appeal in the UK, the deportee could effectively pursue his appeal from abroad, that is likely to be finding of great weight and will often be determinative in favour of exercising the court's discretion not to make a mandatory order for return. On the other hand, if the court assesses that he could not effectively pursue an appeal from abroad, then that may well be determinative in favour of exercising that discretion in favour of making a mandatory order for return.

vi) In addition to these procedural matters, the deportee's continuing absence from the UK may be a breach of article 8 in the sense that he is deprived from being with his family, and they from being with him, pending the outcome of the appeal. Generally, such a breach will not be irreparable. However, in addition to that being a potential substantive breach of article 8, it may result in his article 8 claim in the deportation case being undermined on a continuing basis, which may be a factor of some importance. These matters too may be relevant to the assessment of whether to make a mandatory order for the deportee's return.

vii) There is a public interest in deporting foreign criminals – and in not returning foreign criminals who have been deported – although that may be a point of little weight where the relevant individual would have had the right to remain in the UK during the course of his appeal but for an (unlawful) certificate. There is also a public interest in public money not being expended on arranging for returning a deportee to this country to conduct an appeal which could adequately and fairly be conducted from abroad.”

20. Clearly, therefore, the Court of Appeal considered that an out of country appeal was not necessarily and inevitably ineffective in protecting an individual's Article 8 rights and that there had to be consideration of the particular circumstances in each case. In the case of AJ, the President extracted from the decision in Kiarie & Byndloss a step-by-step approach consistent with that set out at [75(v)] of Nixon, to determining whether an appeal could be properly decided without the appellant being physically present in the UK, as set out in the headnote:

“(2) The First-tier Tribunal should address the following questions:

- 1. Has the appellant's removal pursuant to a section 94B certificate deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?*
- 2. If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?*
- 3. If not, is it necessary to hear live evidence from the appellant?*
- 4. If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?”*

21. It was accepted by Ms Record that the appellant had had full access to legal representation and had been able to obtain supporting expert professional evidence, so that it was only the third question which was relevant in this case. In addressing that question in AJ, the President said as follows:

“The third question is whether, in all the circumstances, hearing live evidence from the appellant is necessary. As we have observed, the effect of Lord Wilson’s judgment is that in many if not most cases a fair hearing cannot take place unless the appellant is heard in person. The First-tier Tribunal will need to consider whether there are any disputed findings of fact. If there are not, then live evidence may not be necessary. Lord Wilson’s judgment, however, makes it clear that, even if hard-edged facts are not in dispute, a judicial fact-finder in this area may nevertheless be properly swayed by seeing and hearing the appellant. **For this reason, we consider that, in section 94B cases, the need for live evidence is likely to be present. A possible exception might be where the respondent’s stance is that, even if the appellant’s case is taken at its highest, so far as family relationships, remorse and risk of re-offending are concerned, the public interest is still such as to make the appellant’s deportation a proportionate interference with the Article 8 rights of all concerned.** It is, perhaps, more difficult to see how the respondent could adopt such a stance where the appellant is not a foreign criminal, unless his immigration history is particularly problematic.”

22. It was Mr Thomann’s submission that the appellant’s case fell within the exception highlighted above. We agree with that submission. As Mr Thomann said, it is necessary to take account of the fact that the appellant made a request to give oral evidence before the Tribunal, as reflected in the directions of the First-tier Tribunal of 18 April 2016 following the case management review. Nevertheless, the relevant question is whether his appeal can be said to have been fully effective and procedurally fair despite his inability to do so. We find that it was and can find nothing further that the appellant could realistically and reasonably have added to the evidence before the Tribunal by way of oral testimony.

