



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04846/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 May 2018
Dictated: 18 June 2018

Decision & Reasons Promulgated
On 16 July 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

ROBERT SOLOMON DAVID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood, Instructed by McKenzie, Beute & Pope
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Grenada, born in 1985. He arrived in the United Kingdom on 14 January 1988 as his mother's dependant. He was, it appears, granted indefinite leave to enter at that time.

2. The appellant has a history of criminal offending, his first conviction being in October 2007 for grievous bodily harm, for which he was sentenced to an 18-month community order. In March 2009 the appellant was convicted of battery and given a fine. A further conviction followed in March 2012 for using threatening behaviour, for which the appellant was again given a fine.
3. The conviction which led to the appellant being in his current predicament was for grievous bodily harm at Cambridge Crown Court on 28 June 2013. He was sentenced to five years in imprisonment as a consequence.
4. On 23 December 2014, the Secretary of State for the Home Department (“SSHHD”) made a decision to deport the appellant, at the same refusing a human rights claim made in response to an invitation from the SSHHD to provide reasons why the appellant should not be deported. The claim was certified pursuant to Section 94B of the Nationality, Immigration and Asylum Act 2002, the consequence of such certification being that the appellant was not entitled to bring an appeal against the decision refusing his human rights claim until after his departure from the United Kingdom.
5. The appellant nevertheless attempted to bring an appeal whilst in the UK, but this was dismissed for want of jurisdiction by First-tier Tribunal Judge Shanahan in a decision of 16 February 2015.
6. The appellant was subsequently deported on 25 January 2016 after the SSHHD had considered, and rejected, his further representations and after Upper Tribunal Judge Allen had refused to stay his removal in the context of an application for judicial review brought against the aforementioned rejection.
7. Once in Grenada the appellant lodged an appeal with the First-tier Tribunal (“FtT”). He has remained in Grenada throughout the course of these proceedings.

First-tier Tribunal’s Decision

8. The appellant’s appeal came before FtT Judge Nicholls on 9 December 2016 and was dismissed in a decision sent to the parties on 16 January 2017. A substantial number of witnesses gave oral and written evidence on the appellant’s behalf but the appellant himself did not give oral evidence, but relied only on written evidence produced with the assistance of his legal representatives.
9. In its decision, the First-tier Tribunal (“FtT”) carefully summarises the evidence before him [paragraphs 6 -23], and thereafter provides detailed reasons for dismissing the appellant’s appeal [paragraphs 26 - 42]
10. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Craig on 20 September 2017 in the following succinct terms:

“In light of the decision of the Supreme Court in *Kiarie and Byndloss v SSHD* [2017] UKSC 42, this appeal is arguable.”
11. Thus, the matter comes before me.

Legal Background

12. The instant appeal before the Upper Tribunal must be put in the proper context of the developing case law regarding the ambit of the procedural protection afforded to

litigants by Article 8 ECHR in scenarios such as the instant one, in which an appellant in an appeal before the Tribunal is located outside of the United Kingdom during the appeal process

13. At the cornerstone of this developing case law is the decision of the Supreme Court in Kiarie v SSHD; R (Byndloss) v SSHD [2017] UKSC 42; [2017] 1 WLR 2380 ("Kiarie and Byndloss"). In the Kiarie and Byndloss litigation the senior courts gave detailed consideration to the approach to be taken to an assessment of the lawfulness of a section 94B certificate.
14. Both Mr Kiarie and Mr Byndloss were foreign offenders against whom the SSHD had made deportation orders, rejected human rights claims and certified those human rights claims pursuant to section 94B of the 2002 Act. The Court of Appeal concluded that, in common with her general practice at the relevant time, the SSHD had misdirected herself when considering whether to certify the human rights claims, focus being incorrectly placed on the question of whether the applicants would, before the exhaustion of the appeals process, face a real risk of serious irreversible harm if removed. It is now settled that the SSHD ought to have asked herself whether the applicant's removal would be unlawful under section 6 of the Human Rights Act. Despite accepting that the SSHD had misdirected herself in law, the Court of Appeal dismissed the substantive appeals having found, in both cases, that the error was immaterial on the basis that had the SSHD considered the correct question she would inevitably have concluded that the applicants' removal pending the outcome of their appeals would not breach either the substantive or the procedural aspects of rights afforded by Article 8.
15. In the Supreme Court emphasis was placed on the procedural rights protected by Article 8 and, in particular, the question of whether there was an Article 8 compliant system in place for out-of-country appeals. The Court found that the considerable practical difficulties that faced an out-of-country appellant meant that the burden fell on the SSHD to establish in each case that such an appeal would be effective and fair and, therefore, met the procedural requirements of Article 8. The Court held that the SSHD had not established this was the position in either of the cases before it.
16. Lord Wilson, with whom Baroness Hale, Lord Hodge and Lord Toulson agreed, gave the leading judgment. In paragraph 35 thereof, Lord Wilson identified the public interest in removing a foreign criminal in advance of an appeal as being the risk that, if permitted to remain pending his appeal, the foreign criminal might take that opportunity to reoffend. It was further stated, however, that such public interest "*may be outweighed by a wider public interest which runs the other way*" e.g. "*the public interest that, when we are afforded a right of appeal, our appeal should be effective*".

