



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14104/2016

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

PETER [O]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, Counsel

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 4 June 1986. He has been given permission to appeal against the decision of First-tier Tribunal Judge Miller 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 3 April 2008 with a student visa and was subsequently granted leave to remain until 31 July 2015 on the grounds of his family life with his British partner and child. On 28 July 2015 he submitted an application for further leave to remain on the basis of his family life.
3. On 9 September 2015 the appellant was convicted of six counts involving offences of dishonesty, fraud and making false representations and he was sentenced to a total of 20 months' imprisonment. The appellant was convicted together with a woman, [AK], with whom he had acted in obtaining false bank cards and using the cards to make various purchases.
4. On 25 January 2016 the appellant was served with a decision to deport him. His solicitors made written representations in response dated 18 February 2018 referring to his outstanding application for leave to remain on the basis of his family life with his partner and their child [D], and his wife's three children from a previous relationship, as well as his wife's recent stillbirth. The written representations were considered as a human rights claim which was then refused in a decision dated 13 May 2016 and certified under section 94B of the 2002 Act. A deportation order was signed against the appellant the same day under section 32(5) of the UK Borders Act 2007.
5. In the decision refusing his human rights claim the respondent accepted that the appellant had a genuine and subsisting relationship with his partner and considered that it would not be unduly harsh for his child and step-children and his partner to live in Nigeria or Ghana, from where his partner originated, 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.
6. We are informed that the appellant sought permission to judicially review the certification of his claim but permission was refused. He was duly deported from the UK on 24 May 2016. On 7 June 2016 he lodged a Notice of Appeal against the refusal of his human rights claim.
7. The appellant's appeal came before the First-tier Tribunal on 15 March 2017. The appellant was represented by a legal representative at the hearing. His wife attended and gave oral evidence. The judge had before him a small bundle of evidence and statements from the appellant and his wife together with letters from the children and their schools and a letter from his wife's GP. The appellant's wife gave evidence that she had not seen him since his deportation owing to the expense of travelling. She said that she did not

know the appellant's co-accused [AK] and did not know they were going to commit fraud. The judge accepted that the children had high regard for the appellant. He considered that the evidence suggested that the appellant was engaged in a close relationship of some kind with his co-accused and that his partner and children's loyalties were not reciprocated to the same extent by him. The judge concluded that it would not be unduly harsh for the appellant's wife and children to live in Nigeria with him or to remain in the UK without him and that there were no very compelling circumstances outweighing the public interest in his deportation. He dismissed the appeal on all grounds.

8. Permission to appeal to the Upper Tribunal was sought by the appellant on the grounds that the judge had failed to give full and proper consideration to the best interests of the children, that the judge had erred by finding that it would not be unduly harsh for his wife and the children to move to Nigeria when they were not Nigerian and that the judge had erred by giving weight to immaterial matters such as the nature of his relationship with his co-accused.

9. Permission was granted in the First-tier Tribunal on 19 June 2017 on the basis that the guidance in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 rendered arguable the appellant's claim that his deportation was unlawful by reference to section 6 of the Human Rights Act 1998 and that his approach to the best interests of the children was deficient.

Appeal Hearing

10. At the hearing before us, both representatives made submissions.

11. Mr Pipe accepted that the appellant had had full access to legal representation and had not previously raised the issue of obtaining expert evidence, so that it was only the third question in AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 that was relevant in this case, namely the matter of live oral evidence from the appellant. He submitted that there were credibility issues in this case, in particular in regard to the judge's speculation about the appellant's relationship with his co-accused which was a matter not previously raised by the respondent. The questions raised about the strength of the appellant's relationship with his wife required him to provide an explanation since that impacted on the question of undue harshness. This case did not fall within the exception referred to at [51] of AJ. In any event, Mr Pipe submitted, there were substantive flaws in the judge's decision as there had not been a careful analysis of the best interests of the children and the judge had erred by speculating on the appellant's relationship with his co-accused and had gone behind the respondent's concession on the genuineness of his relationship with his wife.

12. Mr Wilding submitted that there was a remarkable lack of evidence generally from the appellant and the very limited evidence which was available did not go very far in establishing unduly harsh consequences arising from his deportation. He submitted that this was a type of case identified at [51] of AJ where, taking the evidence at its highest, it could not overcome the significant public interest in deportation. This was an ordinary family relationship and there was nothing in the evidence to take the case any further than that. The judge did not go behind the respondent's concession, but simply reflected on the evidence before him. In addition, the appellant had not asked to give oral evidence and

had made no application to rely on any further evidence. As to the judge's assessment of the best interests of the children, there was nothing in the judge's findings that offended against any of the principles in section 55 of the Borders Citizenship and Immigration Act 2009. The brevity of the judge's decision was simply a reflection of the lack of evidence before the First-tier Tribunal.