23. Contrary to the observation in the grant of permission, there were no credibility issues in this case and the findings of fact are uncontroversial. Unlike the circumstances of the appellant in AJ, where the key matter at issue was said at [64] to be the appellant’s own position in Nigeria, the main issue in this appellant’s appeal was the interests of his children and the impact of his deportation upon them and upon his wife. In relation to that issue, the judge had before him a detailed witness statement from the appellant which he considered at [14] to [23]. The judge also had the benefit of direct, oral evidence from the appellant’s wife together with a report from an independent social worker, Mr Horrocks, who had attended the children’s school and had also spoken directly with the appellant in preparing his report, as confirmed at [23] and [30] of his decision, as well as reports from the school. Clearly the appellant’s wife was best placed to explain the children’s circumstances in particular as the appellant had not lived with them for over two years, having been in immigration detention and then deported after completing his criminal sentence. The judge had full regard to her evidence and to that of Mr Horrocks. He noted that the youngest child D had been referred to the Child, Adolescent and Mental Health Services and had received therapy for three months which was successful, but that there was no statement from those services in regard to any treatment and that the

evidence otherwise was that the boys were doing well and had overcome any difficulties. In light of the detailed and direct evidence available to the judge from the family members affected by the appellant's deportation, we fail to see what the appellant could have contributed further by way of oral evidence.

24. We find the same to be true of the other matters referred to by Ms Record. It was her submission that oral evidence was required from the appellant to address other issues involved in a proportionality assessment such as the questions of reasonableness, remorse and likelihood of re-offending. However, as we said above, none of these matters were or are controversial and the judge noted the appellant's evidence in his statement in that regard. At [21] the judge had regard to the appellant's expression of remorse, and the risk of re-offending was not an issue before the Tribunal in any event.

25. Clearly the appellant's case was taken at its highest in all respects, with the judge accepting that the appellant was a loving and caring father who continued to play an influential role in the children's lives. There was therefore nothing that the appellant could have added by way of oral evidence. Accordingly the question of his absence from the UK and his inability to attend the hearing or to give evidence by way of video-link is immaterial and so too is the fact that the First-tier Tribunal Judge did not himself consider the matter. We can find no basis whatsoever for concluding that the appellant was deprived of a fully effective and fair hearing or that he was materially prejudiced in any way owing to his inability to give oral evidence. We therefore reject this ground of appeal.

26. Likewise we find no merit in the second ground of appeal. Contrary to the assertion in the grounds of appeal and Ms Record's submissions the judge plainly undertook a full and thorough assessment of all relevant matters when considering proportionality under Article 8(2) and very compelling circumstances under paragraph 398 of the immigration rules. The judge had full regard to the public interest considerations in section 117B of the NIAA 2002 as well as to the exceptions and additional considerations in section 117C. He gave detailed consideration to the best interests of the children and, as we have stated above, to the impact of their separation from their father and to the evidence of the independent social worker, the children's schools and their mother in that regard, providing cogent reasons for concluding that it would not be unduly harsh for them and their mother to join the appellant in Nigeria or relocate to Gambia or to remain in the UK and continue being separated from him. The judge had regard, at [62], to Ms Record's submissions as to the circumstances leading to the appellant's arrest and his reasons for having committed the criminal offences in the first place, namely to support his family. It was Ms Record's submission before us that the judge failed to have regard to the fact that the appellant's last offence was as far back as 2008. However we are in agreement with Mr Thomann that what is relevant is that the offence consisted of an extended period of deceit which was only discovered in 2013 when he applied for leave to remain and plainly that was a matter which the judge considered at [89]. The judge took account of the seriousness of the offence and also had regard to the appellant's expression of remorse and clearly weighed up all these matters when considering proportionality. Having given full consideration to all relevant matters the judge provided cogent reasons for concluding that

the public interest required the appellant's deportation. That was a conclusion he was fully entitled to reach on the evidence before him and for the reasons properly given.


27. For all of these reasons we find no merit in the grounds of appeal. The appellant had the benefit of a fully effective and fair hearing with all matters properly considered by the judge. The judge's findings and conclusions took account of all the evidence, were supported by cogent reasoning and were entirely open to him on the evidence before him. Accordingly we find no errors of law in the judge's decision and uphold the decision.

DECISION

28. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision. The decision to dismiss the appeal stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014. We continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed 
Upper Tribunal Judge Kebede

Dated: 25 May 2018