Summary of Grounds

17. The appellant's grounds to the Upper Tribunal can be summarised in the following terms:
 - (i) Following the decision in Kiarie & Byndloss, the appeal before the FtT breached the appellant's procedural rights as safeguarded by Article 8

and/or was procedurally unfair as a consequence of the appellant's inability to give oral evidence before the FtT;

- (ii) The FtT's consideration of whether there are very significant obstacles to the appellant's integration into life in Grenada was unlawfully inadequate and failed to comply with the ratio of the decision in SSHHD v Kamara [2016] EWCA Civ 813 (at [14]);
- (iii) The FtT erred in failing to take lawful cognisance of the fact that the appellant had been eligible to apply for British Citizenship, but had not done so in circumstances in which had he applied he would likely have been granted.

Discussion

18. I turn first to the ground underpinned by the rationale in Kiarie and Byndloss. It is not in dispute that an appeal to the FtT against a decision to refuse a human rights claim, which has been legislated for by Parliament, must be "effective". Neither Article 8 nor the common law doctrine of procedural fairness requires access to the best possible procedure on the appeal, but access to a procedure that meets the essential requirements of effectiveness and fairness. What is effective and fair must always be viewed in context, and will depend upon the facts and circumstances of a particular case.
19. In paragraphs 60 to 74 of his judgment in Kiarie and Byndloss, Lord Wilson identifies a number of fact sensitive features of an applicant's claim that require addressing when consideration is being given to the issue of whether an out-of-country appeal against the refusal of a human rights claim is compatible with the procedural requirements of Article 8. I gratefully adopt the following synthesis of that consideration, set out by the Upper Tribunal (President and Upper Tribunal Judge Hanson) in its recent decision of AJ (s94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC)

"First question

The first question, addressed at paragraph 60 of the judgment, is whether the appellant will be able to secure legal representation, which might have been available had the appellant remained in the United Kingdom, and whether the appellant will be able to give instructions to his lawyer and receive advice from the lawyer, both prior to the hearing and during it.

Second question

The second question, addressed at paragraph 74 of the judgment, is whether the appellant's absence from the United Kingdom, as a result of deportation or other removal pursuant to the section 94B certificate, is likely to present "difficulties in obtaining the supporting professional evidence which ... can prove crucial in achieving its success". One example given was the likelihood of submitting evidence from a criminal appellant's probation officer; "but, upon his deportation, his probation officer will have closed his file and will apparently regard himself as no longer obliged to write a report about him". Another potential problem would be where the appellant wished "to submit evidence from a consultant forensic psychiatrist about [the level of risk]" posed by the appellant. In cases concerning relationships with a child, partner or other

family member in the United Kingdom, an appellant “will not uncommonly adduce ... a report by an independent social worker ... but a report compiled in the absence of a social worker’s direct observation of the appellant and the family together is likely to be of negligible value”.

Third question

The third question concerns the need for oral evidence from the appellant. Although in his judgment Lord Wilson dealt with this issue before turning to the two questions set out above, it seems to us that in many if not most cases the First-tier Tribunal should address those two questions first. This is because judicial time and effort spent on determining the need for live evidence and the likely availability and adequacy of a video link will be wasted if the answer to one or both of the first two questions means that the appellant needs in any event to be in the United Kingdom in order for there to be a procedurally fair hearing of his appeal.