13. Mr Pipe, in response, reiterated the points previously made. As to Mr Wilding's reference to there having been no request by the appellant to give oral evidence, he submitted that that was not correct as the appellant had sought to judicially review the certification of his claim and the basis of his judicial review claim had been the need to give oral evidence. Mr Pipe also disputed Mr Wilding's reference to this being an ordinary family, submitting that it was not the case, since the appellant had a biological child and three step-children and that was a matter which needed to have been considered.

Consideration and findings

14. 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."

15. 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 irremediable. 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.”

16. 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?"*

17. It was accepted by Mr Pipe that the appellant had had full access to legal representation and that no issue had been raised about difficulties in obtaining 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."*

18. It was Mr Wilding's submission that the appellant's case fell within the exception highlighted above since, taken at its highest, it was one which could not have established on the evidence that the appellant's deportation had unduly harsh consequences for his wife and children. Having given careful consideration to the nature of the evidence before the judge we find ourselves in agreement with Mr Wilding.

19. 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. As Mr Wilding observed, the evidence before the First-tier Tribunal was extremely limited. The Tribunal had statements from the appellant and his wife but, as the First-tier Tribunal Judge observed at [24], the statements were almost identical. Indeed, other than changes from the first to third person, the statements were exactly the same and thus lacked any personal quality. That in itself was, in our view, a testimony to the limited value of any evidence the appellant was able to give.

20. Furthermore, whilst the appellant produced letters from the four children attesting to their love for him and their distress at being separated from him, there was no evidence of contact between the appellant and the four children and only limited evidence of contact between him and his wife, particularly post-deportation. Again that was a matter observed by the judge, at [28]. The judge had before him letters from the children's schools providing limited reference to their emotional issues arising from their father's absence, to which he plainly had regard, as mentioned at [11] of his decision, but there was no further evidence as to the impact of his deportation on the children. The appellant's absence from the UK did not prevent there being produced full and proper evidence of contact between the appellant and his wife and children, nor evidence of the impact of deportation upon the children. Mr Pipe submitted that if the decision were to be re-made there may be efforts to seek expert evidence about the impact of deportation, but he conceded that that was not relevant to the question of the error of law as there had been no attempt to obtain such evidence previously. In the circumstances, we again fail to see what the appellant could have contributed further by way of oral evidence.

21. Reliance has also been placed on the judge's speculation in regard to the appellant's relationship with his wife as a reason why he ought to have had an opportunity to give oral evidence. However, whilst the judge drew adverse conclusions in regard to the appellant's relationship from his partnership with his co-accused and his wife's lack of knowledge about his co-accused, the judge did not, contrary to the suggestion made on behalf of the appellant, go behind the respondent's concession as to the genuineness of the relationship, but proceeded on the basis that there was indeed a genuine and subsisting relationship between the appellant and his wife and children. The observations that he made arose out of the appellant's wife's evidence and the facts before him as set out in the sentencing remarks of the Crown Court Judge and plainly would have been valid observations whether or not the appellant was present at the hearing.

22. It is also of relevance, as Mr Wilding submitted, that there is no evidence of the appellant having specifically requested to give oral testimony, either by way of video-link or in person. Mr Pipe disputed that that was the case, relying upon the fact that the appellant had sought to judicially review the certification of his claim prior to his deportation and, as part of his claim, relied upon the need to attend an in-country appeal. However, irrespective of the basis upon which the certificate was challenged, there has been nothing further from the appellant to explain what evidence he would have wished to give in person over and above the evidence already available to the First-tier Tribunal.


23. We therefore agree with Mr Wilding that, taking the case at its highest, there was nothing to show that the appellant's circumstances and those of his wife and children were anything other than a normal family life with the expected consequences of separation and that there was therefore nothing material that the appellant could have added by way of oral evidence. We do not consider the fact that the family comprises both a biological child and step-children alters that fact. Accordingly the question of the appellant's 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.

24. Likewise we find no merit in the second ground of appeal. Whilst the judge's assessment of the best interests of the children was brief, the fact is that there was little evidence before the judge and accordingly little more that he could have said. As we have already said above, the judge plainly had regard to all the evidence about the children, including their own letters and the letters from their schools. We agree with Mr Wilding that there was nothing in the judge's findings at [29] that offended against the principles in section 55. The judge provided cogent reasons for concluding that it would not be unduly harsh for the children and their mother to join the appellant in Nigeria or to remain in the UK and continue being separated from him. He was fully entitled to conclude that the appellant could not meet the exceptions to deportation in paragraph 399(a) and (b) and that there were no very compelling circumstances outweighing the public interest in deportation. The judge's conclusion that the public interest required the appellant's deportation was accordingly one that he was fully entitled to reach on the evidence before him and for the reasons properly given.

25. 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 and there was no question of any breach of his Article 8 rights in that respect. 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

26. 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.

Signed 
Upper Tribunal Judge Kebede

Dated: 25 May 2018