Paragraph 61 of Lord Wilson’s judgment highlights the issues regarding live evidence. It is in our view significant that Lord Wilson did not say that every appellant who is abroad as a result of removal pursuant to section 94B must be given the opportunity to give live evidence. In this regard, it needs to be remembered that entry clearance appeals have been a feature of the immigration jurisdiction since the appellate system was created and it has not hitherto been considered that such appeals have, since the coming into force of the Human Rights Act 1998 in 2000, been procedurally unfair because the appellant is unable to give live evidence.

Be that as it may, it is clear that the Supreme Court in Kiarie and Byndloss clearly considered section 94B cases give rise to the need to assess with care whether oral evidence from the appellant is required. The Court’s expectation was that, in most cases, the appellant’s oral evidence would be necessary. Nevertheless, the question remains case-specific and will be for the First-tier Tribunal to decide.

Fourth question

The fourth and final question will be whether, if there is a need to hear live evidence from the appellant, doing so by video-link will be satisfactory: see paragraphs 66 to 73 of the judgments. Lord Wilson was sceptical that such a link would be functionally adequate. His observations on that matter are, however, manifestly not findings of law or irrefutable findings of fact. On the contrary, at paragraph 102, Lord Carnwath could “see no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary facilities and resources are available”. Furthermore, as others have observed, hearing evidence by video-link is a growing feature of United Kingdom legal proceedings. “

20. In AJ the appellant had arrived in the United Kingdom aged two and in his adulthood, had been convicted of a serious offence which had led to an 18-month sentence of imprisonment. AJ was the subject of a decision to deport him from the United Kingdom and a further decision to refuse his human rights claim. That claim, as in the instant case, was certified pursuant to Section 94B of the 2002 Act. The certification had been challenged by way of judicial review but those proceedings were dismissed. AJ was eventually deported. Thereafter he appealed to the FtT. AJ did not give oral evidence at that appeal.

21. All of the material events in AJ, as in the instant case, took place before the Supreme Court's decision in Kiarie & Byndloss. AJ appealed to the Upper Tribunal. The Tribunal found there to be no issues in relation to the first and second Kiarie and Byndloss questions; however, of the third and fourth questions the Upper Tribunal said as follows:

"The third and fourth questions

61. The issue, accordingly, comes down to the third and fourth questions: whether, in the light of Kiarie and Byndloss, the judge acted fairly in proceeding with the hearing, without examining the need for the appellant to give live evidence and, if so, whether there was the possibility of the appellant being able to give such evidence by video-link from Nigeria.
 62. It is, of course, no criticism of the judge that he was unable to address these questions by reference to the judgments in Kiarie and Byndloss, which had not been delivered. We do, however, agree with Miss Cohen that Kiarie and Byndloss, properly interpreted, compelled the judge to address the matters we have set out above.
 63. For the reasons we have given, no material error was committed by the judge in respect of the questions relating to legal representations/instructions and obtaining supporting professional evidence. Even if he had specifically addressed the first two questions, he would not, on the facts, have acted any differently. We do, however, find that the judge erred in law in going ahead without considering the need to hear oral evidence from the appellant.
 64. A key matter at issue in the case was the position of the appellant in Nigeria. The judge heard oral evidence about this and had before him written evidence from the organisation that had been assisting the appellant. There is no doubt that the appellant's position in Nigeria, as disclosed by that evidence, was problematic. The judge came to the conclusion that the evidence did not make the appellant's circumstances "very compelling". If, however, the judge had been able to hear and see the appellant give evidence on this issue, his conclusion may well have been different.
 65. Accordingly, although we emphasise that the judge is not to be criticised, he materially erred in law. As a result, the determination falls to be set aside. In the circumstances, the only appropriate course, given the failure to accord the appellant a fair hearing, is to remit the matter to be re-decided by the First-tier Tribunal. "
22. Returning to the instant case, it is not asserted that there are any issues arising from the first two Kiarie and Byndloss questions. I must turn then to consider the third and fourth questions.
23. The FtT did not consider the issue of whether the appellant could give oral evidence via video link from Grenada. As in AJ there can be no criticism of the FtT in this regard, given (i) that the hearing before the FtT pre-dated the Supreme Court's judgment in Kiarie & Byndloss (ii) the terms of then binding judgment of the Court of Appeal in

that case and (iii) that the legally represented appellant did not make an application for such evidence to be provided. Despite this, it not in dispute that the FtT were required to consider such issue and erred in failing to do so.

24. The disagreement between the parties before me revolves around whether the FtT's failure was one capable of affecting the outcome of the appeal. Mr Haywood submits that the failure of the FtT to consider whether the appellant should give oral evidence is, *per se*, sufficient to render its decision unlawful for procedural unfairness and/or a breach of Article 8. In the alternative, he submits that the FtT was wrong in its conclusion and its reasoning in relation to the issue of integration and that such error is not rendered immaterial simply by the fact that the appellant must establish very compelling circumstances over and above those identified in the relevant provisions of paragraph 399 of the Rules and section 117C of the 2002 Act. The features of these exceptions, even if not satisfied in full, play an integral part in the consideration of whether there are very compelling circumstances; thus, any error in the assessment of whether an exception is made out must necessarily impact on the lawfulness of the assessment of whether there are very compelling circumstances over and above those circumstances identified in the exceptions.
25. In response, Mr Wilding points to the fact that seven witnesses gave evidence on the appellant's behalf and that the appellant produced a detailed statement before the FtT which has not been the subject of adverse credibility findings. He asserts that in such circumstances there is nothing the appellant could have said in evidence to persuade the FtT to come to a different decision than it did. The FtT took the appellant's evidence at its zenith and, nevertheless, concluded that the appeal could not succeed. Mr Wilding further submits in the alternative that this is not an appeal which can ever be capable of succeeding, given the weight to be attached to the public interest as a consequence the five-year prison sentence. He also points to the fact that the issue of integration - which crosses over into the second ground - relates to one of the exceptions under paragraph 399 of the Immigration Rules and section 117C of the 2002 Act and submits that even if the appellant were to make out this exception he could still not succeed in his appeal unless he is able to show that there are very compelling circumstances, over and above those described in the exception. He cannot do so even on his case taken at its absolute highest.
26. I do not accept Mr Haywood's submission that the FtT's failure to consider whether the appellant should give oral evidence leads inexorably to the conclusion that its decision should be set aside. There needs to be some analysis of the potential impact of such failure on the FtT's decision. In this case Mr Wilding is correct to identify that a significant amount of oral and written evidence was given before the FtT, albeit the appellant only provided written evidence. I also accept that there was little if any dispute over the truth of the appellant's written evidence. Nevertheless, as it turned out one of the central issues in the appeal was whether the appellant could demonstrate that there were very significant obstacles to his integration into life in Grenada. This was an issue that the appellant only devoted one paragraph of his written evidence to. Had the FtT been able to see and hear the appellant give evidence on this issue, in particular if the appellant had been given the opportunity to developed orally some of the strands of evidence which appear in an embryonic stage

in the statement, the FtT's conclusion as to whether there were very serious obstacles to the appellant's integration into life in Grenada may well have been different.

27. Whilst the length of the appellant's sentence means that a finding in the appellant's favour on this issue would not have been determinative of the appeal in his favour, I accept Mr Haywood's submission that such a finding would increase the appellant's prospects of demonstrating the existence of very compelling circumstances, required by paragraph 398 of the Rules and section 117C(6) of the 2002 Act. I further accept that although the length of the appellant's sentence means that weight of the public interest in favour of his deportation is significant and that the prospects of him succeeding on appeal are relatively slender, it cannot be said that there is only one possible outcome to this appeal i.e. that it must be dismissed.
28. For these reasons, I conclude that the decision of the First-tier Tribunal contains an error of law capable of affecting the outcome of the appeal and I set it aside. Given this conclusion, I need make no findings as to the merits of the second and third grounds.
29. The general rule is that if an appellant has not had a fair hearing before the FtT then the matter should be remitted to the FtT to be heard again *de novo*. Neither party has suggested that this case is an exception to that general rule. In all the circumstances I remit the appeal to heard afresh by the FtT, with the FtT being required to follow the guidance given in AJ to ensure that the procedural rights the appellant is afforded by Article 8 ECHR are not infringed.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be heard afresh.

Signed:

Date: 16 July 2018

Mark O'Connor

Upper Tribunal Judge O'Connor